

No. 16-2760
Vinson v. Jackson

After unsuccessfully attempting to wake the victim's sister up (who shared a bedroom with the victim), he told the girl to close her eyes and count to fifty. While she counted, he exited through the window.

At trial, the prosecution relied on two pieces of evidence to secure Vinson's conviction. First, the victim identified Vinson as her rapist. She explained that there was enough light in the room for her to see his facial features. She also explained that she recognized his voice because she had met him previously, since Vinson's ex-wife babysat the victim. Second, the state relied on forensic evidence from the crime scene. Specifically, there was a stain containing a mixture of blood and seminal fluid left on the victim's bedsheet. While DNA testing was not yet available, the state conducted serological tests on the bedsheet. Serological testing analyzes bodily fluids and can determine, among other things, the presence of seminal fluid and, in some instances, blood types.

In this case, the state's serological tests on the bedsheet revealed two things: (1) the presence of seminal fluid and at least one sperm cell; and (2) blood type-O antigens.¹ The state conducted tests on both the victim and Vinson, as well. The victim was a type-O secretor and Vinson was determined to be a type-AB non-secretor. The difference between a secretor and a non-secretor is important for purposes of Vinson's claim. A secretor's "bodily fluids (saliva, semen, vaginal secretions) contain a water-soluble form of the antigens of the ABO blood group." *People v. Vinson*, No. 303593, 2012 WL 3046236, at *2 (Mich. Ct. App. July 26, 2012) (quoting mediLexicon, <http://medilexicon.com/medicaldictionary.php?t=80515>). A non-secretor's bodily fluids, on the other hand, will contain no such antigens. Thus, a secretor's

¹ The presence of type-O antigens indicates that the donor of the bodily fluids had type-O blood. Similarly, were there type-AB antigens in the stain, it would indicate that the donor had type-AB blood.

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blood type can be determined by testing that person's bodily fluids, whereas a non-secretor's blood type cannot.

At trial, Paula Lytle, an expert witness for the prosecution, testified that she had tested Vinson and determined him to be a non-secretor, meaning that his blood type *would not* have shown up in the stain on the bedsheet. This was an important piece of testimony, as the bedsheet stain analysis revealed only type-O antigens. Were Vinson a secretor, there likely would have been type-AB antigens on the bedsheet, as well. However, the absence of type-AB antigens from the bedsheet could be explained away by Vinson's non-secretor status.

The jury convicted Vinson, and he began his appeal process. During this process, Vinson sought DNA testing (which, at that point, was available) of the bedsheet; however, he learned that the physical evidence had since been destroyed. After exhausting his state court remedies and unsuccessfully seeking a writ of habeas corpus in federal district court,² Vinson approached a concerned citizen who offered to pay for a new round of serological testing. That testing demonstrated that Vinson was actually a type-AB *secretor*. The Michigan State Police conducted a follow-up test and confirmed that Vinson was, in fact, a secretor. That fact is not in dispute here. Vinson was subsequently granted a post-conviction evidentiary hearing.

Lytle was called to testify once again at the evidentiary hearing. She testified that, had she been asked where the type-O antigens in the stain had originated, she would have responded that they could not have come from Vinson, but that they could have come from the "donor of the semen and/or the victim." She further testified that, if she had known that Vinson was a secretor at his trial, she would have determined that the physical evidence excluded him. Defense counsel called a second expert witness, Arthur Young, who corroborated Lytle's

² Aside from the fact that the claims in his second petition are different from those in his earlier petition, the contents of Vinson's first habeas petition are not important for purposes of this proceeding. See 28 U.S.C. § 2244(b)(1) (requiring dismissal of successive habeas petitions making the same claims).

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testimony. In response, the prosecution presented expert witness Connie Swander, who testified that a stain might contain type-AB antigens but fail to register a result if there is an insufficient number of antigens present on the sampled portion. In other words, according to her testimony, Lytle's tests on the bedsheet stain did not prove the absence of type-AB antigens.

After this evidentiary hearing, the trial judge denied Vinson's request for relief and his claim of ineffective assistance of counsel. Vinson unsuccessfully challenged that determination in the Michigan Court of Appeals. *People v. Vinson*, No. 303593, 2012 WL 3046236, at *7 (Mich. Ct. App. July 26, 2012). The Michigan Supreme Court denied leave to appeal that decision. *People v. Vinson*, 843 N.W.2d 493 (Mich. 2014). Vinson then wished to file a second petition for a writ of habeas corpus. As required by 28 U.S.C. § 2244(b)(3)(A), he sought permission from this court to file that petition. *In re Vinson*, No. 14-2521 (6th Cir. Sept 24, 2015). We authorized that filing and restricted Vinson to three claims: (1) ineffective assistance of trial counsel for failing to adequately cross-examine Lytle; (2) ineffective assistance of appellate counsel for failing to raise the first claim on appeal; and (3) actual innocence. *Id.* The district court rejected all three of the claims. *Vinson v. Mackie*, No. 14-CV-14542, 2016 WL 7100249, at *10 (E.D. Mich. Dec. 6, 2016). Vinson sought a certificate of appealability as to the district court's judgment. *See* 28 U.S.C. § 2254(c)(2). We granted that certificate as to Vinson's first two claims—those alleging ineffective assistance of counsel—and denied it as to his third claim of actual innocence. *Vinson v. Jackson*, No. 16-2760 (6th Cir. June 15, 2017) (order granting certificate of appealability in part).

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II. ANALYSIS

This is Vinson’s second petition for a writ of habeas corpus. As such, he must show that he satisfies the threshold AEDPA requirements to pursue his petition. In relevant part, AEDPA provides:

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.

28 U.S.C. § 2244(b)(2). In granting leave to file this second petition, we held that Vinson had made a *prima facie* showing that he satisfied these requirements. *See In re Vinson*, No. 14-2521 (6th Cir. Sept. 24, 2015); *see also* 28 U.S.C. § 2244(b)(3)(C). The *prima facie* determination, however, is not a full-throated review—it only requires us to determine that the allegations “warrant a fuller exploration in the district court.” *In re McDonald*, 514 F.3d 539, 544 (6th Cir. 2008) (quoting *In re Lott*, 366 F.3d 431, 433 (6th Cir. 2004)). A district court must apply a stricter standard. *See, e.g., Tyler v. Cain*, 533 U.S. 656, 661 n.3 (2001) (“[T]o survive dismissal in district court, the applicant must actually ‘sho[w]’ that the claim satisfies the standard.”). Accordingly, the district court was correct to recognize that it needed to make the threshold

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AEDPA findings. *Vinson*, 2016 WL 7100249, at *4. But the district court never clearly made any findings as to those requirements.³

Only the requirements of section 2244(b)(2)(B) are implicated here. We need not proceed past the first of those requirements, new evidence not previously discoverable through due diligence, because Vinson has failed to present any.

In his second habeas petition and brief in support thereof, Vinson relied primarily on his newly discovered secretor status. But Vinson's status as a secretor or a non-secretor was a discoverable fact at the time of his original habeas petition—the key reference point for our analysis. Indeed, this evidence was available at his original criminal trial, well before his first request for habeas relief. That his secretor status was tested is proof of that. Thus, this information does not meet the requirements of § 2244(b)(2)(B)(i) and cannot support a second habeas petition. 22 U.S.C. § 2244(b)(2)(B)(i).

Perhaps recognizing this deficiency, Vinson presents a slightly different argument on appeal. He argues that the factual predicate supporting his claim is his secretor status “coupled with Ms. Lytle’s testimony at the evidentiary hearing.” He argues that Lytle’s testimony indicates that she would have exonerated Vinson at trial even if he actually was a non-secretor. Specifically, Vinson argues that Lytle, had she been asked the right questions, would have testified that “there is only a remote possibility that the Type-O antigens on the [bedsheet] came from the victim, and, therefore, the Type-O antigens almost certainly came from the true perpetrator’s semen.” But this factual predicate fails for the same reason. Nothing in Lytle’s

³ The district court’s opinion is unclear as to how it rejected these three claims. The opinion began by indicating that it would dismiss the claims due to Vinson’s failure to satisfy the threshold AEDPA requirements. *Vinson*, 2016 WL 7100249, at *4. However, it then proceeded to consider the merits of Vinson’s ineffective assistance of counsel claims—an inquiry presumably reserved for consideration of his habeas petition—and ultimately ordered that his petition be denied, rather than dismissed. *Id.* at *10. This confusion, however, does not affect our judgment here. Accordingly, we need not resolve how the district court did away with these claims.

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statements can be considered evidence that could not have been previously discovered. The technology existed to determine blood type and secretor status. And Lytle's conclusions drawn from those tests were clearly discoverable, as she offered them at trial.

Regardless of how Vinson articulates the factual predicate undergirding his second habeas petition, it is clear that the facts giving rise to this claim were discoverable at trial, and thus, could have been known when he filed his first habeas petition. Because we must dismiss all successive habeas petitions unless the factual predicate supporting the petition "could not have been discovered previously through the exercise of due diligence," Vinson's petition cannot proceed. *See* 28 U.S.C. § 2244(b)(2)(B)(i).

Even had Vinson presented evidence sufficient to satisfy § 2244(b)(2)(B)(i), his second petition must still be dismissed. The second threshold AEDPA requirement mandates that Vinson's new evidence must show, by clear and convincing evidence, that no reasonable juror would have found him guilty. *Id.* § 2244(b)(2)(B)(ii). At trial, the victim presented eyewitness testimony identifying Vinson as her assailant. Given that fact, it is difficult to see how Vinson's secretor status, alone, would meet this requirement.

III. CONCLUSION

For these reasons, we **AFFIRM** the judgment of the district court.

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 26, 2012

v

KARL FREDERICK VINSON,

Defendant-Appellant.

No. 303593
Wayne Circuit Court
LC No. 86-000214-01-FC

Before: MURRAY, P.J., and WHITBECK and RIORDAN, JJ.

PER CURIAM.

Defendant Karl Frederick Vinson appeals by leave granted the denial of his motion for relief from judgment premised on his claim of newly discovered evidence. We affirm.

A jury convicted Vinson in 1986 of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a) (victim under 13 years of age), and breaking and entering a building with the intent to commit a felony (CSC) therein, MCL 750.110.¹ The trial court sentenced Vinson to serve 10 to 50 years' imprisonment for the CSC conviction and to concurrently serve 5 to 15 years in prison for the breaking and entering conviction. This Court denied Vinson's first appeal, which was premised solely on prosecutorial misconduct. *People v Vinson*, unpublished opinion per curiam of the court of Appeals, issued October 25, 1988 (Docket No. 94565). The current appeal stems from Vinson's filing of a third motion for relief from judgment in 2009, asserting that he had newly discovered evidence that would support an acquittal upon retrial. Vinson also argued ineffective assistance of his trial and appellate counsel. Following an evidentiary hearing, the trial court denied Vinson's motion, and this appeal ensued.

This matter arises from the brutal rape of a nine-year-old female victim in her own bed. The victim was asleep when she awoke to find a man in her bedroom. She indicated that she was able to see his facial features because lights, both within the home and outside, provided

¹ We note that the jury also determined that Vinson was guilty of sexual penetration occurring under circumstances involving the commission of another felony, MCL 750.520b(c), and causing personal injury to victim with use of force or coercion to accomplish sexual penetration, MCL 750.520b(f).

illumination within the room. The victim identified Vinson, claiming that she had seen him previously and she recognized his voice, although she could not immediately recall his name. She was further able to identify Vinson as her assailant because she was familiar with him since his wife had babysat her and her younger sister. Vinson's mother and her husband provided an alibi for him at trial, indicating that he was sleeping on their couch at the time of the assault.

Following the assault, the victim was taken to the hospital. She experienced a bloody discharge and a deep cut requiring surgical repair. A specimen of vaginal secretions was obtained from the victim revealing the presence of nonmoving sperm; however, the specimen was not provided for forensic testing.

Fingerprints were not able to be recovered from the window casing where the perpetrator entered the victim's bedroom. The victim's bed sheet, containing a "kind of wet" bloodstain, was taken into evidence. The bed sheet was examined by Sergeant Ronald Badascewski of the Crime Lab Serology and Trace Evidence Unit. Sergeant Badascewski performed an acid phosphatase test on the stained area with a positive result for blood and seminal fluid. After washing the stain from the portion of the sheet, Sergeant Badascewski placed the washing on a microscope slide and found one complete sperm. He then turned over a portion of the stain to Paula Lytle, a registered medical technologist, in order to determine the blood type of the stained area. Lytle detected the presence of blood type O from the sample, which was consistent with the victim. At trial, Lytle acknowledged that she only received one sample from the bed sheet stain and that she did not receive the sperm recovered by Sergeant Badascewski for testing. When questioned by the prosecutor, Lytle opined that the sample she examined contained a mixture or combination of blood and seminal fluid.

Lytle also obtained a blood and saliva sample from the victim and determined that her blood type was O and that she was a secretor. A secretor is defined as:

An individual whose bodily fluids (saliva, semen, vaginal secretions) contain a water-soluble form of the antigens of the ABO blood group. Secretors constitute 80% of the population. In forensic medicine, the examination of fluids has enhanced the ability of law enforcement officials to develop identifying information about perpetrators and narrow a field of suspects. [See mediLexicon, <http://www.medilexicon.com/medicaldictionary.php?t=80515> (accessed May 24, 2012).]

Blood and saliva samples were also obtained from Vinson. Lytle determined at that time that Vinson's blood type was AB and that he was a nonsecretor, defined as "[a]n individual [whose bodily fluids] and saliva that do[] not contain antigens of the ABO blood group." *Id.*

During closing argument at trial, the prosecutor stated that the bed sheet contained a mixture of blood and seminal fluid and argued that the stain came from Vinson and the victim. The prosecution stated that Vinson was a nonsecretor "along with 20 percent of the population." The implication of this statement was that Vinson's status as a nonsecretor explained the absence of any detectable AB antigens from the stained bed sheet. The prosecutor also noted that the victim knew Vinson and had no motivation to lie regarding his identity as the perpetrator and questioned the veracity of Vinson's alibi defense.

Although the jury initially requested the testimony of all the expert witnesses, they rescinded the request and subsequently found Vinson guilty of first-degree CSC and breaking and entering. Along with the denial of Vinson's initial appeal to this Court following his convictions, he also subsequently filed three motions for relief from judgment and a federal petition for habeas corpus, all of which were unsuccessful. Vinson later learned that the physical evidence, including the bed sheet, was destroyed by police. In 2009, Vinson obtained retesting and analysis confirmed that his blood type is AB. Contrary to the evidence at trial, the 2009 analysis revealed that Vinson actually is a secretor. These results were confirmed by an independent laboratory.

In September 2009, Vinson again sought relief from judgment premised on prosecutorial misconduct, ineffective assistance by his trial and appellate counsel, and newly discovered evidence of his status as an AB secretor. The matter came back before the original trial judge, who questioned the ability to demonstrate Vinson's innocence. The trial judge speculated that Vinson could have been using a condom at the time of the assault, but defense counsel responded that, at trial, the prosecution had argued that the semen had come from the rapist. The trial judge ordered the Michigan State Police (MSP) to determine Vinson's blood type and secretor status, and on August 20, 2010, the MSP report confirmed that Vinson is an AB secretor of ABO antigens.

At the ensuing evidentiary hearing, Lytle was called to testify. Following her confirmation of her trial testimony along with the testing originally conducted and results, she acknowledged recent testing demonstrating Vinson's secretor status. Following questioning, Lytle opined that testing on a semen stain differed from the testing performed on a blood stain to determine blood type. Lytle affirmed that the sample tested contained a mixture of semen and blood and, when asked where the type O in the stain originated, Lytle replied that it could not have come from Vinson, but that it could have come from the semen donor and/or the victim. Further, if the type O detected in the stain originated from the victim, then it would have come from her bodily fluid and not her blood. Lytle further opined, on the basis of the results obtained through the acid phosphatase test performed by Sergeant Badascewski, that there was a very high presence of semen in the stain that she tested. She deemed it unlikely that the victim, due to her young age, would have vaginal secretions. Lytle confirmed that she did not detect any AB antigenic substances.

On cross-examination, Lytle acknowledged she did not test the "exact same piece of material" that Sergeant Badascewski tested and detected the presence of seminal fluid. As Lytle did not repeat the test performed by Sergeant Badascewski or examine the section of the bed sheet she received for sperm cells, she could not determine if the material she received contained semen. Lytle further admitted that she might have cut additional samples from the bed sheet and performed additional testing had she known Vinson's status as a secretor. Upon questioning by the trial judge, Lytle indicated that she had originally testified that Vinson was a nonsecretor and that she now believed that the O antigen detected could have been from a male donor of the semen. When asked if she had known Vinson was a secretor during the original trial, Lytle indicated she "would testify that his blood type was not detected . . . and he could not be the donor of the O substance in that stain."

Additional hearings were conducted, with defense counsel presenting Arthur Young, an expert in forensic serology, who confirmed Vinson's status as an "ABO type AB secretor" and that Vinson was a "very strong secretor." Young further testified that he would have expected semen to be mixed in with the blood on the bed sheet and that the O antigens detected were more probably from semen rather than the victim's vaginal secretions. In contrast, the prosecution's witness Connie Swander of the MSP laboratory indicated that it was possible that the O antigen detected was derived from the victim's blood. Swander opined that the only known fact was the presence of an O antigen but that its origin could not be ascertained. She further opined that, despite the victim's young age, vaginal fluid could be in the stain. Swander did admit that she could not rule out the possibility that the blood type of the perpetrator of the assault was O.

The trial judge denied Vinson's request for relief from judgment and his claim of ineffective assistance of counsel, questioning whether Vinson knew of his secretor status based on his prior army enlistment and suggesting that Vinson may have purposefully failed to provide an effective sample for the determination of his secretor status. The trial judge further opined that the bed sheet stain could have come from another source, such as an adult in the household having engaged in sexual intercourse on the bed sheet at an earlier time. The trial judge emphasized the victim's identification of Vinson as the perpetrator as the primary basis for his conviction and indicated that the forensic evidence served only to bolster her identification.

On appeal, Vinson argues that the trial court abused its discretion when it dismissed the newly discovered evidence based purely on speculation. Vinson contends that the prosecution's original case was highly dependent on the now-discredited determination that he was a nonsecretor. In the alternative, Vinson contends that his prior counsel was ineffective for failing during trial or the initial appeal to obtain independent testing and confirmation of his secretor status, for failing to effectively cross-examine Lytle, and for failing to object to misstatements of the forensic evidence by the prosecutor. Vinson alternatively contends that the new evidence establishes his innocence and, therefore, constitutionally entitles him to a new trial.

This Court reviews for an abuse of discretion a trial court's decision on a motion for relief from judgment. *People v Swain*, 288 Mich App 609, 628; 794 NW2d 92 (2010). We review findings of fact by the trial court for clear error. *Id.* We determine that a trial court has abused its discretion when "its decision falls outside the range of reasonable and principled outcomes." *Id.*

Vinson contends that he presented compelling new scientific evidence that resolves any reasonable doubt about whether he could have left the semen stain detected on the bed sheet. He further points out that Lytle testified at the subsequent evidentiary hearing that if he had been correctly identified as a secretor at the time of his original trial, she would have informed the jury that he was excluded as a donor of the semen stain on the bed sheet. As a result, Vinson claims that this newly discovered evidence would have made a different result reasonably likely on retrial.

Our Supreme Court has determined:

For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) "the evidence itself, not merely its materiality, was

newly discovered”; (2) “the newly discovered evidence was not cumulative”; (3) “the party could not, using reasonable diligence, have discovered and produced the evidence at trial”; and (4) the new evidence makes a different result probable on retrial. [*People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (citations omitted).]

As our Supreme Court recently emphasized in *People v Rao*, 491 Mich 271, 279-280; ___ NW2d ___ (2012):

It is equally well established that “motions for a new trial on the ground of newly-discovered evidence are looked upon with disfavor, and the cases where this court has held that there was an abuse of discretion in denying a motion based on such grounds are few and far between.” [Citation omitted.]

The rationales underlying such disfavor are premised on both “the principle of finality” and “the policy of the law . . . to require of parties care, diligence, and vigilance in securing and presenting evidence.” *Id.* at 280. Specifically:

[I]n fairness to both parties and the overall justice system, the law requires that parties secure evidence and prepare for trial with the full understanding that, absent unusual circumstances, the trial will be the one and only opportunity to present their case. It is the obligation of the parties to undertake all reasonable efforts to marshal all the relevant evidence for that trial. Evidence will not ordinarily be allowed in installments. *Cress* set forth the showing that a defendant must make in order to satisfy the exception to this rule and struck a balance between upholding the finality of judgments and unsettling judgments in the unusual case in which justice under the law requires a new trial. [*Id.*]

Similar to the defendant in *Rao*:

Whether defendant is entitled to a new trial on the basis of [his] proffered evidence is governed by *Cress*, and specifically [his] case is resolved by applying the interrelated first and third parts of the *Cress* test, which require that defendant demonstrate that the evidence is “newly discovered” and that [he] “could not, using reasonable diligence, have discovered and produced the evidence at trial[.]” *Cress*, 468 Mich at 692; 664 NW2d 174. After applying the *Cress* test, we conclude that defendant did not carry [his] burden of satisfying this test and thus is not entitled to a new trial. [*Rao*, 491 Mich at 281.]

Our Supreme Court has determined that evidence cannot be deemed newly discovered “if the defendant or defense counsel was aware of the evidence at the time of trial.” *Id.* At the time of the original trial, Vinson was aware of the prosecution’s evidence that ostensibly established he was a nonsecretor and thus could not be ruled out as the perpetrator. Vinson asserts that he is only now aware that the earlier testing was inaccurate and that he is actually a secretor. But we construe Vinson’s claim as actually being one for newly available evidence rather than newly discovered evidence. See *id.* at 282-283, 288; *People v Terrell*, 289 Mich App 553; 797 NW2d 684 (2010). As Vinson himself points out, his actual status as a secretor has not changed over

time. Therefore, his status as a secretor was, and has always been, *potentially available* evidence. See *Rao*, 491 Mich at 285 n 2. That he did not realize he should have sought to question the test results does not vitiate that the *Cress* test requires that the defendant prove that he *could not* have discovered the evidence.

The burden is on Vinson, “on all parts of the *Cress* test, . . . to make an affirmative showing that [he] “could not, using reasonable diligence, have discovered and produced the evidence at trial[.]” *Rao*, 491 Mich at 289, citing *Cress*, 468 Mich at 692. As our Supreme Court noted, even if a defendant is not aware “of the *actual* medical information” it “begs the question *why* defendant lacked awareness at the time of trial[.]” *Rao*, 491 Mich at 287 (emphasis in original). If testing of his secretor status was as pivotal at trial as is now claimed on appeal, reasonable diligence would have required, at the very least, that Vinson request independent laboratory testing. *Id.* at 290. He was certainly aware of the evidence, the manner of testing, and that results contrary to those obtained by the prosecution’s witness could have provided him with support for his defense that he was not the perpetrator. Yet, Vinson fails to offer any viable reason to explain why he did not seek independent testing at the time of trial. When viewed in the context of reasonable diligence, Vinson should have minimally procured independent testing or sought the trial court’s assistance in procuring such testing. “Michigan courts have held that a defendant’s awareness of the evidence at the time of trial precludes a finding that the evidence is newly discovered, even if the evidence is claimed to have been ‘unavailable’ at the time of trial.” *Id.* at 282.

Additionally, not only were elements one and three not satisfied, but we also hold that this new evidence would not make a different result probable on remand. Our review of the original trial transcripts does not support Vinson’s contention that the prosecution’s case hinged on the forensic evidence. Rather, the prosecutor placed significant emphasis on the victim’s identification of Vinson as the perpetrator of the rape. In actuality, very little testimony was elicited regarding Vinson’s alleged status as a nonsecretor and its possible relationship to the physical evidence.

It is necessary to recognize that we are not concerned with how the alleged new evidence would have impacted the jury’s determination at the original trial. Rather, we are required to determine whether the evidence of Vinson’s status as a secretor would make a different result probable upon retrial. Lytle acknowledged at the evidentiary hearing that she was uncertain whether the material or sample she tested actually contained seminal fluid. The portion of the bed sheet that Sergeant Badascewski provided to Lytle was different from the section he tested, and Lytle did not sample for seminal fluid before conducting the test to determine blood type. The intact sperm sample that Sergeant Badascewski recovered was never tested. In addition, we cannot ignore that the victim positively identified Vinson as the rapist on the basis of her prior familiarity with him and her ability to observe him during the assault and identify his features and voice. This identification is not refuted by the scientific evidence as it is no longer possible to ascertain with certainty what substance in the sample resulted in the detection of the O antigen. For these reasons, the trial court did not abuse its discretion in denying defendant’s motion to the extent it was based upon newly discovered evidence.

In the alternative, Vinson asserts entitlement to relief from judgment premised on ineffective assistance of counsel and prosecutorial misconduct. It is at this point that the prosecution's jurisdictional challenge comes into play. In accordance with MCR 6.502(G)(1):

Except as provided in subrule (G)(2), regardless of whether a defendant has previously filed a motion for relief from judgment, after August 1, 1995, one and only one motion for relief from judgment may be filed with regard to a conviction. The court shall return without filing any successive motions for relief from judgment. A defendant may not appeal the denial or rejection of a successive motion.

The exception, contained in MCR 6.502(G)(2), permits a successive motion for relief from judgment premised on a claim of newly discovered evidence. Because we have determined that the evidence relied on is not newly discovered, we cannot consider his other claims as they are not subject to the exception contained in MCR 6.502(G)(2) or MCR 6.508(D)(3). See *Swain*, 288 Mich App at 632-633. Therefore, Vinson's claims of ineffective assistance of counsel and prosecutorial misconduct cannot be sustained because they are precluded by MCR 6.502(G)(1).

Finally, we reject Vinson's alternative argument that he is entitled to relief from judgment and is constitutionally entitled to a new trial because the newly discovered evidence establishes his innocence. This Court has suggested that a defendant may have a constitutional claim in a federal habeas action if he can make a "gateway showing" of actual innocence. *Swain*, 288 Mich App at 636-37; see also *Schlup v Delo*, 513 US 298, 314-315; 115 S Ct 851; 130 L Ed 2d 808 (1995). Integral to such a claim is a "showing of actual innocence." *Swain*, 288 Mich App at 637. In this instance, we are unconvinced that Vinson is able to demonstrate the "requisite gateway showing of actual innocence." *Id.* The evidence that Vinson is actually a secretor does not result in exonerating him from the crimes for which he was charged and convicted or definitively establish his innocence. As noted, the scientific evidence does not obviate the victim's steadfast identification of Vinson as the perpetrator of the rape. While the scientific evidence raises questions regarding the absence of AB antigens in the materials tested and the source of the O antigen identified, it does not serve to establish Vinson's "actual innocence." *Id.* at 636-637.

Affirmed.

/s/ Christopher M. Murray
/s/ William C. Whitbeck
/s/ Michael J. Riordan

No. 14-2521

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: KARL VINSON,

Movant.

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O R D E R

Before: COLE, Chief Judge; SILER and KETHLEDGE, Circuit Judges.

Karl Vinson, a Michigan prisoner, moves this court for an order authorizing the district court to consider a second or successive application for relief under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2244(b)(3)(A).

In the mid-1980s, Vinson was accused of raping a nine-year-old girl. *People v. Vinson*, No. 303593, 2012 WL 3046236, at *1 (Mich. Ct. App. July 26, 2012). A jury convicted Vinson of first-degree criminal sexual conduct and breaking and entering a building with the intent to commit a felony. *Id.* The trial court imposed an aggregate prison sentence of ten to fifty years. *Id.* According to Vinson, there were two key pieces of evidence admitted at trial: the victim's testimony that Vinson was her attacker, *id.* at *1, and the state's scientific evidence that Vinson was a "nonsecretor"—i.e., a person whose blood type cannot be determined by testing other bodily fluids—which the State used to explain the absence of his blood type from seminal fluid collected from the victim's bedsheet, *id.* at *2.

According to the Michigan Court of Appeals, after the assault, the victim was examined and a sample of her vaginal secretions revealed the presence of a nonmoving sperm, but it was not submitted for forensic testing. *Id.* at *1. A stain from the victim's bedsheet tested positive for blood and seminal fluid. *Id.* "After washing the stain from . . . the sheet, Sergeant

Badascewski placed the washing on a microscope slide and found one complete sperm.” *Id.* He turned over a portion of the stain—but not the sperm—to Paula Lytle, a registered medical technologist, to determine the blood type. *Id.* Lytle performed an absorption inhibition test, which was designed to detect the blood type in bodily fluids other than blood. Lytle detected blood-type O antigens. *Id.* Lytle obtained blood and saliva samples from the victim and Vinson, and her results indicated that the victim had type-O blood and was a secretor and that Vinson had type-AB blood and was a nonsecretor. *Id.* at *2. At trial, the State argued that the bedsheet stain came from the victim and that Vinson’s status as a nonsecretor explained the absence of any detectable AB antigens in the stain. *Id.* After trial, police destroyed the bedsheet. *Id.*

The Michigan Court of Appeals affirmed the convictions, and the Michigan Supreme Court denied leave to appeal. After unsuccessfully seeking state postconviction relief, Vinson filed a petition for a writ of habeas corpus in the district court in 2006. The district court dismissed the petition as untimely. *Vinson v. Vasbinder*, No. 06-10850-BC, 2006 WL 3542692 (E.D. Mich. Dec. 7, 2006).

In 2009, a citizen paid for Vinson’s blood and saliva to be retested. The results confirmed that he had type-AB blood but also showed that—contrary to the testimony at trial—he was a secretor. *Vinson*, 2012 WL 3046236, at *2. Vinson filed a motion for relief from judgment. *Id.* The trial court held an evidentiary hearing, and additional testing confirmed that Vinson was an AB secretor. *Id.* at *2–3. At the evidentiary hearing Lytle testified “that the sample tested contained a mixture of semen and blood,”¹ that the “type-O” in the stain could not

¹ Lytle’s testimony, however, contained an inconsistency: she stated on direct examination “that the sample tested contained a mixture of semen and blood[.]” *Vinson*, 2012 WL 3046236, at *3. But on cross-examination, she “acknowledged . . . that she was uncertain whether the material or sample she tested actually contained seminal fluid.” *Id.* at *6; see *id.* at *3.

have come from Vinson, that the O antigens could have come from the victim or a semen donor, that if the O antigens came from the victim they would have come from her bodily fluids rather than her blood, that due to the victim's age it was unlikely she would have had vaginal secretions, and that Lytle "did not detect any AB antigenic substances." *Id.* at *3. The court thereafter held additional hearings. *Id.* An expert in forensic serology testified that Vinson was a "very strong" AB secretor and that the expert "would have expected semen to be mixed in with the blood on the bed sheet and that the O antigens . . . were more probably from semen . . . than the victim's vaginal secretions." *Id.* A third expert testified that "it was possible that the O antigen . . . was . . . from the victim's blood . . . but that its origin could not be ascertained," and that the victim's vaginal fluid could be in the stain, but the witness could not rule out the possibility that the perpetrator was type-O. *Id.*

The trial court denied postconviction relief. *Id.* at *4. The Michigan Court of Appeals affirmed, concluding that Vinson's status as a secretor was not newly available because that evidence had been "potentially available" at the time of his trial, *id.* at *5, that Vinson had not shown the result at trial would likely have been different with that evidence because the prosecution's case was based largely on the victim's identification, *id.* at *6, and that Vinson's status as a secretor did not establish his innocence, *id.* at *7. The Michigan Supreme Court denied leave to appeal. *People v. Vinson*, 843 N.W.2d 493 (Mich. 2014).

Vinson now asks for leave to file a habeas petition in federal district court. *See* 28 U.S.C. § 2244(b)(3)(A). Because the district court dismissed his first habeas petition as untimely—a disposition that qualifies as an adjudication on the merits, *see In re Cook*, 215 F.3d 606, 608 (6th Cir. 2000)—he cannot file another petition unless he shows that his second petition's claims meet the requirements of 28 U.S.C. § 2244(b). *See* 28 U.S.C. § 2244(a), (b)(3)(C); *Burton v.*

Stewart, 549 U.S. 147, 153 (2007). In this successive petition for habeas relief, Vinson presents five claims: first, that his trial counsel was ineffective for failing to hire his own expert to test Vinson's secretor status; second, that his appellate counsel was ineffective for failing to raise the first claim on direct appeal; third, that his trial counsel was ineffective for failing to adequately cross-examine the State's forensic witness; fourth, that his appellate counsel was ineffective for failing to raise the inadequate-cross-examination claim on direct appeal; and fifth, that Vinson is actually innocent.

As an initial matter, we must deny Vinson's motion as to any claims already "presented" in his prior petition. 28 U.S.C. § 2244(b)(1). Vinson makes two such claims here: that his trial counsel was ineffective for failing to hire his own expert to test Vinson's secretor status (the first claim recited above), and that his appellate counsel was ineffective for failing to raise a corresponding ineffective-assistance claim on direct appeal (the second claim recited above). Vinson presented both of those claims in his 2006 petition. R. 1 at 9, 39 (Page ID 56, 86). He cannot present them again. *See In re Siggers*, 132 F.3d 333, 337 (6th Cir. 1997).

That leaves three claims that Vinson has not presented in a prior petition. As to those claims, Vinson must show the following:

- (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.

28 U.S.C. § 2244(b)(2)(B). At this stage, Vinson need only make a "prima facie showing" that his claims satisfy these requirements. 28 U.S.C. § 2244(b)(3)(C). Thus, we may grant Vinson's

motion to the extent his claims have sufficient merit to “warrant a fuller explanation in the district court.” *In re McDonald*, 514 F.3d 539, 544 (6th Cir. 2008).

Vinson has made a prima facie showing that the factual predicate of his remaining claims could not have been previously discovered through due diligence. To show due diligence, Vinson need not have practiced the “maximum feasible diligence.” *DiCenzi v. Rose*, 452 F.3d 465, 470 (6th Cir. 2000). The factual predicate underlying Vinson’s remaining claims is that the semen found on the victim’s bed could not have belonged to him. Vinson sought for two decades to make this showing. Soon after Vinson exhausted his direct appeals, and around the time DNA testing came into widespread use, he wrote several letters from prison to request DNA testing of the stain. *See* R. 1-2 at 25-43 (Page ID 25-43). After learning that the Detroit police had discarded this evidence, Vinson searched on his own for other ways to challenge the state’s forensic evidence. In 2001 and then again in 2006, he requested evidentiary hearings in state court to investigate his trial counsel’s handling of the forensic evidence. Those requests were denied. *See* R. 1 at 31-33 (Page ID 78-80); R. 1-2 at 20-21, 23 (Page ID 20-21, 23). The state court provided the evidentiary hearing Vinson requested only after Vinson received financial assistance in obtaining new secretor testing that suggested he might be innocent. Vinson has made a prima facie showing that he has done as much as could “reasonably” be expected from someone in his circumstances. *DiCenzi*, 452 F.3d at 470.

Vinson has also made a prima facie showing that the new evidence, when considered in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found him guilty but for constitutional error. At trial, the State maintained, among other things, that the victim was attacked by a single rapist, that the bedsheet stain contained a mixture of blood and seminal fluid, that type-O antigens were

found in the stain, that no AB antigens were detected, and that Vinson's status as a nonsecretor explained the absence of any detectable AB antigens from the stain. *Vinson*, 2012 WL 3046236, at *2. Vinson was convicted on the basis of the victim's identification and Vinson's nonsecretor status. *Id.* at *6. New evidence establishes that Vinson is an AB secretor, and that the government's forensic witness might have exculpated Vinson if Vinson's trial counsel had asked her a single question: "Who supplied the type-O antigens found in the stain?" This new evidence arguably exonerates Vinson by showing that the rapist was a type-O secretor, notwithstanding the victim's testimony naming Vinson as her attacker. The jury was not able to consider this evidence due to the constitutional errors alleged in Vinson's petition.

We therefore authorize Vinson to file a second petition for writ of habeas corpus, limited only to his third, fourth, and fifth claims as recited on page 4 of this order.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

KARL F. VINSON,

Petitioner,

Case No. 14-cv-14542

v

Honorable Thomas L. Ludington

THOMAS MACKIE,

Respondent.

**OPINION AND ORDER DENYING THE PETITION FOR A WRIT OF HABEAS
CORPUS, DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY, AND
GRANTING LEAVE TO APPEAL IN FORMA PAUPERIS**

Petitioner Karl Vinson, presently confined at the Carson City Correctional Facility in Carson City, Michigan, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his application, filed through his attorneys, David A. Moran and Imran J. Syed of the Michigan Innocence Clinic, petitioner challenges his conviction for first-degree criminal sexual conduct (CSC), Mich. Comp. Laws § 750.520(b)(1)(a)(victim under 13 years of age), and breaking and entering a building with the intent to commit a felony (CSC) therein, Mich. Comp. Laws § 750.110. For the reasons which follow, the petition for a writ of habeas corpus will be denied pursuant to 28 U.S.C. § 2244(b)(4).

I.

A.

The relevant facts of Petitioner's conviction were outlined by the Michigan Court of Appeals, which are presumed correct on habeas review pursuant to 28 U.S.C. § 2254(e)(1). *See Wagner v. Smith*, 581 F.3d 410, 413 (6th Cir. 2009):

This matter arises from the brutal rape of a nine-year-old female victim in her own bed. The victim was asleep when she awoke to find a man in her bedroom. She indicated that she was able to see his facial features because lights, both within the home and outside, provided illumination within the room. The victim identified Vinson, claiming that she had seen him previously and she recognized his voice, although she could not immediately recall his name. She was further able to identify Vinson as her assailant because she was familiar with him since his wife had babysat her and her younger sister. Vinson's mother and her husband provided an alibi for him at trial, indicating that he was sleeping on their couch at the time of the assault.

Following the assault, the victim was taken to the hospital. She experienced a bloody discharge and a deep cut requiring surgical repair. A specimen of vaginal secretions was obtained from the victim revealing the presence of nonmoving sperm; however, the specimen was not provided for forensic testing.

Fingerprints were not able to be recovered from the window casing where the perpetrator entered the victim's bedroom. The victim's bed sheet, containing a "kind of wet" bloodstain, was taken into evidence. The bed sheet was examined by Sergeant Ronald Badascewski of the Crime Lab Serology and Trace Evidence Unit. Sergeant Badascewski performed an acid phosphatase test on the stained area with a positive result for blood and seminal fluid. After washing the stain from the portion of the sheet, Sergeant Badascewski placed the washing on a microscope slide and found one complete sperm. He then turned over a portion of the stain to Paula Lytle, a registered medical technologist, in order to determine the blood type of the stained area. Lytle detected the presence of blood type O from the sample, which was consistent with the victim. At trial, Lytle acknowledged that she only received one sample from the bed sheet stain and that she did not receive the sperm recovered by Sergeant Badascewski for testing. When questioned by the prosecutor, Lytle opined that the sample she examined contained a mixture or combination of blood and seminal fluid.

Lytle also obtained a blood and saliva sample from the victim and determined that her blood type was O and that she was a secretor. A secretor is defined as:

An individual whose bodily fluids (saliva, semen, vaginal secretions) contain a water-soluble form of the antigens of the ABO blood group. Secretors constitute 80% of the population. In forensic medicine, the examination of fluids has enhanced the ability of law enforcement officials to develop identifying information about perpetrators and narrow a field of suspects. [See mediLexicon, <http://www.medilexicon.com/medicaldictionary.php?t=80515> (accessed May 24, 2012).]

Blood and saliva samples were also obtained from Vinson. Lytle determined at that time that Vinson's blood type was AB and that he was a nonsecretor, defined as "[a]n individual [whose bodily fluids] and saliva that do[] not contain antigens of the ABO blood group." *Id.*

During closing argument at trial, the prosecutor stated that the bed sheet contained a mixture of blood and seminal fluid and argued that the stain came from Vinson and the victim. The prosecution stated that Vinson was a nonsecretor "along with 20 percent of the population." The implication of this statement was that Vinson's status as a nonsecretor explained the absence of any detectable AB antigens from the stained bed sheet. The prosecutor also noted that the victim knew Vinson and had no motivation to lie regarding his identity as the perpetrator and questioned the veracity of Vinson's alibi defense.

Although the jury initially requested the testimony of all the expert witnesses, they rescinded the request and subsequently found Vinson guilty of first-degree CSC and breaking and entering. Along with the denial of Vinson's initial appeal to this Court following his convictions, he also subsequently filed three motions for relief from judgment and a federal petition for habeas corpus, all of which were unsuccessful. Vinson later learned that the physical evidence, including the bed sheet, was destroyed by police. In 2009, Vinson obtained retesting and analysis confirmed that his blood type is AB. Contrary to the evidence at trial, the 2009 analysis revealed that Vinson actually is a secretor. These results were confirmed by an independent laboratory.

In September 2009, Vinson again sought relief from judgment premised on prosecutorial misconduct, ineffective assistance by his trial and appellate counsel, and newly discovered evidence of his status as an AB secretor. The matter came back before the original trial judge, who questioned the ability to demonstrate Vinson's innocence. The trial judge speculated that Vinson could have been using a condom at the time of the assault, but defense counsel responded that, at trial, the prosecution had argued that the semen had come from the rapist. The trial judge ordered the Michigan State Police (MSP) to determine Vinson's blood type and secretor status, and on August 20, 2010, the MSP report confirmed that Vinson is an AB secretor of ABO antigens.

At the ensuing evidentiary hearing, Lytle was called to testify. Following her confirmation of her trial testimony along with the testing originally conducted and results, she acknowledged recent testing demonstrating Vinson's secretor status. Following questioning, Lytle opined that testing on a semen stain differed from the testing performed on a blood stain to determine blood type. Lytle affirmed that the sample tested contained a mixture of semen and blood and, when asked where the type O in the stain originated, Lytle replied that it could not have come from Vinson, but that it could have come from the semen donor and/or the victim. Further, if the type O detected in the stain originated from the victim, then it would have come from her bodily fluid and not her blood. Lytle further opined,

on the basis of the results obtained through the acid phosphatase test performed by Sergeant Badascewski, that there was a very high presence of semen in the stain that she tested. She deemed it unlikely that the victim, due to her young age, would have vaginal secretions. Lytle confirmed that she did not detect any AB antigenic substances.

On cross-examination, Lytle acknowledged she did not test the "exact same piece of material" that Sergeant Badascewski tested and detected the presence of seminal fluid. As Lytle did not repeat the test performed by Sergeant Badascewski or examine the section of the bed sheet she received for sperm cells, she could not determine if the material she received contained semen. Lytle further admitted that she might have cut additional samples from the bed sheet and performed additional testing had she known Vinson's status as a secretor. Upon questioning by the trial judge, Lytle indicated that she had originally testified that Vinson was a nonsecretor and that she now believed that the O antigen detected could have been from a male donor of the semen. When asked if she had known Vinson was a secretor during the original trial, Lytle indicated she "would testify that his blood type was not detected ... and he could not be the donor of the O substance in that stain."

Additional hearings were conducted, with defense counsel presenting Arthur Young, an expert in forensic serology, who confirmed Vinson's status as an "ABO type AB secretor" and that Vinson was a "very strong secretor." Young further testified that he would have expected semen to be mixed in with the blood on the bed sheet and that the O antigens detected were more probably from semen rather than the victim's vaginal secretions. In contrast, the prosecution's witness Connie Swander of the MSP laboratory indicated that it was possible that the O antigen detected was derived from the victim's blood. Swander opined that the only known fact was the presence of an O antigen but that its origin could not be ascertained. She further opined that, despite the victim's young age, vaginal fluid could be in the stain. Swander did admit that she could not rule out the possibility that the blood type of the perpetrator of the assault was O.

People v. Vinson, No. 303593, 2012 WL 3046236, at *1-3, (Mich. Ct. App. July 26, 2012).

After holding the post-conviction hearing, the trial court denied petitioner's motion for relief from judgment, finding:

But the question is, would this new evidence have caused a different result? Now, that's what I understand the standard is.

That young lady's identification the -- only thing that the scientific evidence would have done would have bolstered her testimony. And in this case, I don't think anybody could conclude. And as I remember Paula Lytle testifying here

recently, nobody could say that that was from the rapist. I don't remember her saying that.

And this Court is not convinced that it would cause a different result in this case. And because of that, I'm going to deny your motion.

See 3/28/2011 Tr. P. 40, ECF No. 5-25.

In response to the denial Petitioner filed a motion for leave to appeal to the Michigan Court of Appeals. The Michigan Court of appeals denied Petitioner's motion upon finding that the new evidence "does not serve to establish Vinson's 'actual innocence.'" *People v. Vinson*, No. 303593, 2012 WL 3046236, at * 1, 7, (Mich. Ct. App. July 26, 2012). The Michigan Supreme Court also denied Petitioner leave to appeal. *See People v. Vinson*, 843 N.W.2d 493 (Mich. 2014); *reconsideration denied*, 847 N.W.2d 241 (Mich. 2014).

B.

In 2014, Petitioner filed a motion with the United States Court of Appeals for the Sixth Circuit for permission to file a second or successive petition. In this proposed successive petition, Petitioner presented five claims: (1) that his trial counsel was ineffective for failing to hire his own expert to test Petitioner's secretor status; (2) that his appellate counsel was ineffective for failing to raise the first claim on direct appeal; (3) that his trial counsel was ineffective for failing to adequately cross-examine the State's forensic witness; (4) that his appellate counsel was ineffective for failing to raise the inadequate-cross-examination claim on direct appeal; and (5) that Petitioner is actually innocent.

The Sixth Circuit authorized Petitioner Vinson to file a second petition based on his claims that his trial counsel was ineffective for failing to adequately cross-examine the State's forensic witness, that his appellate counsel was ineffective for failing to raise the inadequate-cross-examination claim on direct appeal, and that he is actually innocent. *See In Re Karl Vinson*,

No. 14-2521, * 4-6 (6th Cir. Sept. 24, 2015). The Sixth Circuit denied Petitioner permission to seek habeas relief on his first two claims because he had already raised them in his prior habeas petition. *Id.* at *4, 6.

In response Petitioner filed the current § 2254 petition on December 1, 2014, asserting all five of his proposed claims, including the two that the Sixth Circuit did not authorize him to file. *See* ECF Nos. 1-2. On April 13, 2016 Respondent filed its response through the Attorney General's Office, arguing that Petitioner's claims are barred by 28 U.S.C. § 2244(b)(4), are time-barred, procedurally defaulted and/or lack merit.

II.

Petitioner's successive habeas petition will be dismissed pursuant to 28 U.S.C. § 2244(b)(4) because his claims fail to satisfy the requirements for filing a second or successive habeas petition. In relevant part, § 2244(b)(2) provides:

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.

In granting Petitioner leave to file his successive habeas petition, the Sixth Circuit determined that petitioner had made a *prima facie* showing that the application satisfied the

requirements of 28 U.S.C. § 2244. *See Ferrazza*, 36 F. Supp. 2d at 973. “‘Prima facie’ in this context means simply sufficient allegations of fact together with some documentation that would warrant a fuller exploration in the district court.” *In re Lott*, 366 F.3d 431, 433 (6th Cir. 2004) (internal quotation omitted). Such a “‘prima facie showing’ ... is not a difficult standard to meet.” *Id.* at 432.

28 U.S.C. § 2244(b)(4) requires a district court to “dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.” *See In re McDonald*, 514 F.3d 539, 543 (6th Cir. 2008). Even after a court of appeals has certified a successive motion on the basis that the movant has made a *prima facie* showing that the statutory standard of § 2244(b) has been satisfied, it is appropriate for a district court to dismiss the petition or motion if the merits of the successive petition or motion do not ultimately satisfy that same statutory standard under § 2244(b). *See Tyler v. Cain*, 533 U.S. 656, 661, n. 3 (2001). Petitioner’s petition does not satisfy these requirements.

A.

Petitioner’s first two claims must be dismissed because they have not been certified by the Sixth Circuit. Before a second or successive habeas petition is filed in a federal district court, a habeas petitioner must move in the appropriate court of appeals for an order authorizing the district court to consider the petition. 28 U.S.C. § 2244(b)(3)(A); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 641 (1998). A federal district court does not have jurisdiction to entertain a successive post-conviction motion or petition for writ of habeas corpus in the absence of an order from the court of appeals authorizing the filing of such a successive motion or petition. *See Ferrazza v. Tessmer*, 36 F. Supp. 2d 965, 971 (E.D. Mich. 1999).

In the present case, the Sixth Circuit has granted the petitioner permission to file his second petition pursuant to § 2244(b)(3)(A) with respect to claims three, four and five contained within the Sixth Circuit Court of Appeal's order. *See* (9/24/15, Sixth Cir. Ord., Docket No. 14-2521, p. 4.). On the other hand, the Sixth Circuit denied Petitioner leave to restate claims that trial counsel was ineffective for failing to obtain an expert to test the petitioner's secretor status and that appellate counsel was ineffective for failing to raise this claim on the petitioner's direct appeal. The Court therefore does not have jurisdiction to hear those claims, and they must be dismissed. *See White v. Carter*, 27 F.App'x. 312, 313-14 (6th Cir. 2001).

B.

Petitioner also raises two claims asserting that his trial counsel was ineffective for failing to cross-examine the prosecution's forensic witness and that his appellate counsel was ineffective for failing to raise this issue on his direct appeal. To show he was denied the effective assistance of counsel under federal constitutional standards, a petitioner must satisfy a two prong test. First, a petitioner must demonstrate that, considering all of the circumstances, counsel's performance was so deficient that the attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In so doing, a petitioner must overcome a strong presumption that counsel's behavior lies within the wide range of reasonable professional assistance. *Id.* In other words, a petitioner must overcome the presumption that, under the circumstances, the challenged action might be sound trial strategy. *Strickland*, 466 U.S. at 689. Second, a petitioner must show that such performance prejudiced his defense. *Id.* To demonstrate prejudice, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The Supreme Court's holding in *Strickland* thus places the burden

on a petitioner raising a claim of ineffective assistance of counsel, and not the state, to show a reasonable probability that the result of the proceeding would have been different, but for counsel's allegedly deficient performance. *See Wong v. Belmontes*, 558 U.S. 15, 27 (2009). The *Strickland* standard applies as well to claims of ineffective assistance of appellate counsel. *See Whiting v. Burt*, 395 F.3d 602, 617 (6th Cir. 2005).

Furthermore, on habeas review, "the question is not whether a federal court believes the state court's determination under the *Strickland* standard was incorrect but whether that determination was unreasonable – a substantially higher threshold." *Knowles v. Mirzayance*, 556 U.S. at 123 (internal quotations omitted). "The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland's* standard." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). Indeed, "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles*, 556 U.S. at 123. Consequently, the § 2254(d)(1) standard applies a "doubly deferential judicial review" to a *Strickland* claim brought by a habeas petitioner. *Id.* This means that on habeas review of a state court conviction, "[a] state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Harrington*, 562 U.S. at 101. Because of this doubly deferential standard, "the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington v. Richter*, 562 U.S. at 105. A reviewing court must not merely give defense counsel the benefit of the doubt, but must also affirmatively entertain the range of possible reasons that counsel may have had for proceeding as he or she did. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1407 (2011).

Petitioner claims that his trial counsel was ineffective for failing to adequately cross-examine laboratory specialist Paula Lytle at trial. Petitioner specifically claims that his trial attorney should have asked Lytle who she believed was the most likely donor of the O-type antigens in the stain, and alleges that, if asked this question, Lytle would have responded that “the rapist” was the most likely source of the O-type antigens in the stain. Petitioner further argues that because he has an AB blood-type, and there was only one perpetrator in this case, he believes that asking this one question would have led the jury to exonerate him. Petitioner relies on Lytle’s post-conviction evidentiary hearing testimony in support of his claim.

However, as respondent argues in his brief, the hearing testimony did not confirm his assertion that, if asked, Lytle would have testified that “the rapist” was definitively the source of the O-type antigen. The colloquy at issue is as follows:

Q: And in fact, at the time, it was likely that it was an O secretor who left that sample; is that right?

A: I believe it was definitely an O secretor, the donor of the semen *and/or the victim showing up in there*.

Q: But given the acid phosphate test results, it’s likely that the rapist in this case was an O secretor; is that fair to say?

A: With the strong AP reaction, then I would suspect I am picking up, you know, some type from the donor of the sperm.

Q: And if you were asked these questions at the original trial, you would have explained all that, wouldn’t you have?

A: Yes.

Q: But none of the attorneys asked you about any of that, did they?

A: No they did not.

9/21/10 Tr. at 30-31, ECF No. 5-18 (emphasis added).

“[C]ourts generally entrust cross-examination techniques, like other matters of trial strategy, to the professional discretion of counsel.” *Dell v. Straub*, 194 F. Supp. 2d 629, 651 (E.D. Mich. 2002). “Impeachment strategy is a matter of trial tactics, and tactical decisions are not ineffective assistance of counsel simply because in retrospect better tactics may have been available.” *Id.*

Petitioner has not demonstrated that trial counsel was ineffective for failing to ask Ms. Lytle who she believed was the most likely donor of the O-type antigens in the stain, because he has failed to show that she would have given an exculpatory response. Ms. Lytle testified at the post-conviction hearing that the O-type antigen could have come from either the rapist or the victim. *Id.* The victim has O-type blood and is an O-type secretor. Connie Swander, Acting Assistant Division Director in charge of the Michigan State Police forensic science laboratories, testified that the O-type antigens detected in the stain could have come from the victim’s red blood cells, vaginal fluid, saliva, urine, or any other bodily fluids or cells from her body. *See* 12/3/31 Tr. 28-36, ECF No. 5-20. Finally, the portion of the bed sheet that Sergeant Badascewski provided to Lytle was different from the section he tested for the presence of semen, and Lytle did not sample for seminal fluid before conducting the test to determine blood type.

Petitioner’s ineffective assistance of trial counsel claim must fail, because even if counsel was deficient in failing to ask Ms. Lytle to speculate about the likely donor of the O-type antigen on the bed sheet, Petitioner has failed to demonstrate any reasonable probability, based on the evidence presented at trial and at the post-conviction hearing, that the cross-examination of this witness by defense counsel would have changed the result of the proceeding. *Moss v. Hofbauer*, 286 F.3d 851, 866 (6th Cir. 2002). Indeed, it is equally as likely that Petitioner’s trial counsel intentionally chose not to ask the question to avoid a response that was not helpful to Petitioner.

Just as Petitioner has not shown that trial counsel was ineffective for failing to cross-examine Ms. Lytle about who the donor of the O-type antigens was in the stain recovered from the crime scene, Petitioner has not shown that his appellate counsel was ineffective for failing to raise the claim on direct appeal. The Sixth Amendment guarantees a defendant the right to the effective assistance of appellate counsel on appeals of right. *See Evitts v. Lucey*, 469 U.S. 387, 396-397 (1985). However, court appointed counsel does not have a constitutional duty to raise every nonfrivolous issue requested by a defendant. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Because Petitioner has failed to show that his trial counsel was ineffective, Petitioner is unable to establish that appellate counsel was ineffective for failing to raise his ineffective assistance of trial counsel claim on his direct appeal. *See e.g. Fautenberry v. Mitchell*, 515 F.3d 614, 642 (6th Cir. 2008); *Lucas v. O'Dea*, 179 F.3d 412, 420 (6th Cir. 1999).

C.

Finally, Petitioner alleges that his continued incarceration is unconstitutional because he is actually innocent. Petitioner asserts that he is entitled to relief on this claim because there is new evidence that could not have been previously discovered through the exercise of due diligence. Specifically, Petitioner claims that evidence shows that he is a Type-AB secretor, and therefore it is “all but scientifically impossible that [he] could have been the perpetrator of the crimes for which he was convicted.” *See* Memorandum in Support of Petition for Writ of Habeas Corpus, p. 22, ECF No. 2.

i.

In *Herrera v. Collins*, 506 U.S. 390, 400 (1993), the Supreme Court held that claims of actual innocence based on newly discovered evidence fail to state a claim for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal

proceeding. Federal habeas courts sit to ensure that individuals are not imprisoned in violation of the constitution, not to correct errors of fact. *Id.*, see also *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013) (“We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence.”). Freestanding claims of actual innocence are thus not cognizable on federal habeas review, absent independent allegations of constitutional error at trial. See *Cress v. Palmer*, 484 F.3d 844, 854-55 (6th Cir. 2007)(collecting cases).

Moreover, the Supreme Court’s subsequent decision in *House v. Bell*, 547 U.S. 518 (2006) does not alter this Court’s adjudication of Petitioner’s claim, as Petitioner argues. In *House* the Supreme Court declined to resolve whether a habeas petitioner may bring a freestanding claim of actual innocence. *Id.* at 554-55. Although the Supreme Court noted in *House* that “in a capital case a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim,” *Id.* (quoting *Herrera*, 506 U.S. at 417), the Supreme Court has declined to recognize a freestanding innocence claim in habeas corpus, outside of the death-penalty context. Petitioner is thus not entitled to relief for his freestanding actual innocence claim. See *Wright v. Stegall*, 247 F.App’x. 709, 711 (6th Cir. 2007).

ii.

Even considering the merits of Petitioner’s actual innocence claim does not entitle him to any relief. In rejecting Petitioner’s actual innocence claim in his post-conviction appeal, the Michigan Court of Appeals stated as follows:

The burden is on Vinson, “on all parts of the *Cress* test,² ... to make an affirmative showing that [he] “could not, using reasonable diligence, have discovered and produced the evidence at trial[.]” *Rao*, 491 Mich. at 289,³ citing *Cress*, 468 Mich. at 692. As our Supreme Court noted, even if a defendant is not aware “of the actual medical information” it “begs the question why defendant lacked awareness at the time of trial[.]” *Rao*, 491 Mich. at 287 (emphasis in original). If testing of his secretor status was as pivotal at trial as is now claimed on appeal, reasonable diligence would have required, at the very least, that Vinson request independent laboratory testing. *Id.* at 290. He was certainly aware of the evidence, the manner of testing, and that results contrary to those obtained by the prosecution’s witness could have provided him with support for his defense that he was not the perpetrator. Yet, Vinson fails to offer any viable reason to explain why he did not seek independent testing at the time of trial. When viewed in the context of reasonable diligence, Vinson should have minimally procured independent testing or sought the trial court’s assistance in procuring such testing. “Michigan courts have held that a defendant’s awareness of the evidence at the time of trial precludes a finding that the evidence is newly discovered, even if the evidence is claimed to have been ‘unavailable’ at the time of trial.” *Id.* at 282.

Additionally, not only were elements one and three not satisfied, but we also hold that this new evidence would not make a different result probable on remand. Our review of the original trial transcripts does not support Vinson’s contention that the prosecution’s case hinged on the forensic evidence. Rather, the prosecutor placed significant emphasis on the victim’s identification of Vinson as the perpetrator of the rape. In actuality, very little testimony was elicited regarding Vinson’s alleged status as a nonsecretor and its possible relationship to the physical evidence.

It is necessary to recognize that we are not concerned with how the alleged new evidence would have impacted the jury’s determination at the original trial. Rather, we are required to determine whether the evidence of Vinson’s status as a secretor would make a different result probable upon retrial. Lytle acknowledged at the evidentiary hearing that she was uncertain whether the material or sample she tested actually contained seminal fluid. The portion of the bed sheet that Sergeant Badascewski provided to Lytle was different from the section he tested, and Lytle did not sample for seminal fluid before conducting the test to determine blood type. The intact sperm sample that Sergeant Badascewski recovered was never tested. In addition, we cannot ignore that the victim positively identified Vinson as the rapist on the basis of her prior familiarity with him and her ability to observe him during the assault and identify his features and voice. This identification is not refuted by the scientific evidence as it is no longer possible to

² *People v. Cress*, 468 Mich, 678, 664 N.W. 2d 174 (2003).

³ *People v. Rao*, 491 Mich. 271, 815 N.W. 2d 105 (2012).

ascertain with certainty what substance in the sample resulted in the detection of the O antigen.

Vinson, 2012 WL 3046236, at *6.

Petitioner's contention that his status as a secretor constitutes newly discovered evidence is unfounded for the reasons stated by the Michigan Court of Appeals. Specifically, Petitioner cannot show that he exercised reasonable diligence because, at the time of trial, he knew of the evidence, the manner of testing, and that any findings contrary to the results obtained by the prosecution's witness would "have provided him with support for his defense that he was not the perpetrator." *Vinson*, 2012 WL 3046236, at *6. Petitioner's claim of newly discovered evidence is thus without merit.

Furthermore, the evidence does not demonstrate Petitioner's actual innocence. Because "[t]he portion of the bed sheet that Sergeant Badascewski provided to Lytle was different from the section he tested, and Lytle did not sample for seminal fluid before conducting the test to determine blood type" and due to the possibility that the O antigen came from the victim, Petitioner's contention that it is scientifically impossible for a reasonable trier of fact to find that he was is perpetrator of the crime is unfounded. Lytle determined that there were O-type antigens present in the stain, indicating that the non-blood fluids came from a person with O-type blood. 9/21/2010 Tr. p. 28, ECF No. 5-18. Such secretions would include saliva, vaginal secretions, perspiration, and tears. *Id.* at 29. Lytle did not test for sperm *Id.* at 25. It is undisputed that the victim has O-type blood and is an O-type secretor. *See* Trial Tr. pp. 75-76, ECF No. 4. Connie Swander, Acting Assistant Division Director in charge of the Michigan State Police forensic science laboratories, testified that, based on the testing performed in 1986 by Lytle, the O-type antigens detected in the stain could have come from the victim's red blood cells, vaginal fluid, saliva, urine, or any other bodily fluids or cells from her body. 12/3/2010 Tr.

pp. 35-37, ECF No. 5-20. Because the O antigens could have come from the victim, Petitioner's AB secretion status does not rule him out as the perpetrator of the crime.

Furthermore, the trial court placed great emphasis on the compelling testimony of the victim in finding support for the petitioner's convictions, and "the testimony of a single, uncorroborated prosecuting witness or other eyewitness is generally sufficient to support a conviction." *Brown v. Davis*, 752 F.2d 1142, 1144 (6th Cir. 1985) (internal citations omitted). Here, the victim specifically identified Petitioner as her attacker, testifying that she had seen him previously, that she recognized his voice, and that she was familiar with him since his wife had babysat her and her younger sister. *See People v. Vinson*, No. 303593, 2012 WL 3046236, at *1 (Mich. Ct. App. July 26, 2012). Finally, any actual innocence claim is undercut by Petitioner's own admissions to his prison psychologist that he had sexual contact with the victim on a different occasion. *See* Psych. Rep., ECF No. 15.

For all of these reasons, Petitioner's actual innocence claim is without merit.

III.

Before a petitioner may appeal this Court's dispositive decision, a certificate of appealability must issue. *See* 28 U.S.C. § 2253(c)(1)(a); Fed. R. App. P. 22(b). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a court rejects a habeas claim on the merits, the substantial showing threshold is met if the petitioner demonstrates that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). "A petitioner satisfies this standard by demonstrating that ... jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). In applying

that standard, a district court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of the petitioner's claims. *Id.* at 336-37.

When a court denies relief on procedural grounds without addressing the merits, a certificate of appealability should issue if it is shown that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). When a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petition should be allowed to proceed further. In such a circumstance, no appeal would be warranted. *Id.*

Having considered the matter, the Court concludes that Petitioner has failed to make a substantial showing of the denial of a constitutional right. Accordingly, a certificate of appealability is not warranted in this case. On the other hand, Petitioner will be granted leave to appeal *in forma pauperis*. Whereas a certificate of appealability may only be granted if petitioner makes a substantial showing of the denial of a constitutional right, a court may grant IFP status if it finds that an appeal is being taken in good faith. *Id.* at 764-65; 28 U.S.C. § 1915(a)(3); Fed. R.App.24 (a). "Good faith" requires a showing that the issues raised are not frivolous; it does not require a showing of probable success on the merits. *Foster*, 208 F. Supp. 2d at 765. Although jurists of reason would not debate this Court's resolution of Petitioner's claims, the issues are not frivolous; therefore, an appeal could be taken in good faith and the petitioner may proceed *in forma pauperis* on appeal. *Id.*

IV.

Accordingly, it is **ORDERED** that Petitioner's petition for a writ of habeas corpus is **DENIED**.

It is further **ORDERED** that a certificate of appealability is **DENIED**.

It is further **ORDERED** that Petitioner is **GRANTED LEAVE** to appeal *in forma pauperis*.

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

Dated: December 6, 2016

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on December 6, 2016.

s/Michael A. Sian
MICHAEL A. SIAN, Case Manager

No. 16-2760

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KARL VINSON,

Petitioner-Appellant,

y.

SHANE JACKSON, Warden,

Respondent-Appellee.

ORDER

Karl Vinson, a Michigan prisoner represented by attorneys from the University Of Michigan Law School Innocence Clinic, appeals the district court's judgment denying his 28 U.S.C. § 2254 habeas corpus petition. He now moves for a certificate of appealability (COA). *See* Fed. R. App. P. 22(b).

In the mid-1980s, Vinson was accused of raping a nine-year-old girl. See *People v. Vinson*, No. 303593, 2012 WL 3046236, at *1 (Mich Ct. App. July 26, 2012). A jury convicted Vinson of first-degree criminal sexual conduct and breaking and entering a building with the intent to commit a felony. *Id.* The trial court imposed an aggregate prison sentence of ten to fifty years. Two key pieces of evidence were admitted at trial: the victim's testimony that Vinson was her attacker, and the state's scientific evidence that Vinson was a blood-type AB nonsecretor.¹ The prosecution relied on this evidence to explain the absence of Vinson's AB blood type from a seminal fluid sample collected from the victim's bedsheet. *Id.* at *2.

¹ A “secretor” is an “individual whose bodily fluids (saliva, semen, vaginal secretions) contain a water-soluble form of the antigens of the ABO group.” *Stedman’s Medical Dictionary*, available

According to the Michigan Court of Appeals, a post-assault examination of a sample of the victim's vaginal secretions revealed the presence of a nonmoving sperm, but it was not submitted for forensic testing. *Id.* at *1. A stain from the victim's bedsheet tested positive for blood and seminal fluid. *Id.* "After washing the stain from . . . the sheet, Sergeant Ronald Badascewski of Michigan's Crime Lab Serology and Trace Evidence Unit placed the washing on a microscope slide and found one complete sperm." *Id.* Badascewski's acid phosphate test indicated that there was a very high presence of semen in the stain. *Id.* at *3.

Badascewski then turned over a different section of the stain from another piece of the bedsheet to Paula Lytle, a registered medical technologist, to determine the blood type. *Id.* Lytle performed an absorption inhibition test, which was designed to detect the blood type in bodily fluids other than blood, through antigens, but the sample she received had both blood and seminal fluid. *Id.* at *1-2. Lytle detected blood type-O, which was consistent with the victim's blood type. *Id.* at *1. Blood and saliva samples from the victim revealed that she was a secretor. At trial, the state relied partially on these lab tests to argue that the bedsheet stain (revealing the O antigen) came from the victim and that Vinson's status as a nonsecretor explained the absence of any detectable AB antigens. *Id.* After trial, the bedsheet and all other physical evidence were destroyed. *Id.*

The Michigan Court of Appeals affirmed the convictions, and the Michigan Supreme Court denied leave to appeal. After unsuccessfully seeking state post-conviction relief, Vinson filed a § 2254 petition for a writ of habeas corpus in the district court in 2006, and the district court dismissed the petition as untimely. *Vinson v. Vasbinder*, No. 1:06-cv-10850-TLL-CEB (E.D. Mich. Dec. 7, 2006). Vinson did not appeal.

When DNA testing began to emerge as a common forensic tool, Vinson wrote to various authorities and to the courts asking that the evidence in his case be tested. However, after

on Westlaw at STEDMANS 805150. "Secretors constitute 80% of the population. *Id.* A "non-secretor" is "a person whose saliva and other secretions do not contain blood-group antigens." See <https://en.oxforddictionaries.com/definition/non-secretor>.

discovering that the Detroit Police Department had destroyed the physical evidence in his case, Vinson began to pursue new secretor testing, and a concerned citizen arranged and paid for this new testing in 2009. The new test results confirmed that Vinson had type-AB blood and showed that he was a secretor, rather than a nonsecretor. *Vinson*, 2012 WL 3046236, at *2. Vinson then filed a motion for relief from judgment in state court based on this evidence.

At an evidentiary hearing on the motion for relief, Lytle, the technologist who testified at trial, stated “that the sample tested contained a mixture of semen and blood” and that the stain she received from Badascewski had a “very high presence of semen.” *Id.* at *3. Lytle testified that the “type-O” in the stain could not have come from Vinson, that it could have come from the victim or a semen donor, that if the type-O came from the victim it would have come from her bodily fluids rather than her blood, that it was unlikely the victim would have had vaginal secretions due to her age, and that she “did not detect any AB antigenic substances.” *Id.* at *3. At additional hearings, counsel for Vinson presented an expert in forensic serology who testified that Vinson was a “very strong” AB secretor and that “the O antigens detected were more probably from semen rather than the victim’s vaginal secretions.” *Id.* Another expert witness testified that “the only known fact was the presence of an O antigen but . . . its origin could not be ascertained,” and she could not rule out the possibility that the perpetrator was type-O. *Id.*

The trial court denied post-conviction relief. *Id.* at *4. The Michigan Court of Appeals affirmed, concluding that Vinson’s status as a secretor was not “newly discoverable” evidence, but only “newly available” evidence because it was “potentially available” at the time of his trial. *Id.* at *5. The state appellate court also determined that Vinson failed to meet his burden, under Michigan law, to show that he could not, using reasonable diligence, have discovered and produced that evidence at trial. *Id.* at *5 (citing *People v. Cress*, 664 N.W.2d 174, 182 (Mich. 2003)). In addition, the state appellate court concluded that Vinson had not established, pursuant to *Cress*, that the result would likely have been different, because the prosecution’s case was based largely on the victim’s personal identification of Vinson, and Vinson’s status as a secretor did not establish his innocence. *Id.* at *6-7. The Michigan Supreme Court denied leave to

appeal, *People v. Vinson*, 843 N.W.2d 493 (Mich. 2014), and denied reconsideration, *People v. Vinson*, 847 N.W.2d 241 (Mich. 2014). Vinson's petition for certiorari was denied as well. *People v. Vinson*, 135 S. Ct. 485 (2014).

In 2014, Vinson moved this court for leave to file a second or successive § 2254 habeas petition, arguing, among other things, that he had new evidence that established that (1) his trial attorney was ineffective for failing to adequately cross-examine the prosecution's forensic expert at trial; (2) his appellate attorney was ineffective for failing to raise the ineffective-assistance-of-counsel claim; and (3) he was actually innocent. *See In re Vinson*, No. 14-2521 (6th Cir. Sept. 24, 2015). We determined that Vinson had made a prima facie showing that he was diligent in trying to discover his secretor status and that the new evidence, when considered in light of the evidence as a whole, would be sufficient to establish that no reasonable factfinder would have found him guilty but for constitutional error. Therefore, we granted Vinson's motion to file a second petition, and Vinson did so.

Addressing Vinson's claims that his trial and appellate counsel were ineffective regarding his trial counsel's preparation for cross-examining the prosecution's forensic witness, the district court applied *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and determined that Vinson was not prejudiced by this deficiency. The district court reasoned that even if Lytle had been asked at trial about the most likely donor of the O-type antigens, Vinson failed to show that Lytle would have given an exculpatory response based on her testimony at the post-conviction evidentiary hearing that the O-type antigen could have come from *either* the rapist or the victim.

A COA may issue when an "applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, a petitioner must demonstrate "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." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). "The question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Id.* at 342.

Ineffective Assistance of Trial and Appellate Counsel

Ineffective-assistance claims are reviewed under the two-part test of *Strickland*, requiring a defendant to show that counsel's performance was deficient and that the deficient performance prejudiced the defense such that the defendant was denied a fair trial. *Strickland*, 466 U.S. at 687. The test for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Vinson argued that his trial counsel's performance was deficient because he failed to adequately prepare for cross-examining Lytle by investigating and understanding the science underlying her testimony. The district court determined that Vinson was not prejudiced by this failure because Lytle would not have given an exculpatory response based on her testimony at the post-conviction evidentiary hearing. However, as Vinson points out, Lytle testified at the evidentiary hearing that, if asked about the source of the O-antigen, she would have responded that "it would have to be the donor of the semen [found in the blood/semen sample], or . . . a *remote possibility*, from the victim." Lytle confirmed that Vinson was an AB secretor but that no AB antigens were found. Lytle also testified that she did not believe a nine-year-old would have vaginal secretions. In fact, Lytle testified that if she had known at the time of the trial that Vinson was actually a secretor, she would have explained that Vinson could be excluded as the source of the stain. In addition, the O-antigen was not detected from blood as the prosecutor argued, but from other bodily fluids.

The district court's rationale failed to take in account Lytle's testimony and the opinion by another forensic expert at the post-conviction hearing that it was unlikely that the victim would have had vaginal secretions due to her age. The district court also ignored evidence that Vinson was a "very strong" AB secretor, that the O antigens were more likely from semen than the victim's vaginal secretions or blood, and that the evidence essentially could rule out the possibility that Vinson was the source of the stain. Therefore, the district court's conclusion that Lytle would not have provided an exculpatory response if further questioned about the source of the O-antigen is debatable. As this court noted in its order granting Vinson's motion to file a

successive petition, the “government’s forensic witness might have exculpated Vinson if Vinson’s trial counsel had asked her a single question: ‘Who supplied the type-O antigens found in the stain?’”

It follows that, based on this new evidence in question, never presented to the jury, there is a reasonable probability that, but for trial counsel’s unprofessional errors in failing to adequately understand the science underlying the evidence and prepare for cross-examining Lytle, the result of the proceeding would have been different. Thus, the district court’s conclusion that Vinson failed to meet the two *Strickland* prongs is debatable and a COA is granted on Vinson’s claim that his counsel rendered ineffective assistance at trial.

The *Strickland* standard applies to Vinson’s claim of ineffective assistance of appellate counsel as well. See *Whiting v. Burt*, 395 F.3d 602, 617 (6th Cir. 2005). To show ineffective assistance when appellate counsel presents one argument instead of another, “the petitioner must demonstrate that the issue not presented ‘was clearly stronger than issues that counsel did present.’” *Caver v. Straub*, 349 F.3d 340, 348 (6th Cir. 2003) (quoting *Smith v. Robbins*, 528 U.S. 259, 288 (2000)). For the same reasons outlined above, Vinson has established that his appellate counsel may have prejudiced his case by failing to present the argument surrounding his trial counsel preparation for cross-examining Lytle. As a result, the district court’s rejection of Vinson’s challenge to his appellate counsel’s performance is debatable and a COA should be issued on this claim.

Claim of Actual Innocence

Vinson repeats his claim that he is actually innocent based on the scientific evidence revealed after his conviction. However, this free standing actual innocence claim is not cognizable in a non-capital habeas corpus proceeding. See *Herrera v. Collins*, 506 U.S. 390, 404-05 (1993); *Hodgson v. Warren*, 622 F.3d 591, 601 (6th Cir. 2010). Reasonable jurists would not debate the district court’s rejection of this claim in light of *Herrera* and our holding in *Cress v. Palmer*, 484 F.3d 844, 854-55 (6th Cir. 2007).

No. 16-2760

Accordingly, we **GRANT** Vinson's motion for a COA in part and **DENY** it in part. The Clerk's office is directed to issue a briefing schedule on Vinson's claims of ineffective assistance of trial counsel and ineffective assistance of appellate counsel.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 16-2760

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KARL VINSON,

Petitioner-Appellant,

v.

SHANE JACKSON, WARDEN,

Respondent-Appellee.

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ORDER

BEFORE: SUHRHEINRICH, SUTTON, and BUSH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

* Judges Griffin and White recused themselves from participation in this ruling.