No. ____

In The Supreme Court of the United States

IAN DAVIS A.K.A. BENSON DAVIS
Petitioner,
v.
MARGARET BRADSHAW,
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Ten years after Ian Davis was convicted of aggravated murder and felonious assault, the only alleged eyewitness to the crime admitted, in an unsolicited statement to two Federal Bureau of Investigation Agents, that he never witnessed the crime and that his testimony in Davis's trial was false. The alleged witness subsequently made similar admissions in a sworn affidavit and a sworn statement, and further revealed that prior to trial, he informed the prosecutor that he was not an eyewitness, and the prosecutor then pressured him to testify.

On the basis of the witness's recantation and the government's potential due process violation under *Brady v. Maryland*, 373 U.S. 83 (1963), Davis sought – and was granted – authorization by the United States Court of Appeals for the Sixth Circuit to file a successive petition for writ of habeas corpus. After filing the successive petition, Davis moved the district court for leave to conduct discovery related to the witness's statements. The district court denied leave to conduct discovery and dismissed Davis's petition. The Sixth Circuit affirmed, holding that Davis's petition was untimely. The questions presented are:

> 1. Whether the proof necessary to make a *prima facie* showing that a petitioner satisfies 28 U.S.C. § 2244(b)(2)(B)(ii) is equivalent to the proof necessary to make a showing of actual innocence sufficient to excuse the untimeliness of a petition for writ of habeas corpus.
>
> 2. Whether, when a court of appeals grants authorization to file a successive petition for writ of habeas corpus and directs the district court to engage in a fuller exploration of a petitioner's claims, the district court must provide a petitioner the opportunity to provide additional support for his claims.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

There are no parties to the proceedings other than those listed in the caption.

Pursuant to Rule 29.6, Petitioner Davis states that no parties are corporations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

No. ____

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_____

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Ian Davis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in *Davis v. Bradshaw*, No. 17-3262, is reported at *Davis v. Bradshaw*, 900 F.3d 315 (6th Cir. 2018), and attached hereto as Appendix A at A-1. The order denying Davis's petition for panel rehearing and rehearing en banc is unreported but is available at *Davis v. Bradshaw*, 2018 U.S. App. LEXIS 27470 (6th Cir. Sept. 25, 2018), and is attached hereto as Appendix B at A-27.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit rendered its opinion on August 16, 2018. Davis timely filed a Petition for Panel Rehearing and Rehearing En Banc. The Sixth Circuit issued an order denying his petition on September 25, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

This case involves the following Amendment to the United States Constitution:

Fourteenth Amendment, which provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the law.

STATUTORY PROVISIONS

This case involves the following federal statute:

Section 28 U.S.C. 2244, which provides in relevant part:

> (b)
>
> (1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)
>
> (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
>
> . . .

(d)

(1)A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

In 2013, Davis, *pro se*, sought authorization from the United States Court of Appeals to file a successive petition for habeas corpus relief. Davis's application and petition were premised on newly discovered evidence, including the sworn recantation of William Avery, Jr., the only alleged eyewitness to the crimes for which Davis had been convicted: Marsha Blakely's assault and murder. In his recantation, Avery not only revealed that he lied about witnessing the crimes, but also disclosed a potential *Brady* violation:

> I told Prosecutor Rosenbaum that I was lying for the money. We were alone in a room at the courthouse. He got very upset at me and scared me. He told me if these dudes don't go down for this, that I would.

Doc. 1-2, PageID# 106-07.[1] Upon consideration of his application, the Sixth Circuit held,

> If it were proven that Avery fabricated his testimony, that he was pressured by the prosecution to testify falsely at trial, and that the prosecution withheld evidence casting further doubt on Avery's credibility, Davis could establish that a constitutional violation occurred and that, absent this violation, no reasonable factfinder would have found him guilty.

Doc. 12-3, Ex. 67, PageID# 1355. Because Davis made a prima facie showing – meaning "sufficient allegations of fact together with some documentation that would warrant fuller exploration in the district court" – that his claims relied on "new facts that could not have been discovered previously through the exercise of due diligence and that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense," the Sixth Circuit authorized him to file a successive petition and transferred his case to the district court. *Id.*, citing 28 U.S.C. § 2244(b)(2); *In re McDonald*, 514 F.3d 539, 544 (6th Cir. 2008) (internal quotations omitted). Following the Sixth Circuit's order, Davis refiled his petition for writ of habeas corpus in the district court.

[1] Unless otherwise specified, record citations are to the record in *Davis v. Bradshaw*, Case No. 1:14-CV-02854 in the United States District Court for the Northern District.

William Avery, Jr. provided the only evidence implicating Davis.

Avery's recantation, which was relied on by the Sixth Circuit to grant him authorization, was significant because Avery provided the *only* evidence that linked Davis to Blakely's murder or assault, much less placed him in Ohio at the time she was killed.

Blakely was murdered in Lorain, Ohio, sometime between the late evening of August 7, 1991, and early morning of August 8, 1991. Not long after, the police investigation stalled, so the prosecutor's office offered a $2,000 reward in exchange for information. It was only then that Avery became involved. His father, William Avery, Sr., frequently worked as a compensated informant for the two detectives leading the Blakely investigation. Doc. 12-6, Ex. 91, PageID# 2088; Doc. 1-4, PageID# 116; Doc. 12-4, Ex. 94, PageID 1652. He contacted the police about the reward. After determining that he did not have firsthand information, however, one of the detectives told Avery, Sr. the reward could only be given to someone "who had professed to be an eyewitness." Doc. 12-6, Ex. 91, PageID 2089. Avery, Sr. returned with Avery the next day, claiming Avery was an eyewitness.

In his first interview with police, Avery alleged that he witnessed Blakely being beaten in her friend's apartment by Davis and several others, but denied witnessing her murder. Doc 12-8, Ex. 97, PageID# 2683. Following the interview, Avery failed a polygraph examination administered by the police. In both a second interview and sworn statement, Avery again denied witnessing Blakely's murder. *Id.* at Ex. 99, PageID# 2787.

As a result of the information provided by Avery, four men, including Davis, were charged. Lenworth Edwards was the first to go to trial. Unsatisfied with the $2,000 he had already received, Avery, at the behest of his father, demanded $10,000 from the prosecution. Doc. 12-6, Ex. 91, PageID# 1986. When he was refused the money, he refused to testify for the State. Instead, he testified on behalf of Edwards, admitting that he never witnessed Blakely's assault, but lied in order to collect the reward money. *Id*. at 1990-91. Based on his in-court recantation, the court declared a mistrial. Avery was charged with perjury and sent to jail.

Once in jail, Avery again did an about-face, claiming that he only recanted at Edwards's trial because he was threatened.[2] He agreed to testify on the State's behalf, reverting back to his story about witnessing Blakely's assault but adding – for the first time – that he observed her murder behind Westgate plaza. *Id*. at 1997, 2042-43. The State dropped the perjury charges against Avery and paid him additional compensation. He subsequently testified in Edwards's second trial, as well as Davis's and co-defendants Alfred Cleveland's and John Edwards's trials. All four men were convicted.

In total, the State of Ohio paid Avery more than $5,000 in exchange for his cooperation. *Id*. at 2043. After Davis's trial, Avery continued to work as a paid

[2] The Lorain County Jail Hearing Board investigated Avery's claim that he was threatened. The Hearing Board interviewed multiple witnesses but could not find any evidence to substantiate Avery's allegations. He was found guilty of making false and malicious statements toward staff. Doc. 1-7, PageID# 130-31.

informant for both the Lorain Police Department and federal government. Doc. 12-8, Ex. 96, PageID# 2581.

No physical evidence linked Davis to Blakely's murder. No other witness implicated him. He testified that he was in New York, where he lived, at the time Blakely was murdered. Davis's girlfriend, who lived in Lorain, corroborated his alibi. She testified that when Davis visited Lorain he stayed with her. She did not see Davis on August 8th or 9th. Doc. 12-6, Ex. 91, PageID# 2146-47. However, he called her *from New York* early on August 8th, shortly after Blakely was killed in Ohio. *Id.* at 2144. Despite his alibi,[3] Davis was convicted as a result of Avery's testimony.

Avery's unsolicited recantations

In November 2004, Avery requested a meeting with two FBI Agents. Doc. 1, Ex. 2, PageID# 111. During that meeting, Avery confessed that he lied about witnessing Blakely's murder and alleged that his father, in fact, had committed the crime. Avery explained that his father provided him details about the crime and urged him to implicate Davis and his co-defendants. Fearing Cleveland because he

[3] Davis's co-defendant Alfred Cleveland also had an alibi. It is uncontested that Cleveland met with his probation officer in New York on the morning of August 7, 1991. *Cleveland v. Bradshaw*, 693 F.3d 626, 629 (6th Cir. 2012). His friend David Donaphin testified by deposition that he saw Cleveland later that night between 10:00 p.m. and 12:00 a.m., and flight records demonstrated that the last flight from New York to Cleveland that night was 10:40 p.m. *Id.* at 636. Cleveland also submitted the detailed calendars of his then-15-year-old neighbor, in which she wrote that Cleveland was in New York on both August 7 and 9 of 1991. Doc. 39-1, PageID# 3268. Though Cleveland's alibi does not provide direct proof of Davis's innocence, it contradicts Avery's trial testimony.

owed him money, Avery followed his father's directions. After first meeting with the FBI agents, Avery never heard from them again. Doc. 1, Ex. 1, PageID# 107.

In 2006, Avery recanted again. Following his conviction, Cleveland hired attorneys and investigators who then located Avery. When they found him, Avery provided a sworn affidavit, again admitting he lied at Davis's and each of his co-defendants' trials. *Id*. at PageID# 104-10. In his affidavit, Avery disclosed his pretrial conversation with Prosecutor Rosenbaum, during which he told Rosenbaum that he lied about being an eyewitness and Rosenbaum responded by pressuring him to testify. Further, Avery explained why he recanted:

> I want to make this right. This has been bothering me since I did this. I feel I have to come clean and tell the truth. It is only now that I finally feel that I can do this without being intimidated or killed by my own father.
>
> . . .
>
> If I don't tell the truth and get this off my chest, then my spirit can't be good with God.

Id. at PageID# 108. Avery later made a sworn statement consistent with his affidavit. Doc. 1, Ex. 3, PageID# 114-23. However, when Cleveland tried to obtain relief on the basis of Avery's recantations, Avery went silent. Cleveland called Avery to testify in a hearing on his state petition for post-conviction relief. Upon learning that he could face multiple perjury charges, Avery invoked his right to not testify. Explaining his decision to reporters, Avery stated: "Dude's innocent. But I don't feel I have to go to jail for 30 years." Doc. 1, Ex. 4, PageID# 124.

Proceedings in the district court

After the Sixth Circuit transferred Davis's petition to the district court, the Warden filed multiple motions to have his case reassigned to the district court judge who had recently dismissed Cleveland's petition for habeas relief.

In 2012, the Sixth Circuit determined Cleveland made a gateway showing of actual innocence, excusing his delay in filing a petition for writ of habeas corpus:

> Had the jury also been able to consider Avery's unsolicited 2004 recantation, the 2006 recanting affidavit, evidence that Cleveland was in New York a couple of hours before Blakely's murder and could not have flown from New York to Ohio in time to commit the murder, along with the fact that there was no other evidence tying Cleveland to the crime, 'it surely cannot be said that a juror, conscientiously following the judge's instructions requiring proof beyond a reasonable doubt, would vote to convict.

Cleveland v. Bradshaw, 693 F.3d 626, 642 (6th Cir. 2012) (citation omitted). However, on remand and following an evidentiary hearing, the district court held that Cleveland's underlying grounds for relief were without merit.

The district court denied the Warden's motions to transfer Davis's case to Cleveland's judge, holding that the cases were not sufficiently related to warrant transfer and that a separate evidentiary hearing would be necessary in Davis's case. Doc. 23, PageID# 3035-38.

Davis subsequently filed a motion for leave to conduct discovery, seeking, in part, to obtain records and depose witnesses in support of a claim that his due process rights had been violated as a result of the State's failure to disclose Avery's pretrial recantation. The district court denied Davis's motion for discovery, citing the burden the court would suffer by having to review additional evidentiary materials. Doc. 29,

PageID# 3120. Instead, the court permitted the Warden to expand the record with the record of the hearing in Cleveland's case, which comprises 133 exhibits and a 350-page transcript. *Id*. at 3123. The court offered no explanation as to why that was not similarly burdensome. Aside from testifying as a witness, Davis had no part in the hearing; neither he nor his counsel had any control over the record developed at the hearing.

After denying Davis leave to conduct discovery, the district court denied Davis's petition for habeas corpus relief, holding that (1) he failed to satisfy § 2244(b)(2)(B)(ii); (2) his petition was time-barred; and (3) his claims were procedurally defaulted. Doc. 49, PageID# 6374-6401. The district court certified that a certificate of appealability was issued as to Davis's first ground for relief (his *Brady* claim). On Davis's motion, the Sixth Circuit expanded the certificate of appealability to include the denial of Davis's motion for leave to conduct discovery. The Sixth Circuit subsequently affirmed the decision of the district court, denied panel rehearing, and denied rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

1. The showing required for 28 U.S.C. § 2244(b)(2)(B)(ii) and for gateway actual innocence arguments should be the same, as that would be consistent with their purposes and effects.

Lower courts need guidance regarding the interplay between the various standards of actual innocence in habeas corpus cases. In order to obtain authorization to file a successor habeas application, a petitioner must make a *prima facie* showing that "the facts underlying the claim, if proven and viewed in light of

the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii). Similarly, with a procedurally defaulted claim and/or a time-barred claim, a petitioner can avoid a procedural bar to the consideration of the merits of his constitutional claim if he can show that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (citing to *Murray v. Carrier*, 477 U.S. 478 (1986)). *See also McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). These two standards – a *prima facie* showing that a petitioner satisfies § 2244(b)(2)(B)(ii) and an actual innocence showing pursuant to *Schlup* and *Perkins* – should be considered equivalent. Interpreting the two standards in the same manner is consistent with their purposes and effects.

Although the standard contained in § 2244(b)(2)(B)(ii) is well-defined, it is not as clear what it means to make a *prime facie* showing of actual innocence under that same standard. The Sixth Circuit has traditionally defined *prima facie* as "sufficient allegations of fact together with some documentation that would warrant a fuller exploration in the district court." Doc. 12-3, Ex. 67, PageID# 1354, citing *In re McDonald*, 514 F.3d 539, 544 (6th Cir. 2008). The Seventh Circuit, too, has understood a *prima facie* showing to mean warranting further exploration by the district court. *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997). In *Bennett*, however, the Seventh Circuit elaborated, stating: "If in light of the documents submitted with the application it appears *reasonably likely* that the application

satisfies the stringent requirements for the filing of a second or successive petition, we shall grant the application." *Id.* (emphasis added). Other circuits have adopted the *Bennett* court's interpretation of *prima facie*, considering not only whether fuller exploration is warranted, but also whether the petitioner has established that it is reasonably likely that he has satisfied the requirements of § 2244(b)(2)(B). *See Rodriguez v. Superintendent, Bay State Corr. Ctr.*, 139 F.3d 270, 273 (1st Cir. 1998) , overruled on other grounds by *Bousely v. United States*, 523 U.S. 614, 622-23 (1998) (adopting *Bennett* interpretation and emphasizing that the standard "erects a high hurdle"); *Bell v. United States*, 296 F.3d 127, 128 (2d Cir. 2002); *Goldblum v. Klem*, 510 F.3d 204, 218-19 (3d Cir. 2007); *In re Williams*, 330 F.3d 277 (4th Cir. 2003); *Reyes-Requena v. United States*, 243 F.3d 893, 898-99 (5th Cir. 2001); *Thompson v. Calderon*, 151 F.3d 918, 925 (9th Cir. 1998); *In re Holladay*, 331 F.3d 1169, 1173-74 (11th Cir. 2003).

If a petitioner establishes that it is reasonably likely he meets the standard outlined in § 2244(b)(2)(B)(ii), then this showing is essentially identical to the probabilistic actual innocence standard articulated in *Carrier, Schlup,* and *Perkins.* That is, to make a *prima facie* showing to warrant authorization to file a successive petition, a petitioner must establish that it is reasonably likely that, but for constitutional error, no reasonable factfinder would have found him guilty. *See Bennett*, 119 F.3d at 469; 28 U.S.C. § 2244(b)(2)(B)(ii). To establish a gateway claim of actual innocence, a petitioner "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup*,

513 U.S. at 327. On their face, the standards seemingly require the same degree of proof. Accordingly, where a petitioner satisfies one standard, he should also be found to have satisfied the other.

Interpreting the two standards in the same manner is consistent with their purposes and effects. This Court identified two reasons why Schlup's evidence of actual innocence "need carry less of a burden" than the evidence that would hypothetically be required to support a freestanding claim of actual innocence, as contemplated in *Herrera v. Collins*, 506 U.S. 390 (1993). *Schlup*, 513 U.S. at 316. First, the type of claim of innocence advanced by Schlup "does not by itself provide a basis for relief," but instead "depends critically on the validity of [a petitioner's] [constitutional] claims." *Id.* at 315. Second, "a court's assumptions about the validity of the proceedings that resulted in conviction are fundamentally different in Schlup's case than in Herrera's." *Id.* Where a petitioner advances a substantive, freestanding claim of innocence, the claim will be evaluated on the assumption that the trial was error-free. *Id.* Because the trial was presumably error-free, it is reasonable to apply a high standard of review. *Id.* In contrast, a claim of innocence made pursuant to *Schlup* or *Perkins* will be accompanied by an assertion of constitutional error. *Id.* at 316. Such a conviction is not entitled to as much respect as one that was the product of an error-free trial, and thus, a lower standard of review is appropriate. *Id.*

The practical effect of the two scenarios also differs. Assuming this Court were to recognize a freestanding claim of actual innocence and a petitioner could meet the "extraordinarily high" burden, the effect would necessarily be his release. *See*

Herrera, 506 U.S. at 405. When a petitioner instead establishes a gateway claim of actual innocence, the result is not his immediate release or the vacation of his sentence, but instead the opportunity to have his constitutional claims considered on their merits.

Like a gateway claim of actual innocence under *Schlup* or *Perkins*, a *prima facie* showing that a petitioner has satisfied § 2244(B)(2)(b)(ii) is accompanied by one or more claims of constitutional error, and does not result in his release, but only permits further consideration of his claims. Accordingly, it, too, should be interpreted as a lower standard of review.

The evidence demonstrates that it is more likely than not that no reasonable juror would have convicted Davis in the light of the new evidence. Davis was convicted solely on Avery's testimony. Avery has since recanted numerous times. Though courts look at recanted trial testimony "with the utmost suspicion," recantations can be convincing where "the court is reasonably well satisfied that the testimony given by a material witness is false." *United States v. Lewis*, 338 F.2d 137, 139 (6th Cir. 1964). When he testified at Davis's trial, Avery was pressured by both his father and the prosecutor, was given a considerable financial reward in exchange for his cooperation, and only claimed to have witnessed the murder after being jailed for perjury. By comparison, "[t]he fact that Avery had no motive to recant his testimony but instead sought to do so on his own free will, and has not subsequently withdrawn that testimony, lends it credibility." *Cleveland*, 693 F.3d at 640, citing *House v. Bell*, 547 U.S. 518, 552 (2006).

The Sixth Circuit determined that Davis made a *prima facie* showing that he could satisfy the actual innocence standard set forth in 28 U.S.C. § 2444(b)(2)(B)(ii), but later affirmed the district court's finding that Davis failed to establish actual innocence sufficient to excuse the untimeliness of his petition. These two legal conclusions are contradictory and should be recognized as such.

2. Where a court of appeals directs a district court to engage in "fuller exploration" of a petitioner's petition, that "exploration" must be meaningful.

The Circuit Courts of Appeals have concluded that one factor demonstrating a petitioner is entitled to authorization to file a successive petition for habeas corpus relief is whether his allegations warrant fuller exploration in the district court. *See*, 28 U.S.C. § 2244(b)(3); *supra* at 16-17. However, it is undecided precisely what "fuller exploration" entails.

Davis contends that it must be meaningful and comprehensive. This Court has long recognized that the incarceration of the innocent is intolerable. *Carrier*, 477 U.S. at 496; *Stone v. Powell*, 428 U.S. 465, 491, fn. 31 (1976) ("We nevertheless afford broad habeas corpus relief, recognizing the need in a free society for an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty."). In a situation where a court of appeals has found it "reasonably likely" a petitioner satisfies 28 U.S.C. § 2244(b)(2), there is a very real possibility that the petitioner is innocent. In such cases, every reasonable measure should be taken to ascertain whether the individual is, indeed, innocent, as well as the merits of his underlying constitutional claims. Accordingly, when considering a successive petition authorized

by a court of appeals, a district court should be encouraged to grant leave to conduct discovery, hold an evidentiary hearing, or both.

Here, the district court did not give Davis the opportunity to meaningfully develop the record. From 1996, when his state direct appeal was denied, until 2014, when the Sixth Circuit granted Davis authorization to file a successive petition, he was without counsel. Doc. 12-1, Exs. 14-22, PageID# 693-837; Doc. 12-2, Exs. 23-52, PageID# 846-1118; Doc. 12-3, Exs. 53-67, PageID# 1127-1355. During that time, Davis's ability to develop the record was hindered by his indigence, incarceration, and inability to find new evidence. Instead, he relied on his co-defendant Cleveland, who was able to hire not only an attorney but also an investigator, to find evidence. Doc. 55, PageID# 1148.

After he was authorized to file a successive petition, Davis, through counsel, moved for leave to conduct discovery and carefully tailored his discovery requests to his constitutional claims. Doc. 26, PageID# 3062-79. The district court, however, denied Davis's motion, finding that discovery at that point would be too burdensome. In the same order, the court permitted the Warden to expand the record with the record from the evidentiary hearing on Cleveland's petition for habeas relief, even though doing so would be equally burdensome. Doc. 29, PageID# 3104-26. Davis was not a party in the *Cleveland* litigation and thus had no ability to develop the record in a manner that would support *his* claims, rather than Cleveland's. Although relevant witnesses, such as the detectives and prosecutors, testified at the hearing, Davis had no ability to question them, and the record from the hearing did not provide

him access to the discovery materials he sought, specifically the police's and prosecutor's files. Despite demonstrating to the Sixth Circuit that it was reasonably likely that he was innocent, and despite the Sixth Circuit's direction for a fuller exploration of his petition, Davis was never given a meaningful opportunity to develop support for his claims or petition.

In light of the societal interest in preventing the incarceration of an actually innocent person, the district court should have granted Davis's motion for leave to conduct discovery.

CONCLUSION

The statutes and procedures governing habeas corpus cases should not be applied so rigidly as to preclude the consideration of the merits of a petition filed by an actually innocent person. Here, the Sixth Circuit determined that Davis made a *prima facie* showing that but for constitutional error, no reasonable factfinder would have found him guilty. Despite that finding, Davis was denied discovery and denied the opportunity to have his petition heard on the merits. The result is inconsistent with the role that actual innocence has historically played in habeas corpus.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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