Case No. 21-5887

IN THE
SUPREME COURT OF THE UNITED STATES

Miguel E. Neil – PETITIONER,

vs.

Jay Forshey, Warden – RESPONDENT.

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

PETITION FOR REHEARING

Miguel E. Neil #: 710-531
Noble Correctional Institution
15708 McConnelsville Rd.
Caldwell, Ohio 43724

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GROUNDS FOR REHEARING

The Court should grant rehearing because, as it has explained, the Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers the U.S. Supreme Court's understanding of what freedom is and must become. The Equal Protection Clause can help to identify and correct inequalities, vindicating precepts of liberty and equality under the Constitution.

First Ground of intervening circumstances of a substantial or controlling effect: Petitioner should be extended "cause" to overcome the procedurally defaulted claim, Claim Eighteen Prosecutorial Misconduct, pursuant to the Sixth Circuits precedence in Mapes v. Coyle, 171 F.3d 408, 427-28 (6th Cir. 1999), as well as in this Courts precedence in Smith v. Robbins, 528 U.S. 259, 288 (2000), because the standard to support ineffective assistance of appellate counsel is identical and extends to such a claim.

In support, Petitioner asks the Court to consider Davila v. Davis, 137 S. Ct. 2058, 198 L. Ed. 2d 603 (June 26, 2017), concerning the "unpreserved trial error."

This Court in *Davila*, at 2056, 2067, explained that:

> A state prisoner may overcome the prohibition on reviewing procedurally defaulted claims if he can show "cause" to excuse his failure to comply with the state procedural rule and "actual prejudice resulting from the alleged constitutional violation." Wainwright v. Sykes, 433 U.S. 72, 84, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977); *Coleman, supra*, at 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640. To establish "cause"—the element of the doctrine relevant in this case—the prisoner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). A factor is external to the defense if it "cannot fairly be attributed to" the prisoner. *Coleman, supra*, at 753, 111 S. Ct. 2546, 115 L. Ed. 2d 640.
>
> It has long been the rule that attorney error is an objective external factor providing cause for excusing a procedural default only if that error amounted to a deprivation of the constitutional right to counsel. See Edwards v. Carpenter, 529 U.S. 446, 451, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000). An error amounting to constitutionally ineffective assistance is "imputed to the State" and is therefore external to the prisoner. *Murray, supra*, at 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397. . . . [Id. 2065]
>
> Effective appellate counsel should not raise every nonfrivolous argument on appeal, but rather only those arguments most likely to succeed. (citations omitted) Declining to raise a claim on

> appeal, therefore, is not deficient performance unless that claim was plainly stronger than those actually presented to the appellate court. See Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000). In most cases, an unpreserved trial error will not be a plainly stronger ground for appeal than preserved errors. [Id. 2067]

See Smith v. Robbins specifically holding that "only when *ignored* issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Id.

Claim Eighteen is Clearly Stronger than those presented:

Petitioner argues that appellate counsel raised weaker arguments on direct appeal upon which trial counsel also failed to object, leaving the errors unpreserved. See (PAGEID #: 461-63) (Attachment 1).

Assignment of Error Number One was inadmissible police officer opinions of guilt, and inadmissible community and victim impact evidence. Assignment of Error Number Two was prejudicial joinder indictments. Assignment of Error Number Three, the jury instruction, Petitioner abandoned because he found several Ohio and Sixth Circuit cases denying relief on instructions tailored like the one in his case. Thus, these errors were considerably weaker, and less likely to succeed when compared to prosecutor's presentation of known perjured testimony/evidence, and other misconduct.

Assignment of Error Number Four was appellate counsel arguing that trial counsel was ineffective for failing to object to the errors in Error One and Two.

Thus, appellate counsel rendered ineffective assistance by arguing the weaker errors instead of the stronger material falsehood issues injected into the trial by the prosecutor and other prosecutorial misconduct issues, as well as trial counsel's ineffective assistance for failing to object to it.

Assignment of Error Number Five, insufficiency of the evidence, was perhaps the strongest of the six assignments of error because the clothing was, by clear and convincing evidence, uniquely different contrary to the prosecutor falsely stating that it was the same; Petitioner's cell phone pinged on towers that placed him nowhere near the robbery locations on the dates and times committed as falsely alleged by the detectives and prosecutor; and the lower courts consistent citing that the suspect was "generally described as a dark skinned black man" by witnesses, upon which Petitioner provided the Court colored photographs of himself to dispute this factual finding by clear and convincing, in that he is not remotely a dark skinned black man. See colored photos in (Appendix R & U) attached to the writ for certiorari.

As for Assignment of Error Number Six, the Sixth Circuit has consistently held that "manifest weight of the evidence is not cognizable on federal habeas review." Robertson v. Fender, 2021 U.S. App. LEXIS 12725, at *10 citing Nash v. Eberlin, 258 F. App'x 761, 764 n.4 (6th Cir. 2007); Johnson v. Havener, 534 F.2d 1232, 1234 (6th Cir. 1976). Thus, Petitioner also abandoned this error.

Thus, the prosecutorial misconduct claim was "clearly stronger than those presented" by appellate counsel on direct appeal, as would be appellate counsel's argument that trial counsel was ineffective for failing to object to the admission of the falsehoods and other misconduct.

One year before this Court's decision in Smith v. Robbins on January 19, 2000, the Sixth Circuit decided Mapes v. Coyle on March 24, 1999, which held:

> The following considerations that ought to be taken into account in determining whether an attorney on direct appeal performed reasonably competently: (1) were the omitted issues significant and obvious; (2) was there arguably contrary authority on the omitted issues; (3) were the omitted issues clearly stronger than those presented; (4) were the omitted issues objected to at trial; (5) were the trial court's rulings subject to deference on appeal; (6) did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable; (7) what was appellate counsel's level of experience and expertise; (8) did the petitioner and appellate counsel meet and go over possible issues; (9) is there evidence that counsel reviewed all the facts; (10) were the omitted issues dealt with in other assignments of error; and (11) was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt? (citations omitted)
>
> Manifestly, this list is not exhaustive, and neither must it produce a correct "score"; we offer these inquiries merely as matters to be considered.

Id., at 247-248, hn.22.

The precedence in headnote 22 has been applied and followed 204 times since 1999, even by the Ohio courts of appeal. See State v. Walker, 8th Dist., 2000 Ohio App. LEXIS 2906 (June 20, 2000).

Petitioner complied with, and met, the Sixth Circuits standard in *Mapes* in support that appellate counsel was ineffective for omitting/ignoring the claim of prosecutorial misconduct because it was "clearly stronger than those presented" in all of his federal proceedings.

The magistrate even cited *Mapes* in Neil v. Warden, Noble Corr. Inst., 2020 U.S. Dist. LEXIS 15359, at *116, to decide whether appellate counsel was ineffective for failing to raise the issues in "Claims Seven, Eight, and Nine," despite Petitioner never seeking review for these claims pursuant to *Mapes*, but unreasonable did not do so for Claim Eighteen.

Petitioner premised his "clearly stronger" argument for Claim Eighteen in his writ for certiorari, as well as in all prior proceedings, based on this Court's historical holding in Giglio v. United States, 405 U.S. 150, 153 (1972) ("As long ago as Mooney v. Holohan, 294 U.S. 103, 112 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice. This was reaffirmed in Pyle v. Kansas, 317 U.S. 213 (1942). In Napue v. Illinois, 360 U.S. 264 (1959), we said, "the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Id., at 269."); Mesarosh v. United States, 352 U.S. 1, 9-14 (1956) ("The dignity of the United States Government will not permit the conviction of any person on tainted testimony. . . . The untainted administration of justice is certainly one of the most cherished aspects of our institutions. . . . The interests of justice call for a reversal of the judgments below with direction to grant the petitioners a new trial."); United States v. Young, 470 U.S. 1, 9 (1985) concerning such misconduct ("The kind of advocacy shown by this record has no place in the administration of justice and should neither be permitted nor rewarded"); and in ABF Freight System v. NLRB, 510 U.S. 317, 325 (1994) that:

> False testimony in a formal proceeding is *intolerable*. We must *neither reward nor condone* such a "flagrant affront" to the truth-seeking function of adversary proceedings. (citations omitted). If knowingly exploited by a criminal prosecutor, such wrongdoing is so "inconsistent with the rudimentary demands of justice" that it can vitiate a judgment even after it has become final. Mooney v. Holohan, 294 U.S. 103, 112, 79 L. Ed. 791, 55 S. Ct. 340 (1935).

See also JUSTICE KENNEDY concurring: "I join the opinion of the Court and agree as well with the concerns expressed by JUSTICE SCALIA. Our law must not become so caught up in procedural niceties that it fails to sort out simple instances of right from wrong and give some redress for the latter. At the very least, when we proceed on the assumption that perjury was committed, the Government ought not to suggest, as it seemed to do here, that one who violates his testimonial oath is no worse than the student who claims the dog ate his homework." *Young*, at 325-26.

Moreover, despite this Court in *Davila* stating that "[i]n most cases, an unpreserved trial error will not be a plainly stronger ground for appeal than preserved errors," it explained at 2067-68, 69 that:

> If an unpreserved trial error **was so obvious** that appellate counsel was constitutionally required to raise it on appeal, **then trial counsel likely provided ineffective assistance by failing to object to it in the first instance**. In that circumstance, the prisoner likely could invoke Martinez

> or Coleman to obtain review of trial counsel's failure to object. Similarly, if the underlying, defaulted claim of trial error was ineffective assistance of trial counsel premised on something other than the failure to object, then Martinez and Coleman again already provide a vehicle for obtaining review of that error in most circumstances. Petitioner's proposed rule is thus unnecessary for ensuring that trial errors are reviewed by **at least one court**. . . . [2067-68]
>
> In *Carpenter*, this Court held that, when a prisoner can show cause to excuse a defaulted claim of ineffective assistance of appellate counsel, he can in turn rely on that claim as cause to litigate an underlying claim of trial error that was defaulted due to appellate counsel's ineffectiveness. [2069]

In the Petitioner's case, **not one court** reviewed the trial errors because trial counsel failed to object to preserve the prosecutor's falsehoods and other errors at trial, and appellate counsel constitutionally failed to raise the prosecutor's misconduct, as well as raising the fact that "**trial counsel likely provided ineffective assistance by failing to object to it in the first instance**." Id.

Appellate counsel's failure to raise Claim Eighteen, the "clearly stronger" error, "amount[ed] to constitutionally ineffective assistance which is 'imputed to the State' and is therefore external to the prisoner." *Davila, supra*, quoting *Murray, supra*, at 488; 28 U.S.C.S. § 2254(d)(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" pursuant Smith v. Robbins.

For these reasons, Petitioner respectfully asks the Courts to not deviate from these historical holdings, and grant "cause" to address the merits of his prosecutorial misconduct claims pursuant to the Due Process Clause and the Equal Protection Clause of the United States Constitution.

Claim Eighteen Was So Obvious/Significant and Obvious:

Concerning whether the "unpreserved trial error was so obvious," Petitioner also argued the first factor in *Mapes* in all of his prior proceedings which identically asks, as this Court does in *Davila*, "were the omitted issues significant and obvious." Id.

Petitioner argues that the unpreserved prosecutorial misconduct errors were "so obvious that appellate counsel was constitutionally required to raise it on appeal." *Davila, supra*.

Proof that it "was so obvious" to appellate counsel is where he argued on direct appeal that Petitioner "was wearing identifiable and unique clothing when arrested and it was different from any of that worn by the suspects in the second indictment." (PAGEID #: 544-45); that the "phone records failed to provide

police with much help in this regard and in some instances even tended to be *exculpatory*." (PAGEID #: 486); and that Detective "Franken falsely asserted that we can put you in the area through phone records and tower pings." (PAGEID #: 509).

In light of this knowledge, appellate counsel argued nothing about the prosecutor's misconduct where the prosecutor repetitively and falsely stated that police officers "collected . . . the pants, the hoodie, the mask that he was wearing through all of these incidents, apprehended" (Tr. PAGEID #: 1924); and in closing arguments, "And repeating myself. He was caught red-handed wearing the same outfit" (Tr. PAGEID #: 2858); and twice more in closing repeated that Petitioner was wearing "the stocking or hoodie, gator mask covering up his face, only showing that much, knit cap on top of it, hoodie on top of that" (Tr. PAGEID #: 2863, 2915), where Petitioner never had on any clothing, gloves, or shoes remotely matching the suspects clothing depicted in the videos and still photographs.

There is simply no case law that "tolerates," "rewards," or "condones," *ABF Freight System*, *supra*, a prosecutor to falsely claim that they have material evidence that they do not, a State's witness to falsely testify and go uncorrected, or trial counsel's failure to object to such misconduct.

It is also highly unlikely that appellate counsel missed the prosecutions misconduct because of his arguments that the clothing was not the same, nor the detective's false assertions about the CSLI because counsel argued that it "exonerated" Petitioner and was "falsely asserted," because they permeated the trial transcript from very beginning and end.

As cited above, "this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence **is incompatible with rudimentary demands of justice**," *Giglio*, *supra*, and where a prosecutor commits such misconduct as herein, "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103 (1976).

Petitioner supported that the prosecutor's falsehoods about the clothing and CSLI was material because such proof would be akin to having the proverbial "smoking gun."

Based on this Court in *Davila*, Petitioner has established that he "has a legitimate claim of ineffective assistance of appellate counsel based on something other than a preserved error, [because] the trial error[s] [were] so obvious that appellate counsel was required to raise [them] on appeal, [and] trial counsel likely provided ineffective assistance by failing to object to [them] in the first instance." Id.

For these reasons, Petitioner also respectfully asks this Court to give him the "rudimentary demands of justice" by granting "cause" pursuant to *Mapes* and *Smith's* "clearly stronger" standard/analysis, as well as to the Due Process and Equal Protection Clause, and review the misconduct claim on the merits.

Second Ground of intervening circumstances of a substantial or controlling effect: Petitioner should be extended "cause" to overcome the procedurally defaulted claims in Claim Fifteen, Ineffective Assistance of Trial Counsel for failing to present alibis witnesses, other witnesses in his favor, and exculpatory evidence at trial, which had to be raised in his initial-review collateral proceeding, pursuant to the Sixth Circuits precedence in Gunner v. Welch, 749 F. 3d 511, 520 (6th Cir. 2014) and White v. Warden, Ross Corr. Inst., 940 F.3d 270, 272 (6th Cir. 2019) following Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), where *Martinez's* "narrow" rule extends to such claims.

Petitioner asks the Court to consider its decision in Taylor v. Illinois, 484 U.S. 400 (1988) which reiterated that "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, **the right to present the defendant's version of the facts** as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has **the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law**." Washington v. Texas, 388 U.S. 14, 19 (1967)." Id., at 409.

This Court in *Taylor* also reiterated that "the right to compel the presence and present the testimony of witnesses provides the defendant with a sword that may be employed to rebut the prosecution's case. The decision whether to employ it in a particular case rests solely with the defendant. The very nature of the right requires that its effective use be preceded by deliberate planning and affirmative conduct." Id., at 410.

And more important, which lies at the heart of Petitioner's argument, this Court in *Taylor* held that "[t]he defendant's right to compulsory process is itself designed to vindicate the principle that the "**ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts.**" (citation omitted). Rules that provide for pretrial discovery of an opponent's

witnesses serve the same high purpose. Discovery, like cross-examination, minimizes the risk that a judgment will be **predicated on incomplete, misleading**, or even **deliberately fabricated testimony**." Id., at 411-12, as was done in the present case.

The evidence in Claim Fifteen was evidence that trial counsel failed to present against Petitioner's express request such as the scientific Google Maps which support that his phone did not place him in the areas of the robberies as falsely alleged by police and the prosecutor at trial; trustworthy alibi evidence of Petitioner's location during a robbery with CSLI (cell cite location information) Google Maps in support; a trustworthy witness account from a robbery detective who viewed the surveillance footage of a robbery and concluded in his report that the suspect was a male white; and critical physical/exculpatory evidence in the form of a tattoo that was on Petitioner but not on the suspect in one of the robberies.

This Court in *Taylor*, at 410 also explained that "[t]he accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Id. See also United States v. Scheffer, 523 U.S. 303, 308 (1998) ("state and federal rule makers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" quoting Rock v. Arkansas, 483 U.S. 44, 56 (1987)).

However, none of the evidence in Petitioner's initial collateral review/state post-conviction proceeding was testimony that is incompetent, privileged, or otherwise inadmissible, or arbitrary or disproportionate to the purposes they are designed to serve. Nor was there any "preclusion of the testimony of a surprise witness," or of the evidence herein as was done in *Taylor*, because trial counsel never presented it in Petitioner's defense.

For these reasons, this Court should grant certiorari so that the exculpatory and evidence which would cause serious reasonable doubt in claim fifteen, can be reviewed because the "ends of criminal justice [was] defeated [because the] judgments were . . . founded on a partial or speculative presentation of the facts." *Taylor*, *supra*.

Again, the Sixth Circuit in Gunner v. Welch, 749 F. 3d 511 (6th Cir. 2014) explained that:

> It is also common ground that "an attorney's errors during an appeal on direct review may provide cause to excuse a procedural default; for if the attorney appointed by the State to pursue the direct appeal is ineffective, the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims." Martinez v. Ryan, 132 S. Ct. 1309, 1317, 182 L. Ed. 2d 272 (2012). . . . [at 516, hn.3]
>
> While petitioner did not file a post-conviction motion, it would have been futile to do so because **the 180-day period in which to file such a petition had long since run as a direct consequence of the failure of his appellate counsel to provide him with relevant information**. This failure amounted to ineffective assistance of appellate counsel and thus constitutes sufficient **cause to excuse the procedural default that would otherwise subject the petition for habeas corpus to dismissal**. [at 520]

And just two years ago, the Sixth Circuit decided White v. Warden, Ross Corr. Inst., 940 F.3d 270, 272 (6th Cir. 2019), which concluded that:

> **because White did not have the aid of an attorney in his post-conviction proceedings**, he had no meaningful opportunity to raise his ineffective-assistance claim. In light of the Supreme Court's decision in . . . Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), we find that White has **cause to overcome his default**.

Pursuant to *Gunner*, Petitioner's argues that because he sought his appellate counsel assistance, and asked when his initial state post-conviction petition to raise ineffective assistance of trial counsel was due, and appellate counsel ineffectively told him that he was "time-barred from seeking such relief now," (see attached letter, Appendix X of the writ for certiorari), his initial-review collateral proceeding was untimely "as a direct consequence of the failure of his appellate counsel to provide him with relevant information. This failure amounted to ineffective assistance of appellate counsel and thus constitutes sufficient cause to excuse the procedural default that would otherwise subject the petition for habeas corpus to dismissal." *Gunner*, *supra*.

More importantly pursuant to *White*, "because [Petitioner] did not have the aid of an attorney in his post-conviction proceedings, he had no meaningful opportunity to raise his ineffective-assistance claim. In light of the Supreme Court's decision in . . . Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), we find that White has cause to overcome his default." *White*, *supra*.

Thus, in accord with Due Process, Petitioner is entitled to Equal Protection of this Court's "narrow" exception in *Martinez*, expanded by Trevino v. Thaler, 569 U. S. 413 (2013), as "cause" to excuse the procedural default of his ineffective assistance of trial counsel claims in Claim Fifteen.

Third Ground of intervening circumstances of a substantial or controlling effect: Petitioner should be granted the Actual Innocence Exception to avoid a procedural bar to the consideration of the merits of his constitutional claims in Claim Fifteen, in particular, because the evidence therein is based on new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial.

The Sixth Circuit in Cleveland v. Bradshaw, 693 F.3d 626, 631-32 (6th Cir. 2012) explained that "[i]n *Schlup*, the Supreme Court held that a petitioner who asserts a credible claim of actual innocence can 'avoid a procedural bar to the consideration of the merits of his constitutional claims.' 513 U.S. 298, 327, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)." Id.

The court in *Cleveland* went on to explain that:

> Based on *Schlup*, we have held that a petitioner who presents a credible claim of actual innocence is entitled to equitable tolling of AEDPA's statute of limitations. *Souter*, 395 F.3d at 601. This does not mean, however, that such a petitioner is automatically entitled to habeas relief. In *Schlup*, the Court distinguished habeas petitions asserting claims of actual innocence in cases where no constitutional error is alleged, as in Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993), from petitions in cases where a constitutional error allegedly occurred, *Schlup*, 513 U.S. at 314-15 (1995). The petitioner in the latter scenario does not argue that his innocence entitles him to habeas relief, **but rather that his innocence entitles him to have a federal court consider the merits of his constitutional claims despite a procedural bar that would ordinarily preclude such review**. Id. at 315. In that case, a credible claim of actual innocence only operates as a "gateway" through which a petitioner may pass and obtain federal review of his claims. Id. Accordingly, where a petitioner's claim of actual innocence is for the purpose of having the court determine whether the constitutional errors alleged in the habeas petition warrant relief, the petitioner is required to meet a **less stringent standard** than in cases where the petitioner seeks habeas relief solely on the basis of his claimed innocence. Id. at 316. The Supreme Court explained the difference between the two situations as follows:
>
> If there were no question about the fairness of the criminal trial, a *Herrera*-type claim would have to fail unless the federal habeas court is itself convinced that those new facts unquestionably establish [the petitioner's] innocence. On the other hand, if the habeas court were merely convinced that those new facts raised sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial without the assurance that trial was untainted by constitutional error, [the petitioner's] threshold showing of innocence would justify a review of the merits of the constitutional claims.

This Court in *Schlup* also held that "such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- **that was not presented at trial.**" Id., at 324; House v. Bell, 547 U.S. 518 (2006).

For these reasons, Petitioner respectfully asks the Court to consider that he has presented a credible claim of actual innocence as a "gateway" through which he may pass and obtain federal review of his claims because he presented new reliable -- exculpatory scientific evidence, trustworthy eyewitness accounts, and critical physical evidence -- **that was not presented at trial.** i.e., scientific Google Maps which support that Petitioner's phone did not place him in the areas of the robberies as falsely alleged by police and the prosecutor at trial; trustworthy alibi evidence of Petitioner's location during a robbery with CSLI Google Maps in support; a trustworthy witness account from a robbery detective who viewed the surveillance footage of a robbery and concluded in his report that the suspect was a male white; and critical physical/exculpatory evidence in the form of a tattoo that was on Petitioner but not on the suspect in one of the robberies, which would prove to be factual innocence if indeed it is "far worse to convict an innocent man than to let a guilty man go free." In re Winship 397 U.S. 358, 372 (1970).

The Petitioner is only required to show, and has, the "less stringent standard," *Cleveland, supra*, or "lower burden of proof," *Schlup, supra*, "that it is more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt" in light of the new evidence which support his claims had the new evidence been presented at trial, the "evidence that was not presented at trial" just above, "raise[ing] sufficient doubt about [Petitioner's] guilt to undermine confidence in the result of the trial." *Schlup*, at 316-17.

Fourth Ground of intervening circumstances of a substantial or controlling effect: The Court should clarify the self-admitted conflict within the Sixth Circuit, and between the other Circuit Courts, concerning what constitutes "new evidence not presented at trial."

Petitioner calls upon this Court to resolve the conflict clarifying what the Court meant in Schlup v. Delo, 513 U. S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995) concerning what constitutes "new reliable evidence that was not presented at trial," pursuant to the Due Process and Equal Protection Clause of the United States Constitution.

Petitioner asks the Court to consider Hiersche v. United States, 503 U.S. 923, 925 (1992) holding that "[t]his Court has a duty to resolve conflicts among the courts of appeals." Id. See also California Board of Equalization v. Sierra Summit, Inc., 490 U.S.844, 846(1989) ("we have both the power and the duty to resolve the conflict"); Miller v. Fenton, 474 U. S. 104 (1985) ("Certiorari was granted to resolve a conflict in the circuits in interpreting 28 U.S.C.S. § 2254(d).").

The Sixth Circuit in Everson v. Larose, 2020, U.S. App. LEXIS 14290, at *9-11, recognizes that "[t]here is a circuit split about whether the 'new' evidence required under *Schlup* includes only newly discovered evidence that was not available at the time of trial, or broadly encompasses all evidence that was not presented to the fact-finder during trial, i.e., newly presented evidence." Cleveland v. Bradshaw, 693 F.3d 626, 633 (6th Cir. 2012); see Connolly v. Howes, 304 F. App'x 412, 418 (6th Cir. 2008). This court has not directly addressed the issue but has suggested that "'newly presented' evidence [is] sufficient." Cleveland, 693 F.3d at 633 (citing Souter v. Jones, 395 F.3d at 577, 595 n.9 (6th Cir. 2005)). Under that standard, Valentin's affidavit would qualify as "new" evidence." Id. ("because the evidence contained in his affidavit was never presented to the jury").

The Sixth Circuit in Lowery v. Parris, 819 Fed. Appx. 420, 421 (6th Cir. 2020) remanded the district court's denial of a writ of habeas to decide whether or not the affidavits are considered "new" for the purpose of the actual innocence gateway. The court stated, "[a]dmittedly, courts have struggled to define what qualifies as new evidence. Some courts treat all evidence as new so long as it was not presented at trial. See, e.g., Gomez v. Jaimet, 350 F.3d 673, 679 (7th Cir. 2003). Other courts maintain that evidence is new only if it was unavailable at the time of the trial. See, e.g., Moore v. Quarterman, 534 F.3d 454, 465 (5th Cir. 2008)." Id.

On remand, the district court in Lowery v. Parris, 2021 U.S. Dist. LEXIS 82372, at *18, held "that the evidence is 'new' under governing standards, as it was not presented to the factfinder at trial. *Schlup*, 513 U.S. at 333-335; *Cleveland*, 693 F.3d at 633." Id.

In *Cleveland*, "[t]he relevant items were the recantation of the only eyewitness to the murder, an affidavit from a forensic scientist that shortened the window of time for the victim's death, an affidavit from a witness that declared he met with the prisoner during a certain time, and flights records." Id.

Thus, Petitioner asserts that pursuant to the Due Process and the Equal Protection Clause, because the Sixth Circuit in *Cleveland* "broadly encompasses all evidence that was not presented to the fact-finder during trial, i.e., newly presented evidence," he is entitled to "cause" "to avoid a procedural bar to the consideration of the merits of his constitutional claims." *Schlup*, at 327. See relevant affidavits, police reports, etc., at (Appendix N, Y, Z, 1, 2, 3, 4) appended to the writ for certiorari.

The Sixth Circuit in United States v. Munoz, 605 F.3d 359, hn.12, 370 (6th Cir. 2010) explained that "[u]nder fundamental tenets of agency law, a principal is not charged with an agent's actions or knowledge when the agent is acting adversely to the principal's interests. Thus, when an attorney's actions extend beyond everyday mistakes into the realm of serious misconduct, in some circumstances such malfeasance may be far enough outside the range of behavior that reasonably could be expected by a client that it would be inappropriate to impute such attorney misconduct to the client." Id.

CONCLUSION

For the reasons above, Petitioner respectfully asks the Court to grant rehearing, and thus "cause" pursuant to the Supreme Court precedence herein, so that the constitutional claims above can be decided on the merits pursuant to the Due Process and Equal Protection Clauses, as they help identify and correct inequalities, vindicating precepts of liberty and equality under the Constitution.

CERTIFICATE OF PETITIONER

I, Miguel E. Neil, declare under the penalty of perjury, that the petition is limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented, and that it is presented in good faith and not for delay.

Miguel Neil
(Signature)

Notary executed on: November 17, 2021.

Deborah L King

DEBORAH L KING
NOTARY PUBLIC - OHIO
MY COMMISSION EXPIRES 02-12-2024

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(September 24, 2015)

Mr. Miguel Neil
A 710 531
Noble Correctional Institution
15708 McConnelsville Rd.
Caldwell, OH 43724

Post-conviction was not due until Dec. 1st, 2015. Did not find this out until late January 2016, filed February 3, 2016.

Dear Mr. Neil:

Enclosed is the brief that I filed for you last Friday. We have some issues that have been successful before. I still do not believe that you understand some of the limitations of the appellate process. We can only raise issues that are apparent from the record. For instance, you have a lot of issues with respect to the effectiveness of your counsel. However, most of these issues are not cognizable on appeal. Your private discussions with him over witnesses to call, alibi evidence, and so forth, are not part of the record. The proper remedy for violations that require proof outside of the record is post-conviction relief. However, your request for help in this respect was rejected and you are time-barred from seeking such relief now.

Hopefully, we will prevail. However, if we do not, I will seek to appeal to the Ohio Supreme Court. They accept only about 1 in 50 of the criminal appeals submitted to them so the odds are that your appeal would not be accepted. However, this is still a necessary step in order to exhaust state remedies to allow you to seek redress in federal court on a habeas petition for a violation of your constitutional rights. You have good issues in this regard and could prevail in federal court. The reason I am telling you this is so that you can plan ahead. I will not be representing you in the federal habeas proceedings. In all likelihood, you will have to arrange to hire private counsel for the federal relief. This would cost anywhere from $10,000 to $25,000.

Hopefully, this will be unnecessary but it is important to plan for all possibilities. The state will file a response to our briefs and I will send you a copy. The matter will be scheduled for oral argument and months later a written decision will be released.

With best wishes, I am

Sincerely yours,

John W. Keeling
Attorney at Law