

No. ~~20-7766~~

IN THE SUPREME COURT OF THE UNITED STATES

LYNDON DAVIS

Petitioner

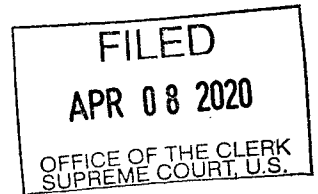
v.

DENNIS REAGIE

Respondent

ORIGINAL

ON PETITION FOR WRIT OF CERTIORARI TO
THE SEVENTH CIRCUIT COURT OF APPEALS



PETITION FOR WRIT OF CERTIORARI

LYNDON C. DAVIS
Petitioner / Pro se
Doc # 232171
Pendleton Correctional Facility
4490 West Reformatory Road
Pendleton, IN 46064-9001

QUESTION PRESENTED

- 1) Did the United States Court of Appeals for the Seventh Circuit exceed its Scope of the COA (Certificate of appealability) analysis when the Court denied appealability to the Petitioner's Claims that were denied relief by the State and District Court?
- 2) Is the United States Court of Appeals for the Seventh Circuit's Scope of the COA analysis in conflict with the United States Supreme Court's Scope of the COA analysis?
- 3) Did the Petitioner demonstrate ineffective assistance of Counsel to his Claims?
- 4) Is the District and State Court's assessment of the Petitioner's Claims debatable?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

The Petitioner, Lyndon Davis, respectfully prays that a Writ of Certiorari issue to review the Judgment and opinion by the Seventh Circuit Court of Appeals denying appealability to the Petitioner's claims on December 2, 2020.

OPINION BELOW

The Seventh Circuit Court of Appeals denied Petitioner's appealability to claims in its Cause no. 20-1769. The Mandate is reprinted in the appendix to this Petition at Appendix D. The order of the Seventh Circuit Court of Appeals denying rehearing is reprinted in the appendix to this Petition at Appendix F.

JURISDICTION

The Mandate of the Seventh Circuit Court of Appeals was entered on December 2, 2020. A timely Motion to that Court for rehearing was denied on January 11, 2021, and the Mandate was issued on January 19, 2021. Appendix D and F.

The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following Statutory and Constitutional Provisions are involved in the Case:

U.S. CONST. AMEND. VI

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.

U.S. CONST. AMEND. XIV

Section 1. All persons born or naturalized in the United States, and subject to the Jurisdiction thereof, are Citizens of the United States and of the State wherein they reside. 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 life, liberty, or property, without due Process of law, nor deny to any Person within its Jurisdiction the equal Protection of the law.

28 U.S.C. § 2254

- (a) The Supreme Court, a Justice thereof, a Circuit Judge, or a district Court shall entertain an application for a Writ of habeas Corpus in behalf of a Person in Custody Pursuant to the Judgment of a State Court Only on the ground that he is in Custody in Violation of the Constitution or laws or treaties of the United States.
- (b)(1) An application for a Writ of habeas Corpus on behalf of a Person in Custody Pursuant to the Judgment of a State Court shall not be granted Unless it appears that
- (A) the applicant has exhausted the remedies available in the Courts of the State; or
 - (B)(i) there is an absence of available State Corrective process, or
 - (ii) circumstances exist that render Such Process ineffective to protect the rights of the applicant.
- (2) An application for a Writ of habeas Corpus may be denied on the Merits; notwithstanding the failure of the applicant to exhaust the remedies available in the Courts of the State
- (3) A State shall not be deemed to have Waived the exhaustion requirement or be estopped from reliance upon the requirement Unless the State, through Counsel expressly Waives the requirement.
- (c) An applicant shall not be deemed to have exhausted the remedies available in the Courts of the State, Within the Meaning of this

Section, if he has the right Under the law of the State to raise, by any available Procedure, the question Presented.

(d) An application for a Writ of habeas Corpus on behalf of a person in Custody Pursuant to the Judgment of a State Court shall not be granted with respect to any Claim that was adjudicated on the Merits in State Court Proceedings unless the adjudication of the Claim

(1) resulted in a decision that was Contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court Proceeding.

(e)(1) In a Proceeding instituted by an application for a Writ of habeas Corpus by a person in Custody Pursuant to the Judgment of a State Court, a determination of a factual issue made by a State Court shall be presumed to be Correct. The applicant shall have the burden of rebutting the Presumption of Correctness by clear and Convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State Court Proceedings, the Court shall not hold an evidentiary hearing on the claim unless the applicant

shows that:

- (A) the claim relies on --
 - (i) a new rule of Constitutional law, made retroactive to cases on Collateral review by the Supreme Court, that was previously unavailable, or
 - (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence, and
- (B) the facts underlying the claim 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.
- (f) If the applicant challenges the sufficiency of the evidence adduced in such State Court proceeding to support the State Court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the state shall produce such part of the record and the Federal Court shall direct the state to do so by order directed to an appropriate state official. If the state cannot provide such pertinent part of the record, then the court shall determine

Under the existing Facts and Circumstances What Weight shall be given to the State Court's factual determination.

(g) A Copy of the official records of the State Court, duly certified by the Clerk of Such Court to be a true and correct copy of a finding, Judicial opinion, or other reliable written indication showing such a factual determination by the State Court shall be admissible in the Federal Court Proceeding.

(h) Except as provided in Section 408 of the Controlled Substances Act, in all Proceedings brought under this Section, and any subsequent Proceedings on review, the Court may appoint Counsel for an applicant who is or becomes financially unable to afford Counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of Counsel Under this Section shall be governed by Section 3006A of title 18.

STATEMENT OF THE CASE

On July 24, 2011, The Petitioner, Lyndon Davis (Mr. Davis herein) and Co-defendant Robert Davis (Robert herein) were both charged with the Murder of Parris Myles. The State tried Mr. Davis and Robert in two separate trials with Robert tried first in a January 2012, trial. With no Motive or Physical evidence, the State tried Robert with a theory that Robert had shot and killed Myles (The Victim on the Case). The State Presented three eyewitnesses to Prove their Case against Robert (Aniya Lawson, Krystle Gavins, and Rosa Orphey), who all gave testimony at Robert's trial to what they had witnessed at the Scene of the Crime. But did not identify Robert as the Man who killed Myles.

Each eyewitness had a different account to what they had witnessed at the Scene of the Crime that contradicted each other's testimony. Krystle Gavins testified that she saw a man in a red colored shirt with a gun in his hand. The Victim Myles's daughter Aniya Lawson, the State's Key eyewitness, testified that she saw two occupants of a Gold colored Toyota Camry pull up while her Father was taking trash to a nearby dumpster. That the two occupants of the Camry called out to Myles and Myles walked up to the Passenger Side of the car to talk to the two men in the car. As Myles walked away from the car, a shot was fired from inside of the car, hitting Myles. A Man in a red colored shirt, white tennis shoes, and a hat, exited the driver's

side of the Camry and shot Myles again. A man wearing a white shirt stayed in the car and slid over to the driver's seat and the man in the red colored shirt and white tennis shoes got in to the passenger seat of the car and the man in the white shirt drove away. Rosa Orphrey testified that she saw the man in the red colored shirt shoot Myles while he was on the ground, but that she did not see a gold colored car near the shooting. Not one of the three state's eyewitnesses had identified Robert as the shooter before Robert's trial or during Robert's trial. But the state used Lawson's testimony as their key evidence to prove their case. (App. 6)

After Robert was not identified as the shooter at his trial, the state told Robert's jury that Robert could still be found guilty for the murder under Indiana's accomplice liability law stating that:

"And he wants to talk about that there's no agreement (between Davis and Robert). Well, guess what? Accomplice liability, it doesn't require an agreement. In fact, the instruction, you'll get the whole, but there's a portion of that instruction that tells you, the presence of a person at the scene of the commission of the crime, and a course of contact before and after the offense are circumstances which may be considered in determining whether such person aided and abetted the commission of such crime. So, even if for some reason you don't believe that the state of Indiana has proven that Robert Davis killed Parrish Myles, you better believe he's guilty through accomplice liability." (App. G) (Robert Davis v. State, Cause No. 45A03-1203-CR-145, January 23, 2013)

Shooting by the State's three eyewitnesses during his trial, but the State proceeded on with an argument to Mr. Davis's Jury that Robert killed Myles, and Davis aided Robert, because Key eyewitness Aniya Lawson testified that she had seen Robert's car pull up within inches of Myles's SUV and saw Robert shoot Myles, and Mr. Davis scoot over from the passenger seat of the car to the driver's seat of the car and drive Robert away from the scene of the crime after Robert killed Myles. Although Lawson was the only eyewitness to testify this account to what she stated that she had witnessed take place, the State used Lawson's testimony as the evidence to convict both Robert and Mr. Davis.

At Mr. Davis's trial, Mr. Davis's trial counsel did not present any evidence on behalf of Mr. Davis to the case. Trial counsel's defense theory at the trial was that Mr. Davis was present when Robert had killed Myles, but that Mr. Davis had no idea that Robert would kill Myles, never told Robert to kill Myles, took no part in the shooting, and that it was not foreseeable to Mr. Davis that Robert would murder Myles. The State presented the same tendered accomplice liability jury instruction to the jury at Mr. Davis's trial that was presented at Robert's trial and Mr. Davis was convicted as an accomplice to murder at his trial as Robert was convicted at his own trial, and sentenced to 55 years in prison. On direct appeal, Mr. Davis's conviction was then

affirmed as the court stated that there was enough evidence presented to find Mr. Davis guilty as an accomplice to Murder (App. H). After the Indiana Supreme Court denied transfer, Mr. Davis filed a Petition for Post-Conviction relief on June 9, 2014, alleging that his trial Counsel was ineffective for:

- 1) Failing to challenge the Petitioner's Probable Cause affidavit
- 2) Failing to investigate
- 3) Failing to impeach the State's eyewitnesses with prior to trial inconsistent statements
- 4) Failing to Move to Suppress Petitioner's Voluntary Statements to Police
- 5) Failing to object to the accomplice Liability Jury instruction
- 6) Failing to object to the separation of the Jurors after the deliberations had begun.

The trial Court held a hearing concerning Mr. Davis's Claims on December 12, 2014, and denied Mr. Davis's Petition following a hearing and the Indiana Court of Appeals affirmed the P.C. Courts decision (App. B)

After the Indiana Supreme Court denied transfer, Mr. Davis filed a instant Petition on January 10, 2019, for a Writ of habeas corpus Pursuant to 28 U.S.C. § 2254 asking the Indiana Southern District Court for relief to four of his

claims that were presented to the Post-Conviction Court for relief:

- 1) Ineffective assistance of counsel for failing to investigate the case before trial to learn of available facts that could have changed the outcome of the case.
- 2) Ineffective assistance of counsel for failing to impeach state eyewitnesses Aniya Lawson and Krystle Gravins with the prior to trial inconsistent statements that were different from their trial testimony statements.
- 3) Ineffective assistance of counsel for failing to object to the state's accomplice liability jury instruction.
- 4) Ineffective assistance of counsel for failing to object to the separation of the jury after deliberations had begun.

The District Court determined that Mr. Davis's trial counsel was not ineffective, and that the Indiana Court of Appeals conclusion that petitioner's trial counsel was not ineffective is in accord with clearly established federal law. Habeas relief is foreclosed. The District Court denied relief on April 20, 2020 (App. A). After the District Court denied relief and appealability to Mr. Davis's claims, Mr. Davis filed for a Certificate of appealability to the United States

Court of Appeals for the Seventh Circuit for his two strongest claims that he feels should have been granted Relief:

- 1) Ineffective assistance of Counsel for failing to conduct a Pretrial investigation to learn of available facts that could have changed the outcome of the case.
- 2) Ineffective assistance of Counsel for failing to impeach States eye witnesses Aniya Lawson and Krystle Gavin with their prior to trial inconsistent statements that were different from their trial testimony statements.

The Seventh Circuit Court denied appealability to Mr. Davis's two claims on December 1, 2020, stating that:

"This court has reviewed the final order of the District Court and the record on appeal. We find no substantial showing of the denial of a Constitutional right. Accordingly, the request for a Certificate of appealability is denied."

(App.D)

Mr. Davis, then filed for a rehearing for the full Panel of the Seventh Circuit Court to reconsider appealability and the request for a rehearing was also denied on January 11, 2021, Mandate issued January 19, 2021 (App.F)

REASONS FOR GRANTING THE WRIT

Mr. Davis argues that the Seventh Circuit Court has misapplied the standard for granting a Certificate of appealability (COA) when the Court denied his application for appealability to appeal his two claims that were rejected by the Indiana Southern District Court for relief. Mr. Davis argues that the Seventh Circuit Court did not determine if reasonable jurists would find the District Court's resolution of the Constitutional claims debatable or not. Instead, the Court inverted the statutory order of operations by deciding on the merits of the claims and then denied the COA based on adjudication of the actual merits of the claims. Mr. Davis argues that the Court of Appeals exceeded the scope of the COA analysis.

Mr. Davis argues that when the Circuit Court denied his claims appealability on December 1, 2020, the Court stated:

"This Court has reviewed the final order of the District Court and the record on appeal. We find no substantial showing of the denial of a Constitutional right. Accordingly, the request for a certificate of appealability is denied." (App.D)

The question for the Seventh Circuit was not whether Mr. Davis

had made a Substantial Showing of the denial of a Constitutional right. This determination was an Ultimate Merits determination that the Panel should not have reached. Mr. Davis argues that the Seventh Circuit Court of Appeals have disregarded the Process and should have limited its examination at the COA Stage to a threshold inquiry into the Underlying Merit of the claims and asked only if the District Court's decision was debatable. See *Miller El. v. Cockrell*, 537 U.S. at 327, 348, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003), and *Buck v. Stephens*, 578 U.S. 136 S. Ct. 2409, 195 L. Ed. 2d 779 (2016). Mr. Davis argues that Certiorari should be granted to correct this error.

Mr. Davis also argues that the District Court's resolution of his two claims are debatable and should be granted appealability to be assessed by a higher Court, and appealed. That he has shown ineffective assistance of Counsel.

The Petitioner, Mr. Davis, argues that he is seeking appealability for his two claims that the Indiana Court of Appeals and the District Court has unreasonably denied relief. At Mr. Davis's State Post-Conviction Proceedings, Mr. Davis argued that (1) his trial Counsel was ineffective

for failing to conduct a Pretrial investigation to his Case to learn of available facts that could have changed the whole outcome of the Case, and (2) that his trial Counsel was ineffective for failing to impeach the State's eyewitnesses Krystle Gravins and Aniya Lawson with their prior to trial statements taken within a deposition that were totally inconsistent, and contradicting, to their trial testimony statements.

Failure to investigate

The Petitioner, Mr. Davis, argues that a thorough Pre-trial investigation of his Case would have revealed to his trial Counsel, Kevin Milner, that Mr. Davis's Co-defendant Robert, who was tried first to the Case, was not identified as the person who had shot and killed the victim at his own trial by the State's eyewitnesses, and that the State convicted Robert for Murder at his trial using a tendered accomplice Liability Jury instruction convicting Robert as an accomplice to Murder. This information, and facts, were on the face of the record and if presented in Mr. Davis's defense, would have stopped the State from knowingly, and falsely, presenting Robert as the shooter a year later after Robert was convicted, at Mr. Davis's trial to show a Principle (shooter) to meet the requirement under the Indiana's accomplice Liability Law that the State needed to convict Mr. Davis as

an accomplice to Murder. Mr. Davis's trial Counsel's defense also placed Robert as the Shooter at Mr. Davis's trial in which was Prejudice, because Counsel was far from the facts of the case, and helped the State present a Shooter (Principle) to be able to convict Mr. Davis as an accomplice at his trial. At Mr. Davis's Post-Conviction hearing, Pro-Se, Mr. Davis asked his Counsel:

Q. I was saying, My question is, before we went to trial, were you aware that the State was taking me to trial under the presumption that I was an accomplice to Robert Davis for Murder?

A. To be honest, whatever their theory was didn't really make a difference to me, frankly, because I understood exactly what their theory should be if they're trying the case as well as they possibly could. That is the theory they used. And I prepared my defenses based on what I anticipated that theory would be.

Q. So, basically, you thought of a defense during trial?

Mr. Davis argues that Counsel's decision to anticipate the State's theory instead of investigating what theory the State had presented at Robert's trial a year prior to Mr. Davis's

trial, fell below the norms of a Competent attorney, because Counsel was aware that Robert was tied to the case with Mr. Davis, and considering that Robert went to trial first, Investigating what happened at Robert's trial would have helped Counsel prepare a winning defense that was indeed available. At the P.C. hearing, Counsel was asked:

Q. Okay, Counsel, you were aware that I had a co-defendant to my case by the name of Robert Davis, before my trial date, is that correct?

A. Yes.

The Prosecutor committed misconduct, and violated Mr. Davis's rights under the due process clause of the fourteenth amendment of the United States Constitution when the State falsely presented Robert at Mr. Davis's trial as the shooter when they were aware that Robert was not identified as the shooter at his own trial a year prior. Mr. Davis's Counsel was ineffective under the Sixth amendment of the United States Constitution for failing to investigate Mr. Davis's case to become aware of the State's actions at Mr. Davis's trial, and to prepare a defense that would have exposed the State's misconduct at Mr. Davis's trial, and could have changed the outcome to the whole case. To Mr. Davis's failure to investigate claim the District Court stated that the Indiana Court of

Appeals:

"Correctly articulated the Strickland Standard in Mr. Davis's Post-Conviction Memorandum decision, but did not explicitly analyze the deficient Performance or Prejudice Prongs of the ineffective assistance of counsel claims. Instead the Court set out each claim and recounted trial counsel's testimony at the Post-Conviction hearing as it related to that claim. The Court noted several times that trial counsel's testimony at the Post-Conviction hearing that his decisions were based on trial strategy. Then at the end of each claim, the Court stated either that reversal was not warranted or that Mr. Davis had not demonstrated ineffective assistance. Because the Court appears to have credited trial counsel's testimony as providing valid strategic reasons, the Court construes the appellate court's decision as resting on the deficient Performance Prong and applies § 22.54(d) deference to the state court's adjudication of that Prong."

Mr. Davis argues that the District Court then went on to say that:

"The Indiana Court of Appeals held that Mr. Davis

failed to show that his trial attorney was ineffective for his pretrial investigation, but it did not discuss this specific allegation, when a State Court rejects a prisoner's federal claim without discussion, a federal habeas court must presume that the court adjudicated it on the merits unless some state law procedural principle indicates otherwise." *Lee v. Avila*, 871 F.3d 565, 567-68 (7th Cir. 2017) (citing *Harrington v. Richter*, 562 U.S. 86, 98 (2011)). The Richter presumption applies when the state court's decision expressly addressed some but not all of a prisoner's claims. Applying this standard, the court finds that the Indiana Court of Appeals reasonably applied federal law with respect to trial counsel's pretrial investigation." (AppA)

Mr. Davis argues that both statements above given by the District Court are contradicting and in conflict, because when a state court has adjudicated a federal claim on the merits, a federal habeas court may not grant relief unless the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or was based on an unreasonable determination of

the facts in light of the evidence presented in the State Court Proceeding, 28 U.S.C. § 2254 (d)(1), (d)(2). Mr. Davis argues that the District Court had concluded that:

" The Indiana Court of Appeals did not explicitly analyze the deficient Performance or Prejudice Prongs of the ineffective assistance of Counsel claims, and because the Court appears to have credited trial Counsel's testimony as providing valid strategy reasons; the Court construes the appellate Court's decision as resting on the deficient Performance Prong." (App. A)

Mr. Davis argues that the District Court has stated that the Indiana Court of Appeals decision's to each ineffective claims were an unreasonable application of clearly established federal law (Under Strickland). Then there after stated that:

" The Richter Presumption applies when the state court's decision expressly addressed some but not all of a prisoner's claims. Applying this standard the Court finds that the Indiana Court of Appeals reasonably applied federal law with respect to trial Counsel's pretrial investigation." (App. A)

Mr. Davis also argues that When the District Court then addressed Mr. Davis's failure to investigate claim, that the District Court Mixed together his ground one's (1) Failure to investigate, and his ground three's (3) Failure to object to the accomplice Liability Jury instruction. Mr. Davis argues that the District Court Misstated his failure to investigate claim stating that it revolved around the language of the accomplice Liability Jury instruction, instead of the State Presenting Robert at Davis's trial in misconduct. Also that the District Court has Misspoke and Misinterpreted Indiana's accomplice liability Law's requirements to deny Mr. Davis's claims Stating that:

" Moreover, Petitioner also appears to argue that because neither he nor his co-defendant were tried as Principals there was no accomplice so therefore there should have been no instruction. Again; Such arguments misconstrue Indiana's accomplice liability law, which does not distinguish between an accomplice and a Principal "

Mr. Davis argues that the District Courts above Statement (App. A) is clearly a misstatement of Mr. Davis's claim, and a Misstatement of the Indiana's accomplice Liability Law. The Indiana Supreme Court Stated in April M. Brown V. State

770 N.E.2d 275 (Ind. 2002) that "In order to Convict April as an accomplice the State had to Prove beyond a reasonable doubt that April (1) knowingly and intentionally (2) aided, induced, or caused "Lee" (3) to Murder "McKenzie" Mr. Davis argues that the Case of April M. Brown V. State of Indiana Proves that there is a distinguish between an accomplice and a Principle. When using the Indiana's Law on accomplice Liability. That there is no rule to the Law that States that a person Could be Convicted at one trial as an accomplice one Year, then Presented as the Principle at another trial a Year later Concerning the Same Case to Convict a Second Person as an accomplice, See (Ind. Code Ann. § 35-41-2-4)

Mr. Davis argues that the State Presenting Robert at his trial was a false theory, and false evidence, and that the State's actions Violated his right to a fair trial guaranteed by the Fourteenth Amendment's due Process clause. See *Mooney V. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935). And that his trial Counsel's failure to investigate his Case Prior to trial to learn of facts that could have helped Counsel Prepare a winning defense for Mr. Davis's trial Violated Mr. Davis's right to effective Counsel under the Sixth amendment of the U.S. Const. See *Strickland V. Washington*, 456 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Mr. Davis also argues that

the District Court's assessment to his claim was clearly unreasonable under Strickland's standard of review and that the District Court's conclusion to this claim is not only debatable, but is wrong, and Certiorari should be granted for Mr. Davis to be able to appeal this claim to correct the State and District Court's error. The District Court's decision is contrary to clearly established Federal law, and involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States. Every man has a right to a fair trial according to the U.S. Constitution. Mr. Davis argues that he is innocent to this charge of Murder and deserve a fair Proceeding.

Failure to impeach

The Petitioner, Mr. Davis, argues that the State's eyewitnesses Aniya Lawson and Krystle Gavins both falsely testified to the facts of the case at his trial, and that the State fabricated Lawson's testimony to the events to place Robert and Mr. Davis within inches of the shooting, and as the perpetrators of the crime. Mr. Davis argues that his trial counsel, Kevin Milner, was in possession of evidence prior and during Mr. Davis's trial that would have shown that the two eyewitnesses were falsely testifying at Mr. Davis's trial, and that Lawson's testimony was fabricated by the State, but failed to present this evidence in Mr. Davis's defense at trial. Mr. Davis has presented evidence to the Post-Conviction Court

that a deposition was taken of State's eyewitnesses Aniya Lawson and of Krystle Gavins prior to both Mr. Davis's and Robert's trial on November 3, 2011, and each deposition contained statements made by each eye witness that were inconsistent, and contradicting to the stories and statements that both eyewitnesses testified. Mr. Davis argues that the depositions could have impeached these two witnesses.

At Robert's trial Krystle Gavins testified that she had seen a dark skinned man, wearing a red shirt, holding a gun within his hand (App. G). Within her deposition, she stated that she only saw a gold colored car leave the apartment complex before she was aware that a shooting had happened, and that she did not see the gold colored car near the area within the parking lot where the shooting had occurred (App. I). At Mr. Davis's trial, her testimony did not implicate Mr. Davis as a participant to the crime, but it would have been valuable to the defense to read her deposition statements to the jury to discredit any other testimony that she had given, and made her irrelevant as a eyewitness. She never identified Mr. Davis or Robert as participants to this crime at either Mr. Davis's or Robert's trials.

At Robert's trial Aniya Lawson, who was the victim's daughter, and the State's key eyewitness, testified at Robert's trial that her father, Myles the victim to the case, had went to put trash in the nearby dumpster when she saw a bronze colored car with two occupants of the car called out to her

father Myles and Myles had walked up to the Passenger Side of the Car and briefly talked to the two men in the Car. As Myles Walked away from the Car, a Shot Was fired from inside the Car hitting Myles. Then a Man in a red Colored Shirt, White tennis Shoes, and a hat, exited the driver's Side of the Car and Shot Myles again. Then She Saw a man in a White Shirt stay in the car and Slide over to the driver's Seat from the Passenger Seat of the Car and the Man Wearing the red Colored Shirt and White tennis Shoes get into the Passenger Seat of the Car, and the Man in the White Shirt had drove the Car away (App. G). Mr. Davis argues that Lawson also testified the above Story at his trial; but did not State at Mr. Davis's trial that a Shot Was first fired from inside of the Car hitting Myles. But that Lawson's Story of events became the State's theory to Why Mr. Davis and Robert Were the Perpetrators of the Crime, and that Robert's Car Was the Car that Lawson had Seen with the two Occupants Who Were Robert and Mr. Davis. Lawson never identified Mr. Davis or Robert as Participants of this crime during both trials.

Mr. Davis argues that not only did Lawson Switch up her testimony from Robert's to Mr. Davis's trial about the first shot being fired from inside of the Car, but that Mr. Davis has Presented the evidence to the Post-Conviction Court that Lawson had given a total of four different accounts of what she Seen take Place at the Scene of the Crime, and that each Statement Story was "Hot" and "Cold" in the

terms of Showing its difference.

Story one (Probable Cause affidavit)

Lawson gave a Statement to the Police at the Scene of the Crime that Was Stated in the Probable Cause affidavit. Lawson stated that a man had Walked up on foot as her father Myles was taking trash to a nearby dumpster. She Stated that the Man and Myles had a brief Conversation as both men Walked back to Myles's SUV where She Was waiting. She Stated that once Myles turned his back and Was about to enter the SUV, the Man Shot Myles in his back. Then She saw the Man get into the Passenger Seat of a car and the Car drove away. Lawson agreed to telling this Story to Police within her deposition (App. K X App. J)

Story two (Lawson's deposition)

In Lawson's deposition, as She Was being examined by Robert's trial Counsel, Lawson Stated that She Saw two men drive up in a gold colored Car and Spoke to her father as he Was Walking back to her father's SUV where She Sat with her Younger brother. She then Saw the Passenger of the Car who Was wearing a red shirt, exit the Car and Shot her father after running around from the Passenger Side of the Car to the driver's side of the Car where her father Stood. That after the Man wearing the red shirt Shot her father he had got back into the Passenger Seat of the Car and the car drove away. She Stated that She had never Saw the driver of the Car because the driver never exited the Car, but her brother had Seen that the driver Was wearing all black colored clothing (App. J.)

Story three (Lawson's deposition)

In Lawson's deposition, as she was cross examined by State's Prosecutor Angela Mattozzi, Lawson's story changed from what she had stated to Robert's trial counsel on direct examination as the State Prosecutor crafted her story by leading questions. Lawson's story changed to say that she had witnessed two men drive up in a gold colored car and spoke to her father Myles as Myles was walking back to his SUV where she was waiting. As her father talked to the two men from the passenger side of the gold colored car, the driver of the car who was wearing a red colored shirt, exited the car and ran around to the passenger side of the car and shot her father. Then she saw the passenger who was wearing a white colored shirt, scoot over to the driver seat of the car to wait on the man who was wearing the red colored shirt who shot her father to get into the passenger side of the car. Then she saw the car drove away. (App. J). This story became Lawson's trial testimony and the prosecutor's theory at both Mr. Davis and Robert's trial.

Mr. Davis argues that it is clear to see that Lawson's trial testimony was crafted by the State when examining Lawson's deposition. (Examples below) (App. J.)

Q. So he's getting out of the - he's getting out of the drivers side of the bronze car?

A. The passenger's.

Q. (Ms. Mattozzi) We're not trying to Confuse You. We Weren't there,

Q. So this over here would be the driver's side (indicating)

A. NO, This one was over here, was the driver's side, because the Passenger came over.

Q. Okay. Well, this is the front of the car here, where I have F. And we're driving here in America and the driver's side would be on the left of the car, right?

A. Yes.

Q. Okay, the person who got out of the car, which side of the car did you see him get out of?

A. I thought I saw him get out on this side (indicating)

Q. So did he get out of the car on the side that was further away from you?

A. Yes.

Q. So, then did he come around then to the passenger's side?

A. Yes.

Q. Now the person that you said got out of the driver's side and walked around to the passenger's side, did you describe him for the police?

A. Yes.

Q. Do you remember telling them that he was middle aged?

A. Yes.

Q. Do you remember telling the Police he was wearing a red shirt, possibly, with gold markings?

A. Yes.

Q. And that he approached your dad on foot?

A. Yes.

Q. Is that what you meant by he came out of the driver's side and walked around to the passenger's side?

A. Yes.

Q. Well, you had told the Police that the man who shot him was already outside the car. So was he inside the car when they spoke or outside of the car?

A. Inside.

Q. When the gold car left, did the man who shot your dad get in the passenger's side or did he go back around to the driver's side?

A. I think passenger, and then the one that was in the driver's seat got over to the passenger.

Q. Did he get out of the car to get from the passenger's seat to the driver's seat or did he like scoot over?

A. Scoot over.

Mr. Davis argues that during Lawson's direct examination by Robert's attorney, the above answers in the Q and A were never told by Lawson until the State lead Lawson to say the answers to her questions with leading questions. Mr. Davis argues that within the Q and A above that

it is clear to see that Aniya Lawson had agreed to making the statement to the police in the Probable Cause Affidavit, and told two additional different stories of the Murder, all within the same deposition. (App. I)

At Robert's and Mr. Davis's trial, Rosa Orphey, who was the state's third eyewitness, testified that she heard the gunshots and saw a man wearing a red shirt shoot Myles while he was on the ground. She stated that she did not see a gold colored car near the shooting when she had seen the shooter standing over the body with the gun in his hand. Orphey never identified Robert or Mr. Davis as participants to this crime at both trials.

Mr. Davis points out that not only did Lawson have several different accounts to the crime scene, but that she is the only eyewitness placing Robert's car near the shooting when it happened. At Mr. Davis's post-conviction hearing, Mr. Davis's trial counsel, Kevin Milner testified that he was in possession of the prior to trial depositions before Mr. Davis's trial, but stated that it was his strategy not to show that the state's witnesses were "lying at the trial" (in his own words)

Counsel Stated:

A. Why would I want to discredit either one of those witnesses. These are your best witnesses? They came out there, said they saw what happened, and that you didn't do anything wrong that they saw. I don't want to discredit them. To the contrary, I want the jury to think that they're the most truthful people in the trial.

Q. Yes, but if they're making contradicting statements, counsel

Why Won't we impeach them at all?

A. They're helping You.

Mr. Davis argues that Counsel also testified that:

- A) I Would not have impeached those two Witnesses at all, because they were Witnesses that I felt helpful to Your Case. Even if I could have caught them in a lie, I Would not have done it.
- A) You're not hearing me, I don't want to establish that she's lying. Those are impeaching questions.

Mr. Davis argues that his trial Counsel's strategy of not establishing that Lawson and Gavin were "Lying" at Mr. Davis's trial was a failure, was prejudice to the defense, resulted in Mr. Davis being convicted due to Lawson's trial testimony, and fell outside the wide range of professional competent assistance under the Sixth amendment of the United States Constitution, and under the Strickland v. Washington Set Standard, 456 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). Mr. Davis argues that Lawson's trial testimony only "helped" put him in prison according to the Indiana Court of Appeals (App B). Mr. Davis argues that the Court stated in Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L. Ed. 2d 1217 (1959), that:

"A Lie is a lie, no matter what it's subject, and, if it is in any way relevant to the case the attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. Also prosecutors and law enforcement officers may not knowingly use false evidence, including false or fabricated —

testimony to obtain a tainted conviction."

And that the Court stated in *Mooney v. Holohan*, 294 U.S. 103, 102, 55 S.Ct. 340, 79 L.Ed. 791 (1935) that:

"Using false evidence to convict violates a defendant's right to a fair trial guaranteed by the Fourteenth Amendment's Due Process Clause."

Mr. Davis argues that the Indiana Court of Appeals concluded in its March 5, 2014, Memorandum decision denying Mr. Davis's direct appeal (App. H) that Aniya Lawson's trial testimony is the reason for both Mr. Davis and Robert's convictions. Mr. Davis argues that there are three other individual's statements that contradict Lawson's trial testimony story that the state and District Court are overlooking.

- 1) Mr. Davis's own statement during custodial interrogation stating that he wasn't aware that a shooting had occurred, and that Robert's car was not near the shooting when it occurred.
- 2) Rosa Orpheus's trial testimony that she had witnessed the shooting and saw the shooter standing over the body, but did not see a gold colored car like Robert's near the shooting when it happened.
- 3) Krystle Gavin's deposition statement that she saw a gold colored car like Robert's car, but that it was not near where the shooting happened. Also, that the car was already gone when she heard the shots that she thought were fireworks.

Mr. Davis lastly argues that the District Court's conclusion to this claim was unreasonable, because the Court has misapplied the Strickland standard test for prejudice when the Court denied

Mr. Davis's claim stating that Counsel's Performance was not ineffective. Mr. Davis argues that the District Court's conclusion of his claim was bias; because the Court did not consider all of the evidence in the record; both that which was admitted at the trial and that which is developed at the Post-Conviction stage in which the Court is required in analysing the Prejudice Prong Under Strickland v. Washington. Mr. Davis argues that the State and the District Court are addressing his claim only by considering the evidence in the light of the evidence most favorable to the State and the Verdict. That the State and the District Court are both overlooking and minimizing the fact that the State's Key eyewitness falsely testified at Mr. Davis's trial, and the the State and Mr. Davis's trial Counsel allowed the false testimony to go unchecked, and uncorrected, as both were aware that it was taking place. Mr. Davis argues that Minus Lawson's testimony the State did not have a case against Mr. Davis and Robert.

The District Court Stated that:

"The Indiana Court of Appeals easily disposed of Petitioner's claim that trial Counsel should have impeached Aniya Lawson and Krystle Gavin with their depositions. Counsel explained that his reason for not impeaching these two witnesses was that their trial testimony benefitted Petitioner, so he did not want to attack their credibility. That trial Counsel's reasons for not impeaching the two witnesses was based on

objective reasonable trial strategy to not discredit the only two witnesses who provided beneficial testimony on behalf of petitioner. Had trial counsel impeached their credibility; trial counsel would have been ineffective for doing so without any rational basis. Based on these facts, the Indiana Court of Appeals held that counsel did not render ineffective counsel."

(App. A)

Mr. Davis argues that the District Court's assessment to his impeachment claims were clearly unreasonable under the Strickland's standard of review and that the State and District Court's conclusion to this claim is not only debatable, but is wrong, and certiorari should be granted for Mr. Davis to be able to appeal this claim to correct the State and District Court's error. The District Court's decision is contrary to clearly established Federal law, and involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States. Every man has a right to a fair trial under the U.S. Constitution. The Courts, or Mr. Davis's trial counsel, are not denying that Lawson falsely testified at Mr. Davis's trial, they are just down playing the damage and prejudice that Mr. Davis received because of her testimony. Mr. Davis argues that he is innocent to this charge of murder and deserve a fair proceeding. And that Lawson's testimony did not benefit him only put him in prison.

II. THE DECISION OF THE SEVENTH CIRCUIT IS IN CONFLICT WITH THE DECISION OF OTHER CIRCUITS AND U.S. SUPREME COURT.

In the closely analogous case of *Buck v. Stephens*, 578 U.S. 136, 136 S.Ct. 2409, 195 L.Ed.2d 799 (2016), this Court confronted a situation where the Fifth Circuit Court of Appeals denied appealability to Buck's claims by misapplying the standard for granting a Certificate of appealability. This Court found that the Fifth Circuit erred in denying Buck the COA required to pursue his claims on appeal by basing its decision on the adjudication of the actual merits of the claims instead of determining if Buck's claims were reasonably debatable. This Court granted Buck's Writ of Certiorari.

In the closely analogous case of *Couch v. Booker*, 632 F.3d 241 (6th Circuit, 2011) the Sixth Circuit Court of Appeals affirmed the District Court's granting of Couch's petition for a Writ of habeas corpus, because Couch's counsel rendered ineffective assistance by failing to investigate a causation defense, and because the state court's contrary conclusion violated the standards of the Anti-Terrorism and Effective Death Penalty Act. In *Booker*, the Sixth Circuit Court of Appeals confronted

a situation where the State Court concluded Booker's trial counsel's failure to investigate a causation defense to Booker's case as trial strategy when the State Court denied Booker's ineffective assistance of counsel claim. The Court stated:

"While the point of the Sixth amendment is not to allow Monday Morning quarterbacking of defense counsel's strategic decisions, a lawyer cannot make a protected strategic decision without investigating the potential basis for it."

In the closely analogous case of *Dixon v. Snyder*, 266 F.3d 693 (7th Circuit, 2001), The Seventh Circuit Court of Appeals found that Dixon's trial counsel was ineffective for failing to introduce the State's eyewitness "Carlisle's" two-recantation statements as evidence at Dixon's trial to discredit Carlisle's previous statement to police that put Dixon in the crime as perpetrator. The court granted Dixon's petition for a writ of habeas corpus stating:

"The State appellate court found defendant was not prejudiced by counsel's failure to introduce the eyewitness's earlier statements and that counsel's actions were sound trial strategy. These were unreasonable conclusions, under the accepted test for determining effective assistance of counsel, and there was reasonable doubt that, absent counsel's errors, defendant would have been found not guilty."

These cases stated above illustrate that the Indiana State and District Courts, and the Seventh Circuit Court of Appeals is out of step with this court, its own circuit, and other circuits in its determination under the COA, and Strickland v. Washington Standard of review. Each of the above stated cases are somewhat similar in situation to Mr. Davis's case and were granted the deserved relief. (Claims are similar).

CONCLUSION

For the reasons stated in this Petition, a Writ of Certiorari should issue to review the Judgment and opinion of the Seventh Circuit Court of Appeals.

Respectfully Submitted

Lyndon Davis

Lyndon Davis

DOC# 232171

Indiana Department of Corrections

Pendleton Correctional Facility

4490 West Reformatory Road

Pendleton, IN 46064

April 6, 2021

Date

PROOF OF SERVICE

I, the undersigned, do swear or declare that on this date of April 6, 2021, as required by Supreme Court Rule 29, I have served the enclosed Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari on each Party to the above proceeding, or that Party's Counsel, and on every other Person required to be served by depositing an envelope containing the above documents in the U.S. Mail properly addressed to each Party and with sufficient first-class postage prepaid.

The names and addresses of those served below as follows.

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