

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

KARL VINSON,

Petitioner,

v.

SHANE JACKSON,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

After filing his first habeas petition in 2006, Petitioner discovered, with the assistance of a concerned citizen and an innocence project, that his trial counsel had been ineffective in failing to investigate the serological evidence at trial. The State's serologist subsequently testified at a state post-conviction hearing in 2010 that, had trial counsel asked the right question, she would have testified at trial that Petitioner almost certainly was not the source of the semen found on the child victim's bedsheet because his blood type definitively excludes him.

After Petitioner exhausted a claim of ineffective assistance of counsel in state court, the Sixth Circuit, finding the evidence of innocence compelling, permitted Petitioner to file a successive habeas petition. However, after the district court denied relief, the Sixth Circuit held that Petitioner did not meet the requirements to file a successive petition because his trial counsel should have discovered the factual predicate of Petitioner's ineffective assistance claim. In other words, the Sixth Circuit barred Petitioner from raising an ineffective assistance claim in a successive petition on the logic that *the same lawyers who were ineffective should have discovered their own ineffectiveness*, and thus the claim could not proceed in a successive petition.

This case therefore presents the following issue for review:

When a petitioner discovers evidence establishing trial counsel's ineffectiveness after filing a first habeas petition, does the due diligence requirement in 28 U.S.C. § 2244(b)(2)(B)(i) bar the ineffective assistance claim from being litigated in a successive petition because the ineffective attorney should have discovered her own ineffectiveness?

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REFERENCES TO OPINIONS AND ORDERS BELOW

The Sixth Circuit's January 11, 2018, amended opinion denying habeas relief is found at 711 Fed. App'x 329 (6th Cir. 2018). The Michigan Court of Appeals' July 26, 2012, opinion denying Petitioner's motion for post-conviction relief; the Sixth Circuit's September 24, 2015, order authorizing Petitioner to file a successive petition for writ of habeas corpus; the district court's December 6, 2016, opinion and order denying that habeas petition; the Sixth Circuit's June 15, 2017, order granting a certificate of appealability; and the Sixth Circuit's March 14, 2018, order denying rehearing *en banc* are all unpublished.

All of these opinions and orders are reproduced in the appendix to this petition.

STATEMENT OF JURISDICTION

Petitioner seeks review of the January 11, 2018, amended opinion of the United States Court of Appeals for the Sixth Circuit. A timely petition for rehearing *en banc* was denied by the Sixth Circuit on March 14, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

28 U.S.C. § 2244(b)(2):

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

- (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
- (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

STATEMENT

In 1986, Petitioner Karl Vinson was convicted of breaking into a house and raping a nine-year-old girl in Detroit. App. 1a. The man who committed the rape left behind a semen stain on the girl's bedsheet, and the serological evidence, both at the time and now, proves Petitioner could not have been the rapist and has wrongfully served 32 years in prison for a crime he did not commit. *See* App. 43a (Sixth Circuit Order granting certificate of appealability).

That serological evidence also establishes that Petitioner's trial and appellate counsel were ineffective in failing to understand the science and that they therefore *failed to ask the State's expert at trial the single question that would have exculpated Petitioner*—who could have left the blood type-O antigens found in the semen stain on the young girl's bedsheet? App. 43a. The serologist would have answered that it is a near certainty that a type-O secretor was the source of the semen and that there was only a "remote possibility" that the antigens could have come from the victim. *Id.* *That answer would have exculpated Petitioner because it was known at the time of trial that Petitioner has blood type-AB. Id.*

The stain in question—a fresh, wet stain on the victim's bedsheet left behind by the perpetrator, which contained a mixture of the victim's blood and the rapist's semen—was the only physical evidence used for identification purposes. App. 2a. Petitioner's trial took place before DNA testing was available, but serological testing was performed by the prosecution's

serological expert, Paula Lytle. App. 2a-3a. That testing revealed only type-O blood antigens in the stain, and that Petitioner had type-AB blood. App. 3a.

The blood-type antigens present in the semen stain (type-O instead of type-AB) should have established Petitioner's complete innocence but for a critical lab error. Lytle testified at trial that Petitioner could not be excluded as a donor of the semen because a lab test had (erroneously) found Petitioner to be a "non-secretor" (a person whose blood type does *not* show up in bodily fluids such as semen). App. 3a, 39a-40a.¹ Because Lytle was not aware at trial that this was a single-perpetrator rape, she did not definitively rule him out as a source of the semen (that is, she assumed that Petitioner's type-AB antigens were not present because she erroneously believed he is a non-secretor, and she assumed that the type-O antigens came from a second rapist).

After his conviction, Petitioner tried for decades to have the stain on the bedsheet tested for DNA—until he finally learned that the Detroit Police had destroyed the evidence. App. 40a-41a. Petitioner eventually filed an *in pro per* habeas petition. That habeas petition was denied as untimely in 2006. App. 40a.

After the denial of his 2006 habeas petition and learning that the bedsheet had been destroyed, Petitioner, aided by a concerned private citizen, sought new serological testing of his secretor status. App. 41a. That testing, performed in 2009, conclusively proved Petitioner is a "very strong" type-AB *secretor*, not a type-AB *non-secretor* as the State's serologist, Paula Lytle, had testified at trial. *Id.* As stated in the Sixth Circuit's order granting Petitioner a certificate of appealability, "*the evidence [of Petitioner's correct secretor status] essentially could rule out the possibility that Vinson was the source of the stain.*" App. 43a (emphasis

¹ Eighty percent of the population are secretors, or people who naturally secrete ABO blood-type antigens into their other bodily fluids (besides blood). App. 39a-40a n.1. The remaining twenty percent of the population are non-secretors, or people who do not secrete ABO blood-type antigens into their other bodily fluids. *Id.*

added). *See, e.g., Hilliard v. Spaulding*, 719 F.2d 1443, 1445 (9th Cir. 1983) (“the [secretor] test *can* conclusively exculpate an individual if the blood types do not match.”) (emphasis in original); *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988) (recognizing that the semen stain on the victim’s jacket could have been subjected to secretor testing, “the results of which might have exonerated the defendant.”).

Petitioner could not have known at the time of trial that the State’s lab test had been incorrect in declaring him a non-secretor. Petitioner did not know his true secretor status: almost no one knows this information because, unlike blood type, it does not have any medical significance. And the serologist’s testimony declaring Petitioner a non-secretor did not mean that he committed the rape; it simply put him in the twenty percent of the population who could not be ruled out as having contributed to the semen stain. App. 3a. Therefore, Petitioner, knowing at the time of trial that he was innocent, had no reason to question the State’s claim that he was a non-secretor, and thus no reason or basis to seek retesting of his secretor status. Only after he learned that the physical evidence had been destroyed—and the DNA testing he had sought for 20 years could no longer be performed—did Petitioner seek retesting, because he had essentially no other conceivable avenue to pursue. App. 40a-41a.

After Petitioner discovered in 2009 that he is actually a type-AB *secretor* (and thus AB antigens would be present in the semen stain if he was the rapist), he promptly filed a new state post-conviction motion in which he argued, among other claims, that his trial and appellate counsel were ineffective for failing to investigate and understand the serological evidence. App. 41a. At a hearing on that motion, Paula Lytle—the State’s own serologist at trial—testified that Petitioner could not have been the source of the semen found on the victim’s sheet and that she would have told the prosecutor that Petitioner was excluded if she had known he was a secretor. App. 43a.

But Lytle also confirmed that had she been asked a single question at trial—whose type-O antigens are those in the stain? — she would have testified that those antigens almost certainly came from a semen donor (i.e., the rapist) who has type-O blood and that there is only a “remote possibility” that they from the victim. *Id.* In other words, the State’s own serologist confirmed that not only did Petitioner’s correct secretor status exculpate him but also that she would have almost completely exculpated him at trial, *even with the incorrect secretor status result*, had counsel asked her who was the source of the blood type-O antigens found in the stain on the sheet. App. 43a.

The Michigan Court of Appeals, the last state court to issue a reasoned decision on that post-conviction motion, denied relief claiming the evidence was not new because Petitioner should have sought retesting of his secretor status at the time of trial. App. 12a-13a. Therefore, that court rejected his ineffective assistance claims. App. 14a.

After exhausting his state court remedies, Petitioner received permission from the Sixth Circuit to file a successive habeas petition in 2014. App. 15a. That court found that Petitioner had presented a *prima facie* case that the factual predicate of his claims could not have been previously found by him through due diligence and that no reasonable juror would convict him if he/she had known of the new serology evidence. App. 19a-20a.

Petitioner’s habeas petition was denied by the District Court, and the court declined to issue a certificate of appealability. App. 21a-38a. The Sixth Circuit, however, granted a certificate of appealability, finding again that Petitioner had diligently sought DNA testing on the bedsheet stain and then turned to the possibility of serological retesting only after learning the evidence had been destroyed. App. 40a-41a. The Sixth Circuit also found that the district court had mischaracterized the strength of the serological evidence and had erroneously found that Ms.

Lytle would not have exculpated Petitioner at trial if she had been asked the right question when, in fact, she made it clear that she would have exculpated him. App. 43a.

However, after briefing, a different panel of the Sixth Circuit denied the petition in a short opinion issued without oral argument. App. 1a-7a. In contrast to the panel that granted permission for Petitioner to file a successive petition and the panel that granted the certificate of appealability, the third panel found that Petitioner did not meet the due diligence requirement of 28 U.S.C. §2244(b)(2)(B) for filing a successive habeas petition because the newly discovered evidence—Petitioner’s correct secretor status and the fact that Lytle would have exculpated him at trial if asked the right question—could have been discovered through the exercise of diligence “at his original criminal trial.” App. 6a-7a. In other words, the Sixth Circuit panel concluded that Petitioner could not file a successive habeas petition after he discovered the factual basis of his ineffective assistance of counsel claims because his ineffective attorneys should have discovered the factual basis of their own ineffectiveness.

Petitioner filed a timely petition for rehearing or rehearing *en banc*, arguing that the due diligence requirement of 28 U.S.C. § 2244(b)(2)(B)(i) must apply to what the *claimant*, not his counsel, could have discovered through due diligence. Petitioner also argued that he had in fact exercised due diligence. The Sixth Circuit denied rehearing on March 14, 2018. App. 46a.

REASONS FOR GRANTING THE WRIT

I. The Circuits Have Reached Inconsistent Results as to Whether the Due Diligence Requirement Set Forth in 28 U.S.C. § 2244(b)(2)(B)(i) is Applicable to the Claimant or Claimant’s Counsel.

The provision governing successive habeas petitions, 28 U.S.C. § 2244(b)(2), permits a successive petition to be considered if “the factual predicate for the [successive habeas] claim

could not have been discovered previously through the exercise of due diligence.” The Courts of Appeals are split as to whom this due diligence requirement applies.

Some circuits have held that the due diligence requirement applies only to the habeas petitioner himself. That is, the test is whether the petitioner *himself* could have discovered the factual predicate for the claim with due diligence. *See, e.g., Herrera-Gomez v. United States*, 755 F.3d 142, 147 (2nd Cir. 2014) (“under pre-AEDPA law, a prisoner was required to show ‘cause’ for why a successive habeas petition should be permitted by demonstrating that he ‘conduct[ed] a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition.’ There is nothing to suggest that Congress intended to eliminate that requirement for successive § 2255 motions when it amended the statute by enacting AEDPA.”) (citing *McCleskey v. Zant*, 499 U.S. 467, 498 (1991)); *Libby v. Magnusson* 177 F.3d 43, 50 (1st Cir. 1999) (evaluating due diligence by what claimant knew).

However other circuits have held that the due diligence requirement applies to the petitioner’s prior counsel. *Johnson v. Dretke*, 442 F.3d 905, 910 (5th Cir 2006) (“Thus, Johnson’s *counsel* knew or should have known . . . the failure to previously discover . . . is objectively a bar to Johnson’s successive petition”) (emphasis added); *Case v. Hatch*, 731 F.3d 1015, 1031 (10th Cir. 2013) (evaluating “the failure of defense” and defense counsel in evaluating due diligence).

Further confounding matters is the fact that different panels of the same circuits and even different judges on the same panel reach varying results. *Compare Cooper v. Woodford*, 358 F.3d 1117, 1121, 1126 (9th Cir. 2004) (majority applying due diligence standard to the applicant, while the dissent would have it applied to the “defense”); *with Siripongs v. Calderon*, 167 F.3d 1225, 1228 (9th Cir. 1999) (finding diligence requirement not met because “the evidence was available for the defense to test at trial.”); *compare In re Boshears*, 110 F.3d 1538, 1540 (11th

Cir. 1997) (“[U.S.C. 28 § 2244(b)(2)(B)(ii)] means that an *applicant* seeking permission to file a second or successive habeas motion must show some good reason why *he or she* was unable to discover the facts supporting the motion before filing the first habeas motion.”) (emphasis added); *with Felker v. Turpin* 101 F.3d 657, 662 (11th Cir. 1996) (finding diligence requirement not satisfied because “*counsel* for Petitioner could have sought [the] information”) (emphasis added).

The Sixth Circuit’s inconsistency in applying the standard within this very case illustrates the need for this Court’s intervention. The panel that granted Petitioner permission to file his successive petition unquestionably recognized that the due diligence requirement in 28 U.S.C. § 2244(b)(2)(B)(i) asks what the claimant, not the allegedly ineffective counsel, could have discovered. *See* App. 19a. (summarizing Petitioner’s diligent efforts over two decades to prove through DNA testing that biological evidence on the bedsheet did not belong to him and observing that new secretor testing only became possible after private citizen offered to pay for testing). However, a different panel of the Sixth Circuit later squarely held that Petitioner could not file a successive petition after he discovered the factual basis of his claims because his trial attorney should have discovered the factual basis at the time of trial (that is, she should have discovered her own ineffectiveness). App. 6a-7a.

There is, therefore, a persistent split among the circuits and even within the circuits, sometimes, as here, even on the same case. This Court should exercise its jurisdiction to settle this important question.

II. The Sixth Circuit's Decision Rests on an Unsustainable Reading of Both the Statutory Text and the Sixth Amendment Right to Counsel.

The Sixth Circuit faulted Petitioner for his counsel's errors when the panel denied Petitioner's habeas petition. According to the Sixth Circuit, and other circuits, a petitioner, like Mr. Vinson, who finally discovers proof that his counsel was ineffective cannot bring a successive habeas petition simply because his ineffective counsel should have discovered his own ineffectiveness. This result is absurd, given both the text of 28 U.S.C. § 2244(b)(2)(B)(i) and the purpose of the Sixth Amendment.

The relevant portion of § 2244(b)(2)(B) provides that "A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless . . . the factual predicate for the claim *could not have been discovered* previously through the exercise of due diligence[.]" (Emphasis added). The Sixth Circuit panel that permitted Petitioner to file a successive petition read the discoverability language as applying to Petitioner himself, App. 19a, but the Sixth Circuit panel that rejected his petition held that it applied to his prior, allegedly ineffective, counsel, who should have discovered the exculpatory evidence at the time of trial. App 6a-7a.

The latter interpretation is absurd because it reads the language to bar a habeas petitioner from filing a successive claim if *anyone* could have found the evidence earlier through due diligence. By that reading, if a habeas petitioner discovers *Brady* material withheld by the State after filing a first habeas petition, she would be barred from filing a second petition because the *Brady* material could have been discovered earlier (and was, in fact, discovered earlier) by the State. And by that reading, if, as here, an indigent and incarcerated habeas petitioner only discovers her prior attorneys' ineffectiveness after filing a habeas petition, that claim can never

be raised in a successive petition. Such a reading of section 2244(b) cannot be correct because that section is focused on what the *applicant* must show to be permitted to file a successive petition, not on what other actors may have known.

And that reading of 2244(b) creates tension with the Sixth Amendment itself. This Court has explained the purpose of the right to counsel “is to ‘protect the unaided layman at critical confrontations’ with his ‘expert adversary,’ the government.” *McNeil v. Wisconsin*, 501 U.S. 171, 177–78 (1991) (quoting *United States v. Gouveia*, 467 U.S. 180, 189 (1984)).

To deny a petitioner’s successive habeas petition raising a newly discovered claim of ineffective assistance of counsel because his ineffective counsel should have previously discovered their own ineffectiveness—as the Sixth Circuit did here—is inherently contrary to the purpose of the Sixth Amendment right to counsel, as it faults the “unaided layman” for his counsel’s errors. The test for due diligence in successive habeas petitions then must be considered from the perspective of what the claimant could have discovered, rather than what his counsel knew or could have discovered. To hold that the burden lies with the claimant’s counsel would effectively nullify the claimant’s Sixth Amendment right to effective counsel, unless she is fortunate enough to discover that ineffectiveness before filing a first habeas petition.

As discussed above, the Sixth Circuit is not alone in making this mistake. The split among the circuits and the importance of clarifying the proper due diligence standard justify the exercise of this Court’s jurisdiction.

III. Petitioner’s Case Is an Excellent Vehicle to Resolve the Statutory Question.

Petitioner’s case turns squarely on the question presented. The Sixth Circuit panel unambiguously denied Petitioner relief on the basis that his prior counsel could have discovered the highly exculpatory serological evidence with the exercise of due diligence. App 6a-7a. A

different panel of the Sixth Circuit, by contrast, allowed him to file a successive petition by unambiguously focusing on Petitioner's own diligence, instead of that of his allegedly ineffective prior counsel, in finding the exculpatory evidence that his prior counsel missed. App. 19a.

Petitioner's trial counsel, after conducting a reasonable investigation to understand the serological science and its potential to exculpate her client, would have understood the need to question the State's serologist, Paula Lytle, at trial. However, as the earlier Sixth Circuit panel correctly recognized, Petitioner could not have discovered the factual predicate underlying his successive habeas claim through the exercise of his own due diligence.

Because she was constitutionally ineffective, trial counsel failed to ask Ms. Lytle the one question that the earlier panel of the Sixth Circuit recognized "might have exonerated" her client: "Who supplied the type-O antigens found in the stain?" App. 20a. If that one question had been asked, Lytle would have explained that the type-O antigens almost certainly came from the semen of the rapist, thus exonerating Petitioner, who has type-AB blood, and she would have allowed only a "remote possibility" that the antigens could have come from the victim. App. 43a.

Trial counsel's failure to adequately investigate the scientific evidence that should have exculpated her client fell below an objective standard of reasonableness. *See, e.g., Hinton v. Alabama*, 571 U.S. 263 (2014) (holding trial counsel ineffective for failing to obtain adequate expert to examine and challenge ballistics evidence). Similarly, in failing to investigate the serological evidence and then litigate an ineffective assistance of trial counsel claim, appellate counsel was also constitutionally ineffective. *See Evitts v. Lucey*, 469 U.S. 387, 395-97 (1985).

In this case, trial counsel failed to speak before trial with the State's serologist, Ms. Lytle, and as a result, failed to ask the one question that any reasonably well-prepared

attorney would have asked. That one question would have produced a highly exculpatory response. App. 43a. Because the only other inculpatory evidence was weak identification evidence from the young victim, asking the right question of the serologist almost certainly would have changed the outcome of Petitioner's original trial, making the trial counsel's error highly prejudicial.

As the Sixth Circuit panel that allowed the successive petition correctly put it, "[t]he factual predicate underlying [Petitioner's] remaining claims is that *the semen found on the victim's bed could not have belonged to him.*" App. 19a (emphasis added). The fact that the semen on a young rape victim's bedsheet does not belong to the defendant would, in fact, have changed the outcome of this case.

Finally, if the Sixth Circuit had applied the correct standard to the due diligence question, Petitioner would certainly have met that standard. As the Sixth Circuit panel that allowed him to file a successive petition and the panel that granted him a certificate of appealability both found, Petitioner diligently tried for two decades to obtain DNA testing on the stained bedsheet and only turned to the possibility of secretor testing after learning that the police had destroyed the evidence. App. 19a, 40a-41a. Petitioner, a layman without serological training, could not have known at the time of trial that his original secretor status was wrong because falsely being labeled a non-secretor did not mean that he committed the rape. Nor could he have known that, even with the incorrect secretor result, the State's own serologist would have essentially exculpated him at trial had she simply been asked who contributed the type-O antigens found in the semen stain.

Petitioner could not discover any of this highly exculpatory information until a concerned citizen paid for new secretor testing in 2009. The new testing led to the discovery that Ms. Lytle not only could confirm that Petitioner was completely excluded as the source of

the semen because he is actually a secretor, but also that *she would have exculpated him at trial even with the wrong secretor result had she been asked the right question.*

It is clear from these facts that Petitioner satisfies the due diligence requirement of 28 U.S.C. § 2244(b)(2)(B), if that provision is read to apply to his diligence and not that of his allegedly ineffective prior counsel. Therefore, this case is a perfect vehicle for this Court to decide the proper interpretation of 28 U.S.C. § 2244(b)(2)(B)(i).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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