No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2020

Gracshawn Thomas,

Applicant-Petitioner,

v.

Ed Sheldon, Warden

Respondent.

ON APPLICATION FOR A CERTIFICATE OF APPEALABILITY TO
THE U.S. COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Application for Certificate of Appealability

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Application for a Certificate of Appealability

To the Honorable Brett M. Kavanaugh, Circuit Justice for the United State Court of Appeals for the Sixth Circuit:

Mr. Thomas seeks a certificate of appealability under 28 U.S.C. 2253 (c)(1). A COA has been denied by the Sixth Circuit. See Order of March 29, 2021, Ex. A.

Mr. Thomas is serving a life sentence for Aggravated Murder after a jury convicted him of a drive-by shooting in Akron, Ohio at a busy intersection at approximately 8:30 a.m. However, no eyewitnesses identified Mr. Thomas as the shooter and there was no physical evidence linking him to the crime.

Unfortunately, this case represents a miscarriage of justice from beginning to end. Defense counsel at trial did not understand the cell phone records which the State relied on to place Thomas in the vicinity of the shooting; defense counsel presented a cell phone expert that was not an expert but a law student who did not understand the records until mid trial when it was much too late and the damage was done; defense counsel promised the jury that the cell phone records would prove that Thomas was innocent which was not true; counsel failed to investigate the alibi, failed to present available evidence of other suspects and failed to present evidence that Thomas was actually innocent.

On direct appeal, Thomas was appointed appellate counsel. The family of Mr. Thomas timely hired a lawyer for the appeal, the Ohio App R 26(B) application and the Habeas Petition but the lawyer did little except take the $7400 paid to him by the family. The lawyer did not file a brief and is not listed as counsel on the state court's opinion; he failed to file an application under

Ohio App R 26(B) as he promised to do; and failed to file a Petition for Writ of Habeas Corpus.

Thomas hired new counsel to remedy these failures but the Ohio courts turned a cold shoulder to his efforts. Likewise, the federal courts have denied relief and have not even discussed many of the relevant facts and related law.

Factual and Procedural Background

Mr. Thomas was tried before a jury in Akron, Ohio for Aggravated Murder and convicted. He is serving a sentence of 35 years to life.

Alfonso Golden was shot and killed at approximately 8:30 a.m. at a busy intersection; he was driving a car that belonged to his brother. The State did not have any eyewitnesses at trial; there was no forensic evidence linking Thomas to the killing; there was no confession by Thomas; there were no informants who claimed Thomas made incriminating statements.

The State relied on cell phone records to put Thomas "in the area" of the killing at the time in question; additionally, the State had two short video clips from two different security cameras. One video near the crime scene revealed an SUV that the State believed carried the shooter seconds before the shooting; a second video about 15 minutes later shows Thomas exiting a similar looking SUV.

Mr. Thomas testified he did not shoot or kill the victim. He explained his whereabouts on the day in question. The trial lawyers for Thomas filed a notice of alibi on his behalf. The defense lawyer told the jury in opening statements that the phone records in question *proved* Thomas could not have done the shooting.

Unfortunately for Thomas, his attorneys did not understand that the State's evidence and the cell phone/text records were not kept in Eastern Time Zone but rather were either in the Central Time Zone or even the Pacific Time Zone.

The defense "expert" concerning the phone records was a *law student* and the son of one of the defense attorneys. Colin Meeker, the law student, testified that he didn't know until the day before his testimony that many of the records were kept according to Central Time Zone and Pacific Time Zone rather than Eastern Time Zone.

Contrary to defense counsel's understanding of the records and his very own opening statement, the phone records did not prove Thomas could not have done the shooting.

The alibi was seriously damaged by the phone records which were consistent with the State's theory of the case. Counsel did not understand the State's evidence and affirmatively misread the phone records. Counsel relied on an "expert" that was not a cell phone records "expert" but a law student and son of one of the defense attorneys.

During his testimony, Thomas testified that he was at the Ohio Bureau of Motor Vehicles on the day of the Aggravated Murder. Defense counsel presented no records in support of Thomas. In fact, the State presented a rebuttal witness from the BMV that it had no record of Thomas being at the BMV on the day of the Aggravated Murder. Thomas was made to look like a liar.

Investigation in post conviction revealed that Thomas made a $50.00 payment at the BMV concerning his suspended driver's license the day *before* the Aggravated Murder. See Doc. 7-2# Page ID 261-263; 282.

Thomas was obviously confused about the date of the payment by one day; but his defense counsel did no investigation pre-trial to determine whether Thomas' memory was accurate or not. Defense counsel's failure to investigate and prepare Thomas for his testimony resulted in the State's rebuttal witness and the undermining of Thomas' credibility before the jury.

The State did not have overwhelming evidence of guilt by any means; yet counsel's failure to investigate and prepare Thomas for his testimony seriously damaged Thomas' own credibility and that of the entire defense.

Defense counsel also failed to present compelling evidence of "*third party guilt* " that was contained in the Akron Police Reports concerning this homicide.

In this case, the police reports in question put the homicide in a completely different light than what the jury heard. See Doc. #7-2 237-287. Either the State failed to disclose the relevant police reports and thus Brady was violated; or, defense counsel failed to properly utilize the disclosed/relevant police reports and were constitutionally ineffective under Strickland.

Either way, Thomas was prejudiced because the jury did not have all the information necessary and there was much significant evidence pointing to other suspects who had a motive and could have committed the Aggravated Murder in this case.

In fact, a few months before this shooting, the victim was arrested for shooting into another car with two named people; but the victim told the police he was the one shot at and the police had it backwards. Either way, such evidence helps Thomas yet was not revealed to the jury.

Further, there were several other incidents revealed in the police reports of other people following the victim and wanting him dead. Much exculpatory evidence is contained in these reports which were never utilized during trial to the prejudice of Thomas. The jury did not have an accurate picture of available evidence.

Unfortunately for Mr. Thomas, the court appointed appellate lawyer failed to raise the ineffective assistance of trial counsel and other meritorious issues.

Mr. Thomas' family timely hired a lawyer for the appeal. Hired appellate counsel, Gary Levine, had more than adequate time to properly represent Thomas; he was hired in April 2015 but did not enter his Notice of Appearance until December 2015. Doc. # 7-2 Page ID 257-260.

Mr. Levine did not file an appellate brief. He also did not file an Ohio App R 26(B) application concerning appointed appellate counsel's ineffectiveness and did not file any appeals to the Ohio Supreme as he agreed to do for Mr Thomas either from the direct appeal or the denial of the pro se Ohio App R 26(B) denial. The egregious misconduct by Mr. Levine is central to this court's review of the case.

Mr. Thomas' family hired attorney Gary Levine to represent him on appeal in April 2014 and Mr. Thomas received a visit in prison from Mr. Levine on Thomas' birthday November 26, 2014. Mr. Levine promised to file the appellate brief and spoke to Thomas approximately ten times by phone. Doc.#7-2 Page ID 252-256; Page ID 257-260 (affidavit of Dora Thomas aka Rice; Levine hired April 2014; Levine's handwritten receipts for $7400 attached to affidavit).

Appointed counsel filed the appellant's brief (instead of retained counsel) on December 1, 2014. Mr. Levine entered an appearance on December 4, 2014 even though he was hired in April 2014. Doc. #7-2 Page ID 154. Appointed counsel was allowed to withdraw on January 23, 2015.

Also on January 23, 2015, Mr. Levine filed a motion to strike appointed counsel's brief. Doc. #7-2 Page ID 156. The State did not oppose this motion but it was denied February 9, 2015 thus violating Thomas' right to counsel of choice. U.S. v. Gonzalez-Lopez, 548 U.S. 140 (2006). No briefing was filed by Mr. Levine.

The convictions were affirmed June 17, 2015. Appointed counsel was listed on the opinion as counsel for Thomas. Doc. 7-2 Page ID 169, 184 ; See State v. Thomas, 2015 Ohio 2377. It must be noted that two of the three assignments of error in the appellate brief were for "Mr. Clayton" and not Mr. Thomas. See Doc#29. PageID# 1522-1523.

Neither counsel timely informed Thomas his appeal was denied or timely filed in the Supreme Court of Ohio. Doc. 7-2 Page ID 174. See Ground 4 of Petition.

Mr. Levine told Thomas that since he did not file the direct appeal brief, then he would file an Ohio App R 26(B) and they discussed it several times by phone. Mr. Levine even told Mr. Thomas he had "mailed it" to the Court but it was never filed. Mr. Levine had then promised to drive it to the Court himself but that also was not done. Mr. Thomas felt Mr. Levine "abandoned me and left me out to dry." Doc. #7-2 Page ID 252-256.

Mr. Thomas was forced to mail a pro se App R. 26(B) application. The pro se application was filed September 16, 2015. The Court of Appeals denied the application on March 30, 2016 because it was untimely (by 1 day) and no good cause was offered for its untimeliness. Previously, Mr. Thomas was forced to file a delayed appeal to the Ohio Supreme Court pro se.

Mr. Thomas hired new counsel to file a delayed application under Ohio App R. 26(B) and offered as "good cause" for the delay the unprofessional conduct of Mr. Levine in failing to file the appellate brief that he was hired to file as well as his complete failure to file the Ohio

App R 26(B) application; Doc. #7-2 Page ID 237; equitable tolling principles favored Thomas, Holland v. Florida, 130 S. Ct 2549 (2010), at 2562-63; Thomas was diligent.

Mr. Levine's unprofessional conduct was an extraordinary circumstance beyond Thomas' control. Mr. Levine misled, lied to and abandoned Thomas and kept his $7400.

The delayed 26(B) was filed August 23, 2017 with good cause shown but was denied in a one paragraph order October 2, 2017 as a "successive" application and the court held res judicata barred the litigation of counsel's ineffectiveness. However, the pro se delayed application was a nullity since it did not comply with Ohio App R 26(B) and was not denied on the merits; it did not bar the court's proper consideration of the delayed application with "good cause" offered for the delay.

Thomas timely appealed the denial of the delayed 26(B) application to the Supreme Court of Ohio on November 13, 2017. See Ohio Supreme Court Case Number 2017-1614 (publicdocket);https://www.supremecourt.ohio.gov/Clerk/ecms/#/caseinfo/2017/1614.

The Ohio Supreme Court declined to accept jurisdiction on February 14, 2018. See 2018 Ohio 557.

Thomas timely hired Gary Levine to pursue his direct appeals, then his Ohio App. R 26(B) remedies in state court and a federal Writ of Habeas Corpus. See Doc.#7-2, Page ID #251-256 (affidavit of Petitioner).

However, Mr. Levine took the $7400 from Thomas and his family and failed to file any appellate brief or App R 26 (B) application or the Federal Writ of Habeas Corpus.

As Thomas said in an affidavit filed in State court, Mr. Levine took his money and hung him out to dry. Doc.#7-2, Page ID # 254. Thomas was then left to file his appeal in the Ohio

Supreme Court pro se and on a delayed basis as provided for under Ohio law; Thomas was also forced to file a App R 26(B) application pro se which the Court of Appeals rejected as untimely by one day. Mr. Levine even lied or misled Thomas in believing certain documents had been filed when the records reflect they were never filed. Doc. #7-2 Page ID 252-256.

Thomas then hired new counsel to file a delayed Ohio App R 26(B) application (as provided for in Ohio law) which was filed with substantial issues. See Supreme Court of Ohio Case Number 2017-1614. Thomas has been diligent in pursuing and exhausting his state remedies before filing the Petition for Writ of Habeas Corpus.

Actual Innocence

Early on in this case the U.S. District Court granted Thomas equitable tolling due to Mr. Levine's misconduct. Doc.#20. In a footnote in that order, footnote 3, the Judge stated equitable tolling did not apply to the "actual innocence" doctrine. But that footnote was dropped in the context of an equitable tolling argument concerning whether the Petition was timely filed in federal court.

The Court did not decide the timeliness issue under the "actual innocence" doctrine because she had found Mr. Levine abandoned his client.

At best, footnote 3 was dicta and not binding in the context of the Petition and the issues presented especially those related to ***state*** court filing deadlines.

These state court filing deadline issues and whether the actual innocence doctrine applied were not present for the District Court to decide at the time of footnote 3 when the judge was deciding whether the federal Petition was timely filed.

Actual innocence, which Thomas has always maintained including during his testimony at trial that he did not kill the victim, may serve as a gateway in order to avoid the impediment of a statute of limitations. McQuiggin v. Perkins, 133 S. Ct. 1924 (2013). See Ground 5 of Petition. Doc.#7-2 Page ID 283. (Affidavit of Thomas maintaining actual innocence)

In granting equitable tolling to file the habeas Petition, the District Court failed to cite or discuss McQuiggin v. Perkins. Instead, the Court relied on two District Court opinions decided 4 and 5 years before McQuiggin was issued. See Doc#17, Page ID # 344. See Doc. 20 at fn. 3.

It is necessary to quote McQuiggin v. Perkins, 133 S. Ct. 1924 (2013) at length:

> We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence. Herrera v. Collins, 506 U.S. 390, 404-405, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). We have recognized, however, that a prisoner "otherwise subject to defenses of abusive or successive use of the writ [of habeas corpus] may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence." Id., at 404, 113 S.Ct. 853 (citing Sawyer v. Whitley, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992)). See also Murray v. Carrier, 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) ("[W]e think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."). In other words, a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims (here, ineffective assistance of counsel) on the merits notwithstanding the existence of a procedural bar to relief. "This rule, or fundamental miscarriage of justice exception, is grounded in the `equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." Herrera, 506 U.S., at 404, 113 S.Ct. 853.
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> We have applied the miscarriage of justice exception to overcome various procedural defaults. These include "successive" petitions asserting previously rejected claims, see Kuhlmann v. Wilson, 477 U.S. 436, 454, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986) (plurality opinion), "abusive" petitions asserting in a second petition claims that could have been raised in a first petition, see McCleskey v. Zant, 499 U.S. 467, 494-495, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), failure to develop facts in state court, see Keeney v. Tamayo-Reyes, 504 U.S. 1, 11-12, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992), and ***failure to observe state procedural rules, including filing deadlines*** (emphasis added), see Coleman v. Thompson, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991);

> Carrier, 477 U.S., at 495-496, 106 S.Ct. 2639.
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> The miscarriage of justice exception, our decisions bear out, survived AEDPA's passage. In Calderon v. Thompson, 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998), we applied the exception to hold that a federal court may, consistent with AEDPA, recall its mandate in order to revisit the merits of a decision. Id., at 558, 118 S.Ct. 1489 ("The miscarriage of justice standard is altogether consistent ... with AEDPA's central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence."). In Bousley v. United States, 523 U.S. 614, 622, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998), we held, in the context of § 2255, that actual innocence may overcome a prisoner's failure to raise a constitutional objection on direct review. Most recently, in House, we reiterated that a prisoner's proof of actual innocence may provide a gateway for federal habeas review of a procedurally defaulted claim of constitutional error. 547 U.S., at 537-538, 126 S.Ct. 2064.
>
> These decisions "see[k] to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." Schlup, 513 U.S., at 324, 115 S.Ct. 851. Sensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is AEDPA's statute of limitations.
>
> As just noted, see supra, at 1931-1932, we have held that the miscarriage of justice exception applies to state procedural rules, including filing deadlines (emphasis added), Coleman, 501 U.S., at 750, 111 S.Ct. 2546. A federal court may invoke the miscarriage of justice exception to justify consideration of claims defaulted in state court under state timeliness rules. See ibid. The State's reading of AEDPA's time prescription would thus accord greater force to a federal deadline than to a similarly designed state deadline. It would be passing strange to interpret a statute seeking to promote federalism and comity as requiring stricter enforcement of federal procedural rules than procedural rules established and enforced by the States

McQuiggin at 1931-1932.

Habeas courts have “equitable discretion” to see that federal constitutional errors do not result in the incarceration of innocent persons. McQuiggin at 1931; citing Herrera at 404. This exception can overcome any filing deadline required under AEDPA or ***by state courts.*** (emphasis added) McQuiggin at 1931-32; Penney v. United States, 870 F.3d 459 (6th Cir. 2017).

There was evidence available but not presented at trial of third party guilt. Holmes v. South Carolina, 547 U.S. 319 (2006). See Cleveland v. Bradshaw, 693 F.3d 626, 633 (6th Cir. 2012)(newly presented evidence).

Here, the newly presented evidence was contained in the delayed 26 (B) application and is contained in the Habeas Petition and in the record before the U.S. District Court.

The evidence of third party guilt is contained in police reports not used at trial either by the State or the defense. In short, other identified people (according to the victim in this case) had shot at him previously, wanted him dead and he was fearful for his life. In fact, the victim in this case had gone to the Akron police with his concerns that his life was in danger and others had tried to kill him.

The police reports also reflect that at the time of the victim's death, the victim was charged with shooting at two people in a car even though he maintained and told the police he was the victim in that case when he was actually the one shot at by the two people. In none of these reports is Thomas named as a suspect. Doc.#7-2 Page ID 268-269, 272 (police reports charging victim in this case with shooting at two named people in car)

Additional evidence of third party guilt that was not presented to the trial court/jury included statements/testimony by the victim's brother (named Demarcus whose car the victim was killed in; See Doc. #7-2 Page ID 279-280) had been previously shot at (Doc.# 7-2 Page ID 273, 276-77) when Demarcus was driving and that Demarcus had reason to believe the co-defendant in Thomas's trial (Rico) was the actual killer in this case and not Thomas. (Doc.#7-2 Page ID 275-81)

The victim expressed concern for his life to the police and told them he had been followed by numerous black males in SUVs, he was worried for his life and "Shit is real." Doc. #7-2 PageID 271-274.

The lower federal courts denied the actual innocence claim and evidence that supports it without discussing the facts or McQuiggin. A complete miscarriage of justice itself.

Newly discovered evidence and evidence "not presented to fact finder at trial"

When there is a claim of ineffective assistance of counsel concerning evidence that was not "presented" to the jury or fact finder, is that "newly discovered" evidence?

A recent case (citing a Sixth Circuit case) supports Thomas's position that when trial counsel does not present available exculpatory evidence that demonstrates a Petitioner's actual innocence, such evidence is new evidence for the Schlup/McQuiggin actual innocence gateway. Reeves v. Fayette SCI, 897 F.3d 154 (3rd Cir. 2018).

> Petitioners can satisfy the actual innocence standard's new evidence requirement by offering "newly presented" exculpatory evidence, meaning evidence not presented to the jury at trial. See Gomez v. Jaimet, 350 F.3d 673, 679-80 (7th Cir. 2003); Griffin v. Johnson, 350 F.3d 956, 963 (9th Cir. 2003). More recently, the Courts of Appeals for the First, Second, and Sixth Circuits have similarly suggested that actual innocence can be shown by relying on newly presented—not just newly discovered—evidence of innocence. See Riva v. Ficco, 803 F.3d 77, 84 (1st Cir. 2015); Cleveland v. Bradshaw, 693 F.3d 626, 633 (6th Cir. 2012); Rivas v. Fischer, 687 F.3d 514, 543, 546-47 (2d Cir. 2012).
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> Reeves at 161-162.

As argued in the lower courts, Thomas can demonstrate that if there are state procedural defaults, then such defaults must be forgiven due to the actual innocence gateway. Otherwise, there would be a miscarriage of justice. The 6th Circuit ignored this line of cases and the facts.

Federal Constitutional Right to Counsel on Appeal and in State Post Conviction Proceedings

There is a right to the effective assistance of counsel on appeal (Evitts v. Lucey, 469 U.S. 387 (1985)) and since an Ohio App R. 26(B) application is a post conviction proceeding, see Morgan v. Eads, supra, then there is a right to the effective assistance of counsel there too. See Martinez v. Ryan, 132 S.Ct. 1309 (2012).

Further, the 26(B) process is the first and only opportunity in Ohio for one to raise the ineffective assistance of appellate counsel for failing to raise ineffective assistance of trial counsel which must be done in Ohio on direct appeal. See Martinez at 1317:

> Where, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim. This is because the state habeas court "looks to the merits of the clai[m]" of ineffective assistance, no other court has addressed the claim, and "defendants pursuing first-tier review ... are generally ill equipped to represent themselves" because they do not have a brief from counsel or an opinion of the court addressing their claim of error. Halbert v. Michigan, 545 U.S. 605, 617, 125 S.Ct. 2582, 162 L.Ed.2d 552 (2005); see Douglas, 372 U.S., at 357-358, 83 S.Ct. 814.
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> *****
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> A prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system. It is deemed as an "obvious truth" the idea that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Gideon v. Wainwright, 372 U.S. 335, 344, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Indeed, the right to counsel is the foundation for our adversary system. Defense

counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged. See, e.g., Powell v. Alabama, 287 U.S. 45, 68-69, 53 S.Ct. 55, 77 L.Ed. 158 (1932) ("[The defendant] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence"). Effective trial counsel preserves claims to be considered on appeal, see, e.g., Fed. Rule Crim. 1318*1318 Proc. 52(b), and in federal habeas proceedings, Edwards v. Carpenter, 529 U.S. 446, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000).

Martinez at 1317-1318.

As the U.S. Supreme Court made clear:

Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Martinez at 1320.

In Thomas, the Ohio App R 26(B) proceeding is the initial -review collateral proceeding from which a claim of ineffective assistance of trial counsel must be raised when appellate counsel is ineffective for failing to raise the ineffectiveness of trial counsel. Counsel Gary Levine was ineffective in that he abandoned Mr. Thomas on direct appeal and never filed the 26(B) application he promised to file and to which he was hired and paid to file. See generally State v. Cole, 2 Ohio St.3d 112 (1982)(IAC must be raised on direct appeal). In finding equitable tolling for the purpose of filing this Petition, District Court Judge Gaughan already found Mr. Levine abandoned Thomas.

Diligence

Mr. Thomas was diligent. Thomas hired Mr. Levine and paid him. Yet Mr. Levine did next to nothing. Out of desperation, Thomas attempted to file his own 26(B) because Levine lied to Thomas about timely filing one. However, the pro se 26(B) was untimely by one day according to the state courts; then, Thomas hired new counsel to pursue a delayed 26(B) which is allowed under Ohio law. The state court rejected that application and improperly labeled it a "successor" even though no timely 26(B) had been properly filed or decided on the merits.

Thus, Ohio has completely denied Thomas the opportunity to file a 26(B) which contains legitimate claims that appellate counsel was ineffective under the federal Constitution for failing to raise ineffective assistance of trial counsel claims as detailed in the Petition and Traverse.

Thomas has been locked out and denied a fair opportunity to litigate his claims through no fault of his own. Reasonable diligence but not "maximum feasible" diligence is required. Holland at 653. Here, Thomas exercised reasonable diligence

Denial of Access to the Courts

Mr.Thomas has been denied a full and fair opportunity to litigate the effective assistance of appellate counsel and in turn the effective assistance of trial counsel. Ohio must provide a corrective process to address the ineffective assistance of appellate counsel under the Sixth and Fourteenth Amendments of the federal Constitution. Duckworth v. Serrano, 454 U.S. 1 (1981).

The delayed 26(B) application in this case is such a corrective process. However, even though the delayed application was the only application that was filed that complied with App R 26(B), Ohio has refused to consider it and instead improperly labeled it a successor.

Under Ohio law, the App R 26(B) application is the first opportunity to raise the ineffective assistance of appellate counsel for not raising ineffective assistance of trial counsel. It is Thomas' first and only opportunity to raise such a claim and it is considered to be a "collateral post conviction remedy." See Morgan v. Eads, 104 Ohio St.3d 142 (2004). Thomas is entitled to the constitutionally effective assistance of counsel. Strickland, Evitts, and Martinez v. Ryan, 132 S. Ct. 1309 (2012).

In this case, Ohio has denied Thomas due process, i.e., the opportunity to be allowed to substantiate a claim before it is rejected. See Ford v. Wainwright, 477 U.S. 399, 414 (1986) (plurality opinion); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring) (protecting the "elementary rights of men" requires "fairness" and "[a]n opportunity to be heard"); Mathews v. Eldridge, 424 U.S. 319 (1976) (setting forth test for procedural due process compliance).

Ohio also denied Thomas the fundamental constitutional right of access to the courts. See, e.g., Bounds v. Smith 430 U.S. 817, 828 (1977). That right of access to the courts is the right to "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." Lewis v. Casey, 518 U.S. 343, 351 (1996).

Thomas has not had a full and fair adjudication of his federal constitutional claims in the Ohio courts. See Rose v. Lundy, 455 U.S. 509 (1982). Thomas is entitled to the effective assistance of counsel at trial, on direct appeal and in his initial post conviction challenge to the

effectiveness of trial and direct appeal counsel's constitutional effectiveness. See Strickland, Evitts v. Lucey, 469 U.S. 387 (1985), Martinez v. Ryan, supra.

Thomas has not had an adequate and effective means of vindicating his constitutional rights under the application of Ohio App R. 26(B).

Cause and Prejudice

If the Court determines Thomas defaulted a federal claim in state court, then habeas review is still required if Thomas can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. Coleman v. Thompson, 501 U.S. 722, 750 (1991).

Constitutionally ineffective counsel may establish cause for procedural default. Coleman at 752-54. A counsel's action is deficient if it was not supported by "reasonable" strategy and prejudicial if there is a "reasonable probability" but for counsel's unprofessional errors the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687 (1984); Massaro v. United States, 538 U.S. 500, 505 (2003).

Request for an Evidentiary Hearing

Mr. Thomas has properly requested in both State court and in the District Court an evidentiary hearing. See Doc#29, Page ID#1534.

Nonetheless, all courts have improperly denied Thomas an evidentiary hearing.

First, if AEDPA does not apply because issues were not decided on the merits, then the District Court has complete discretion to conduct an evidentiary hearing. Here, Mr. Thomas argued that all issues contained in his "delayed" 26(B) application were denied and not on the merits. In fact, Mr. Thomas was denied any meaningful avenue in the Ohio state courts to litigate such issues.

The District Court clearly had discretion to conduct an evidentiary hearing on the issues or claims it deemed appropriate. The District Court conveniently omits many or all facts which point to Mr. Thomas' innocence which are contained in this record and are addressed specifically elsewhere in this application. The Sixth Circuit likewise ignores the evidence and facts which point to the ineffective assistance of counsel and the actual innocence of Mr. Thomas.

AEDPA

Many issues raised were never addressed by the Ohio courts on the merits of the federal Constitutional issues presented. Thus, AEDPA does not apply. The U.S. Supreme has defined when a claim has been adjudicated on the merits. Johnson v. Williams, 133 S. Ct. 1088 (2013).

As the Court made clear in Johnson v. Williams at 1097:

" A judgment is normally said to have been rendered "on the merits" only if it was "delivered after the court ... heard and evaluated the evidence and the parties' substantive arguments." Black's Law Dictionary 1199 (9th ed. 2009) (emphasis added). And as used in this context, the word "merits" is defined as "[t]he intrinsic rights and wrongs of a case as determined by matters of substance, in distinction from matters of form." Webster's New International Dictionary 1540 (2d ed. 1954) (emphasis added); see also, e.g., 9 Oxford English Dictionary 634 (2d ed. 1989) ("the intrinsic `rights and wrongs' of the matter, in contradistinction to extraneous

points such as the competence of the tribunal or the like" (emphasis added)); Random House Dictionary of the English Language 897 (1967) ("the intrinsic right and wrong of a matter, as a law case, unobscured by procedural details, technicalities, personal feelings, etc." (emphasis added)). If a federal claim is rejected as a result of sheer inadvertence, it has not been evaluated based on the intrinsic right and wrong of the matter.

In this case, the Ohio Courts did not evaluate on the merits many of the grounds raised. The claims must be reviewed de novo. None of the claims concerning the delayed App R. 26(B) were decided on the merits. (See Ground One)

By its very terms, AEDPA applies only to habeas claims that were "adjudicated on the merits in State court...." 28 U.S.C. 2254(d). Regardless of the nature of the petitioner's claim, deference is required only where the state courts in fact adjudicated a claim "on the merits."

Where the state court did not address or assess the merits of a claim properly raised in a habeas petition, the deference due under AEDPA does not apply. Wiggins v. Smith, 539 U.S. 510, 534 (2003); Maples v. Stegall, 340 F.3d 433, 436 (6 th Cir. 2003). Regardless of whether the state courts have purported to resolve a particular claim on the merits, the federal courts are obliged to determine whether that claim in fact was addressed by the state courts. Brown v. Smith, 551 F.3d 424 (6th Cir. 2008)(concurring opinion at 437)(citing Cargle v. Mullin, 317 F.3d 1196, 1206-07 (10th Cir. 2003).

If this Court finds that AEDPA applies, then the Ohio courts unreasonably applied clearly established U.S. Supreme Court law in violation of 2254(d)(1) and/or unreasonably determined the facts under 2254(d)(2). The Ohio courts did even mention or discuss the facts that point to actual innocence as discussed throughout the federal pleadings or the facts concerning the ineffective assistance of counsel.

Grounds For Relief

One point needs to be clear. Mr. Thomas did not have counsel on his first, untimely App R 26(B) application. Mr. Levine abandoned him as found by the District Court early in this litigation.

Mr. Thomas as a result attempted to file a pro se App R 26(B) application but it was one day late and not rule compliant. It was thus a nullity.

Thomas then hired counsel to file a delayed 26(B) application as the rule permits and offered as cause for the delay the abandonment of Mr. Levine. The Ohio courts refused to even consider the reasons given for the delay. Instead, the courts improperly labeled the second 26(B) application a "successor" even though there had not been a first properly filed application. Thus, Mr. Thomas objects to any characterization of this second 26(B) application as a "successor." There never was a first timely filed 26(B) thus there can not be a "successor."

Mr. Levine did not represent Mr. Thomas in his pro se first application for 26(B) relief. Any determination otherwise is factually incorrect. Mr. Thomas filed it pro se 26(B) precisely because Mr. Levine abandoned him. See Doc. #20. The mental gymnastics of the Magistrate and U.S. District Court in trying to determine that Mr. Levine "filed a brief" for Mr. Thomas in "reconsideration" doesn't change this fact. Ohio law does not provide for a "reconsideration" of an untimely 26(B) application. And the reason the Ohio courts denied the first application was because it was one day late due to the abandonment of Mr. Levine. Counsel is baffled at the District Court's determination to find somehow or someway that Mr. Levine represented Mr. Thomas in state court. He did not. He took the money ($7400) and ran; he did nothing to protect

or preserve or advance the legal rights of Mr. Thomas. The District Court's conclusion that Levine did not abandon Thomas is unreasonable and factually inaccurate. See Doc. #34 PageID # 1649.

The reliance on Smith v. Warden, Toledo Corr. Inst., 780 F. App'x 208 (6th Cir. 2019) is misplaced. Doc#29, PageID #1540; Doc.#34, Page ID# 1639.

First, Mr. Levine never represented Mr. Thomas in his R. 26(B) application even though he promised to file it. Mr. Thomas was left to fend for himself pro se. Thus, the Smith decision is distinct from this case. See fn. 116. Doc. #29, PageID 1540.

Mr. Thomas maintains that since App R 26(B) is an initial collateral proceeding under Martinez, he is entitled to the effective assistance of counsel. The complete abandonment of Mr. Levine in this regard equals ineffectiveness.

The District Court's reliance on Young v. Westbrooks, 702 F. App'x 255 (6th Cir. 2017) is also misplaced. Doc#29, 1540. Doc #29, PageID # 1540; Doc#34, Page ID# 1644. Mr. Thomas objects that this case is like Young. Doc #29, PageID #1542; Doc# 34, Page ID# 1644.

Mr. Levine completely abandoned Mr. Thomas and left him to file a pro se 26(B) application. Plus, District Court Judge Gaughan already found abandonment. See Doc #20.

The District Court's insistence that Mr. Levine's purported "brief" in reconsideration of the pro se untimely 26(B) application somehow cures the "procedural default" is perplexing. See Doc #29, Page ID# 1544; Doc. #34, 1644. The failed effort, if any, of Mr. Levine to remedy his abandonment of Mr. Thomas by filing a motion for reconsideration which is not even provided for in the Ohio rules is meaningless. Otherwise, Judge Gaughan would never have found equitable tolling. See Doc. #20.

The District Court's decision concerning "prejudice" is also mistaken. Doc # 29, PageID # 1544; See Doc. #34

The second App R 26(B) application is the only correctly filed App R 26(B) application filed by Mr. Thomas. It is the only "rule compliant" application. Yet the Ohio courts denied it without addressing the good cause provided by Mr. Levine's abandonment. In effect, Ohio gave Mr. Thomas no valid method to ineffectiveness of his appellate counsel, trial counsel or even his initial collateral review counsel. No deference is owed under AEDPA here because Mr. Thomas never got a merits review. The District Court should have examined all claims (and 'sub-claims') in Ground One de novo and granted relief.

Mr. Thomas has been diligent as explained in previous section on "Diligence."

Mr. Thomas can and has shown his actual innocence. In addition, Mr. Thomas has demonstrated how his trial was infected with ineffective assistance of counsel from the lack of pre-trial investigation, to opening statements to the presentation of a defense "expert" on cell phone records that was only one of the defense lawyers's sons and a law student and who did not understand the cell phone records were maintained in Pacific and Central Time Zones until the day before he testified. The lower court refused to discuss or analyze any of the facts.
Actual innocence excuses any state court procedural faults so that the federal courts can properly determine these important constitutional issues.

Issues which Warrant a Certificate of Appealability (renumbered from lower court filings):

GROUND ONE

Appellate counsel were constitutionally ineffective by failing to raise trial counsel's constitutional ineffectiveness under the Sixth and Fourteenth Amendments of the federal Constitution as follows:

A. Trial counsel failed to understand the cell phone records used by the State, put forth an alibi based on the misunderstanding of the cell phone records, and failed to investigate properly the available evidence.

A defendant has a constitutional right to the effective assistance of counsel on appeal. Evitts v. Lucey, 469 U.S. 387 (1985). Many courts in habeas have granted relief where appellate counsel was ineffective. Counsel has been ineffective in failing to file a notice of appeal and depriving client of his right to a direct appeal, Glover v. Birkett, 679 F.3d 936 (6th Cir.2012); ineffective in failing to file an appellate brief, Hardaway v. Robinson, 655 F.3d 445 (6th Cir. 2011); failing to raise trial counsel ineffectiveness and raising other issues that were clearly weaker, Showers v. Beard, 635 F.3d 625 (3rd Cir. 2011); raise weaker issues rather than meritorious issues, Lynch v. Dolce, 789 F.3d 303 (2nd Cir. 2015), Carter v. Straub, 349 F.3d 340 (6th Cir. 2003); failure to raise ineffective assistance of trial counsel based on trial counsel's failure to authenticate email sent by complainant that would have undermined her truthfulness, Hawes v. Perry, 633 Fed. Appx. 720 (11th Cir. 2015); appellate counsel failed to seek plain error review of erroneous jury instruction, Payne v. Stansberry, 760 F.3d 10 (D.C. Cir. 2014), Roe v. Delo, 160 F. 3d 416 (8th Cir. 1998). There are nearly limitless ways appellate counsel can be

found to have been ineffective.

In this case, counsel filed a Notice of Alibi on April 28, 2014 approximately one month after receiving discovery. The Notice of Alibi states that the victim was killed at about 8:33 a.m. but the defendant was not " at or around the area" of the shooting which was Waterloo Road and Brown Street in Akron, Ohio on September 18, 2013. Instead, the defendant was at 869 Hartford Avenue, Akron, Ohio until about 8:35 a.m. See opening statements, Doc #23-3, PageID #510 et seq. ; Doc. #23-7 Page ID 1216-1217.

The state relied on two types of evidence to prove Thomas' guilt:

1. The cell phone records of Thomas put him in the area of the Murder at the time of the crime;
2. Surveillance videos suggest the SUV Thomas was driving several minutes after the Murder is the same SUV used in this drive-by shooting of the victim.

Before and even during the trial, defense counsel did not understand the State's evidence as it relates to the cell phone records/texts. In fact, many of the records used by the State were kept in central time zone and/or pacific time rather than eastern time zone. Doc. #7-2 Page ID 265-267. The defense "expert" on the phone records was not an expert; instead, he was a son of one of the attorneys who freely acknowledged his misunderstanding of the records *during* his testimony. See cross examination of Colin Meeker, Doc. 23-7, Page ID # 1240, #1250. Defense counsel's fundamental misunderstanding of the phone/text records undermined the alibi defense.

The alibi was filed based on a false understanding of the phone records. Defense counsel believed that the phone/texts records were no problem because the defense counsel didn't

understand they were in Pacific and Central time zone rather than Eastern Time zone. This fundamental misunderstanding reflects deficient performance of counsel's duties under Strickland and prejudiced the defense severely. The so called defense expert (who was the son of one of the defense attorneys) looked incompetent in front of the jury when he acknowledged he didn't know about his misunderstanding of the records until the day before his testimony and well into the trial of the case. Doc. # 23-7 Page ID# 1240.

Counsel is ultimately responsible with understanding the evidence and did not in this case. In this circumstantial evidence case, the credibility of the defense was thus destroyed. In opening statement, defense counsel told the jury that the cell phone records would prove the innocence of Thomas. This promise to the jury was based on a fundamental misunderstanding of the phone records.

Mr. Thomas testified on his own behalf denying any involvement in this killing. Doc. #23-7, Page ID #1134-1220. Part of his testimony involved Thomas going to the Bureau of Motor Vehicles and getting his suspended driver's license "straightened out" on the day of killing. (TR 875) The State on rebuttal called a witness who testified there were no records of Thomas at the BMV on the day in question. (Sharon Taylor TR 983-987) Doc # 23-8, Page ID #1292-1297.

The testimony of Ms. Taylor severely damaged the credibility of Thomas. However, if defense counsel had properly investigated the BMV records, then counsel would have learned that Thomas made his payment the day *before* the shooting. Doc. # 7-2, Page ID 261-263, 282.

The lack of investigation by counsel was unreasonable and prejudiced the defense. Counsel should investigated and prepared Thomas for his testimony and his honest mistake

concerning the date of the payment to the BMV could have been avoided. Instead, the State on rebuttal made him look like a liar. Thomas' credibility was destroyed.

Defense counsel was completely incompetent when it was revealed *during* trial they had no proper understanding of the cell phone/texts records and Thomas was made to look like a liar on cross examination because defense counsel did not investigate his BMV records and did not prepare him for his testimony. Trial counsel were ineffective under Strickland; appellate counsel was ineffective under Evitts.

Here, defense counsel did not have an expert concerning the cell phone records/texts but instead his son who was a law student. Counsel's deficient performance is similar to that of counsel in Hinton v. Alabama, 134 S. Ct 1081 (2014), decided 2-24-14 only two months before the notice of alibi was filed based on a misunderstanding of the records.

Prejudice is self evident; lawyers didn't understand evidence that the alibi was based on and failed to prepare Thomas to testify; the defense was completely undermined. In opening statements, the State argued the phone records put the defendant in the area of the shooting Doc.# 23-3 Page ID# 504 (TR 240); the defense argued that phone calls proved he couldn't have done the shooting. Doc. #23-3 Page ID # 522-523 (TR 258-259)

Counsel did not investigate "thoroughly" but his "inattention" to the investigation demonstrates his failure to use "reasoned" strategic judgment. Wiggins v. Smith, 539 U.S. 510, 526 (2003). Inherent in reviewing the state's evidence is understanding it. See Rompilla v. Beard, 545 U.S. 374, 387 (2005). A recent murder case was reversed in habeas where defense counsel did not use exculpatory cell phone records. This case presents the flip side. Counsel must understand the records sufficiently so that he doesn't file an alibi based on a

misunderstanding/faulty knowledge of the phone records and rely on an "expert" that is not an expert. See York v. Ducart, No. 16-15060, decided June 1, 2018 (9th Cir. Court of Appeals)(available for free on Google Scholar).

As the Sixth Circuit has held, a lawyer has a duty to know enough to make a reasoned determination about whether he should abandon a possible defense based on his expert's opinion. Richey v. Bradshaw, 498 F. 3d 344, 363 (6th Cir. 2007).

Here, counsel did not even have a qualified expert and should not have relied on his "opinion" at all in filing an alibi or otherwise.

Thomas did not have the effective assistance of counsel at trial or on appeal. A new trial and/or appeal is necessary. If cause and prejudice is necessary, it has been demonstrated. The errors are not harmless.

B. It was either prosecutorial misconduct and/or ineffective assistance of trial counsel to present the victim in a false light to the jury and withhold from the jury the true reputation of the victim especially in light of the State's opening statement and the pending charges against the victim for shooting at two people in a car and withhold evidence of third party guilt. The Sixth and Fourteenth Amendments of the federal Constitution were violated.

Even though under Summit County Local Rule 21.06 there is "open file discovery," the State still must not mislead the jury and defense counsel has a duty to demand discovery, make a record and use Brady and other material relevant to the defense. Berger v. United States, 295 U.S. 78 (1935); Strickland.

In its opening statement (Doc. #23-3, Page ID# 490-491) (TR 226-227), the State told the jury that the victim was a good father, good son, loved by his family, took care of and supported his kids, had four kids with two women and had problems with the defendants.

The jury did not find out that the victim had pending felony charges for shooting at two people sitting in their car in April 2013; further, the victim told the police the other people actually shot at him! See Doc. # 7-2, Page ID 270-274.

Either way, it is material and helpful to the defense. The jury should have known; either defense counsel should have crossed Detective Shaeffer (TR 616-715) about this information/presented witnesses disclosed in police reports or the prosecutor should have revealed it.

The police reports documenting the victim's case were part of the open file discovery. Evidence of "third party guilt" is admissible. Holmes v. South Carolina, 126 S. Ct. 1727; see also Crane v. Kentucky. supra; see also Ohio Evid R 405 (A) and (B). The victim's reputation as a significant drug dealer (Doc # 7-2 Page ID #285) and gambler gives rise to other suspects especially since he told police he was the victim in his pending case where he was charged with shooting at others in a car.

There were additional police reports in which the victim told the police after his arrest that he was afraid for his life and he never mentioned that he was afraid of Thomas. Doc. #7-2, Page ID # 270 et seq. Events since in June and July 2011 and August 2013 caused the victim to report to police about other people following him and wanting him dead and that he is "always being followed."

The victim's brother (Demarcus Golden) told police about the co-defendant (Rico) "acting weird"; Demarcus recounted a shooting of his car the night before Father's day (June 2013); it is important to note the victim in this case was driving Demarcus' car at the time of his death; Demarcus was very suspicious of "Lil Dude" aka Duetta Nurse and Demarcus' car being shot up in June 2013. (Doc. #7-2 Page ID # 275-281) Demarcus named at least two people (not Thomas) who could have put up hit money on the victim; he knew that the victim had been followed one night after he left a "gambling spot." The victim felt someone named "B-Loc" had been following him; not Thomas. He also "knows that Rico and his family got money for the hit"; no mention was of Mr. Thomas.

Evidence of third party guilt need only tend to create reasonable doubt that Thomas committed the offense. State v. Gillespie, 2012 Ohio 1656; State v. Brown, 115 Ohio St. 3d 55 (2007); Kyles v. Whitley (1995), 514 U.S. 419, 435. (Doc.# 7-2Page ID 282-287)

Either the prosecution didn't disclose the above information or defense counsel didn't properly use it at trial; Thomas was prejudiced either way because he didn't get a fair trial and the jury was deprived of relevant information. Strickland; Brady, Berger, Brown.

The State presented a completely circumstantial case against Thomas. However, there were many, many circumstances surrounding the victim, his history, his involvement in dangerous and violent activities (drug dealing and illegal gambling), his fear that people were out to kill him, the fact that he was shot and killed in his brother's car which had previously been shot at; and the fact that none of these other circumstances involved Thomas.

In addition, the victim had a pending case where he was charged at shooting at two people in a car and he told police they had the story backwards and the victim was actually shot

at by these two people! These two people were named victims in his case. Moreover, Thomas is NOT implicated in any of these other scenarios where the victim was in fear of his life. One must keep in mind that this victim was a significant drug dealer in the Akron area and he is going to police with concerns for his safety!

Yet the jury never knew about all of these other circumstances. This is not a case of "overwhelming" evidence against Thomas. Defense counsel, at trial and on appeal, had a duty to raise these other circumstances and to sow reasonable doubt that Thomas was the shooter.

It was also prosecutorial misconduct for the State to misrepresent the victim and the total circumstances surrounding the shooting rather than cherry picking the circumstances that suited him.

Thomas was prejudiced because the jury never had a complete picture of the circumstances. Thomas did not have a complete defense. See Crane v. Kentucky, supra. There is a reasonable probability of a different outcome at trial and on appeal if Thomas had the effective assistance of counsel.

A lawyer who fails to adequately investigate, introduce evidence and information that demonstrates a client's factual innocence or raises sufficient doubts as to that question to undermine the verdict, renders deficient performance. Richey v. Bradshaw, 498 F.3d 344, 362 (6th Cir. 2007); Reynoso v. Guurbino, 462 F.3d 1099, 1112 (9th Cir. 2006); Lord v. Wood, 184 F.3d 1083, 1093 (9th Cir. 1999).

The Ohio courts never determined this issue on the merits. No AEDPA deference is owed. If necessary, cause and prejudiced can be shown because Thomas hired Attorney Levine to represent him on appeal and he never filed a brief. He also did not file an appeal or a 26(B)

application or a federal habeas petition which he was hired to do in a timely fashion.

The error is not harmless.

C.

Appellate counsel was constitutionally ineffective in failing to inform Thomas of the deadline for filing a post conviction petition under ORC 2953.21 to his prejudice in violation of Sixth and Fourteenth Amendment of the federal Constitution, Gunner v. Welch, 749 F.3d 511 (6th Cir. 2014) and Williams v. Lazaroff, Case No. 14-3441, 5-12-16, unpublished, Martinez and Trevino.

The Sixth U.S. Circuit Court of Appeals has held that appellate counsel has a duty to inform his or her client of the filing deadline under ORC 2953.21. Gunner v. Welch and Williams v. Lazaroff, supra.

Moreover, this issue must be exhausted and presented under App R 26(B). Any of the issues raised above that could have been raised in a petition under ORC 2953.21 would have been raised by Thomas if counsel would have told him about the PC process and deadline. Doc. #7-2, Page ID #256.

Many of the police reports that contain evidence of the victim's drug dealing, gambling habits and other circumstances where he feared for his life discussed previously, could and should have been used in a Post Conviction Petition under ORC 2953.21 and there is a reasonable probability that Thomas would have gained a new trial or had the convictions vacated altogether.

Unfortunately for Thomas, counsel never told him about the post conviction process available to him; in this case, such an omission is no surprise given Mr. Levine's abandonment and misconduct and the ineffective assistance of his counsel and that of appointed counsel who

actually filed a very poor brief omitting many meritorious issues.

Cause and prejudice has been established due to the ineffective assistance of counsel through Mr. Levine's abandonment/incompetence and or the same for appointed appellate counsel who withdrew while the appeal was pending. The error is not harmless.

Ground Two: There was insufficient evidence to convict Thomas of Aggravated Murder and related charges under the Fourteenth Amendment of the federal Constitution.

The State's case was circumstantial and weak. Thomas testified he did not commit the Aggravated Murder or any of the related charges. The State primarily relied upon cell phone records and two videos from security cameras to implicate Thomas. The firearm used in the crime was never found; no gun shell casings were found either. No forensic evidence linked Thomas to these crimes; there was no confession; no informants; no eyewitnesses who identified Thomas.

Thomas was seen approximately 15 minutes after the crime driving a similar SUV as the State believed was involved in the homicide. Cell phone records putting Thomas in the general area along with the videos are simply not enough. There was insufficient evidence of Thomas' guilt.

"The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). See also Jackson v. Virginia, 443 U.S. 307, 315 (1979).

The sufficiency of the evidence standard requires evidence that would allow a rational juror to **"reach a subjective state of near certitude"** as to the existence of each and every element of the crime. Jackson v. Virginia, 443 U.S. at 315 (defining the beyond-a-reasonable-doubt standard); Piaskowski v. Bett, 256 F.3d 687, 692 (7th Cir. 2001) (insufficient evidence in a murder case; a strong suspicion that someone is involved in criminal activity is no substitute for proof of guilt beyond a reasonable doubt.)

If defaulted, cause and prejudice has been established through Attorney Levine's misconduct and appointed appellate counsel's withdrawal from the case.

Any state court finding is contrary to 2254 (d)(1) and (2) for the reasons discussed throughout the pleadings in this case.

Trial counsel's ineffectiveness cannot be minimized. The trial attorneys promised the cell phone records would prove Thomas' innocence. However, the so called defense expert, one of the defense lawyer's son who was a law student, did not understand the cell phone records until towards the end of the trial after he listened to the State's expert. He freely admitted his ignorance while testifying "for the defense" and thus made the lawyers look as incompetent as they actually were in this case. The records did not prove the innocence of Thomas as promised in opening statements. Further, the credibility of Thomas himself was undermined by counsel failing to investigate the case thoroughly as described earlier with respect to the BMV payment.

When all of the evidence available to this Court is considered then there is insufficient evidence to convict Mr. Thomas.

Ground Three

> Appellate counsel failed to inform Thomas of the decision by the Court of Appeals in his direct appeal and was thus constitutionally ineffective under Evitts and the Sixth and Fourteenth Amendments of the U.S. Constitution.

Direct appeal counsel never informed Thomas of the Court's decision. As a result, Thomas had to pursue a pro se delayed appeal to the Ohio Supreme Court. Thomas was prejudiced by counsel's action because he would have pursued a timely appeal if counsel had told him of the Court's decision and there is a reasonable probability that the Ohio Supreme Court would have accepted a timely appeal and granted him relief. In addition, Thomas would have pursued all other available avenues of relief more quickly than he did to secure his release from prison. See generally Glover v. Birkett, 679 F. 3d 936 (6th Cir. 2012), Hardaway v. Robinson, 655 F.3d 445 (6th Cir. 2011).

Ground Four

Actual Innocence is a "gateway" to the ineffective assistance of counsel claims under the Sixth and Fourteenth Amendments. The substance of Ground Four is set forth below for the court's convenience and de novo review.

> Mr. Thomas is actually innocent of the Aggravated Murder and related charges and is in custody for crimes he did not commit in violation of the Sixth and Fourteenth Amendments of the U.S. Constitution.

Mr. Thomas is actually innocent of the crimes for which he is convicted. He is incarcerated due to the ineffective assistance of counsel, prosecutorial misconduct and the absence of sufficient evidence to convict him. Mr. Thomas testified he did not commit these

crimes. He maintains his innocence. See Schlup v. Delo, 513 U.S. 298 (1995); Herrera v. Collins, 506 U.S. 390 (1993).

Further, Mr. Thomas presented newly discovered evidence, see Reeves, supra, i.e. evidence that was available but not presented to the jury, that he is actually innocent and there were others who were more likely to have been the shooter. At the very least, there is sufficient evidence of actual innocence to allow this court to address and decide the underlying federal constitutional issues, i.e. whether Thomas received the effective assistance of trial and appellate counsel. Further, the court must consider whether Thomas received the effective assistance of Ohio 26 (B) counsel under Morgan v. Eads, supra, and Martinez, supra. Here, Thomas was forced to file the initial 26(B) pro se due to Mr. Levine's misconduct and it was one day late and thus rejected by the Ohio courts. Further, this "denial" was then the basis of the Ohio court denying the delayed 26(B) as a "successor" without addressing the good cause offered.

The Ohio Supreme Court in Morgan v. Eads held that the 26(B) application is part of the post conviction process and thus Thomas is entitled to the effective assistance of counsel.

COA Standards

In order to make the showing required to obtain a COA, Mr. Thomas "need not show that he should prevail on the merits...rather he must demonstrate that the issues are debateable among jurists of reason; that a court could resolve the issues [in a different manner]; or that questions are 'adequate to deserve encouragement to proceed further." Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983). See also Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

A certificate of appealability should issue if the claims are not "squarely foreclosed by statute, rule or authoritative court decision or .....lacking in any factual bases in the record." Barefoot at 894.

Mr. Thomas must simply prove "something more than the absence of frivolity" or the mere "good faith" on his part. Miller-El at 338.

As held recently

> The COA inquiry, we have emphasized, is not coextensive with a merits analysis. At the COA stage, the only question is whether the applicant has shown that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." [citations omitted] This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims." [citations omitted]. "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction."

Buck v. Davis, 137 S. Ct. 759, 773 (2017)

Conclusion

At the very least, a COA must issue as to the Grounds presented by Mr. Thomas.

This case demonstrates a miscarriage of justice from beginning to end. Trial defense counsel did not understand the phone records which were at the core of the state's case; in fact, the defense relied on a cell phone expert that was not an expert at all but rather a law student who was the son of one of the defense attorneys. The student's lack of expertise, and prejudice to Thomas, is clearly demonstrated by the student's lack of knowledge that the records were kept in Central and/or Pacific Time Zones rather than Eastern Time Zones and thus completely undermined the credibility of the defense and the alibi it filed.

Defense counsel in opening statements promised the jury that the records would prove Thomas innocent. Then, during trial the law student realized, when it was much too late, that he did not know how to read the state's cell phone evidence. The records did not come close to proving Thomas is innocent. The entire defense was undermined and the credibility of defense counsel was ruined. This is outrageous and prejudicial to Thomas.

In addition, defense counsel did not investigate Thomas' testimony before trial. This lack of investigation allowed Thomas to testify, mistakenly, that he was at the Bureau of Motor Vehicles around the time of the shooting. The State presented a rebuttal witness that was devastating. There was no record at BMV corroborating the testimony of Thomas.

However, unknown to the defense and the jury, but easily available if an adequate investigation had been done, Thomas had made the payment to the BMV the day before the Aggravated Murder. If counsel had properly investigated, then they would have known this fact, discussed it with Thomas and he would not have had his credibility undermined by the rebuttal witness from BMV.

Counsel also did not use many police reports available concerning other potential suspects, the drug dealing and gambling lifestyle of the victim, the victim's fear of others after him without naming Thomas, the victim's own case where he was charged with shooting at two people in a car and his explanation to the police that those two people (neither of whom was Thomas) were shooting at him. There was plenty of evidence that someone else killed the victim. Yet the jury never knew any of this evidence of third party guilt.

The devastating effect of counsel's ineptitude in this trial cannot be understated. But then the misfortune for Mr. Thomas was compounded on appeal. Mr. Levine was timely hired by the

family of Mr. Thomas yet he did next to nothing. The appointed lawyer filed a poor brief missing many meritorious issues and then withdrew from the case.

Mr. Levine's misconduct continued and prejudiced Thomas in the 26(B) application, the delayed appeal to the Ohio Supreme Court and the lack of a post conviction petition under ORC 2953.21.

The misfortune of Thomas continued when the Ohio courts have failed to address on the merits many of the meritorious claims brought herein. Mr. Thomas has been denied access to the courts to address his legitimate federal Constitutional claims. Meanwhile Thomas is doing life.

The lower federal courts have not addressed many of the facts, legal issues and arguments contained in the Petition, the record and the Traverse. Nor did counsel for the Respondent-Appellee. It is little wonder that counsel for the Respondent does not want to defend the conduct of counsel and the Ohio courts in this case. No lawyer can reasonably defend what happened here.

Instead, counsel for Respondent convinced the lower court to procedurally default many of the claims even though procedural default is not appropriate for reasons already discussed.

The right to the effective assistance of counsel throughout this case has been made a mockery. It is actually hard to believe so many devastating and fundamental errors have taken place and that the Ohio courts have turned a blind eye rather than taking corrective measures.

The miscarriage of justice must end now. This Court must grant a COA for the reasons already given herein.

If AEDPA applies, the state court findings are contrary to 2254(d)(1) and (2). However, Mr. Thomas asserts that AEDPA does not apply and the lower courts should have reviewed ALL of the evidence in the record and granted habeas relief.

Respectfully submitted,

/s/John P. Parker

Counsel for Mr. Thomas

Service

A copy of the foregoing document was served on counsel for Respondent by regular U.S. Mail, Ms. Mary Anne Reese Office of the Attorney General of Ohio, 441 Vine Street, Suite 1600, Cincinnati, OH 45202 this 24th day of August 2021.

/s/John P. Parker