No. 12-126

IN THE

Supreme Court of the United States

GREG MCQUIGGIN, WARDEN,

Petitioner,

v.

FLOYD PERKINS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT FLOYD PERKINS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) contains a one-year statute of limitations for filing a petition for a writ of habeas corpus. The following questions are before the Court:

1. Is a credible claim of actual innocence a valid basis for equitably tolling the AEDPA statute of limitations?

2. If so, must a petitioner who has a credible claim of actual innocence also demonstrate he has diligently pursued his rights?

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STATEMENT OF THE CASE

Greg McQuiggin, a Warden with the Michigan Department of Corrections, seeks review of the Sixth Circuit's decision entered in *Perkins v. McQuiggin,* 670 F.3d 665 (6th Cir. 2012). The panel unanimously found that a credible claim of actual innocence, without more, warrants equitable tolling of AEDPA's statute of limitations. *Id.* Rehearing and rehearing *en banc* were denied without dissent. (Pet. App. 47a.)

None of the Warden's bases for review justify a writ of certiorari. First, he asserts that several circuit court decisions conflict with the Sixth Circuit's holding. (Pet. App. 8–10, 13–16.) No case following *Holland v. Florida,* 130 S. Ct. 2549 (2010), however, conflicts with the Sixth Circuit's decision. Rather, those circuits that have considered the issues involved in this case post-*Holland* (the Second, Ninth, Tenth, and Eleventh Circuits) all agree with the Sixth Circuit. Second, the Warden claims that the Sixth Circuit's holding conflicts with *Holland* itself. (Pet. App. 10–12, 16–19.) But *Holland* held that AEDPA's statute of limitations may be equitably tolled. 130 S. Ct. at 2560, 2562. Thus, not surprisingly, the Sixth Circuit cited *Holland* as supporting its conclusion regarding equitable tolling. Finally, the Warden (joined in part by *Amici Curiae*) asserts that the Sixth Circuit's decision welcomes relief based on frivolous claims of actual innocence and opens the door to burdensome new trials. (Pet. App. 11, 19–21.) Given the high burden associated with clearing both the credible claim of actual innocence and habeas corpus hurdles, however, the Warden's concerns are unfounded. For all of those reasons, the Warden's Petition for a Writ of

Certiorari to the Sixth Circuit Court of Appeals should be denied.

I. STATE COURT PROCEEDINGS

On March 4, 1993, Floyd Perkins attended a house party in Flint, Michigan, with his friend, Rodney Henderson, and an acquaintance, Damarr Jones. The three men left the party together. Henderson was later discovered on a wooded trail, deceased as a result of stab wounds to the head. (Pet. App. 2a–3a.)

Perkins was arrested and charged with open murder in Michigan state court. He pled not guilty. Conflicting testimony was presented at trial. Jones testified that Perkins stabbed Henderson on the trail and then fled the scene. Perkins testified that after the three men left the party, they went to a convenience store. Perkins stated that Jones and Henderson left the store before Perkins had finished paying. Perkins testified that he never entered the trail where Henderson's body was found. Perkins later saw Jones under a streetlight, agitated and wearing distinctive bloody clothes. (Pet. App. 3a.)

The jury convicted Perkins of first degree murder. He was sentenced to life in prison without the possibility of parole. (Pet. App. 26a, 42a.) Perkins exhausted his state court appeals and his conviction became final on May 5, 1997. (Pet. App. 3a.)

II. DISTRICT COURT PROCEEDINGS

On June 13, 2008, Perkins filed a petition for a writ of habeas corpus with the United States District Court for the Western District of Michigan. His claims of error related to sufficiency of the evidence, jury instructions, trial procedure, prosecutorial misconduct, and ineffective assistance of counsel.

(Pet. App. 3a.) Perkins requested equitable tolling of the one-year AEDPA statute of limitations on the ground that he is actually innocent. (Pet. App. 28a.)

Perkins presented three supporting affidavits. First, Ronda Hudson stated that she heard Jones bragging about killing Henderson and then taking his bloody clothes to the dry cleaner. (Pet. App. 54a–55a (Jan, 30, 1997).) Second, Demond Louis stated that Jones admitted to killing Henderson on the night of the murder. Jones was wearing blood-stained orange shoes, orange pants, and a colorful shirt at the time. The next day, Louis accompanied Jones to a dry cleaning store, where Jones dropped off his bloody pants and shirt. Jones threw his shoes in a dumpster outside the dry cleaner. (Pet. App. 50a–53a (March 16, 1999).) And third, Linda Fleming, a clerk at the dry cleaning store, stated that a man matching Jones' description came into the store around the date of the murder, asking Fleming to remove blood stains from orange pants and a colorful shirt. (Pet. App. 48a–49a (July 16, 2002).)

The magistrate judge's Report and Recommendation found that Perkins' petition was barred by the one-year AEDPA statute of limitations. (Pet. App. 35a.) The district court agreed, but further found that Perkins was not entitled to equitable tolling based on a credible claim of actual innocence because he had failed to diligently pursue his rights. (Pet. App. 31a.) According to the district court, "[b]y July 2002, Petitioner had acquired all of the evidence that he recites to support his actual innocence, yet he waited until June 2008 to bring his claim before any court. Such a delay falls far short of demonstrating the requisite diligence" (*Id.*) The district court

denied Perkins' petition for a writ of habeas corpus and his request for a certificate of appealability. (Pet. App. 31a, 33a.)

III. PERKINS' APPEAL AND SUBSEQUENT PROCEEDINGS

Perkins sought a certificate of appealability from the Sixth Circuit. The Sixth Circuit issued the certificate and identified one issue for review: whether "'reasonable diligence is a precondition to relying on actual innocence for purposes of equitable tolling.'" (Pet. App. 5a (citing Order Granting Certificate of Appealability).) The Sixth Circuit then unanimously reversed and remanded to the district court so it could "consider whether Perkins asserts a credible claim of actual innocence." (Pet. App. 21a.)

The Sixth Circuit first found that actual innocence is a valid basis for equitably tolling AEDPA's statute of limitations. Following its earlier holding in *Souter v. Jones*, the Sixth Circuit held that "'where an otherwise time-barred habeas petitioner can demonstrate that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt, the petitioner should be allowed to pass through the [AEDPA statute of limitations] gateway and argue the merits of his underlying constitutional claims.'" (Pet. App. 8a (quoting 395 F.3d 577, 602 (6th Cir. 2005)).)

The Sixth Circuit then found that habeas petitioners in the unique position of having a credible claim of actual innocence need not demonstrate reasonable diligence. "Given the Supreme Court's rich jurisprudence protecting the rights of the wrongfully incarcerated, petitioners who seek equitable tolling based on actual innocence should

not be treated the same way as those seeking equitable tolling because of ineffective assistance of counsel, confusion of filing requirements, or other important, but less compelling reasons." (Pet. App. 21a.) In other words, unlike in other equitable tolling contexts, reasonable diligence is not a precondition to passing through the AEDPA statute of limitations gateway in the unique case where a petitioner has a credible claim of actual innocence. (*Id.*)

The Warden responded by seeking rehearing *en banc*. The Sixth Circuit denied rehearing and *en banc* review without dissent. (Pet. App. 47a.)

REASONS FOR DENYING THE PETITION

I. POST-*HOLLAND* CIRCUIT COURT DECISIONS DO NOT CONFLICT.

According to the Warden, this Court should grant a writ of certiorari to resolve "mature circuit conflicts" regarding both innocence-based equitable tolling and reasonable diligence. (Pet. App. 4.) Several of the circuits the Warden references do not, in fact, disagree with the Sixth Circuit. Following this Court's decision in *Holland,* moreover, the circuit courts are in agreement regarding equitable tolling in cases where a credible claim of actual innocence has been made. Likewise, the clear post-*Holland* trend is to forego reasonable diligence. The Warden's claimed conflicts ring false. As a result, the Court need not review this case. *See* SUP. CT. R. 10(a).

A. Following *Holland,* The Circuit Courts Agree That A Credible Claim Of Actual Innocence Justifies Equitable Tolling Of The AEDPA Statute Of Limitations.

Citing cases from 2002–2005, the Warden claims that the First, Fifth, and Seventh Circuits disagree with the Sixth Circuit regarding innocence-based equitable tolling. (Pet. App. 9 (citing *David v. Hall*, 318 F.3d 343, 347 (1st Cir. 2003); *Cousin v. Lensing*, 310 F.3d 843, 849 (5th Cir. 2002); *Escamilla v. Jungwirth*, 426 F.3d 868, 871–72 (7th Cir. 2005)).) But other decisions from those same circuits belie the Warden's assertion. The First Circuit has recently acknowledged that innocence-based equitable tolling may be appropriate. *Riva v. Ficco*, 615 F.3d 35, 44 n.4 (1st Cir. 2010) (vacating and instructing the district court to consider on remand whether the petitioner has a credible claim of actual innocence that justifies tolling the AEDPA statute of limitations). The Fifth Circuit has indicated that "[t]here is no precedent in this circuit whether actual innocence may equitably toll the [AEDPA] statute of limitations." *Prince v. Thaler*, 354 F. App'x 846, 847 (5th Cir. 2009) (declining to decide the issue of innocence-based equitable tolling because the petitioner's claim of actual innocence was not credible). And the Seventh Circuit has indicated that actual innocence may be relevant to a claim for equitable tolling in the appropriate case. *See Gildon v. Bowen,* 384 F.3d 883, 887 (7th Cir. 2004) (adopting the Eighth Circuit's approach articulated in *Flanders v. Graves,* 299 F.3d 974, 978 (8th Cir. 2002) ("We do not hold that actual innocence can never be relevant to a claim that the habeas statute of limitations

should be equitably tolled."), *cert. denied*, 537 U.S. 1236 (2003)).

Moreover, *all* of the cases the Warden cites were decided *well before* the Court issued its *Holland* decision in 2010. Following *Holland*, every circuit to address the issue has found that innocence-based equitable tolling is appropriate. *See Rivas v. Fischer,* 687 F.3d 514, 548 (2nd Cir. 2012) (finding it highly relevant that "no court has settled on the contrary conclusion [regarding innocence-based equitable tolling] following the Supreme Court's decision" in *Holland*). Indeed, the Second, Sixth, Ninth, Tenth, and Eleventh Circuits—five circuits—have indicated post-*Holland* that the AEDPA statute of limitations may be equitably tolled based on a credible claim of actual innocence. *Rivas,* 687 F.3d at 548; *Perkins,* 670 F.3d at 672*; Lee v. Lampert*, 653 F.3d 929, 932 (9th Cir. 2011) (*en banc*); *Sandoval v. Jones*, 447 F. App'x 1, 4–5 (10th Cir. 2011); *San Martin v. McNeil,* 633 F.3d 1257, 1267–68 (11th Cir. 2011), *cert denied*, *San Martin v. Tucker,* 132 S. Ct. 158 (2011).[1]

The Warden claims that looking only to cases following *Holland* is a "red herring." (Pet. App. 19.) In reality, it is a proper respect of precedent. After all, *Holland* was a landmark decision; this Court announced new legal principles. *Holland* made clear that "traditional principles of equity continue to have a place in the review of habeas petitions following the enactment of AEDPA." *Rivas,* 687 F.3d at 549.

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[1] Following *Holland,* the Fifth Circuit held that claims of innocence may not toll AEDPA's statute of limitations. *Henderson v. Thaler*, 626 F.3d 773 (5th Cir. 2010). *Henderson*, however, did not address factual innocence, but innocence from a sentence of death, so it is inapposite.

Holland emphasized generally that courts must "not construe a statute to displace courts' traditional equitable authority absent the clearest command." *Holland,* 130 S. Ct. at 2560 (quoting *Miller v. French*, 530 U.S. 327, 340 (2000) (internal quotation marks omitted)). No such clear command can be derived from AEDPA's text. *See* § II(A), *infra*. As a result, federal courts may hear claims that are barred (whether by procedural default or the statute of limitations) if they are accompanied by a credible claim of actual innocence.

In short, the Warden's alleged circuit split with respect to innocence-based equitable tolling is illusory. Several cases undercut the Warden's claim that the First, Fifth, and Seventh Circuits disagree with the Sixth Circuit's decision. Moreover, a "growing chorus" of circuit courts across the country have fallen in line with *Holland's* new rules by permitting innocence-based equitable tolling. *See Rivas,* 687 F.3d at 552. That "growing chorus"—not cases that came before the landmark *Holland* decision—should be considered. *Id.* Based on those cases, there is no circuit court split that calls for this Court's review. At the very least, the Court should wait for an actual post-*Holland* conflict, if one ever comes to pass, before it finds the need to further weigh in on the issue of equitable tolling.

B. Following *Holland,* The Circuit Courts Also Agree That Reasonable Diligence Is Not Required For Equitable Tolling Based On A Credible Claim Of Actual Innocence.

Citing cases from the Third, Seventh, and Eighth Circuits, the Warden also argues that the circuit courts are divided as to whether petitioners seeking

equitable tolling based on a credible claim of actual innocence are required to demonstrate reasonable diligence in pursuing their rights. (Pet. App. 15 (citing *Miller v. New Jersey State Dep't of Corr.*, 145 F.3d 616, 618–19 (3rd Cir. 1998); *Gildon,* 384 F.3d at 887; *Flanders,* 299 F.3d at 978).) But here again, the Warden does not tell the full story. For one thing, *Miller* is inapposite; it addresses equitable tolling based on lack of access to legal documents and inadequate knowledge of the time limitations. *See* 145 F.3d at 617. For another, the two remaining circuits issued their opinions prior to the Court's watershed decision in *Holland.*

After *Holland*, no circuit court has held that reasonable diligence is a precondition to equitable tolling based on a credible claim of actual innocence.[2] In fact, the Second, Sixth, Ninth, Tenth, and Eleventh Circuits have all indicated in the years following *Holland* that reasonable diligence is not required in actual innocence cases. *Rivas,* 687 F.3d at 547–552; *Perkins*, 670 F.3d at 675; *San Martin*, 633 F.3d at 1267–68; *Lee*, 653 F.3d at 934; *Lopez v. Trani*, 628 F.3d 1228, 1230–31 (10th Cir. 2010), *cert. denied*, 132 S. Ct. 307 (2011).

To be sure, *Holland* did not squarely address whether reasonable diligence must be demonstrated

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[2] The Third Circuit assumed in a case where equitable tolling was sought based on ineffective assistance of counsel that a petitioner seeking to toll AEDPA's statute of limitations based on a credible claim of actual innocence "would still have the burden of demonstrating...reasonable diligence[.]" *Reed v. Harlow*, 448 F. App'x 236, 238 n.2 (3rd Cir. 2011). The Third Circuit cited *Miller,* 145 F.3d at 618–19, as support. As indicated above, however, *Miller* also does not address equitable tolling based on a credible claim of actual innocence.

before a habeas petitioner may seek innocence-based equitable tolling. *See* § II(B), *infra*. But, following *Holland*, the circuit court trend is to forego reasonable diligence. That trend reflects the sound reasoning, articulated throughout the Court's decisions, that actual innocence is different from other grounds for equitable relief. Equity must be liberally provided in actual innocence cases to avoid a "miscarriage of justice." *See Schlup v. Delo*, 513 U.S. 298, 299 (1995).

Taking into account this Court's precedent, post-*Holland* circuit courts have found AEDPA's statute of limitations may be equitably tolled in two different circumstances: (1) where a petitioner has demonstrated reasonable diligence and that extraordinary circumstances prevented timely filing or (2) where a petitioner has presented a credible claim of actual innocence (without more) such that providing a meaningful avenue for habeas relief is necessary to avoid manifest injustice. *See, e.g., San Martin*, 633 F.3d at 1267–68 (Reasonable diligence and extraordinary circumstances may toll the AEDPA statute of limitations, but "[a] court may also consider an untimely [habeas] petition if, by refusing to consider the petition for untimeliness, the court thereby would endorse a 'fundamental miscarriage of justice' because it would require that an individual who is actually innocent remain imprisoned."); *Lopez*, 628 F.3d at 1231 ("Where. . . a petitioner argues that he is entitled to equitable tolling because he is actually innocent, this argument is premised on the same fundamental miscarriage [of justice] exception that was discussed by the Supreme Court in *Schlup* and *Coleman* [*v. Thompson,* 501 U.S. 772 (1991)], and

as such the petitioner need make no showing of cause[.]").

In short, the clear post-*Holland* trend is to only require reasonable diligence in cases where equitable tolling of the AEDPA statute of limitations is based on extraordinary circumstances, not where it is based on actual innocence and the "miscarriage of justice" ground for relief is in play. *See Schlup,* 513 U.S. at 299. Due to that trend, there is no "mature circuit conflict," as the Warden claims. (Pet. App. 4.) If a circuit court decides post-*Holland* that reasonable diligence is required in an actual innocence equitable tolling case, then perhaps the Court's review might be necessary at that time. But today, there is no conflict for the Court to resolve.

II. THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *HOLLAND*.

The Warden also claims that this Court's review is necessary because the Sixth Circuit's decision conflicts with *Holland.* But the Sixth Circuit's decision is entirely consistent with *Holland*. Indeed, *Holland* supports equitable tolling of AEDPA's statute of limitations. Moreover, although *Holland* discusses reasonable diligence, it does not hold that it is required in all equitable tolling cases. Accordingly, there is no conflict with a decision from this Court. *See* SUP. CT. R. 10(c).

A. The Sixth Circuit's Decision Is Consistent With The Court's Holding In *Holland* That Equitable Tolling Is Proper Absent The "Clearest Command."

Despite the Court's clear language in *Holland* that equitable tolling of AEDPA's statute of limitations is appropriate, the Warden asserts that equitable

tolling is impermissible in the specific context of actual innocence. (Pet. App. 10–12.) He claims that AEDPA's plain text contains the "clearest command" against such tolling. (*See id.*) *See also Holland,* 130 S. Ct. at 2560 (quoting *Miller,* 530 U.S. at 340).) Under the Court's precedent, only a clear command from Congress is sufficient to overcome a presumption of equitable tolling. *Id.*

As support, the Warden cites two AEDPA provisions: 28 U.S.C. §§ 2244(b)(2)(B) and 2244(d)(1)(D). According to the Warden, there is no need for equitable tolling based on a credible claim of actual innocence because "Congress comprehensively dealt with the issue in § 2244." (Pet. App. 12.) But he is incorrect; neither § 2244(d)(1)(D) nor § 2244(b)(2)(B) provides the clearest command against equitable tolling.

Section 2244(d)(1)(D) addresses *triggering* the AEDPA statute of limitations, not *tolling*. Specifically, it provides that a habeas petitioner's one year statute of limitations is triggered when a new factual predicate for a habeas claim is discovered. 28 U.S.C. § 2244(d)(1)(D). As recognized in *Holland,* AEDPA "does contain multiple provisions relating to the events that *trigger* its running." 130 S. Ct. at 2561. But the triggering of a petitioner's claim is distinguished from tolling the statute of limitations. *See id.* (citing *Cada v. Baxter Healthcare Corp.,* 920 F.2d 446, 450 (7th Cir. 1990)). "Triggering" refers to the date on which a statute of limitations begins to run, while tolling stops the statute of limitations from running out. *See Cada*, 920 F.2d at 450. And § 2244(d)(1) addresses *triggering* of a habeas corpus claim, not *tolling*. *Holland*, 130 S. Ct. at 2561.

Congress' decision to permit AEDPA's statute of limitations to be triggered when a new factual predicate for a habeas petition is discovered does not foreclose equitable tolling based on actual innocence. *See id.*

Equitable tolling, moreover, does not render § 2244(d)(1)(D) a "nullity," as the Warden claims. (Pet. App. 11.) A claim filed within one year of the discovery of new evidence proceeds directly to the district court for a determination on the merits. *See Souter,* 395 F.3d at 600. Where equitable tolling is sought, however, a petitioner must demonstrate a credible claim of actual innocence before a court will reach the merits of his constitutional claims. "Because one must meet a significantly greater burden to pass through the gateway, no petitioner would forego filing within the one-year period under § 2244(d)(1)(D) if possible." *Id.* "The actual innocence exception [is] limited to the rare and extraordinary case where a petitioner can demonstrate a credible claim of actual innocence and the one-year limitations window has closed." *Id.* In short, equitable tolling does not nullify § 2244(d)(1)(D)—it simply provides an avenue for relief in cases where AEDPA's one-year statute of limitations has been triggered and run out.

Section 2244(b)(2)(B), for its part, permits a habeas petitioner to file more than one petition if he can establish by clear and convincing evidence that a reasonable juror would not have found him guilty of the underlying offense. Congress did not address the statute of limitations or equitable tolling in § 2244(b)(2)(B), but it did authorize relief for habeas petitioners who have a credible claim of actual

innocence. That authorization bolsters—rather than defeats—innocence-based equitable tolling.

The Warden disagrees, claiming that Congress' reference to actual innocence in § 2244(b)(2)(B) creates a "negative inference" against equitable tolling. (Pet. App. 12.) But the mere fact that "Congress included an actual innocence exception to the procedural bars on successive habeas petitions . . . does not give rise to the negative implication that the absence of an exception was intended." *Souter*, 395 F.3d at 598. By analogy, even though Congress included a 30-day tolling period in an AEDPA limitations provision governing capital prisoners represented by competent counsel in state post-conviction proceedings, *see* 28 U.S.C. § 2263(b)(3)(B), there is no "negative implication" that tolling of § 2244(d)(1) (for any reason) is not permissible simply because it is not discussed in § 2244(d)(1). *See Souter,* 395 F.3d at 598.

In sum, contrary to the Warden's statutory arguments, the Sixth Circuit's decision permitting equitable tolling based on a credible claim of actual innocence is not at odds with *Holland.* AEDPA does not provide the clearest command against equitable tolling, in particular where a credible claim of actual innocence is the basis for such tolling. Indeed, §§ 2244(b)(2)(B) and 2244(d)(1)(D) do not address (let alone foreclose) innocence-based equitable tolling. In short, the Warden's asserted conflict with *Holland* is illusory.

B. The Sixth Circuit's Decision Regarding Reasonable Diligence Does Not Conflict With *Holland* And Is Consistent With The Court's Actual Innocence Cases.

Turning to reasonable diligence, the Warden contends that the Sixth Circuit's holding conflicts with *Holland's* statement that a habeas corpus petitioner seeking equitable tolling of the AEDPA statute of limitations must ordinarily show "that he has been pursuing his rights diligently." 130 S. Ct. at 2562 (citing *Pace v. DiGuglielmo,* 544 U.S. 408, 418 (2005)). But the Court did not address whether reasonable diligence is required in the context of equitable tolling based on a credible claim of actual innocence. In other words, the Sixth Circuit's decision does not conflict with *Holland*.

What is more, the Sixth Circuit's decision to not require reasonable diligence comports with this Court's well-established actual innocence jurisprudence. In a variety of post-conviction contexts, the Court has made clear that a habeas petitioner, even if he was not reasonably diligent, may seek review of procedurally defaulted claims if he can make a credible claim of actual innocence. *See House v. Bell*, 547 U.S. 518, 536–37 (2006) (habeas petitioners who have procedurally defaulted their claims may have them heard by showing, without more, a credible claim of actual innocence); *Schlup*, 513 U.S. at 327 (finding, without mentioning reasonable diligence, that a credible showing of actual innocence is sufficient for a court to reach the merits of an otherwise procedurally barred habeas petition); *Murray v. Carrier*, 477 U.S. 478, 496 (1986) ("where a constitutional violation has probably

resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default").

The Warden attempts to summarily dismiss this Court's actual innocence cases by asserting that "the petitioners in the *House* line of cases diligently pursued their actual-innocence claims." (Pet. App. 17.) But the Supreme Court did not *require* reasonable diligence—or anything beyond a credible claim of actual innocence. Contrary to the Warden's assertions, this Court's precedent (including *House*) supports the Sixth Circuit's decision that reasonable diligence is not required for equitable tolling based on a credible claim of actual innocence.

III. THE SIXTH CIRCUIT'S DECISION INCORPORATES NECESSARY SAFEGUARDS.

A. The Sixth Circuit's Decision Will Not Open The Door To Untimely Habeas Petitions Following Frivolous Innocence Claims.

Unable to show a division in the lower courts or establish a conflict with *Holland*, the Warden resorts to arguing that the Sixth Circuit's decision should nevertheless be reviewed because it goes too far. He explains that "[w]hen the judiciary allows untimely habeas petitions based on nothing more than the petitioner's flimsy claims of innocence, the judicial branch abrogates, through equity, the one-year AEDPA limitations period that Congress constructed." (Pet. App. 20.) *Amici Curiae* agree and provide examples of a few cases where petitioners raised frivolous actual innocence claims. (*Amici* Br.

6–14.) The concerns voiced by the Warden and *Amici Curiae* are unfounded and do not support review.

The Warden and *Amici Curiae* ignore the high burden habeas petitioners face when seeking innocence-based equitable tolling. A thin, unsupported claim of actual innocence is not sufficient to equitably toll the AEDPA statute of limitations. Instead, the petitioner must present a "credible claim" of actual innocence that is supported by "new reliable evidence." *Schlup,* 513 U.S. at 324. Because it is difficult to establish a "credible claim" of actual innocence, cases where habeas petitioners are able to have their habeas claims heard on the merits based on actual innocence "remain rare." *Id.* It follows that the Sixth Circuit's decision is not the crack that will open the floodgates to untimely habeas claims in cases where petitioners provide nothing more than "flimsy" claims of actual innocence. (*See* Pet. App. 20.) Rather, high walls remain that, in most instances, will foreclose relief.

On the merits, Perkins' claim of actual innocence is not cut from the same cloth as the three cases raised by *Amici Curiae*. Perkins relies on three new affidavits, not presented at trial, that inculpate Jones and exculpate Perkins. Perkins is not making a "flimsy" claim of actual innocence. (*See id.*) The Sixth Circuit properly remanded to the district court so it could fully consider (for the first time) whether Perkins' new evidence is sufficient for innocence-based equitable tolling.

B. The Sixth Circuit's Decision Will Not Unduly Burden The Federal Courts With New Trials.

Amici Curiae also claim that the Court should review this case because of the "difficulties of

litigating guilt and innocence many years after a crime." (*Amici* Br. 2.) They contend that new trials are difficult because "'[w]itnesses die or move away; physical evidence is lost; memories fade.'" (*Amici* Br. 5 (quoting *Vasquez v. Hillery*, 474 U.S. 254, 280 (1986) (Powell, J., dissenting)).) But the Sixth Circuit's decision will not cause a flood of new trials many years after crimes were allegedly committed. To obtain new trials, petitioners will have to overcome two hurdles: (1) presenting a credible claim of actual innocence and (2) making valid habeas claims. Few petitioners will be able to do so.

IV. JURISPRUDENCE REGARDING PROTECTING THE INNOCENT CLEARLY SUPPORTS THE SIXTH CIRCUIT'S DECISION.

Finally, the Sixth Circuit's decision takes into account this Court's "rich jurisprudence protecting those that may be wrongfully incarcerated." *See Perkins,* 670 F.3d at 674. "[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Schlup,* 513 U.S. at 325. After all, "'it is far worse to convict an innocent man than to let a guilty man go free.'" *Id.* (quoting *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)). Given that concern, habeas courts have long held the "equitable discretion" to "see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera v. Collins,* 506 U.S. 390, 404 (1993). Indeed, equity can overcome procedural rules intended to limit habeas relief in "extraordinary case[s], where a constitutional violation has probably resulted in the

conviction of one who is actually innocent[.]" *Murray*, 477 U.S. at 496.

It would defy explanation for equitable tolling to be permitted based on the attorney error that was at issue in *Holland,* but not a credible claim of actual innocence. *See Lee*, 653 F.3d at 935 n.10. There is no stronger reason for keeping open the courthouse doors than actual innocence, "the ultimate equity on the prisoner's side." *Withrow v. Williams*, 507 U.S. 680, 700 (1993) (O'Connor, J., concurring in part and dissenting in part) (the Supreme Court "continuously has recognized that . . . a sufficient showing of actual innocence" is normally enough, "standing alone, to outweigh other concerns and justify adjudication of the prisoner's constitutional claim"). Indeed, "the individual['s] interest in avoiding injustice is most compelling in the context of actual innocence." *Schlup,* 513 U.S. at 324. The Sixth Circuit's decision recognized the importance of that "most compelling" ground for equitable relief by deciding that a habeas petitioner who has a credible claim of actual innocence should be permitted to pass through the one-year AEDPA statute of limitations gateway regardless of reasonable diligence.

CONCLUSION

The Warden's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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