

No. 12-126

In the Supreme Court of the United States

GREG MCQUIGGIN, WARDEN, PETITIONER

v.

FLOYD PERKINS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The petition raises two questions of jurisprudential significance: (1) whether equitable tolling is available when a habeas petitioner asserts an actual-innocence claim but cites no extraordinary circumstances that prevented timely filing; and (2) whether a habeas petitioner must exercise reasonable diligence in pursuing an actual innocence claim to receive the benefit of equitable tolling. On the latter issue, this Court’s decision in *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010), seems dispositive. In *Holland*, this Court held that a habeas petitioner seeking to equitably toll AEDPA’s statute of limitations must demonstrate that he has been pursuing his rights diligently. *Id.* Accord, e.g., *Flanders v. Graves*, 299 F.3d 974, 978 (8th Cir. 2002) (petitioner claiming equitable tolling of § 2244’s limitation period based on an actual-innocence claim must show “that a reasonably diligent petitioner could not have discovered these facts in time to file a petition within the period of limitations.”).

But the circuits have split on the question of whether due diligence applies to innocence-based claims for equitable tolling. In response, Perkins suggests that *Holland* requires the circuit courts to recognize innocence-based tolling. He also argues that *Holland*—and other cases from this Court addressing equitable tolling—have never required a petitioner to act diligently when asserting actual innocence. Perkins notes that the post-*Holland* “trend” demonstrates that there is not a true circuit split and that this Court’s intervention in the issue is not necessary. Br. in Opp. 6–10. But this argument fails for three reasons.

First, Perkins misapprehends the interplay between equitable tolling and 28 U.S.C. §§ 2244(b)(2)(B) and (d)(1)(D). The entire purpose of equitable tolling is to provide habeas petitioners with additional time to file their claims when an extraordinary circumstance prevents them from filing on time. That is precisely what the statute does in the case of actual innocence. Under § 2244(b)(2)(B), a habeas petitioner is granted an additional 365 days to pursue his claims once he discovers, or with reasonable diligence should have discovered, evidence of his actual innocence. That time is provided by statute even when the petitioner has already filed a prior petition. 28 U.S.C. § 2244(d)(1)(D). In other words, the statute itself serves the same purpose as equitable tolling.

Second, Perkins misinterprets this Court's actual-innocence jurisprudence. Perkins places great weight on the fact that this Court has never held that a habeas petitioner who is actually innocent must diligently pursue his claims. But that is because the issue has never been presented. All of the cases cited by Perkins and the Sixth Circuit below involved circumstances where the petitioner *had* diligently pursued his actual-innocence claim. Those cases failed to address a myriad of irrelevant claims. Perkins is now attempting to parlay this Court's silence on irrelevant issues into a statement of the law. But the question of whether diligence is required remains a live question that has divided the circuits. This Court should grant the petition to resolve that split.

Third, this Court should decline Perkins' invitation to ignore those circuit court decisions that pre-date *Holland*. In *Holland*, this Court acknowledged that it

was adopting a rule that had been recognized by all eleven Courts of Appeals that had considered the issue of whether the statute of limitations under AEDPA could be equitably tolled. By Perkins' own admission, the Court did not decide the diligence question. But it did state, in general, that a petitioner is only entitled to equitable tolling if "he has been pursuing his rights diligently." *Holland*, 130 S. Ct. at 2562. That is exactly the rule of law that was applied by the Third, Seventh, and Eight Circuits prior to *Holland*. This Court should reject Perkins' suggestion to simply ignore those circuit decisions that give rise to the conflict requiring resolution.

The petition for a writ of certiorari should be granted.

ARGUMENT

- I. The Court should grant the petition to resolve whether equitable tolling based on actual innocence is necessary to give a habeas petitioner additional time to file when the statute provides that petitioner has an additional 365 days to file based on the time he discovers evidence that he was actually innocent.**

Perkins' primary argument is that this Court's decision in *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010), supports the Sixth Circuit's conclusion that a claim of actual innocence tolls the statute of limitations without a showing of an extraordinary circumstance that prevented the habeas petitioner from timely raising the claim. Br. in Opp. 11–14. According to Perkins, 28 U.S.C. § 2244(b)(2)(B) and § 2244(d)(1)(D)

address triggering the statute of limitations, as opposed to tolling. Br. in Opp. 12. Because “tolling” is not expressly mentioned, Perkins reasons that AEDPA does not contain the “clearest command” against such tolling. *Holland*, 130 S. Ct. at 2560.

But Perkins misses the point. Equitable tolling excuses an untimely habeas petition based on the existence of some “extraordinary circumstance” that prevented timely filing. *Holland*, 130 S. Ct. at 2562. And excusing a late filing is exactly what AEDPA already provides to habeas petitioners. No matter how much time has passed, the statute of limitations resets to “zero” once a habeas petitioner discovers—or should have discovered through the exercise of due diligence—evidence of his actual innocence. 28 U.S.C. § 2244(d)(1)(D). That is, Congress has provided habeas petitioners an additional 365 days to file a habeas petition where an extraordinary circumstance—the late discovery of evidence establishing his actual innocence—rendered the petitioner unable to file his habeas in a timely manner.

Congress provides a mechanism by which to excuse the untimely filing of a second habeas petition. Under 28 U.S.C. § 2244(b)(2)(B), Congress lifted AEDPA’s prohibition on successive petitions where the facts underlying a new claim would establish by clear and convincing evidence that a reasonable juror would not have found him guilty of the underlying offense. Thus, Congress has provided habeas petitioners the same additional time to file a petition that would ordinarily be covered by equitable tolling.

Perkins’ attempt to create an artificial distinction between tolling and triggering of a new limitations

period is foiled by the statutory plain language. This Court should grant certiorari to consider whether equitable tolling based on actual innocence is necessary to give a habeas petitioner additional time to file when the statutory scheme already provides that petitioner an additional 365 days after he discovers evidence that he was actually innocent.

Perkins also tries to “undo” the circuit conflict by selectively citing decisions of the First, Fifth, and Seventh Circuits. Br. in Opp. 6 (citing *Riva v. Ficco*, 615 F.3d 35, 44 n.4 (1st Cir. 2010); *Price v. Thaler*, 354 F. App’x 846, 847 (5th Cir. 2009); *Flanders v. Graves*, 299 F.3d 974, 978 (8th Cir. 2002)). That effort fails.

Riva expressly acknowledged the Third Circuit’s previously-articulated skepticism regarding use of an actual-innocence claim to “override the AEDPA’s limitation period” and merely remanded to the District Court for further consideration. 615 F.3d at 44 n.4. *Price* is an unpublished decision that erroneously stated that there was no Fifth Circuit precedent addressing “whether actual innocence may equitably toll the [AEDPA] statute of limitations.” 354 F. App’x at 847. In fact, the Fifth Circuit in *Cousin v. Lensin*, 310 F.3d 843, 849 (5th Cir. 2002), held that claims of innocence do *not* justify equitable tolling of § 2244(d)’s limitations period. And while it is true that the Eighth Circuit in *Flanders* declined to say that actual innocence can *never* be relevant to equitable tolling, 299 F.3d at 978, it limited such circumstances to those beyond the habeas petitioner’s control. *Id.* But in those circumstances, § 2244(d)(1)(D) would toll the limitations period and render equitable tolling unnecessary anyway. This Court should resolve the conflict.

II. This Court should grant the petition to resolve whether allowing claims of actual innocence to be heard without a showing of reasonable diligence is consistent with AEDPA.

Perkins says that certiorari is also inappropriate because the Sixth Circuit's decision that a habeas petitioner need not show diligence is consistent with this Court's actual-innocence jurisprudence. But again, Perkins misses the point. This Court has not yet addressed the question of whether a habeas petitioner must diligently pursue his claims of actual innocence because this Court's actual innocence cases *all* involve diligent petitioners.

This Court's decision in *Holland* could not be more clear: to obtain equitable tolling, a habeas petitioner must have been "pursing his rights diligently." *Holland*, 130 S. Ct. at 2562. The Sixth Circuit avoided this clear language by citing a "tension" between *Holland* and this Court's line of cases addressing actual innocence as a gateway to review procedurally barred claims without imposing additional requirements. *House v. Bell*, 547 U.S. 518, 536–537 (2006). This Court did not address reasonable diligence in the *House* line of cases because diligence was not at issue. The petitioners in *House* and *Murray v. Carter*, 477 U.S. 478, 496 (1986), each filed their habeas petitions *on time* and, therefore, diligently pursued their actual innocence claims. This Court did not address issues that were irrelevant to the disposition of those cases. One of the legions of irrelevant issues was whether a habeas petitioner must diligently raise his claim of actual innocence. Perkins attempts to parlay

this Court's silence on an irrelevant issue into a rule of law.

As noted in the State's petition, whether a habeas petitioner has to demonstrate that he diligently pursued his claim of innocence depends on where he lives. Petitioners in the Third, Seventh, and Eighth Circuits must demonstrate due diligence. But those in the Second, Sixth, Ninth, Tenth, and Eleventh Circuit can raise their claims at any time—in this case a decade after the evidence of actual innocence came to light. And all of the decisions recognizing an actual-innocence exception to the due-diligence requirement conflict directly with this Court's admonition in *Holland* that a habeas petitioner must pursue his rights diligently.

Again, Perkins tries to undo the circuit conflict, this time by arguing that all of the contrary circuit decisions on the reasonable-diligence issue pre-date *Holland*. Br. in Opp. 9. But after this Court in *Holland* made clear that a petition is entitled to equitable tolling “only if he shows . . . that he has been pursuing his rights diligently,” 130 S. Ct. at 2562, those circuits that require reasonable diligence to invoke equitable tolling based on actual innocence would likely view their precedents as *strengthened*, not diminished. Perkins fails to explain why the opposite would be true.

In sum, the importance and recurring nature of the questions presented and the uncertainty in the law that the splits of authority create counsel strongly in favor of granting the petition.

III. *Holland* did not resolve the conflict between the circuits.

Perkins encourages this Court to simply ignore circuit court decisions that pre-date *Holland* and deny certiorari because the “clear, post-*Holland* trend favors the decision of the Sixth Circuit.” Br. in Opp. 11. But in nearly the same breath, Perkins admits that “*Holland* did not squarely address whether reasonable diligence must be demonstrated before a habeas petitioner may seek innocence-based equitable tolling.” Br. in Opp. 9–10. And Perkins ignores that the two prerequisites to equitable tolling that *Holland* announced—extraordinary circumstances that prevented a timely filing and a habeas petitioner’s diligent pursuit of his rights—run exactly opposite to the circuit decision below and in many other post-*Holland* cases. Perkins has failed to articulate a rational reason why this Court should continue to ignore a clear split between the circuits.

Perkins admits that *Holland* did not squarely address the question of whether a habeas petitioner must diligently pursue his innocence-based equitable tolling claim. But this Court did declare that a petitioner seeking equitable tolling must demonstrate that “he has been pursuing his rights diligently[.]” *Id.* at 2562. Indeed, a fundamental principle of a Court’s equitable power is that the party seeking equity must act in a timely manner, not sit on their rights for a decade. As the Court has held in the context of tolling civil-rights limitation periods, “[o]ne who fails to act diligently cannot invoke equitable principles to excuse that lack of diligence.” *Baldwin County Welcome Ctr. v. Brown*, 147 U.S. 147, 151 (1984).

The fact that there is a “trend” in favor of the Sixth Circuit’s decision does not make this circuit split go away. Indeed, *Holland* itself does not support this “trend.” Rather, the decisions of the Third, Seventh, and Eight Circuits requiring a habeas petitioner to diligently pursue claims of actual innocence are fully consistent with the elementary notions of equity expressed by this Court in *Baldwin County*. More critically, they are consistent with this Court’s language in *Holland* requiring a habeas petitioner to demonstrate that he diligently pursued his claim. Thus, the pre-*Holland* circuit court decisions were buttressed—not contradicted—by this Court’s decision in *Holland*.

The fundamental disagreement between the circuits regarding the meaning of *Holland* demonstrates succinctly why certiorari should be granted in this case. On one hand, the language of *Holland* itself seems consistent with the rule set forth by the Third, Seventh, and Eighth Circuit. On the other hand, the “trend” of cases following *Holland* indicates that several circuits—like the Sixth Circuit—interpret *Holland* not to apply to claims of actual innocence. These positions are entrenched and there is no reasonably likelihood that the circuit split will resolve itself. The importance of the question presented and the uncertainty in the law that the split of authority creates counsel strongly in favor of granting the petition.

This Court should grant the petition and decide whether *Holland*’s due diligence requirement is universal or whether claims of actual innocence should be treated differently for purposes of equitable tolling.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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