

No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

Mark Schwarzman — PETITIONER  
(Your Name)

vs.

David Gray — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Sixth Circuit  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Mark Schwarzman #643-446  
(Your Name)

P.O. Box 540  
(Address)

St. Clairsville, OH 43950  
(City, State, Zip Code)

N/A  
(Phone Number)

QUESTION PRESENTED

Is the highly infectious, extremely contagious, incurable sexually transmitted disease Herpes Simplex Virus HSV-2 (genital herpes) a medical, scientifically proven, reliable, critical physical evidence which demonstrates actual innocence sufficient to overcome procedural bar under Schlup?

## **LIST OF PARTIES**

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix 1a to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the United States district court appears at Appendix 8a to the petition and is

reported at 2017 U.S. Dist. LEXIS 117897; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

reported at \_\_\_\_\_; or,  
 has been designated for publication but is not yet reported; or,  
 is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was January 30, 2018.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: May 24, 2018, and a copy of the order denying rehearing appears at Appendix 55a.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_. A copy of that decision appears at Appendix \_\_\_\_\_.

A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## REASON FOR NEED OF JURISDICTION

Petitioner asserts that the Sixth Circuit Court of Appeals' Decision is in conflict with the United States Supreme Court; and, in conflict within its own Circuit Courts' precedents, and it is in conflict with other Circuit Court of Appeals' decisions and interpretations.

Petitioner Requests this Honorable Court to Certify this Conflict.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides that [in] all criminal prosecutions, the accused shall enjoy the right...to have Compulsory Process for obtaining witnesses in his favor, this right was not limited to the right to subpoena witnesses, but also, included the right to present defense evidence. In addition, the Sixth Amendment guarantees (an effective) Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

1. Petitioner who has been diagnosed with Herpes Simplex Virus (HSV-2), "Genital Herpes" since 1997 has been conviction of raping alleged victim, T.B. on a daily basis with and without condom use over an eight (8) year period (1999-2007). Petitioner asserts that this would have been impossible without her contracting this highly infectious, extremely contagious, incurable Herpes Simplex Virus (HSV-2) from petitioner whom was diagnosed with HSV-2 in 1997.

2. When a constitutional claim is procedurally defaulted, the actual innocence exception can be used to overcome the procedural bar. Petitioner must present new evidence showing that he is actually innocent. **This evidence must not have been presented at trial.** (Emphasis). Schlup v. Delo, 513 U.S. 298, 324, 327-328, 115 S. Ct. 851, 856, 867, 130 L. Ed 2d 808, 834, 836-37 (1995) (Stating that the new evidence does not have to be evidence that would be admissible at trial). Petitioner must show that with new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. In Murray v. Carrier, 477 U.S. 478, 496, 106 S. Ct. 2639, 2649, 91 L. Ed 2d 397, 413 (1986), the Court stated the standard for a Fundamental Miscarriage of Justice, a prisoner must show "**a constitutional violation has probably resulted in the conviction of one who is actually innocent,**" (Emphasis) in order to meet the Fundamental Miscarriage of Justice exception. In Schlup, the Court explained that the standard requires the defendant to "show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt" if the constitutional error had not occurred. Schlup v. Delo, Supra. In House v. Bell, 547 U.S. 518, 539, 126 S. Ct. 2064, 2078, 165 L. Ed 2d 1, 22-23 (2006), The Supreme Court determined that AEDPA's higher standard of review **does not apply in cases where there is a claim of actual innocence.** (Emphasis).

Petitioner asserts this is a rare and truly extraordinary case.

3. Petitioner Mark Schwarzmann, in 1997, was diagnosed with the highly infectious, extremely contagious, incurable sexually transmitted disease "HSV-2 (Genital Herpes)." (See Petitioner's Medical Record, Exhibit 1, App. 75a). He was a single father with custody of his two young daughters. That same year, in 1997, petitioner met Ms. James, who was a single mother of three young daughters. Ms. James knew petitioner had HSV-2 (genital herpes); after a few years of dating, she married petitioner.

Over the years, Ms. James and petitioner grew apart. In August 2010, Ms. James moved out of petitioner's house, leaving behind her now adult three daughters. On July 1, 2012, petitioner told his step-daughters that they had to find a new place to live<sup>1</sup>.

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<sup>1</sup> Of the five daughters living in the house only one (1) makes rape allegations and the other two (2) step-daughters' allegations to have knowledge; none of them inform anyone of the sexual abuse until petitioner requested them to leave the house. Furthermore, when the step-daughters' mother moved out, the alleged victim and her siblings chose to remain with petitioner.

On July 16, 2012, one of the step-daughters, T.B., told the Cleveland Heights Police Dept. that petitioner had been sexually raping her on a daily basis starting when she was ten (10) years old and continued to when she was a teenager. (App. 95a).

Petitioner was charged in March 2013 with 18 counts ranging from G.S.I to Rape and Kidnapping from 1999-2007. On June 18, 2013, trial counsel for petitioner filed a motion for a continuance. The motion was denied and trial began on June 24, 2013. Before the jury selection, trial counsel requested an oral motion for a continuance explaining he (trial counsel) was not prepared for trial. Trial counsel explained to the court a private investigator had been trying to locate petitioner's doctor who had recently retired. The trial court denied the continuance. The doctor would have testified that he diagnosed

petitioner with HSV-2 (genital herpes). With the doctor's testimony, the Doctor's Medical Record's of petitioner would have been properly introduced as evidence of petitioner's actual innocence. The doctor would have testified further as an expert witness to educate the trial jury/court about how HSV-2 (genital herpes) would be transmitted; vaginally, anally or by oral sex. In addition, the doctor would have testified that HSV-2 would be transmitted without any sign of a herpes sore or outbreak present. The doctor would have testified and confirmed that the chance of transmitting HSV-2 is extremely high. See Whitley, Kimberlin and Roizman, "Herpes Simplex Virus," Oxford University Press, 26 March 1998, p. 545. (Exhibit 4, App. 86a), "Women have higher rates of infection than men: the estimated risk of a susceptible female contracting HSV-2 from an infected male is 80% following a single contact." The HSV-2 (genital herpes) is so contagious, the virus can be transmitted even with the use of a condom. The doctor would have testified that petitioner could not have raped the alleged victim without infecting her with HSV-2 (genital herpes) given the circumstances of the allegation (being raped on a daily basis over many years with or without condom usage).

Due to the denial of the trial continuance, trial counsel was unable to locate the recently retired doctor, (becoming ineffective as a trial counsel), resulting in the inability to present HSV-2 (genital herpes) as evidence of petitioner's actual innocence.

Petitioner was denied the right to present evidence of his actual innocence supported with expert testimony; depriving him the right to Compulsory process, a Fair Trial, Due Process, and the Right to effective use of counsel when he was unable to present a proper defense; all due to the denial of a much needed trial continuance.

Petitioner was convicted of three (3) counts of rape, one (1) count of attempted rape, and four (4) counts of kidnapping. Petitioner was sentenced to

16 years in prison.

In the state courts, petitioner appealed his conviction to the Ohio Eighth Court of Appeals; the conviction was affirmed. (App. 56-74a). Petitioner then appealed to the Ohio Supreme Court. The court denied jurisdiction. Petitioner filed a 26(B). The court affirmed. The petitioner filed a §2953.21, Post-Conviction Relief. The court denied relief.

Petitioner filed a timely §2254, Federal Habeas Corpus Petition, raising twelve (12) claims. The Magistrate's Report and Recommendation denied petitioner's claims; either procedural defaulted, non-cognizable or without merit. (App 15a-54a). Petitioner filed a timely objection to the Report and Recommendation. Petitioner asserts at least Claim One: "Trial Court Denial of Continuance," and Claim Ten: "The Trial Court Committed a Reversible Error When it Denied Petitioner's Motion for a Medical Technician to Determine the Transmittal of an Infectious Disease," being procedurally barred should be excused due to his actual innocence; in addition, the other constitutional claims should be excused also due to petitioner's actual innocence.

Petitioner explained in the objection to the Magistrate's Report and Recommendation that petitioner has had the highly infectious, extremely contagious, incurable sexually transmitted disease HSV-2 (genital herpes), which is sufficient evidence of petitioner's actual innocence, and it was evidence not presented at trial due to the denial of a much needed trial continuance. Petitioner submitted three (3) exhibits to the U.S. District Court.

Exhibit #1:

A copy of petitioner's medical record. (Exhibit 1, App. 75a). The doctor's medical record (of petitioner) verifies petitioner was diagnosed in 1997 of having HSV-2 (genital herpes).

Exhibit #2:

A signed letter sent from Dr. Deborah McMahon, U.P.M.C., Dept. of Medicine,

Div. of Infectious Disease, (Exhibit 2, App. 77a), to assist petitioner to prove his actual innocence by duplicating what his medical doctor would have said at trial. The letter explicitly states, "You cannot be cured of HSV-2 infection." "Using condoms...doesn't eliminate the risk completely." "[O]utbreaks can occur in areas of the body not covered by a condom, so their use is not fully protective." "HSV-2 may be transmitted...in the absence of visible sores."

Exhibit #3:

A copy of the CDC-Genital Herpes Factsheet, (Exhibit 3, App. 78a-81a) provides/confirms the same information as the letter from (expert) Dr. Deborah McMahon.

The chance of transmitting genital herpes from an infected male to an uninfected female with one single sexual contact is 80%. (Exhibit 4, App. 86a).

The U.S. District Court (Judge) stated in his "Order and Decision," (App. 11a), denying habeas relief:

"Instead of introducing scientific evidence Petitioner only asserts he planned to introduce testimony by a medical expert who could testify that petitioner has genital herpes ("HSV-2") that could have been transmitted to the victim. Further, the evidence presented at trial alleged that petitioner wore a condom while committing each offense. Therefore, even if the Scientific Evidence was presented, it would be inconclusive and not exculpatory scientific evidence, his claim that procedural default should be excused must fail."

This was the same denial to petitioner's Claim Number Ten, "The Trial Court Committed a Reversible Error When it Denied Petitioner's Motion for a Medical Technician to Determine the Transmittal of an Infectious Disease." (App. 13a).

The U.S. District Court's "Opinion and Decision" was wrong and untrue. First, petitioner asserts his doctor would have testified as an expert witness to the fact that, not only does petitioner has/had HSV-2 (genital herpes) since 1997, but would have testified / educated the jury about the charac-

teristics of HSV-2 and the probability of transmitting HSV-2 (genital herpes). Secondly, the U.S District Court was wrong about the alleged victim testifying about condom usage on each sexual offense. The **alleged victim had testified petitioner did not always use a condom.** (See Trial Testimony attached, Exhibit 6, App. 96a.).

Denying petitioner's claim of actual innocence due to the use of a condom is irrelevant. HSV-2 (genital herpes) can and would be transmitted even with the use of a condom. This has been medically confirmed. See **signed letter** from Dr. Deborah McMahon, (Exhibit 2, App. 77a), and the CDC-Genital Herpes Factsheet, (Exhibit 3, App. 79a, 80a). In addition, the alleged victim testified that petitioner did not always use a condom. (App. 96a).

Petitioner requested a Certificate of Appealability (COA) 28 U.S.C §2253 (c)(1)(A) to appeal the District Court's Judgement denying his 28 U.S.C §2254 petition for Writ of Habeas Corpus. The ruling differs from the District Court to the Sixth Circuit Court of Appeals Decision. The Sixth Circuit denied petitioner's request for C.O.A., (App. 4a), stating:

"In the district court, Schwarzman argued as he does in his COA application here, that he can escape the procedural-default bar through the actual-innocence exception. He argues that, had the trial court granted him a continuance, he would have been able to procure an expert witness who could have testified that he had a "highly infectious and extremely contagious" form of genital herpes, which would have exonerated him because the victim did not have the disease. But that is not new evidence of his actual innocence. For one, it is not new, because Schawzman knew of this evidence for many years before his trial. Moreover, the only evidence that schwarzman has presented other than his own statement, are general facts about the disease and medical notes showing that he had the disease in 1997. In short, Schwarzman has not presented new evidence showing 'that it is more likely than not no reasonable juror would have convicted him.' Schlup v. Delo, 513 U.S. 298, 327."

Petitioner requested a Rehearing. The Rehearing was denied. (App. 55a).

## REASON FOR GRANTING THE WRIT

The Sixth Circuit Court of Appeals decision to deny petitioner's (COA) in regards to the evidence that petitioner now presents to prove actual innocence to overcome the procedural bar is not only in conflict with the United States Supreme Court Precedent in Schlup v. Delo, 513 U.S. 298, 324, 327-328 (1995). The decision is also contrary to other Circuit Court of Appeals; but more importantly, the decision is in conflict with their own courts' precedent.

The Sixth Circuit has noted "new evidence" includes both newly discovered, i.e., evidence unavailable at the time of trial and newly presented evidence, i.e., evidence not presented to the jury. Cleveland v. Bradshaw, 693 F. 3d 626 (6th Cir. 2012) citing Souter v. Jones, 395 F. 3d 577, 596 n.9 (6th Cir. 2005).

Certiorari should be granted. Petitioner will break down the Sixth Circuit's ruling for denial of (COA) into two distinct reasons for denial. The Sixth Circuits' Decision(App. 4a).

### Reason for Denial #1:

The Court of Appeals' Decision, "But that is not new evidence of his actual innocence. For one, it is not new, because Schwarzman knew of his evidence for many years before his trial." This reasoning is contrary to the Schlup Court and the Sixth Circuit Cases, Cleveland v. Bradshaw, 693 F. 3d 626 (2012); and, Souter v. Jones, 395 F. 3d @ 596 n.9 (2005).

The United States Supreme Court has held that a claim of actual innocence can be raised "to avoid a procedural bar to the consideration of the merits of [petitioner's] constitutional claims." Schlup, 513 U.S. @ 326-27. "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence --that was not presented at trial. Id @ 324. Thus, the threshold inquiry is rather "new facts raise []sufficient doubt about the result of the trial." Id

In Souter v. Jones, 395 F. 3d @ 596 n.9 (6th Cir. 2005) the Court held, "Thus, even if the [HSV-2 (genital herpes) communicable disease was] available, there is no evidence in the record that [the HSV-2 was] ever presented to the jury and therefore, [is] new evidence in support of [petitioner's] actual innocence claim under Schlup." "The Court of Appeals, including the Sixth Circuit have continued to apply Schlup actual innocence exception to cases involving procedural default." Souter v. Jones, 395 F. 3d @ 600 (6th Cir. 2005).

The "'new evidence' necessary to support [the] claim of actual innocence under Schlup encompasses not only 'newly available,' but also, 'newly presented' evidence: The Schlup Court specifically stated that a claim of actual innocence requires that introduction of 'new reliable evidence...that was not presented at trial.'" Sistrunk v. Armenakis, 293 F. 3d 669, 673 n.7 (9th Cir. 2002)(en banc), cert. denied, 537 U.S. 1115 (2003). See also Gomez v. Jaime, 350 F. 3d 673, 679 (7th Cir. 2003)(“All Schlup requires is that the evidence is reliable and not presented at trial.”) (See also Griffin v. Johnson, 350 F. 3d 956. 963 (9th Cir. 2003)(“Requiring ‘newly presented,’ not newly available evidence.”))

In Cleveland v. Bradshaw, 693 F. 3d 626, 633 (6th Cir. 2012)(citing Connolly v. Howes, 304 F. App'x 412, 419 (6th Cir. 2008) Sutton, J. Concurring; noted that Souter suggest that the Sixth Circuits consider "newly presented" evidence sufficient.

As shown, under the actual innocence exception, it is not necessary when the evidence was known; only that it was not presented at trial. Petitioner asserts had the trial court not erred in granting a continuance, he (trial counsel) could have located petitioner's medical doctor so that the medical records would have been properly presented before the court with expert testimony. If the evidence HSV-2 (genital herpes) was presented by the defense without the testimony from his medical doctor to support the argument regarding any inform-

ation about the characteristics of HSV-2 (genital herpes), the State would have argued the information was mere speculation and the evidence would have been unadmitted into evidence.

Petitioner was denied his Federal Constitutional Right to Compulsory Process, to Compel Witness(es), denied the right to present a defense that would have proved petitioner's actual innocence.

The Sixth Circuit's decision to deny petitioner's (COA) because the evidence (extremely contagious sexually transmitted disease, HSV-2 (genital herpes)) was known to petitioner before trial, or that the evidence was not new, is irrelevant. The decision is not only in conflict with Schlup; but also, the decision is in conflict with its own Sixth Circuit Court's precedent of Cleveland v. Bradshaw, 693 F. 3d 626, 633 (6th Cir. 2012) citing Souter v. Jones, 395 F. 3d @ 596 n.9 (6th Cir. 2005). "That 'new evidence' need not be newly discovered evidence, however [\*564] but simply may be 'evidence that was not present to the fact-finder during trial, i.e., newly presented evidence.'" "Newly presented evidence is sufficient," under Souter. The decision by the Sixth Circuit is also in conflict with other Circuit Courts of Appeals. See, Sistrunk v. Armenakis, (9th Cir.) Supra; Gomez v. Jaimet (7th Cir.) Supra; Griffin v. Johnson, (9th Cir.) Supra.

Reason for Denial #2:

The Court of Appeals decision, (App. 4a), "Moreover, the only evidence that Schwarzman has presented, other than his own statement, are general facts about the disease and medical notes showing that he had the disease in 1997."

Petitioner asserts the value on the "medical notes" are being misplaced. The "medical notes" are petitioner's actual medical records, not "notes." The medical records were of petitioner recorded by Dr. Barry Gordon. He diagnosed petitioner with HSV-2 (genital herpes) in 1997. (See Exhibit 1, App. 75a). In order for the trial court to accept them into evidence; Dr. Barry Gordon would

needed to been present. Anyother doctor could only have testified to the veracity that petitioner has HSV-2 (not to when he was diagnosed). These medical records are verifiable proof of having HSV-2 (genital herpes) prior to any alleged sexual abuse claims. Comparing to the case in Graves v. Davis, 2018 U.S. Dist. LEXIS 100078 (5th Cir. TX)(noting that [Graves] could not prove he had genital herpes prior to the alleged rapes). The signed letter from Dr. McMahon, (See Exhibit 2, App. 77a), provides critical information about HSV-2 (genital herpes). This signed letter explicitly states, 1) "You cannot be cured of HSV-2 infection." 2) "Using condoms...doesn't eliminate the risk completely." 3) "[O]utbreaks can occur in areas of the body not covered by a condom, so their use is no fully protective." 4) "HSV-2 maybe transmitted...in the absence of visible sores." (See also the CDC-Genital Herpes Factsheet, Exhibit 3, App. 78a, 79a, 80a.) Both would be confirmed with the same information as if Dr. Barry Gordon was located and testified.

This information is not just "general facts about the disease;" it is substantial information about genital herpes (more specifically, HSV-2) **that any juror would need to know**, and proof to a court-in-review would need to know in order to substantiate as verifiable proof for an actual innocence claim.

"Women have higher rates of infection than men: the estimated risk of a susceptible female contracting HSV from infected males is 80% following a single contact." (See Exhibit 4, App. 86a.) As each sexual contact increases, statistically the chance of infecting the alleged victim increases. Logically--with increased sexual contact with an infected male (petitioner) increases the probability of transmittal to a susceptible female (T.B.--alleged victim). If the alleged rapes had actually occurred, as T.B. claimed (with or without condom usage), she would have contracted HSV-2 in a relatively short period of time, i.e., within the first few sexual contacts. Not to have HSV-2 after years of daily sexual abuse, can only lead a jurist to believe that all of the alleged

claims are false / made-up (which supports the petitioner's theory that these claims are only retaliatory due to the fact that he requested the step-daughters to move out of his house). To further support this ideology, the "Herpes Simplex Viruses" article states, "antibodies to this virus are rarely found before the age of onset of sexual activity." The alleged acts on T.B. were to have occurred while she was ten years old and on; the susceptibility of her contracting HSV-2 would have been greater than 80%. (App. 86a).

The U.S District Court and the Sixth Circuit Court of Appeals has under estimated the value of the information about HSV-2 (genital herpes) that any medical doctor or infectious disease specialist would testify to as the same information provided without being physically present before the court.

#### **A. THE QUESTION PRESENTED IS OF GREAT IMPORTANCE.**

**Is** the highly infectious, extremely contagious, incurable sexually transmitted disease **Herpes Simplex Virus** -- HSV-2 (genital herpes) a medical, scientifically proven, reliable, critical physical evidence which demonstrates actual innocence sufficient to overcome procedural bar under Schlup?

This Court should grant certiorari, the Court in House v. Bell, 547 U.S. @ 548-53 stated, "[0]ther types of evidence can pass the high bar set by Schlup." Nothing in Schlup says that there is such a strict limitation on that sort of evidence that maybe considered in the probability determination. All Schlup requires is that the new evidence is reliable and--was not presented at trial. Schlup v. Delo, 513 U.S. 538, 559, 140 L. Ed 2d 728, 118 S. Ct. 1489 (1998).

Petitioner asserts that no court nor jury could have confidence in the outcome of the trial if the HSV-2 evidence/testimony was presented at trial. Retrospectively, had the trial court granted the continuance to allow the defense (counsel) ample time to locate petitioner's medical doctor, Dr. Barry

Gordon, who would have presented petitioner's medical records and testify to the characteristics of HSV-2 (genital herpes), and to when he contracted the virus.

It is more likely than not, no reasonable juror would have found petitioner guilty beyond a reasonable doubt.

The evidence of HSV-2 (genital herpes), a sexually transmitted disease, is reliable evidence and should be sufficient to demonstrate actual innocence to overcome procedural bar. HSV-2 (genital herpes) is not like other sexually transmitted diseases such as: Chlamydia, Gonorrhea, Syphilis; all curable with antibiotics.

#### Chlamydia v. HSV-2

In the case of Evicci v. Maloney, 387 F. 3d 37 (1st Cir. 2004); petitioner Wilford Evicci was convicted of rape. To overcome the procedural bar he had to demonstrate actual innocence. Evicci argued that the victim had chlamydia and he did not. Evicci had taken a STD test 14 months after the "alleged" rape while he was incarcerated. Evicci tested negative for chlamydia. After careful review, the First Circuit denied relief partially relying on chlamydia maybe treated with antibiotics and Evicci has presented no evidence on whether he was treated with antibiotics before the test were administered.

Petitioner agrees with the First Circuits ruling; chlamydia can be cured with antibiotics. This case would apply to gonorrhea and syphilis. The similarity of these STD's to HSV-2 (genital herpes) is just that--there all sexually transmitted diseases. The difference is there is no cure of HSV-2 (genital herpes), it is life-long. There is treatment; but, it only reduces the duration of the outbreaks, not the infection. "It is important to note that asymptomatic (no visible sores) shedding of [the HSV-2] virus can continue despite clinically effective suppression with acyclovir; thus the possibility of person-to-person transmission persist." (See Exhibit 4, App. 92a).

The U.S. District Court denied petitioner's actual innocence claim on the

basis of the use of a condom. (App. 11a). This fact might be true if the sexually transmitted disease was limited only to the penis.

#### Aids (HIV) v. HSV-2

The Aids (HIV) is similar to HSV-2 (genital herpes) only to the point that both viruses are treatable, and incurable (life-long) sexually transmitted diseases. There is a difference between Aids (HIV) and HSV-2 (genital herpes).

Aids (HIV): It is medically and scientifically proven that the Aids (HIV) virus can only be transmitted by bodily fluids and condom use is an effective barrier to prevent transmission of Aids (HIV).

HSV-2: It is medically and scientifically proven that HSV-2 (genital herpes) sores develop on the penis, testicles, surrounding pubic area and buttocks (areas that cannot be covered by a condom). The CDC has stated that genital herpes can be released through the skin. (App 78a). In fact, "Good Morning America (GMA)" covered a story where a woman infected with HSV-2 kissed a newly-born baby; the baby contracted HSV-2, and died of complications from contracting HSV-2. (Story aired the week of 7/24/17). There was no sexual misconduct. It is also medically documented that genital herpes (HSV-2) can be transmitted even with or without the use of condoms. (App 77a, 78a, 79a, 80a).

A correct reading of Schlup reveals that the evidence following the words "newly reliable evidence" were not meant to be an exhaustive list of everything upon which an actual innocence claim may be based. The Schlup Court specifically stated that "newly presented evidence may indeed call into question the credibility of the witness[es] presented at trial." 513 U.S. @330. Petitioner asserts HSV-2 (genital herpes) being presented as evidence to prove actual innocence would call into question the credibility of the alleged victim.

The alleged victim claims<sup>2</sup> she was raped on a daily (not weekly or monthly) basis over several years with and without condom use (including oral sex). (See Exhibit 6, App. 96a). At the sentencing, the alleged victim (T.B.)

acknowledged that she did not have any sexually transmitted diseases to include HSV-2. (Exhibit 7, App. 97a).

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<sup>2</sup> These claims occurred only after petitioner had requested her and her sisters to move out of his house 7/1/12.

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Genital herpes sores usually appear as one or more blisters on or around the genitals, rectum or mouth. If someone touches the sores or the fluids from the sores, he/she can transfer the genital herpes (HSV-2) virus to other parts of the body. The CDC warns people not to touch the sores or the fluids to avoid spreading herpes to another part of the body (or others). (See Exhibit 3, App. 80a). Petitioner brings to the Court's attention how easy it is to transmit herpes, even without any sores or outbreaks present. (App 77a, 78a-80a, 89a, 92a).

The alleged victim claims to have been raped on a daily basis over several years with and without (and orally) condom use; genital herpes can be transmitted with no visible sore(s) or outbreaks. And according to medical science, a susceptible female's risk of contracting HSV-2 from an infected male is 80% on the first single contact; statistically, T.B. most certainly would have been infected with HSV-2 (genital herpes) if the alleged rapes had occurred as as she alleged. An incurable sexually transmitted disease that is extremely contagious (easily transmitted) presented as evidence would call into question the credibility of T.B. as a witness.

The application of the science to present facts assumed remains petitioner's burden. Evinci v. Maloney, 387 F. 3d (1st Cir. 2004) (citing Smith v. Robbins, 528 U.S. 259, 285-86, 120 S. Ct. 746, 145 L. Ed 2d 756 (2000)).

Petitioner presents to this Honorable Court the HSV-2 (genital herpes) as evidence to prove his actual innocence under Schlup. Petitioner supports his evidence with reliable documents: 1) Copy of petitioner's Doctor's medical

records confirming petitioner has had HSV-2 (genital herpes) prior to the alleged rapes. (App. 75a); 2) Copy of the CDC-Genital Herpes Factsheet. (App. 78a-81a). The factsheet provides reliable medical information about the HSV-2 (genital herpes); such as, an infected person cannot be cured of genital herpes, HSV-2 can be transmitted through skin contact, with or without sores present, and transmitted with or without the use of a condom; 3) Copy of the publication, Whitley, Kimberlin and Roizman "Herpes Simplex Viruses," Oxford University Press, 26 March 1998, pp 541-553, (App. 82a-94a); which explains in extreme detail about the herpes (HSV-2) virus. It provides crucial information; such as, genital herpes can be transmitted symptomatic (visible) or asymptomatic (non-visible sores), the chance of infecting a female is 80% following a single contact, and even if being treated with antibiotics, genital herpes (HSV-2) can still be transmitted; and, 4) A signed letter from Dr. Deborah McMahon, (App. 77a), which states: "You cannot be cured of genital herpes." "Using condoms...doesn't eliminate the risk [of susceptibility] completely." "[O]ut-breaks can occur in areas of the body not covered by a condom so their use is not fully protect[ive]." "HSV-2 may be transmitted...in the absence of visible sores."

Petitioner asserts he has provided ample / sufficient information from three (3) independent and reliable sources<sup>3</sup> regarding the circumstances about HSV-2 (genital herpes) to undermine the confidence in the outcome of the trial if the evidence was admitted / were presented to the trial jury<sup>4</sup>.

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<sup>3</sup> One of these sources is a signed letter on Company letterhead from Dr. Deborah McMahon, U.P.M.C., Dept. of Medicine, Div. of Infectious Diseases. This is the closest that petitioner can get without being a "notarized affidavit" from a board certified doctor.

<sup>4</sup> Petitioner asserts that had this information been presented to the original jury, they too would have found him innocent of all charges--they were already doubtful--including the ones they already acquitted him of.

B. THIS CASE IS AN EXCELLENT VEHICLE FOR CONSIDERING  
THE QUESTION PRESENTED.

Certiorari should be granted. Under Sixth Circuit case law, court precedent in Souter v. Jones, 395 F. 3d 577 (6th Cir. 2005), the court is to focus on the strength of the evidence rather than the availability of the evidence. The Souter Court allowed evidence that was available, and not used at trial; yet denied this petitioner the same opportunity under Schlup; Souter, 577 F. 3d @ 596 n.9 (6th Cir. 2005); Cleveland v. Bradshaw, 693 F. 3d 626, 633 (6th Cir. 2012). In petitioner's case, had he not been denied a continuance such evidence would have been properly presented to the trial court/jury.

This Court explained in House v. Bell, 547 U.S. 518, 538, 126 S. Ct. 2064, 165 L. Ed 2d 1 (2006), that the Schlup standard "is demanding and permits review only in the 'extraordinary' case. At the sametime, though, the Schlup standard does not require absolute certainty about the petitioner's guilt or innocence." Id (citations omitted). Petitioner asserts this is a "extraordinary" case. HSV-2 (genital herpes) is reliable and sufficient evidence to prove actual innocence under Schlup, because petitioner could not have raped the alleged victim as alleged without infecting her with HSV-2 (genital herpes), as presented with expert documentation by Dr. Deborah McMahon, (App. 77a); HSV-2 (genital herpes) would have been transmitted regardless of visible sores or outbreaks present, and would have been transmitted even through the use of a condom.

This Court has held that if a habeas petitioner "presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless [\*590] constitutional [\*29] error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." Schlup v. Delo, 513 U.S. @ 316. "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence--

whether it be exculpatory, scientific evidence, trustworthy eyewitness accounts, or **critical physical evidence--that was not presented at trial.**" Schlup v. Delo, 513 U.S. @ 324.

Petitioner has been prevented from presenting the **medical records** that proves his actual innocence. An innocent man is incarcerated for alleged rapes that he did not, and could not have committed. Petitioner asserts there is no possibility that his conviction could stand in part or in whole based on having HSV-2 since 1997 and alleged to have sexually raped T.B. on a daily basis over a eight (8) year period (1999-2007) with or without the use of a condom without infecting T.B. with the highly contagious HSV-2 (genital herpes).

In addition to petitioner's constitutional question, petitioner also request an oral hearing, appointment of counsel, and any expert witnesses to testify before this Honorable Court to certify the characteristics about HSV-2 (genital herpes); this includes Dr. Barry Gordon (petitioner's doctor who originally diagnosed petitioner with HSV-2 (genital herpes) in 1997).

#### CONCLUSION

The Sixth Circuit's decision to deny petitioner's COA, and his actual innocence claim due to the evidence "was known prior to trial" is contrary to this Honorable Court's precedent of Schlup. The "new evidence" for Schlup purposes is merely evidence not presented at trial, regardless of when it was discovered; any other interpretation would effectually continue the detention of innocent criminal defendants--who in this case--was thwarted in the presentation of such evidence that would have exonerated him at his trial--freeing him of the now undue burden of continuous appeals throughout the State of Ohio through this Great Court. Not only is this case decision contrary to Schlup, the Sixth Circuit denied this petitioner of the same standard entitled to Cleveland

v. Bradshaw, (6th Cir. 2012); and, Souter v. Jones, (6th Cir. 2005).

Certiorari should be granted since there is a conflict of interpretation of Schlup; whereas, petitioner's medical records were not presented at trial due to the denial of a trial continuance (the right to prepare a proper defense, a fair trial, incorporating an ineffective trial counsel), and compulsory process by not allowing a continuance to locate a much needed witness, Dr. Barry Gordon, whose testimony would have undermined any confidence of the jury's guilt of this petitioner--challenging the credibility of the states' key witness. Is HSV-2 (genital herpes) sufficient evidence to prove actual innocence and to overcome the procedural bar under Schlup?

Petitioner seeks any/all relief that he maybe entitled to. For the foregoing reasons; this court should grant this petition for a Writ of Certiorari.

Respectfully Submitted,



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