No. 18-7188

In The Supreme Court of the United States

IAN DAVIS A.K.A. BENSON DAVIS
Petitioner,
v.
DAVE MARQUIS,
Respondent.

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

REPLY TO PETITION FOR WRIT OF CERTIORARI

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Ian Davis's conviction rested entirely on the testimony of a single witness whose trial testimony was utterly lacking in credibility and who later recanted his testimony of his own volition. Despite a determination by the United States Court of Appeals for the Sixth Circuit that Davis submitted evidence which "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 District Court and later the Sixth Circuit denied Davis the opportunity to have his claims heard on the merits[1] or to further develop the record.[2]

The Warden's opposition rests primarily on two arguments. First, the Warden maintains there is no split among the circuit courts regarding the standard for granting a petitioner authorization to file a second or successive habeas petition. Because several of the circuits, however, use differing language to explain the standard, the Warden is unable to articulate precisely how the standard should be applied. Second, the Warden submits that both Davis's innocence claim and motion

[1] Question Presented #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] Question Presented #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.

for discovery are without merit, and thus his case is not appropriate for review. This argument, however, rests on a selective and inaccurate reading of the record.

In light of Davis's actual innocence, the lower courts should have excused the untimeliness of his habeas petition and granted him leave to conduct discovery.

I. This Court has held that actual innocence matters.

As the Warden notes, "the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") tightly circumscribes the availability of federal habeas relief to state prisoners." Brief in Opp., p. 13, citing *Williams v. Taylor*, 529 U.S. 420, 436. Indeed, the AEDPA was enacted in part to advance the principles of comity, finality, and federalism. *See Williams*, 529 U.S. at 436. To that end, this Court has "been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings." *Id*.

This Court, however, has recognized that "habeas corpus is, at its core, an equitable remedy." *Schlup v. Delo*, 513 U.S. 298, 319 (1995). As such, the Court has long held that "statutes and rules governing habeas petitions must be applied with an eye toward 'the ends of justice.'" *Rivas v. Fischer*, 687 F.3d 514, 540 (2d Cir. 2012), citing *Sanders v. United States*, 373 U.S. 1, 12 (1963). "[I]n 'appropriate cases' the principles of comity and finality that underlie federal habeas corpus review 'must yield to the imperative of correcting a fundamentally unjust incarceration.'" *Id*., quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982). Consistent with this approach, this Court has held that the AEDPA should not be applied so as to incarcerate an actually

innocent person whose trial was not free of constitutional error. *See McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013).

Here, the Sixth Circuit determined that Davis made a *prima facie* showing of actual innocence, i.e. that, but for constitutional error, no reasonable factfinder would have found him guilty. The Warden implies that the Sixth Circuit's decision was hastily made and that the authorization-to-file standard is easily met. Brief in Opp., p. 14, 18. That is inaccurate.

Although 28 U.S.C. § 2244(b)(3)(D) requires a court of appeals to "grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion," courts do not abide by that standard. *Ezell v. United States*, 778 F.3d 762, 765 (9th Cir. 2015) ("We agree with the majority of our sister circuits and hold that when a § 2255(h) motion presents a complex issue, we may exceed § 2244(b)(3)(D)'s thirty-day time limit."); *In re Siggers*, 132 F.3d 333, 336 (6th Cir. 1997). Davis filed a motion for authorization to file a second or successive petition on August 19, 2013. Doc. 12-3, Ex. 66, PageID# 1324. In addition to Davis's motion, the Sixth Circuit considered two responses submitted by the Warden and three replies submitted by Davis. *See In re Davis*, Case No. 13-3981, Doc Nos. 15-1, 20, 30, 34-1, 35 (6th Cir.). The court took nearly nine months to rule on Davis's motion. Doc. 12-3, Ex. 67, PageID# 1353-55. It can hardly be said that the court's decision was hastily made or ill-informed.

Moreover, the authorization-to-file standard employed by the Sixth Circuit is far from easy to satisfy. To illustrate, a search of decisions rendered by the Sixth

Circuit in the past year yields only four cases in which the court has granted authorization to file a second or successive habeas petition. *In re Wogenstahl*, 902 F.3d 621 (6th Cir. 2018); *In re Titus*, No. 18-1142, 2018 U.S. App. LEXIS 10578 (6th Cir. Apr. 25, 2018); *In re Keith*, No. 18-3544, 2018 U.S. App. LEXIS 30517 (6th Cir. Oct. 26, 2018); *In re Baugh*, No. 18-1848, 2018 U.S. App. LEXIS 35384 (6th Cir. Dec. 17, 2018).

The time with which the Sixth Circuit took to review Davis's case, coupled with its infrequent grant of authorization to file a second or successive petition, demonstrates that the Sixth Circuit's finding that Davis made a *prima facie* showing that he can satisfy 28 U.S.C. § 2244(b)(2)(B) was well-reasoned and necessitated careful and expanded consideration of Davis's claims. In light of this Court's jurisprudence regarding actual innocence and habeas corpus, the District Court and Sixth Circuit should have afforded Davis the opportunity to develop further support for his claims and demonstrate that his trial was not free of constitutional error.

II. The circuit courts do not decide applications for authorization to file a second or successive habeas corpus petition in a consistent manner.

While the Warden submits that there is no split among the circuit courts regarding the authorization-to-file standard under § 2244(b)(2)(B), he concedes that the circuit courts use differing language in explaining the standard and how it is to be applied. Brief in Opp., p. 19. To ensure the just and efficient adjudication of cases, both parties and courts must understand the applicable standards; the manner in which those standards are articulated and applied matters and must be consistent. As thoroughly discussed in Davis's petition, this Court should provide guidance to the

lower courts regarding the interplay of the various actual innocence standards. Petition, p. 10-15.

Davis has not waived this issue. *See* Brief in Opp., p. 21. Rather, he argued below that his untimeliness should be excused and his claims considered on the merits due to his actual innocence. App. Br., No. 17-3262, Doc. 13, 20-45 (6th Cir.). Moreover, "it is claims that are deemed waived or forfeited, not arguments." *United States v. Pallares-Galan*, 359 F.3d. 1088, 1095 (9th Cir. 2004). "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992).

III. Avery's trial testimony is not corroborated by other evidence.

Contrary to the Warden's claims, Davis made a compelling showing of actual innocence, and William Avery's testimony is not corroborated by additional evidence. *See* Brief in Opp., p. 3-7, 22-24. The Warden correctly notes that some of the issues with Avery's credibility – his failure to come forward until a reward was posted, multiple stories, failed polygraph, and in-court recantation – were known to Davis's jury. *Id*. at 5. The jury, however, "also heard explanations for much of this," which included Avery's fear of placing himself too close to the scene and alleged fear of Davis's co-defendant.[3] *Id*. It is for that reason that Avery's 2004 recantation to the FBI and 2006 recantation, wherein he admits that his testimony was false and the

[3] Avery reported that a correctional officer permitted Lenworth Edwards to make a threatening motion to him while in jail. A jail hearing board found that Avery's report was false. Doc. 1-7, PageID# 130-31.

prosecutor knew it was so, are reliable; they were not motivated by fear or money, but instead by Avery's desire to tell the truth. Doc. 1-2, PageID# 104-10; Doc. 1-3, PageID# 111-13. *Cleveland v. Bradshaw*, 693 F.3d 626, 640 (6th Cir. 2012), citing *House v. Bell*, 547 U.S. 519, 552 (2006) ("[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.").

Moreover, much of the evidence the Warden claims corroborated Avery's testimony does not. First, the Warden alleges that a "grassy substance" found on Blakely's body corroborates Avery's claim that Davis dragged her from an apartment. Brief in Opp., p. 5. Avery, however, claimed that Blakely was dragged "face down." Doc. 12-6, Ex. 91, PageID# 1976. The grassy substance, though, was found on Blakely's lower back, which is less consistent with being dragged face down, and more consistent with being murdered outside, where a detective observed foliage. *Id*. at PageID# 1880-81, 1939-40.

The Warden also claims that Avery's first story to police (in which he said he did not witness the murder) was credible because the police had previously obtained Lenworth Edwards's jacket, which contained his own blood, and Avery claimed that Blakely hit Edwards in the nose during her assault in the apartment. Brief in Opp., p. 6. However, the police tested the jacket *before* speaking to Avery, they spoke to him and his father before his first recorded interview, and his account of Blakely hitting Edwards changed over time. Doc. 12-6, Ex. 91, PageID# 1974, 2104; Doc. 12-

8, Ex. 99, PageID# 2792. Significantly, neither Blakely's, Edwards's nor any other person's blood was found in the apartment.

Finally, the Warden claims that "more corroborating evidence emerged long after Davis's trial, in an evidentiary hearing in a federal habeas proceeding for one of Davis's accomplices." Brief in Opp., p. 6. This is simply untrue. No new evidence emerged; rather, a police officer, after acknowledging that Avery lacked credibility, testified to evidence he believed corroborated Avery's trial testimony. Doc. 12-4, Ex. 84, PageID# 1703-11. That included his recollection that Edwards's girlfriend claimed both that she loaned Edwards her car and that Blakely may have stolen drugs from Davis and his co-defendants. A-21-22. The Warden, however, fails to acknowledge that that same girlfriend recanted her statement, swearing that she lied due to pressure from the police and prosecutor. Doc. 39-3, Ex. 26, PageID# 3634-35.

Although courts may look at recantations with suspicion, in this case, Avery's trial testimony was uncorroborated and marred by his lies, demands for compensation, and pressure from the prosecutor. His recantation, made first to the FBI, does not suffer the same problems.

IV. Davis is entitled to discovery.

With respect to Davis's second question presented, the Warden again claims there is no circuit split, but fails to cite to any clear guidance on what "fuller exploration" by the District Court entails after authorization to file a successive habeas petition is granted. Brief in Opp., p. 25.

Because the authorization to file necessarily means the Sixth Circuit found some merit to Davis's claim of actual innocence, discovery should be granted to permit him to provide further support for his claims. Contrary to the Warden's claim, Davis is not suggesting a new rule, but rather a commonsense interpretation of the "good cause" discovery standard following the authorization of a successive habeas petition. Where a court finds it reasonably likely that if certain facts were proven, a petitioner "could establish that a constitutional violation occurred, and that, absent that violation, no reasonable factfinder would have found him guilty," it follows that the petitioner has also demonstrated that "specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief." *Compare* Doc. 12-3, Ex. 67, PageID# 1355, *with Harris v. Nelson*, 394 U.S. 286, 300 (1969) (citations omitted).

The Warden's claim that Davis's case is a "bad vehicle" is without merit. Initially, the District Court acknowledged that Davis should be permitted to conduct some discovery. Doc. 23, PageID# 3038. While the District Court later denied Davis's motion for discovery, the Sixth Circuit never considered the merits of the motion. A-25, fn. 13. Of note, the Sixth Circuit granted Davis's application to expand the certificate of appealability to include the denial of his motion for discovery. A-9.

Davis's discovery requests were not exceptionally broad. In his petition, Davis alleged that the State improperly withheld evidence of Avery's pretrial recantation

and then permitted him to testify falsely. It was reasonable, then, for Davis to request the State's files as well as depositions of Avery, the police, and the prosecutor.

Nor was his motion untimely. The District Court set no deadline by which a discovery request must be made. And though the District Court alleged discovery at the time Davis requested it would be burdensome, the court failed to explain how permitting the Warden to expand the record with the record from Alfred Cleveland's evidentiary hearing was not equally burdensome.

Further, the expansion of the record failed to answer Davis's discovery request. *See* Brief in Opp., p. 26. At Cleveland's hearing, Davis has no ability to contribute to the evidence developed, call or question witnesses, or introduce evidence. Davis should not have been saddled with the choices made by Cleveland and his counsel.

Davis established both his actual innocence and good cause for discovery. The District Court's "fuller exploration" of his case should have included discovery.

CONCLUSION

The Sixth Circuit held that Davis submitted evidence which "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" and directed the District Court to engage in fuller exploration of Davis's claims. Upon that holding, the District Court should have undertaken a fuller exploration – in the form of discovery – and excused the untimeliness of Davis's petition.

The petition for writ of certiorari should be granted.[4]

Respectfully submitted,

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[4] The Warden submits that this Court has denied petitions presenting Question Presented #1. Brief in Opp., p. 12, citing *Richardson v. United States*, No. 18-738 (U.S.), *cert denied* __ S. Ct. __ (Jan. 14, 2019). *Richardson* did not present the same question. Rather, the pro se petitioner in that case failed to file an application for authorization to file a second or successive petition for habeas corpus relief and in his petition argued that § 2244(b)(2)(B) should not apply. Davis makes no such argument. The Warden likewise cites to *Cooper v. Ayers*, No. 09-363 (U.S.), *cert. denied sub nom. Cooper v. Ayers*, 558 1049 (2009). Brief in Opp., p. 12. The questions presented in that case, too, differed substantially from the questions presented by Davis and instead focused on the application of § 2244(b)(2)(B) in cases involving *Brady v. Maryland*, 373 U.S. 83 (1963).