19-7316

ORIGINAL

No. USCA6 No. 19-5181

IN THE

Supreme Court of the United States

SHAWN R. BOUGH,

Petitioner,

v.

KEN HUTCHISON, WARDEN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner and his co-defendant Craig Shears had separate trials where, in an effort to save his own life, Mr. Shears presented Petitioner as responsible for the offenses. Shears did not testify at Mr. Bough's trial nor did he come clean that he and another or others committed the offenses and that Petitioner was not involved. He came clean only after exhausting his own legal fights and feeling convicted whereby he sought to make it right. The state and federal courts in turn would not consider Shears testimony as newly discovered gateway evidence of innocence based on what a reasonable juror would have done in Mr. Bough's case, but focused more on what Shears had said in his own case. Further against this Court's precedents, neither court would consider all of the evidence, old and new, inclusive of decisive testimony from Petitioner's trial of which corroborates Shears new testimony. The questions ask:

I. Does the Sixth Circuit's failure to analyze the claim in consideration of the overwhelming corroborating innocence proof in Mr. Bough's case, in conjunction with what Mr. Shears' testimony would have had on a reasonable juror in Bough's case, as opposed to relying upon the biased self preservation evidence Shears presented in his own case, contravene Precedent?

II. Does the Sixth Circuit's failure to address gateway timeliness based upon the immediacy within which Mr. Bough filed his challenges upon receipt of the new evidence, as opposed to how long it took for his Co-defendant to provide such information, contravene this Court's precedent?

III. Does the Sixth Circuit's finding of an insufficient showing of actual innocence, by essentially requiring Mr. Bough to prove conclusive exoneration, contravene this Court's precedent?

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Appendix D- *Shawn R. Bough, Petitioner, v. Darren Settles, Respondent,* No. 3:18-cv-00204, 2019 WL 430906 (E.D. Tenn. February 4, 2019) (Denial-dismissal of habeas corpus petition).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Shawn R. Bough, respectfully petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

Appendix A- *Shawn R. Bough, Petitioner, v. Kevin Hampton, Warden,* No. 19-5181 (6th Cir. June 10, 2019)(Denial of the request for a COA).

Appendix B- *Shawn R. Bough, Petitioner, v. Kevin Hampton, Warden,* No. 19-5181 (6th Cir. September 25, 2019) (Denial of Petition to Rehear Enbanc the Denial of COA).

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JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254 (1). The Sixth Circuit entered its judgment on June 10, 2019, and denied a timely petition to rehear and rehear enbanc on September 10, 2019 and September 25, 2019 respectively.

CONSTITUTIONAL AND STATUTORY

PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution made applicable to the states through the Fourteenth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Federal Habeas Petition was filed under 28 U.S.C. §2254.

STATEMENT OF THE CASE

On May 15, 2018, Mr. Bough submitted to prison authorities for mailing a pro se petition for writ of habeas corpus under 28 U.S.C. § 2254. **[ECF No. 1, Page *Id* 14]**.

He argued claims relative newly discovered evidence establishing his actual innocence, based upon an affidavit received from his co-defendant setting forth that he committed the offenses and that Mr. Bough had nothing to do with the offenses herein this case.

On June 12, 2018, the District Court entered an order for service of the § 2254 petition on the Respondent. **[ECF No. 4]** The Petitioner himself also filed a motion seeking to amend his petition with proposed supplemental claims being:

The state court's denial of a new trial based on the newly discovered evidence in the affidavit of Mr. Craig Shears denied Mr. Bough of due process of law and a fundamentally fair trial in violation of the 14th Amendment to the United States Constitution.

Whether *Schulp v. Delo*, 513 U.S. 298, 1995 WL 2054, or the standard of *Murray v. Carrier*, 477 U.S. 478 (1986), defines the kind of miscarriage of justice which permits the consideration of an otherwise barred constitutional claim regarding the determination of guilt or innocence.

Which alleges whether the Carrier standard applies. It requires the Petitioner to show that a constitutional violation has probably resulted in the conviction of one who is actually innocent.

[ECF No. 6 p. 1-2].

As the record reflects, this motion and Mr. Bough's federal habeas corpus filings have all been filed pro se. Generally speaking, however, his position is that he has newly discovered evidence of actual innocence of which should be considered and that should basically excuse any procedural default or statute of limitations and hence permit review of his claims.

On July 3, 2018, the District Court entered an order permitting Mr. Bough's amendment. **[ECF No. 8].** Amendment permitted, the entirety of Ms. Bough's claims were as follows:

1. THE STATE COURTS' DENIAL OF A NEW TRIAL TO MR. BOUGH, ON THE BASIS OF THE NEWLY DISCOVERED EVIDENCE IN THE AFFIDAVIT AND TESTIMONY OF MR. CRAIG SHEARS, WHEREIN MR. SHEARS SETS FORTH THAT MR. BOUGH WAS NOT PRESENT AND HENCE HAD NOTHING TO DO WITH AND DID NOT COMMIT THE OFFENSES IN THIS CASE, DENIED PETITIONER OF HIS RIGHT TO DUE PROCESS OF LAW AND A FUNDAMENTALLY FAIR TRIAL IN VIOLATION OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

2. MR. BOUGH SHOULD BE GRANTED HABEAS RELIEF BASED UPON THIS FREESTANDING CLAIM OF ACTUAL INNOCENCE ENCOMPASSED IN THE NEWLY DISCOVERED EVIDENCE AFFIDAVIT-TESTIMONY OF CRAIG SHEARS, SETTING FORTH THAT THE PETITIONER WAS NOT THE ONE WHO COMMITTED THESE OFFENSES AND/OR WAS NOT AROUND WHEN SUCH OFFENSE OCCURRED AND WHERE IT IS MORE LIKELY THAN NOT THAT NO REASONABLE JUROR WOULD HAVE FOUND MR. BOUGH GUILTY BEYOND A REASONABLE DOUBT HAD THEY HEARD THIS EVIDENCE.

3. PETITIONER BOUGH IS MADE TO SUFFER THE ONUS OF CRIMINAL CONVICTIONS FOR FELONY MURDER AND ESPECIALLY AGGRAVATED ROBBERY ABSENT SUFFICIENT EVIDENCE IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

4. TRIAL COUNSEL FAILED TO HAVE CONDUCTED THE APPROPRIATE FACTUAL AND LEGAL INVESTIGATION IN THE CASE AND UTILIZED THE SAME TO ESTABLISH THE IMPOSSIBILITY OF GUILT/CONVICTION WHEREIN THE TAKING IN THE CASE WAS COMPLETED BEFORE ANY SHOOTING OCCURRED AND THERE WAS A DIFFERENT MENTAL STATE RELATIVE THERETO THE SHOOTING.

5. TRIAL AND APPELLATE COUNSEL FAILED TO OBJECT, REQUEST A MISTRIAL AND RAISE ON MOTION FOR NEW TRIAL AND DIRECT APPEAL THE TRIAL COURT'S FELONY MURDER JURY INSTRUCTION OF WHICH CONSTRUCTIVELY AMENDED THE INDICTMENT TO CHANGE THE UNDERLYING FELONY FROM THAT OF ROBBERY TO THAT OF ESPECIALLY AGGRAVATED ROBBERY HENCE RESULTING IN CONVICTION AGAINST THE PETITIONER ON AN ELEMENT NOT CHARGED IN THE INDICTMENT NOR MADE OR FOUND BY THE GRAND JURY, AND THUS RESULTING IN THE CONVICTION OF A CRIME OF WHICH PETITIONER WAS NOT CHARGED.

6. COUNSEL FAILED TO FOLLOW UP ON THE MOTION IN LIMINE THAT HE HAD FILED, NOR HAVE ENTERED A CONTEMPORANEOUS OBJECTION, BOTH IN RELATION TO THE TRIAL COURT'S ALLOWANCE OF THE 911 TAPE OF THE ALLEGED VICTIM AND DETECTIVE LOEFFLER'S HEARSAY TESTIMONY CONCERNING WHAT THE ALLEGED VICTIM TOLD HIM ABOUT WHO COMMITTED THE CRIME BOTH IN VIOLATION OF THE CONFRONTATION CLAUSE OF THE UNITED STATES CONSTITUTION.

7. COUNSEL FAILED TO TIMELY AND/OR PROPERLY OBJECT TO THE IMPROPER COMMENTS OF THE PROSECUTOR, AND APPELLATE COUNSEL FAILED TO PROPERLY RAISE SUCH DURING MOTION FOR NEW TRIAL AND/OR DIRECT APPEAL.

[ECF No. 11].

Respondent sought dismissal on grounds of the statute of limitations- arguing that the petition was filed over almost ten years past the expiration of the statute of limitations, and hence should be dismissed as untimely. Respondent's Motion to Dismiss **[ECF No. 13].**

The Respondent's response focused on the ten years within which it had been since Petitioner's initial state court actions had concluded, before the finding of the new evidence, and further focused on the state court credibility analysis under the standard for state court error coram nobis review as opposed to federal law as set forth in precedent.

Mr. Bough responded arguing that the Respondent's reply does not properly reflect the standard for consideration of actual innocence claims and the statute of limitations under federal law. *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013); *House v. Bell*, 126 S.Ct. 2064 (2006); and *Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005); *Bousley v. United States*, 523 U.S. 614, 623 (1998); *Goldman v. Winn*, 565 F. Supp.2d 200, 224 (D. Mass. 2008).

On February 4, 2019, the district court entered an order denying the petition on grounds of the same being untimely as it was filed well after the expiration of the statute of limitations and finding that the Petitioner had not presented credible new evidence of actual innocence to excuse the statute of limitations. **[ECF No. 20].**

In conclusion, of its order, the District Court denied a certificate of appealability and the Sixth Circuit refused to grant a COA and further denied rehearing and rehearing enbanc. **[ECF No. 20]. Appendix A-C.**

The facts here are that Petitioner, Bough, never testified at his co-defendant Craig Shears trial and neither did Mr. Shears testify at Mr. Bough's trial.

On March 7, 2016, however, Mr. Bough, through counsel, filed a petition for writ of error coram nobis based upon new evidence establishing his actual innocence in the form of an affidavit from Mr. Craig Shears, his alleged co-defendant. The letter was dated five months earlier, being October 23, 2015. Therein Shears states that he acted alone in committing the offenses in this case and that the petitioner was not involved.

The October 23, 2015 affidavit of Craig Shears, substantiated by testimony and the record, and which qualifies as new evidence, sets forth in detail as follows:

I, Craig Shears state under oath the following:
I. That the information in this two paged notarized document is correct and true, that I have not been coerced, threatened, or forced to provide this information in any way.

II. My co-defendant Shawn Bough is innocent of the Murder and Robbery of Mr. William Oldham. That occurred at the Expo Inn, in the State of Tennessee, City of Knoxville.

III. I, Craig E. Shears am responsible for the murder and robbery of Mr. William Oldham.

IV. My Sworn Statement is that Mr. Bough left the Inn early that morning. He tried several times to get Dontae Smith to try and pick him up to take him to Ridgebrook Apt. Mr. Bough had some luggage at someones Apt. I know he was leaving for Nashville to catch a Flight. Dontae never came so Mr. Bough left. I did not see the car or person Mr. Bough left with.

Shortly after Mr. Bough left I tried to call Dontae so he could give me a ride to the bus station. He answered he had just woke up and told me he would come get me in a while. I had smoked a couple of blunts and drunk a beer that was left over from the night. I had decided to go out and wait for Dontae. As I stood outside I forgot that I had left my pistol in the room. I got the pistol months prior to this for protection. So I went back to the room to get the pistol, and went back outside. By now I was pretty stoned and drunk. This may be hard to believe but it was as if I became possessed. I seen the office at the Inn and the clerk inside. I went into the office and

demanded the money. I guess I thought I could get some quick cash and get away without no one getting hurt. My intention was never to hurt the man let alone shoot or kill him. The man opened the safe and put the envelopes on the table. When I put the money in my pockets and tried to leave the man went for the pistol and my arm paniced and started pulling the trigger. The man fell down. I went to look and make sure no one else was in there. I saw a switch blade on the table I grabed it and cut the phone lines. I left out and seen Dontae's car pulling up got in. Instead of going to the bus station I told Dontae to take me back to his Apt. I needed some more weed that's where I seen Mr. Bough again. I asked him was he still going to Nashville. He said he was flying to Chicago then to California. I told him I was going to go with him.

V. The reason I made up Mr. Bough's involvement was to try and get away with what I done. Plus the detectives made it easy for me to lie instead of telling the truth. They were convinced that two people robbed the INN. Why not try and get away with it by giving them Mr. Bough. He was at the Inn all I had to do is make my involvement as little as possible. Now I got my life together and found a better way to live. I wanna be forgiven for my sins so I got to make it right...

VI. I exercised my 5th amendment right at Mr. Bough's trial cause I knew I couldn't testify to false statements. I knew I had made two stories up to the detectives. I figured by me not testifying on Mr. Bough then he would have beat his trial. I should have set the record straight, and testified on Mr. Bough behalf then. I should have told the jury the contents of this affidavit. That yes Mr. Bough was present at the INN, but not when this crime was committed.... I don't know if it is too late to now, but at least the truth will be out.

VII. I deeply apologize to the Oldham family for their loss, also to the Bough family for my trespasses. I just hope this truth can bring both families closure. Given the chance I would testify to this document in court to a jury.

Please forgive me.....
Affidavit of Craig Shears.

Though Mr. Shears never testified at the Petitioner's trial, his affidavit and new testimony are in line with trial evidence and testimony-where in conjunction with the above, Mr. Shears testified that he shot the victim 4 times-which is consistent with Dr. Sandra Elkin's testimony that the victim had four entrance wounds. This is further consistent with the testimony of Edie Jones who claimed to have heard 3-4 shots while Joe Cox testified to having found 5 shell casings.

Mr. Shears' affidavit and own trial testimony, to having afterwards ran around and cut the wires, and gone into the back and cut the wires, is further consistent with the testimony of Mr.

A.J. Loffler, Joe Cox and David Goldcoft relative the same. There was actually no physical evidence, i. e. gun, DNA, fingerprints, palm prints etc, linking Mr. Bough to this case and further no eye- witnesses.

At the time of the offenses in this case Petitioner, Bough, was a college student. He was indicted along with Shears in a three-count indictment on May 6, 1999. The counts were for one count of first-degree premeditated murder, count two felony murder, based upon a murder committed during the perpetration of a robbery, and count three especially aggravated robbery, all under Tennessee Code Annotated § 39-13-202 and 39-13-403, and all based upon a theft and subsequent shooting death of a person at a local motel.

Defendant Craig Shears was tried first and, as with Petitioner's case, it was the Respondent's theory that, at the end of the school term, both defendants robbed and then killed the alleged victim, who was the owner of the Expo Inn in Knoxville Tennessee.

As discovered after Petitioner's trial, the only, presently known, discrepancies with the respondent's presentation of the alleged facts of the case, between the two trials, was that at the trial of Craig Shears, the Respondent's key witness, Edie Jones, testified that she went down stairs to get a light for her cigarette and returned with two cups of coffee, however, at Petitioner's trial she stated that she declined the offer of coffee by the alleged victim.

Another of Respondent's key witnesses, Dante Smith, testified at Shears' trial that he was given forty dollars, however, at the Petitioner's trial he alleged that he was given twenty five to thirty dollars.

Another even more critical witness for respondent, Investigator A.J. Loeffler, testified at defendant Shears' trial that the alleged victim said that the two men pointed a gun at him and demanded his wallet, and the money in the motel safe, in which he complied with the request and

was then shot. At the Petitioner's trial, Loeffler merely testified that the victim stated the men "asked me for my money, and then shot me", and he put his arms up.

As set forth, Mr. Shears never testified at the Petitioner's trial, however, at his own trial Shears allegedly placed full blame on the Petitioner.

In his pretrial statement, Mr. Shears stated that the Petitioner approached the man behind the registration counter and demanded money. Shears then stated that the man placed several envelopes on the counter and Petitioner put the money in his pocket. Shears then stated that the Petitioner started firing his gun.

Shears testified at his own trial that Mr. Bough pulled his gun in which the victim jumped back and put his arms up. Shears then stated that the Petitioner went behind the counter and returned to the counter with some money, which he put in a bag. Shears went on to testify that the Petitioner shot the victim turned and began to run in which Petitioner fired three more times. Shears likewise testified in his own trial that Petitioner stated in the car "I think I might have killed him."

Though neither Shears nor the Petitioner testified at each other's trial, both were found guilty in the separate trials and the prosecution informed the jury at the Petitioner's trial that the case *against the Petitioner was based in large part on circumstantial evidence.*

As a result of the Petitioner's jury trial of June 11-12 of 2001, the Petitioner was found not guilty of first-degree premeditated murder and instead that of felony murder and especially aggravated robbery. He was immediately sentenced to life in prison on the felony murder conviction. After an additional later held sentencing hearing, he was sentenced to a current 21-year sentence for the especially aggravated robbery.

It is important to note that the respondent in its answer in the district court, and the district court itself in denying relief, continued to use the term recanted, and further analyzed the case as if co-defendant, Shears, had testified at the Petitioner's trial.

In short, both are allowing Mr. Shears' testimony at his own trial, of which was given to save his own life, to control the analysis and to determine the outcome of what would have occurred in the Petitioner's trial.

The courts further go on to fault the Petitioner for Mr. Shears' delay in coming forward earlier, despite Mr. Shear's up until that time having been positioning Mr. Bough as the culprit in order to save his own life and preserve his own appeal.

Furthermore here, despite Petitioner's request, the Court made its findings without the appointment of counsel and/or an evidentiary hearing and absent considering all of the proof-good and bad-in its review. The Court basically utilized the gateway stage as requiring a showing of conclusive exoneration, and used the COA stage as a merits phase.

REASONS FOR GRANTING THE PETITION

I. THE SIXTH CIRCUIT HAS REFUSED TO FOLLOW PRECEDENT OF WHICH HAS TIME AND TIME AGAIN MANDATED REVIEW IN LIGHT OF ALL OF THE EVIDENCE IN THE CASE AT HAND AND HAS NEVER DIRECTED THE COURTS TO LOOK TO EVIDENCE IN AN AFFIANT'S OWN CASE AS DECISIVE OF THE ISSUE NOR CONCLUSIVE EXONERATION BUT EVIDENCE IN THE PETITIONER'S OWN CASE.

House v. Bell, 547 U.S. 518 (2006) and *McQuiggin v. Perkins*, 569 U.S. 383 (2013), have made clear that the consideration of a gateway innocence claim "involves evidence the trial jury did have before it, [and] the inquiry requires the federal court to assess how reasonable jurors would react to the overall newly supplemented record." In doing so, this Court has stated that we must consider all of the evidence, old and new, incriminating and exculpatory... *House*, at 537. Very recently, the Sixth Circuit has also reminded of this. *Davis v. Bradshaw*, 900 F.3d 315, 326 (6th Cir. 2018).

Here, as the factual record in the above discloses, the Sixth Circuit and District Court were required to consider this case in light of the new evidence and the record of Mr. Bough's trial, case and defense, inclusive of all of the corroborating proof Mr. Shear's affidavit and testimony provided and only the culprit who committed the offenses would know.

Properly considered, Mr. Bough, while maybe not having proved exclusive exoneration at the initial stage, made enough of a gateway showing of which would have permitted his remaining constitutional claims to proceed further. *House v. Bell*, 547 U.S. 518 (2006) and *McQuiggin v. Perkins*, 569 U.S. 383 (2013).

Based upon the above, and record herein this case, Mr. Bough respectfully ask the grant of the writ.

II. THE SIXTH CIRCUIT HAS REFUSED TO FOLLOW PRECEDENT OF WHICH ALL CIRCUITS, INCLUDING THE SIXTH CIRCUIT, HAS SET FORTH REQUIRES THE GATEWAY TIMELINESS QUESTION TO BE MEASURED NOT BY THE TIME IT TOOK TO OBTAIN THE NEW EVIDENCE BUT THE TIME IN WHICH A PETITIONER ACTS ON THE NEW EVIDENCE.

The Sixth Circuit, as did the district court, has focused more on the ten years between the trial and receipt of the affidavit more so than it did the action taken within five or six months between Mr. Bough's actual receipt of the affidavit.

Against the weight of this and other Courts precedents, the Court has placed Mr. Bough, and other similarly situated petitioners, under an impossible standard. Where despite the credibility and corroborating nature of a co-defendant's or other affiant's proof to a Petitioner's own evidence showing innocence-and yet the unavailability of the affiant to assist the Petitioner because the affiant has been utilizing the Petitioner and others as the culprits to save self from conviction and/or prevent the maintaining of a conviction-the court has utilized the time it took the Petitioner to obtain the affidavit versus looking to the immediacy of using the information upon its receipt.

The relevant standards reflect a consideration and analysis of equitable tolling and actual innocence, as it relates to diligence, from two different analytical frameworks. Equitable tolling requires diligence in the discovery of the factual predicate. *Atta v. Scutt*, 662 F.3d 736, 741 (6th Cir. Nov. 28, 2011) (...a petitioner is "'entitled to equitable tolling' only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filling.").

Diligence in the *actual innocence* context applies only to the reliability of the new evidence, measured somewhat by the amount of time a person waits before pursuing his claims

after having received the new evidence. *McQuiggin v. Perkins*, 133 S.Ct. 1924 (2013); *Arnold v. Dittman*, 901 F.3d 830, 836-837 (7th Cir. August 24, 2018) (Actual innocence is an equitable exception that renders the time limit set forth in section 2244(d)(1) inapplicable); *Reeves v. Fayette SCI*, 897 F.3d 154, 161 (3rd Cir. 2018)(As part of the reliability assessment of the first step, the court "may consider how the timing of [the petitioner's] *submission* and the likely credibility of the [witnesses] bear on the probable reliability of that evidence," as well as the circumstances surrounding the evidence and any supporting corroboration. *Id.* at 537, 551, 126 S.Ct. 2064 (internal quotation marks and citation omitted); *see also McQuiggin*, 569 U.S. at 399, 133 S.Ct. 1924)).

In *Freeman v. Trombley*, 483 Fed. Appx. 51 (6th Cir. 2002) (the Sixth Circuit found that there were "strong reasons to question the reliability of each of the affidavits relied on by Freeman." Writing further, "Indeed, the reliability of all the items is impugned by the age of the information *and Freeman's unexplained delay in pursuing relief. See House*, 547 U.S. at 537, 126 S.Ct. 2064. Why would a man as adamant about his innocence and as assertive of his rights as Freeman seem to refrain for some ten years from asserting this exculpatory information *and pursuing his post-conviction remedies*? Freeman's failure to offer any answer to this question casts a pall over his arguments." *Freeman* at 64-65.

As the *McQuiggin v. Perkins*, 133 S.Ct. 1924 (2013), Court set forth, "a federal court, faced with an actual innocence gateway claim, should count *unjustifiable delay* on a habeas petitioner's part, *not as an absolute barrier to relief*, but as a factor in determining whether actual innocence has been readily shown." *Id.* Additionally the Court made clear that "[f]ocusing on the merits of a petitioner's actual-innocence claim, and taking account of delay in that context, rather than treating timeliness as a threshold inquiry, is tuned to the rationale

underlying the miscarriage of justice exception–i.e., ensuring" "that federal constitutional errors do not result in the incarceration of innocent persons." *Id* at 400 (citing *Herrera v. Collins*, 506 U.S. 390, 404 (1993).

Respectfully, the Sixth Circuit, as did the district court, continues to rely upon the timing of obtaining the evidence as opposed to considering that Mr. Bough acted immediately in seeking relief based on the new information of which Mr. Shears only recently decided to come forward with, unlike Petitioners in *Freeman* and *McQuiggin*, who waited years before acting on the new evidence received in those cases.

Based upon the above, and record herein this case, Mr. Bough respectfully ask the grant of the writ.

III. THE SIXTH CIRCUIT HAS REFUSED TO FOLLOW PRECEDENT OF WHICH ALL CIRCUITS INCLUDING THE SIXTH CIRCUIT HAS SET FORTH REQUIRES THE GATEWAY TIMELINESS QUESTION AS NOT REQUIRING EXCLUSIVE EXONERATION BUT TO BE MEASURED BY WHETHER MR. BOUGH HAD MADE A SHOWING THAT NO REASONABLE JUROR WOULD HAVE CONVICTED HIM BEYOND A REASONABLE DOUBT IN LIGHT OF SHEARS'S AFFIDAVIT AND TESTIMONY WHERE THE RECANTATION OCCURRED MANY YEARS AFTER THE ORIGINAL TESTIMONY AND WHERE AN EXPLANATION FOR THE DELAY IS GIVEN –ON THE BASIS THAT TESTIMONY AT TRIAL INDICATED THAT THE PETITIONER WAS WITH SHEARS.

The Sixth Circuit accepted the district court finding even here at the certificate of appealability stage. *House v. Bell*, 547 U.S. 518 (2006) and *McQuiggin v. Perkins*, 569 U.S. 383 (2013).

Moreover, as to the facts, witnesses at trial indicated that Bough and Shears were together at the time of the shooting, that Bough told two people that he had shot someone, and that the victim indicated that two men robbed and shot him

Mr. Bough first submits that it must be remembered that we are talking about Mr. Bough's trial. Mr. Shear's never testified at Mr. Bough's trial.

As to Mr. Bough having allegedly told two people that he had shot and robbed the victim, the same is not a full analysis of the proof.

Isaiah Dixon had never been to Tennessee and was not from Tennessee. Mr. Dixon was not present when the offenses occurred. There was no audio or video of Mr. Dixon's confession. Mr. Dixon was incarcerated in California. He was a drug addict and admitted testifying in order to get out of jail.

The evident credibility issue then affects the prosecution and not the defense. Bringing in such a witness from California showed questions related to connecting Mr. Bough to this case; an attempt only possibly could be created by Mr. Dixon. The prosecution utilized Mr. Dixon having been incarcerated, his drug use and the promise of leniency. Mr. Bough's case was on the news and in the newspapers. Everyone knew that a motel clerk had been shot and robbed, except allegedly Mr. Dixon. Clearly Shears is most credible.

As it relates to having never explained Shears' significant delay, Mr. Bough did explain the date of the affidavit and the fact that Mr. Shears was trying to save his own life and not going to come forth with the truth about Mr. Bough until the time that he did. Upon receipt of this affidavit, there was no significant delay on Mr. Bough's part in seeking relief.

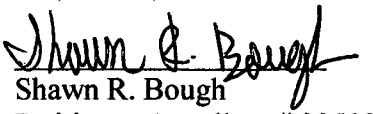
Respectfully, here Mr. Bough, in conjunction with facts already stated in the statement of the case and below, has made a showing of actual innocence sufficient to have passed the gateway stage as any other standard or consideration would render useless this Court's precedents.

Based upon the above, and record herein this case, Mr. Bough respectfully ask the grant of the writ.

CONCLUSION

For the foregoing reasons, Mr. Shawn Bough respectfully requests that the petition for writ of certiorari is granted and that the appropriate relief is granted relative the important issues raised herein whether in the form of summary remand, GVR and/or a merits determination.

Respectfully Submitted,



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