

No. 17-9332

In the Supreme Court of the United States

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KARL VINSON, PETITIONER

V.

MICHIGAN DEPARTMENT OF CORRECTIONS

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts of appeals are all correct in holding that a second or successive petition brought under 28 U.S.C. § 2244(b)(2)(B) must be based on facts that could not have been discovered previously by the applicant through the exercise of due diligence, including those working on his behalf?
2. If Karl Vinson satisfied § 2244(b)(2)(B)(i)'s diligence requirement, whether he also satisfies (B)(ii)'s requirement that no reasonable factfinder could have convicted him of rape, where his conviction was based on the nine-year-old victim's testimony that she recognized him (by both his face and his voice, based on meeting him previously), and where the forensic evidence he now relies on (his status as an AB secretor) does not exclude him from being the rapist?

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. The petitioner is Karl Vinson, a Michigan parolee. The named respondent below was Shane Jackson, Vinson's former warden. Vinson is now on parole, and the proper respondent is the Michigan Department of Corrections. Mich. Comp. Laws § 791.238(1) ("Each prisoner on parole shall remain in the legal custody and under the control of the department.").

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OPINIONS BELOW

The opinion of the Sixth Circuit affirming the district court's denial of Vinson's request to file a second or successive habeas petition, Pet. App. 1a–7a, is reported at 711 F. App'x 329. The Sixth Circuit's order denying Vinson's petitioner for rehearing en banc, Pet. App. 46a, is not reported. The district court's opinion and order denying Vinson's second habeas petition, Pet. App. 21a–38a, is not reported but is available at 2016 WL 7100249. The Sixth Circuit's order authorizing the district court to consider Vinson's second habeas petition, Pet. App. 15a–20a, is not reported.

The order of the Michigan Supreme Court denying Vinson's application for leave to appeal the denial of his motion for relief from judgment is reported at 843 N.W.2d 493. That Court's order denying Vinson's motion for reconsideration is reported at 847 N.W.2d 241. The Michigan Court of Appeals' opinion affirming the denial of Vinson's motion for relief from judgment, Pet. App. 8a–14a, is not reported but is available at 2012 WL 3046236. The Wayne Circuit Court's order denying Vinson's motion for relief from judgment, Resp. App. 1a–32a, is not reported.

JURISDICTION

The State accepts Vinson's statement of jurisdiction as accurate and complete and agrees that this Court has jurisdiction over the petition.

STATUTORY PROVISION INVOLVED

28 U.S.C. § 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.

INTRODUCTION

Karl Vinson presents this case as an opportunity to resolve a circuit split concerning the above-quoted diligence requirement of 28 U.S.C. § 2244(b)(2)(B)(i). But subsection (B) permits an applicant to present a second or successive habeas petition only if *both* of its two conditions are met: first (the issue Vinson focuses on), if “the factual predicate for the claim could not have been discovered previously through the exercise of due diligence,” § 2244(b)(2)(B)(i), *and* second (the issue Vinson glosses over), if in light of both the new evidence and the old, “no reasonable factfinder would have found the applicant guilty of the underlying offense,” § 2244(b)(2)(B)(ii).

Certiorari is unnecessary for two reasons. First, there is no circuit split on the (B)(i) issue. The courts of appeals have consistently held that the diligence requirement applies to the defense team as a whole, not just to the applicant *personally*, as Vinson would have it. Indeed, accepting Vinson’s interpretation would nearly read the diligence requirement out of the statute, because there is very little evidence that *could* be discovered by an incarcerated prisoner on his own. Nothing in the text eliminates the ordinary rules that principals act through agents and that litigants—

especially criminal defendants and habeas petitioners (who are usually incarcerated)—act through their attorneys.

Second, even if Vinson were correct that the diligence requirement applied only to him, it would not change the outcome of his case: a reasonable factfinder could convict him even if it considered the evidence that he says is new. His conviction for raping a nine-year-old girl rested primarily on her identification of him, not on forensic evidence: she testified that she knew him prior to the rape (because his wife had been her babysitter) and that she recognized him during the rape by both his appearance and his voice. As the state appellate court recognized, the state “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.” Pet. App. 11a (emphasis added); Pet. App. 13a (“Our review of the original trial transcripts does not support Vinson’s contention that the prosecution’s case hinged on the forensic evidence. . . . In actuality, very little testimony was elicited regarding Vinson’s alleged status as a nonsecretor and its possible relationship to the physical evidence.”). Because of this identification, each court that has considered his proffered new forensic evidence has concluded that his status as a secretor does not prove he could not have been the rapist. Pet. App. 7a, 31a, 13a; Resp. App. 31a. And in any event, this factbound question does not warrant this Court’s review.

Because (B)(ii) *by itself* bars Vinson from obtaining habeas relief, any decision about the scope of (B)(i) would not make a difference in his case. Certiorari should be denied.

STATEMENT OF THE CASE

This case arises from Karl Vinson's 1986 rape of a nine-year-old girl in her own bed. Pet. App. 8a. The girl awoke to find Vinson in her room, and there was enough light in the room for her to identify him. *Id.* at 8a–9a. She had seen Vinson before because his wife had babysat her. *Id.* at 9a. And she also recognized his voice. *Id.*

The victim was taken to the hospital and examined. *Id.* She had a deep cut to her vagina, requiring surgery. *Id.* Sperm was also present in her vagina. *Id.* Police (specifically, Sergeant Badascewski) also tested a stain on her bedsheet, which was found to contain both blood and seminal fluid. *Id.* A portion of that stain was also tested (by Paula Lytle, a medical technologist) to determine blood type. *Id.* The blood was type O, the same as the victim's. *Id.* Vinson's blood type was AB. *Id.* This portion of the stain was not tested to see if it contained seminal fluid, leaving open the possibility that this portion contained only blood. *Id.* at 9a, 13a (“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.”), 16a n.1 (“[Lytle] ‘acknowledged . . . that she was uncertain whether the material or sample she tested actually contained seminal fluid.’”), 31a.

There was testimony at trial that the victim was a “secretor,” defined as “[a]n individual whose bodily fluids (saliva, semen, vaginal secretions) contain a water-soluble form of the antigens of the ABO blood group.” *Id.* at 9a. There was also testimony that Vinson was a “nonsecretor,” defined as “an individual whose bodily fluids and saliva . . . do not contain antigens of the ABO blood group.” *Id.* (alterations removed). Vinson's status as a nonsecretor was used to explain why he could be the

source of the seminal fluid on the bedsheet even though there were no AB antigens found when a portion of the stain was tested for blood type. *Id.*

Vinson was convicted of one count of first-degree criminal sexual conduct. He appealed, arguing that he was denied a fair trial by the prosecutor's remarks in closing argument. The Michigan Court of Appeals affirmed his conviction in an unpublished opinion per curiam, and the Michigan Supreme Court denied his application for leave to appeal.

In 2000, Vinson returned to the trial court and filed a motion for relief from judgment, which that court denied. In 2006, Vinson filed his first federal habeas petition in the Eastern District of Michigan, which that court denied as barred by AEDPA's one-year statute of limitations.

In 2009, Vinson obtained a blood typing and secretor test and was found to be an AB secretor. He sought to file a second motion for relief from judgment in the state trial court. As ultimately amended, the motion argued that Vinson's secretor status made it scientifically impossible for him to have raped the victim. The trial court ordered an additional secretor test performed, which confirmed that Vinson is a secretor.

Although Vinson's motion argued that trial and appellate counsel were ineffective for not seeking independent testing of Vinson's secretor status, Vinson's counsel argued at a hearing on the motion that trial counsel had committed no error regarding Vinson's secretor status:

There is no reason to believe or no reason for the trial counsel at the time to have thought that she needed to seek independent testing of Mr.

Vinson's secretor status, or of any of the other forensic testing that was conducted in the case.

There was no reason why Mr. Vinson's trial counsel should have sought funds from the Court for her own independent testing. [Resp. App. 5a.]

Counsel also conceded that there was eyewitness testimony from the victim identifying Vinson as her rapist, and that "identification testimony is obviously important." Resp. App. 8a.

The trial court denied the motion for relief from judgment, holding that the new evidence of Vinson's secretor status would not have caused a different result in the case. Resp. App. 31a. Noting that "[t]he young girl had reason to know who he was" and had identified him, *id.* at 29a, 31a, the trial court rejected Vinson's argument that the scientific testimony bolstered the identification testimony, recognizing that the scientific evidence was not used to inculcate Vinson, "[b]ecause the scientific testimony actually said that he could not be excluded because of his secretor status, but it didn't include it." *Id.* at 8a. The trial court also pointed out that, at best, the evidence excluded Vinson as the source of the portion of the stain on the sheet that was tested for blood type, but that the antigens in the stain could have come from a source other than the rapist (such as from the victim herself)—i.e., excluding Vinson as the source of the stain did not exclude him as the rapist. *Id.* at 9a–13a, 30a, 31a. The court concluded by holding that it was not convinced the new evidence would lead to a different result. *Id.* at 30a, 31a.

Vinson appealed the decision to the Michigan Court of Appeals, which affirmed in an unpublished opinion per curiam. Pet. App. 8a–14a. The Michigan Court of

Appeals applied the so-called *Cress* test, after *People v. Cress*, 664 N.W.2d 174 (Mich. 2003), which governs motions for new trial based on newly discovered evidence. *Id.* at 11a–12a. The court held that Vinson failed to satisfy three of *Cress*’s four prongs, including the required showing that “the new evidence makes a different result probable on retrial.” *Id.* at 13a. The court held that Vinson’s secretor status did not actually exclude him as the rapist, and that the victim’s eyewitness testimony was the key evidence of Vinson’s guilt:

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. [*Id.* (emphases added).]

Vinson sought leave to appeal this decision to the Michigan Supreme Court, which that Court denied. *People v. Vinson*, 843 N.W.2d 493 (Mich. 2014). Vinson then

sought reconsideration of that decision, which was also denied. *People v. Vinson*, 847 N.W.2d 241 (Mich. 2014).

Vinson next returned to the federal courts, seeking permission to file a second or successive habeas petition. The Sixth Circuit granted his request, holding that he had made a prima facie showing of satisfying 28 U.S.C. § 2244(b)(2)(B). As to the first prong, the panel held that Vinson had made a prima facie showing of diligence because he began seeking DNA testing “[s]oon after [he] exhausted his direct appeals, and around the time DNA testing came into widespread use[.]” Pet. App. 19a. And as to the second prong, the panel held that Vinson’s status as a secretor might have made a difference at trial. Pet. App. 19a–20a.

On remand to consider his second habeas petition on the merits, the district court denied habeas relief as to all of Vinson’s claims. While recognizing that the Sixth Circuit had held Vinson made a prima facie showing of meeting the requirements of § 2244(b)(2)(B), the district court held that Vinson had not actually met the requirements. Pet. App. 27a–28a.

The Sixth Circuit granted Vinson a certificate of appealability as to two of his claims: first, ineffective assistance of trial counsel for not adequately cross-examining the prosecution’s serology expert, and second, ineffective assistance of appellate counsel for not raising the first claim on direct appeal. See Pet. App. 4a. The court did not, however, reach the merits of the claims, because it held that he failed to meet either of the requirements of § 2244(b)(2)(B). Pet. App. 6a–7a.

As to (B)(i), the court held that, whether Vinson's claim depends on his secretor status or simply on trial counsel's supposed failure to ask a particular question on cross-examination, "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." Pet. App. 7a. And as to (B)(ii), the court held that, given the victim's eyewitness testimony identifying Vinson as the rapist, "it is difficult to see how Vinson's secretor status, alone, would meet [(B)(ii)'s] requirement." *Id.*

REASONS FOR DENYING THE PETITION

I. There is no circuit split on who is covered by the rule regarding newly discovered evidence.

The court of appeals affirmed the denial of Vinson's habeas petition in part because Vinson's secretor status "was a discoverable fact at the time of his original habeas petition." Pet. App. 6a. Vinson's sole argument before this Court is that the court of appeals erred because, while his secretor status might have been discoverable by Vinson's trial or appellate counsel, it was not discoverable by him personally.

Vinson claims that this case presents the opportunity to resolve a split between the courts of appeals on the proper interpretation of 28 U.S.C. § 2244(b)(2)(B)(i). That provision requires a petitioner seeking a second bite at the habeas apple to come forward with a "factual predicate" that "could not have been discovered previously through the exercise of due diligence." According to Vinson, some circuits (including the Sixth Circuit in his case) interpret this to mean "could not have been discovered previously" by anyone at all, while others interpret it to mean "could not have been discovered previously" by the petitioner personally. Pet. 7.

The cases Vinson cites to support his split are inapposite. The first such case is *Herrera-Gomez v. United States*, 755 F.3d 142 (2d Cir. 2014). *Herrera-Gomez* does not explicitly address whether (B)(i)'s requirement applies only to the petitioner personally, or to the petitioner acting by and through counsel. But *Herrera-Gomez* stands squarely for the opposite proposition from the one Vinson advances. The Second Circuit noted that “Herrera-Gomez has failed to explain why he, *who was represented by counsel at all relevant times*, could not have discovered this evidence earlier.” *Id.* at 147 (emphasis added). If the diligence requirement applied solely to the claimant personally, it would be irrelevant to note that Herrera-Gomez was represented by counsel. The only way *Herrera-Gomez* makes sense is if it applies to the defense *team*, not to the petitioner alone. Because Herrera-Gomez was represented by counsel, his ability to discover evidence was enhanced.

Libby v. Magnusson, 177 F.3d 43, 50 (1st Cir. 1999), is also of no help to Vinson. In that case, the First Circuit held that Libby's successive petition was barred in part because he knew of the existence of a potential alibi witness before he filed his first petition. But that does not answer the question whether *only* the personal knowledge of the petitioner is relevant. If Libby's attorney had known or been able to know of the potential alibi witness, would that have barred the successive petition? The question did not arise in *Libby*, and *Libby* did not answer it. Because *Libby* was not presented with the question whether the diligence requirement includes counsel, it cannot be read to have answered it.

Vinson cites *Cooper v. Woodford*, 358 F.3d 1117 (9th Cir. 2004), as a case he believes divided a Ninth Circuit en banc panel on whether the diligence requirement applies to the petitioner personally or more broadly. But neither the majority nor the dissent held that the requirement applies to the petitioner personally. Both sides applied the requirement to Cooper's team. The majority noted, "Cooper . . . attaches a sworn declaration of his present counsel stating that *Cooper's investigators* became aware of the information . . . on January 30, 2004," and on that basis held that Cooper satisfied (B)(i). *Id.* at 1121 (emphasis added). The dissent believed, however, that the defense *could* have known of the information if it had investigated. *Id.* at 1126. The disagreement between the majority and the dissent, then, is not between what the petitioner personally could have known and what his team could have known. Rather, it is a disagreement between what the defense team *actually* knew and what the defense team *could have* known. That is not the question presented in this case.

And Vinson cites *In re Boshears*, 110 F.3d 1538 (11th Cir. 1997), as a case in which the diligence requirement is applied only to the petitioner personally. But like *Herrera-Gomez*, *Boshears* stands for the opposite proposition. In holding that Boshears had not met (B)(i)'s diligence requirement, the Eleventh Circuit held that the facts in the case "strongly suggest that *Boshears' attorney* had an opportunity to question" the physician who examined the victim, and noted also that "Boshears gives no indication as to whether he *or his attorney* contacted" another physician." 110 F.3d at 1541 (emphases added).

In sum, Vinson has found no decision by any court that confronts the question he presents in this petition and resolves it in his favor. His assertion that there is a split for this Court to resolve is incorrect.

And it makes sense that the circuit courts agree that (B)(i)'s diligence requirement applies to the defense team rather than the petitioner personally. Principals act through agents. Attorneys are agents of their clients, and clients (especially prisoners) act through their attorneys. Recognizing this, the statement of jurisdiction in Vinson's petition for certiorari begins, "Petitioner seeks review . . ." even though the petition is not signed by Vinson but by counsel. Pet. at 1, 13. Similarly, in recounting the procedural history, Vinson explains that the Sixth Circuit "found that Petitioner had presented a prima facie case . . . ," although it was in fact Vinson's attorney who presented that case. Pet. at 5.

Because the courts of appeals correctly and consistently apply (B)(i) by recognizing that asking what a criminal defendant or petitioner could have done entails asking what their counsel could have done, there is no question here that requires this Court to weigh in.

II. There is no split within the Sixth Circuit regarding the question presented.

Vinson also cites the history of his own case to support the idea that the Sixth Circuit is split on the application of (B)(i). Again, he is mistaken. The first panel examined only whether Vinson made a prima facie showing about the evidence, which it acknowledged is a low standard: a prima facie showing requires only that his claims

“‘warrant a fuller explanation in the district court.’” Pet. App. 19a. That conclusion did not bind either the district court on remand or the later panel, as both recognized. Pet. App. 5a (noting that a *prima facie* determination is “not a full-throated review” and that a “district court must apply a stricter standard”), 27a. There is no intracircuit split here, any more than there would be if one panel imposed a stay (using the likelihood-of-success standard) and a later panel came to a difference conclusion in the same case when fully examining the merits.

When the merits panel applied the actual standard of (B)(i), rather than just the *prima facie* standard, it concluded that “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.” *Id.* at 7a.

The difference between the two panels is not that the first panel thought the diligence requirement applies only to the petitioner personally while the second understood that it applies to petitioner’s counsel as well. Rather, the difference is that the first panel was evaluating the diligence requirement at a time at which Vinson had no attorney (in 2001 and in 2006). The second panel evaluated the claim at an earlier time (before trial in 1986, when secretor status testing was available), at which Vinson *did* have counsel. When Vinson had counsel, he had a greater ability to investigate. But it would not make sense to extend the diligence requirement to counsel that does not exist.

In sum, there is no reason to think that the two panels were divided on the question presented in this petition. There is no intra-circuit split requiring resolution.

III. There are no absurdities in the Sixth Circuit's correct application of (B)(i).

Vinson attempts to show two problems with the court of appeals' application of (B)(i), but both depend on a misunderstanding of the diligence requirement.

First, Vinson claims that (B)(i) requires an ineffective attorney to discover her own ineffectiveness. This misunderstands the diligence requirement. Section 2244(b)(2)(B) applies to second or successive habeas petitions. Appellate counsel (not just Vinson himself) could have discovered trial counsel's supposed ineffectiveness and raised it in a motion for new trial, or on direct appeal of right to the Michigan Court of Appeals, or in the Michigan Supreme Court, or in the trial court in a first motion for relief from judgment under subchapter 6.500 of the Michigan Court Rules, or in a first federal habeas petition. None of these avenues are subject to the requirement that the factual basis could not have been discovered previously through the exercise of due diligence. It is only now that Vinson is taking this second bite at the federal habeas apple that Congress has required him to bring a claim he could not have brought before. Vinson's second habeas petition is not barred because trial counsel should have discovered her own ineffectiveness. Rather, it is barred because appellate counsel, or post-conviction counsel, or Vinson's first habeas counsel, or Vinson himself, could have discovered trial counsel's ineffectiveness.

Vinson also claims that the court of appeals' interpretation of (B)(i) is "absurd" because it bars "a successive claim if *anyone* could have found the evidence earlier through due diligence," even the police or prosecutor. Pet. at 9–10. This is indeed absurd, and unsurprisingly, Vinson cites no decisions of any court that have

interpreted (B)(i) in this way. The fallacy in Vinson’s argument is the apparent assumption that (B)(i) must either apply only to the petitioner personally, or to anyone and everyone. Neither of these is correct. Subsection (B)(i) applies *only* to the petitioner, but not only to the petitioner personally. As the cases Vinson cites illustrate, it applies to the petitioner and includes those working on the petitioner’s behalf, like his attorneys. It does not apply to the rest of the universe, including the police and prosecution.

IV. The state courts and the lower courts have uniformly held that Vinson has failed to show that this newly discovered evidence would have caused a jury to acquit.

Vinson claims that his petition is an “excellent”—indeed, a “perfect”—vehicle to resolve the question presented. He supports this by mistakenly asserting that this case “turns squarely on the question presented.” Pet. at 10. It does not. In order to bypass the bar on second or successive habeas petitions, Vinson has to show not only that the evidence “could not have been previously discovered through the exercise of due diligence,” as required by (B)(i), but also that “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.” § 2244(b)(2)(B)(ii).

Apart from a few conclusory assertions, Vinson attempts no argument on this (B)(ii) point. He does not mention that the Sixth Circuit affirmed the denial of the habeas petition not only on (B)(i), but also on (B)(ii). Pet. App. 7a. The Sixth Circuit

concluded its opinion affirming the dismissal of the petition by citing (B)(ii) and recognizing that, “[a]t 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 [(B)(ii)’s] requirement.” Pet. App. 7a.

Although its explanation was less direct, the district court also held that Vinson failed to meet the requirements of (B)(ii). Without discussion, the district court held that Vinson failed to meet both of (B)’s requirements. Pet. App. 27a. Despite this, the district court went on to discuss the merits of Vinson’s ineffective-assistance claim. Pet. App. 28a–32a. As part of this discussion, the district court held there was no reasonable probability that evidence of Vinson’s secretor status would have made a difference to the verdict. Pet. App. 31a. Because *Strickland*’s “reasonable probability” standard is an easier standard for the petitioner to meet than (B)(ii)’s “no reasonable factfinder” standard, it follows necessarily that the district court would have found (B)(ii) unsatisfied if it had discussed the question explicitly.

And there is more. Although the Michigan Court of Appeals was not bound by § 2244(b), it had its own standard to apply—the standard for granting a new trial based on newly discovered evidence discussed in *People v. Cress*, 664 N.W.2d 174 (Mich. 2003). Under that standard, the defendant must show, among other things, that “the new evidence makes a different result probable on retrial.” *Id.* at 182. The Michigan Court of Appeals held that Vinson failed to make this required showing. Pet. App. 13a. And again, the *Cress* probable-prejudice standard is more defendant-friendly than (B)(ii)’s “no reasonable factfinder” standard.

Finally, the state trial court also considered whether the new evidence would have caused a different result. Resp. App. 30a, 31a. The same judge who presided over the trial presided over the motion for new trial. And that judge held that the newly discovered evidence would not have made any difference. *Id.*

Even if this Court were to overturn the Sixth Circuit's reasoning on (B)(i), it will not make any difference to the outcome of this case unless this Court also engages the (B)(ii) question. This is a factbound question of no jurisprudential significance. This Court would merely be engaging in possible error correction of the lower federal courts, and it would need to hold that the Michigan Court of Appeals' resolution of the claim was not only incorrect, but so unreasonable that it constituted "an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). And it would need to do so despite the question not being raised or even mentioned, much less argued, in the petition for certiorari.

And there was no error on the (B)(ii) question. A reasonable factfinder could believe the victim's testimony identifying Vinson as the rapist and could accept the evidence explaining why O antigens (the victim's blood type) were found but not AB antigens (Vinson's blood type). As to the presence of O antigens, the very witness that Vinson relies on (Paula Lytle) testified that the O antigens she found in the smaller sample could have come from the victim, Pet. App. 3a, 10a, 30a, and a second witness also testified that the O antigens could have come from the victim, *id.* at 31a. As to the absence of AB antigens, a reasonable factfinder could conclude that their

absence does not exculpate Vinson, either because the smaller sample that was actually tested for blood type did not contain sufficient antigens, Pet. App. 4a, or because that smaller sample might not even have included seminal fluid, *id.* at 13a, 16a n.1, 31a (each noting that Lytle conceded that she did not test that sample for seminal fluid). In short, a reasonable factfinder could believe the young girl's identification of Vinson by both his face and his voice and could conclude that the forensic evidence is uncertain.

Given this independent basis for the Sixth Circuit's rejection of Vinson's habeas petition, which was unanimously decided against Vinson by both lower federal courts and by both state courts, which is factbound and without jurisprudential significance, which implicates concerns of comity and federalism, and which was not even presented by the petition for certiorari, this case is far from a "perfect vehicle" for the question presented. Quite the opposite, this is a case where the answer to the question presented will not resolve even Vinson's own case.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

Bill Schuette
Michigan Attorney General

A handwritten signature in cursive script, reading "Aaron D. Lindstrom".

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Dated: October 2018

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Post-Conviction Hearing

Wayne County Circuit Court No. 86-000214

March 28, 2011

Full Transcript..... 1a-32a

STATE OF MICHIGAN
COUNTY OF WAYNE
THIRD JUDICIAL CIRCUIT COURT - CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,

vs.

Case No. 86-000214

KARL FREDERICK VINSON,
Defendant.

POST-CONVICTION HEARING

BEFORE THE HONORABLE VERA MASSEY JONES
CIRCUIT COURT JUDGE

Detroit, Michigan - Monday, March 28, 2011

APPEARANCES:

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Detroit, Michigan

Monday, March 28, 2011

At about 9:55 a.m.

(All parties present.)

THE CLERK: Case number 86-00214; People versus Karl Vinson.

MS. EISENBRAUN: Good morning, your Honor. Marilyn Eisenbraun for the People.

MS. McCORMACK: Good morning, your Honor. Bridget McCormack for Mr. Vinson.

MR. KRIGER: Good morning, your Honor. Mark Kriger also for Mr. Vinson.

MS. McCORMACK: Also at the table, as has been throughout the hearing, is Chad Ray, law student at the University of Michigan Law School.

THE COURT: All right.

MS. McCORMACK: May I proceed, your Honor?

THE COURT: Of course.

MS. McCORMACK: Before I begin my argument on the motion, your Honor, I mailed last week a stipulation signed by both the parties to the Court; but I brought another copy, and I'd like to admit it as Exhibit 8 unless you have already --

THE COURT: I have it here someplace. You guys file so much stuff in duplicate copy that things get lost. I have some questions about the... I'm looking for a copy of it. Please go ahead and have that marked.

MS. McCORMACK: Okay. Thank you, your Honor.

(Proposed Exhibit Number 8 marked for identification and admitted.)

THE COURT: May I see a copy of that stipulation?

MS. McCORMACK: Yes, your Honor.

THE COURT: I think you guys like to do this so we end up with so much paper it buries the Court.

May I see it, Marilyn, because I had -- on the piece that I had -- I thought it was just two pages -- I had some questions.

Okay. All right, Marilyn. Hand this back to them so they can put it in the file, this exhibit.

I guess the only question I have, it seemed pretty late to tell us about who it was who took something from one place and took it to another, which is your -- what number is that, 2 or 3? That some law student --

MS. McCORMACK: Yeah. Number 2 is a stipulation that Chad Ray would testify that he picked up the semen sample given to Mr. Vinson in May of 2009, and it took 45 minutes for that semen sample to dry.

THE COURT: And I know the court reporter didn't get a word you said since you talked so fast.

MS. McCORMACK: I think you're correct, and I'm going to try and slow down.

Number 2 says: "Chad Ray, a student at the Michigan Innocence Clinic, would testify that he picked up a semen sample given by Mr. Vinson in May of 2009, and it took 45 minutes for that semen sample to dry." That's what Number 2 says, your Honor.

THE COURT: Okay.

MS. McCORMACK: Thank you. May I proceed with argument, your Honor?

THE COURT: Yes.

ARGUMENT

MS. McCORMACK: I don't expect to take very much time, although I intend to obviously answer any questions the Court has. I want to address two claims.

The claim that the new evidence that Karl Vinson is an AB secretor, and not an AB nonsecretor, as was thought at the time of his trial, requires that his Motion for Relief From Judgment be granted, and he be given a new trial.

And second, and I'll turn to this after that first claim, that the ineffective assistance of his trial counsel requires the same result.

We believe he's met his burden on both claims, and I'll start, as I said, with the newly discovered evidence of his AB secretor status.

As the Court is aware, it was first determined in February of 2009 that Mr. Vinson secretes his AB antigenic substances in his bodily fluids other than blood. This was not known at the time of his trial. At the time of his trial he was believed to be a nonsecretor, and this was obviously important in the case that was tried against him at that time.

It is now not in dispute that he is an AB secretor. That's been determined through the course of three separate testings; one ordered by this Court.

The burden for newly discovered evidence is, first, that the evidence is newly discovered. This evidence was newly discovered in February '09, after Mr. Vinson's earlier motions for relief from judgment.

The second prong is that the new evidence is not cumulative. Since the evidence at his trial was the opposite of this new evidence -- the evidence at his trial was that he was a nonsecretor -- this new evidence is not cumulative.

The third prong is that it could not have been discovered using reasonable diligence. There is no reason to believe or no reason for the trial counsel at the time to have thought that she needed to seek independent testing of Mr. Vinson's secretor status, or of any of the other forensic testing that was conducted in the case.

There was no reason why Mr. Vinson's trial counsel should have sought funds from the Court for her own independent testing. So the third prong is satisfied as well.

And finally, the fourth prong, and the prong where most of these cases are decided, Mr. Vinson has to show that upon retrial, this new evidence would probably cause a different result.

Mr. Vinson's status as an AB secretor would certainly cause a different result if he were tried with that correct forensic evidence. The fact that he was thought to be a nonsecretor by everybody in the trial, his own counsel, the prosecution, and the jury, made him an eligible perpetrator of this crime. It made him one of the possible people who could have committed the crime.

The test that we now know that correctly shows that he is an AB secretor makes him ineligible as a perpetrator of the crime. As you heard Paula Lytle testify, she would say that he would be excluded from the sample that was collected on the young victim's bed sheet. That she, herself, would tell the prosecutor he was excluded. And if asked during trial, she would testify that he was excluded from the sample that she tested. That testimony from Paula Lytle would certainly have made a difference in the outcome.

The scientific testimony was very important in this case. Obviously, there was identification testimony from the victim. But the scientific testimony --

THE COURT: Can I get you to stop for one minute.

MS. McCORMACK: Yes, I will.

THE COURT: One of the questions I wanted to ask was during this trial, before we brought the jury in, didn't I have to do something about how this young lady could identify him? Hadn't there been some, quote, "prior bad act"?

MS. McCORMACK: I believe -- sorry.

THE COURT: And at that time when we tried this case, the law was such that prior bad acts could be used. Because I thought that what we had come up -- I didn't read all the transcripts. I'm not going to do that. Like I said, you guys are burying me in enough paper.

But if I remember correctly, there was some evidence that I had to suppress or caution the prosecutor about bringing up because this young lady had claimed that this man had tried something similar in regard to her in the past; that she recognized him. You know, "the babysitter's boyfriend or husband --

MS. McCORMACK: Yes.

THE COURT: -- who tried to do something to me before."

So, wasn't that suppressed by the Court?

MS. McCORMACK: I believe that's correct, your Honor.

THE COURT: Okay.

MS. McCORMACK: And I did read the transcript. But I want to confess that it has been some time since I've read that part of it. But I believe it's correct that there was an allegation, at least, from the young victim that there was some previous interaction. For the record, I believe it was three years prior.

THE COURT: And that's how she recognized his face. She knew it was the same person.

MS. McCORMACK: I don't believe the record ties that together, but that may well have been the case. It's impossible for me to know that at this point.

What I do know is that there were other aspects of the identification. It was from a nine-year-old girl, and it was –

THE COURT: Kids always get it wrong.

MS. McCORMACK: I think kids sometimes get it right. I just don't -- you know, in fact, my kids seem to be better observers of details than I am at this point in my life. So, that wasn't my point.

My point was, when she was nine and this happened to her, it had been three years since she had seen Mr. Vinson at all. So her previous contact with Mr. Vinson, whatever the details of that contact was, was three years old or one-third of her life old at that point.

And in addition to that, as the Court is aware, there have been -- 75 percent of the DNA exonerations have shown that eyewitness testimony has been wrong.

THE COURT: But we don't have DNA, so let's not talk about that.

MS. McCORMACK: Well, I think that's right. Of course, we don't have DNA. We wish we did. But I just mean to say identification testimony is obviously important, but it's not infallible.

And in this case, the identification testimony was supported by the scientific testimony, the forensic testimony.

THE COURT: No, it wasn't. Because the scientific testimony actually said that he could not be excluded because of secretor status, but it didn't include it.

Didn't Paula Lytle testify that at the trial -- she said if at trial she had been asked, she would have said -- if she had known he was a secretor, she would have said he could have been excluded.

But at this time, from the stain that was left on the bed sheet, the stain on the bed sheet. So, I think it has to do with -- they did argue different things, but what she said was he could not be -- she could not exclude him. Not that she could include him. She could not exclude him. That was her testimony at trial.

MS. McCORMACK: I agree with that, your Honor. She said she could not exclude him. And in fact what she also said, and I have the trial testimony before me, is that because nonsecretors, which is what she thought he was at the time, do not demonstrate types in their bodily fluids, they couldn't be detected in this particular stain.

So, because she believed him to be a nonsecretor, her testimony was his semen could well have been in that stain that they were testing, and not been detected by her.

THE COURT: Big word, "could."

MS. McCORMACK: That's right, could.

THE COURT: Okay.

MS. McCORMACK: And the fact that it could, gave the victim's identification a lot more -- it meant that the victim's identification became of paramount importance, obviously, because --

THE COURT: Okay. And that's why I go back to what had happened to her three years earlier. And maybe we don't understand how children react, but I would think a traumatic event such as someone sexually assaulting you when you were six might keep that picture of that person in your mind so that the identification ...

But I had, at that time, to suppress it because the state of the law was that it couldn't be included as evidence during that trial.

MS. McCORMACK: That's all correct, your Honor. It may well be. I don't think there's any way for me to, at this point, second guess, you know, how well the victim remembered Mr. Vinson's face from when he was her babysitter's husband.

I will reiterate that it's my understanding that the allegation from her from three years prior was an allegation. I don't believe there was any evidence or proof of that allegation.

But the point is, and the point I wanted to get to is that if there had been correct forensic testing in 1986, if Paula Lytle had known he was an AB secretor, and not the nonsecretor she thought him to be, she would have testified very differently from how she did testify.

So, instead of saying he could well be the rapist, his semen could well be in that stain, she would have said, instead, he could not be the rapist.

THE COURT: Oh, no, she wouldn't have said that.

MS. McCORMACK: Well --

THE COURT: I don't think so. I don't think you have that. She might have said he could not have contributed to this stain.

MS. McCORMACK: That's fair.

THE COURT: And I think that's where we have another real big problem, is about the stain on the sheet.

MS. McCORMACK: Well, I want to talk about that as well, obviously. But I believe --

THE COURT: And while we're at it, let's just add one other thing. Because I think I asked counsel who sits at the table with you before about this, and I know it can't be used in -- but didn't he take a lie detector test, your client?

MS. McCORMACK: I don't -- I know that I've seen that in the prosecutor's pleadings, but I have to say I'm not familiar with that part of the case.

THE COURT: Um, okay. Let's go on. Go ahead with your argument.

MS. McCORMACK: But my view is that lie detector wouldn't have been admissible. But Paula Lytle's testimony that his --

THE COURT: But we aren't -- but where we are at is something else here in this, and I guess that was one of the things I was going to ask you to brief.

You see, there are a lot of things in here, and we are how many years later now?

MS. McCORMACK: Twenty- five.

THE COURT: The law has changed in regard to whether or not I could have admitted how she knew his face. Particularly, they changed the law particularly for child abuse cases. So that would be other acts.

MS. McCORMACK: Your Honor, I'm not --

THE COURT: Also, at the time, the prosecutor would allow, and now the law requires, particularly in sexual assault cases, they allow the defendant to take a lie detector test. But sometimes they won't bring the charge.

And if I remember correctly, there was a lie detector taken in this case. It never came out at trial. Could not come out at trial. But I would have asked you in this regard to this matter here.

Because, see, I think the real problem that you have is the stain on the sheet. Everybody keeps telling me, well, she was a nine-year-old girl. Yes, but there's a whole lot of questions that were never asked about the conduct of the mother in the house, who else was in the house.

I didn't hear certain questions that I was concerned about. Could they tell whether this was fresh or not fresh? That those questions were never asked at the trial. We know that they were wet. We know they were wet because this little girl bled on them. There were so many things, and I'll wait for you to answer. But I just wanted to bring that to your attention. Go ahead.

MS. McCORMACK: I appreciate it, your Honor. I'll address the stain on the sheet now. Because while I believe you're correct that the trial record didn't spend -- or, none of the witnesses or the lawyers spent very much time exploring the details of the stain, it seems to me that was true because it wasn't in dispute. It was the prosecutor's argument. He said it repeatedly that the fluids on the stain came from, he said, the defendant. I believe he meant the perpetrator and the victim; and Mr.

Vinson's lawyer didn't dispute that. Mr. Vinson's lawyer didn't dispute that the stain came from the perpetrator and the victim.

But we know a lot more about it now, based on the testimony at this hearing. We know that the -- well, some of it was admitted at trial. We know that when the sheet was collected, the stain was wet. That was the police officer's testimony.

We know from Paula Lytle and Sergeant Badescewski that the semen stain was a mixture of blood -- I'm sorry -- the stain was a mixture of blood and semen. We know a little bit about the strength of the presence of semen in this stain because Sergeant Badescewski got the highest possible result on an acid phosphatase test. He got a plus-four, so there was a strong presence of semen. And we know he found an intact sperm.

We also --

THE COURT: Excuse me. Did any of that tell us when that stain, other than the fact that it was wet, had been placed there?

MS. McCORMACK: I believe so, your Honor, because there was also --

THE COURT: Well, I want to hear that. That's the part you haven't gotten to yet.

MS. McCORMACK: So, my understanding is that Dr. Tigchelaar --

THE COURT: Oh, Dr. Tigchelaar. Go ahead.

MS. McCORMACK: -- testified that sperm only remain intact for up to eight to ten hours after they are deposited. And after that point, their tails are cut off or come off the rest of the sperm.

And given that, and the fact that both Sergeant Badescewski and Dr. Tigchelaar --

THE COURT: Excuse me. Tigchelaar said there was a sperm. There was a tail on the sperm that she saw which came from the young girl; right?

MS. McCORMACK: Yes, that's correct.

THE COURT: Did anybody testify that there was a tail on the sperm on the sheet?

MS. McCORMACK: Sergeant Badescewski's testimony was that the sperm that he identified after the acid phosphatase test was an intact sperm.

THE COURT: Go ahead.

MS. McCORMACK: So these two separate confirmations of fresh sperm on the stain and --

THE COURT: Oh, that's what you call it Okay.

MS. McCORMACK: Well, intact sperm on the stain --

THE COURT: Yeah.

MS. McCORMACK: -- and intact sperm in the young victim's vagina make it pretty unbelievable that there happened to be some other sperm in the stain.

And in addition, there's no evidence whatsoever in the trial record that anyone else had sex in the young girl's bed, and deposited semen in the young girl's bed.

And if that were the case, obviously, the prosecutor is permitted to prove that at a retrial. But the record as it stands has no evidence whatsoever that someone else had sex in the young girl's bed.

THE COURT: Isn't the burden on you in this hearing?

MS. McCORMACK: The burden is on us to show that the new evidence would change the outcome. And since the trial evidence had no theory whatsoever that the semen that was mixed with the young girl's blood came from anyone other than the defendant --

THE COURT: Excuse me. See, and I tell jurors all the time that what the lawyers say isn't evidence. The evidence comes from the witness stand. So the prosecutor's argument is not evidence. It's their theory.

Now, in this case you have the burden of proving certain things to me that would give me confidence in knowing that I'm making the right decision.

MS. McCORMACK: That's right, your Honor. And our burden is to show that this new evidence, the fact that he's an AB secretor, would upon retrial probably cause a different result.

And even though the prosecutor's arguments are not evidence, which of course they're not, the prosecutor's evidence are obviously related to the result at a trial if the prosecutor is a good prosecutor, which Mr. Talon truly was. So the prosecutor's arguments, while not evidence, are clearly related to the result that's produced at a trial.

But maybe I'm like straying from what is perhaps the most important aspect of the new forensic evidence, which is AB antigens were not in that stain. Paula Lytle did thorough acid -- thorough testing for antigenic substances in the stain. As she

said, they could not test the blood. So the O result that she got was, in her view, from the semen.

If Mr. Vinson had been the perpetrator and had left semen in that stain, that AB antigens from his semen would have appeared as the result -- in the results in Paula Lytle's testing, and they did not. The only results she got was O.

Her testimony that based on that, his AB secretor status, she would exclude him from that stain, would clearly cause a different result. That isn't to say, your Honor, that the prosecutor might not make other arguments and might not call other witnesses. But all we can do is judge the new evidence against the trial evidence, and determine whether a different result is likely; and a different result is plainly likely.

If the Court doesn't have further questions on the new evidence, I'll turn to the ineffective assistance of counsel claim briefly that I would like to highlight for today.

THE COURT: Go right ahead,

MS. McCORMACK: Thank you.

As your Honor heard in Paula Lytle's testimony at the evidentiary hearing, Paula testified that she would have said even at the time of trial had she been asked, that the O antigens she detected, in her opinion, were from the rapist. Nobody asked her that question. And it seems to me, probably because no one understood that to be the case. No one ever did their homework and understood how this testing worked.

THE COURT: Excuse me. Was the young lady type O?

MS. McCORMACK: She was type O, yes.

And as the Court remembers --

THE COURT: So, you're saying it would be ineffective for counsel to -- because she didn't ask -- we know that the young lady was O.

MS. McCORMACK: Yes.

THE COURT: No question about that.

MS. McCORMACK: Yes.

THE COURT: And we know that they found O stains; right?

MS. McCORMACK: Yes.

THE COURT: So you're saying the attorney would have been ineffective for not asking Paula Lytle if the O came from the assailant?

MS. McCORMACK: Absolutely.

THE COURT: Why?

MS. McCORMACK: Because it was not in dispute that Mr. Vinson was AB. And the O that was detected, based on the kind of testing they were doing, could not have come from blood. As you heard Paula explain, the absorption inhibition test tests for antigenic substances and fluids --

THE COURT: Excuse me; gobbledegook. Why?

MS. McCORMACK: Okay.

THE COURT: Real simple.

MS. McCORMACK: Okay.

THE COURT: Wouldn't anybody -- because, remember, I did sit here during the trial, and I listened. And as far as I was concerned, the scientific evidence did not

include this man because Paula Lytle could not say it was him. It did not include him. She said she could not exclude him. We knew that the young lady was type O.

Now, I was trying to listen, and I tried to listen very hard. Where is it that -- I didn't understand how Paula Lytle would say, well, the O had to come from the assailant. Why? What basis does that come from when the victim who bled all over the sheets because of the wounds inflicted upon this young girl, and she was type O?

See, sometimes you listen to an expert -- and I have to tell you, your expert that you called, the one gentlemen, sometimes you figure that they're educated, but they don't know what they're talking about, and a jury can determine that themselves.

So, I'm trying to see what basis would Paula Lytle have had to say that the O could only have come from the assailant?

MS. McCORMACK: Because Paula Lytle says, as she said at the hearing, your Honor, that the testing she performed would not and could not pick up O from blood. The testing could not pick up O from blood. It picked up O antigenic substances in fluids other than blood.

Now, Paula Lytle asked by the prosecutor --

THE COURT: Now, did she say it could not, or did she say it had never done that in her experience?

MS. McCORMACK: She said it had never done it in her experience, and she wasn't aware of anyone ever getting O substances from blood using the absorption inhibition test.

MS. EISENBRAUN: Your Honor, I'm sorry to object, but that was not her testimony. She testified she was aware of that in the literature.

THE COURT: I thought she did say she was aware in literature, but she had never had that happen.

MS. McCORMACK: I believe she said all those things. And I'm sorry, I did not mean to misstate the record. I don't believe they're inconsistent. I think she said she was aware of it in the literature. She herself, had never known it to happen, nor was she aware of anyone she worked with knowing it had happened before.

THE COURT: But then, also, what she would have said -- that would have been the basis for her saying that she believed that the O came from only the assailant rather than the victim.

MS. McCORMACK: Well, that's what she said at the evidentiary hearing, your Honor. She said -- I asked her, I said, "If you were asked at trial, would you have -- if the trial lawyer had said to you, 'Do you think the O that you detected likely came from the rapist,' and she said, 'I would have said, yes;'" but nobody asked her that. And nobody asked her that because nobody understood that the testing didn't test for antigens in blood; that it was testing for antigens in semen and other bodily fluids.

Even the prosecution's expert, Connie Swander, says that it was unlikely that the O could have come from the victim. So the very best possible testimony that the O came from the victim wouldn't be a great record upon which to argue proof beyond a reasonable doubt.

If the O came from the perpetrator, then the defense attorney would have had a great argument in closing; not that he's included, but he's only twenty percent of the people who could have committed the rape. But in fact, we know he couldn't have committed it because we know the rapist is still out there. He's someone with type O blood. That's who committed this rape. Someone who has type O blood.

But she didn't make that record because she never asked Paula Lytle a series of questions, which Paula Lytle says at the evidentiary hearing she would have answered in a way that would have given her that argument to make.

That failure to fully investigate the scientific evidence and to cross-examine based on the scientific evidence was a Sixth Amendment failure, and requires relief from judgment because it was obviously harmful to the outcome.

If the Court has no additional questions, I would rest on my record at this point, and save a little time for rebuttal.

ARGUMENT

MS. EISENBRAUN: Your Honor, regarding the ineffective assistance of counsel claim, I've written at great length as to why that claim is barred.

However, given that Counsel has brought it up, factually speaking, trial counsel is dead. We do not know why she asked certain things, and why she did not ask certain things. We know that she had in her mind the possibility of extra testing because she raised it both in opening statement and in closing argument.

The results of the polygraph examination did not come into the trial, but trial counsel knew what those results were. And you cannot reasonably say that trial

counsel did not consider those results when she, quote, “failed to do certain things or did certain things at trial.”

That being said, the only individual who testified at the evidentiary hearing before the Court that Karl Vinson, the person that twelve people upon hearing the testimony of a nine-year-old child convicted of raping that nine-year-old child, the only person who testified that he could not have done that was the Defense expert.

Paula Lytle and Connie Swander, both scientifically-minded --

THE COURT: Excuse me. Testified that he could not have been -- the Defense expert. You mean during the evidentiary hearing?

MS. EISENBRAUN: During the evidentiary hearing.

THE COURT: Okay.

MS. EISENBRAUN: Yes.

THE COURT: Not at trial?

MS. EISENBRAUN: No, not at trial.

THE COURT: Okay. Go ahead.

MS. EISENBRAUN: Paula Lytle and Connie Swander, I submit, very carefully did their best to present to this Court objective and scientific testimony to the best of their knowledge.

Ms. Lytle would not, despite repeated questioning and attempts by the Defense to solicit that testimony, would not testify that Karl Vinson could not have been the rapist. Neither one of them could have.

It's not my burden to prove the defendant guilty again. That was done in 1986. And upon the unshaken, absolutely credible testimony of a witness who knew the defendant, had seen him before, had very good reason to remember him, and saw him when he came in her window into a brightly-lit room, and raped her.

The Defense would have the Court believe that there is something shaky or wavering, or not credible about that victim's testimony. It was credible. If you look at the instructions your Honor gave to the jury at that time regarding the kinds of things they're to consider, and weighing the witness's testimony, you will find that the victim's testimony meets every one of those criteria.

The Defense can talk about studies that have been done on identification, reliability of identification testimony. They don't have to do with the circumstances that were before the jury in this case if Ms. Lytle's testimony -- if Ms. Lytle had found at that time that the defendant was a secretor, and she did not find the AB substances on the little, tiny one-eighth inch square scrap of that stain that she tested, then more would have been done.

It is totally unreasonable to think that in a case like this with strong eyewitness testimony from a victim who knew the assailant, the polygraph test that the prosecutor had at the time, that more testing would not have been done had the defendant tested as a secretor.

You cannot take the test that no reasonable juror could possibly -- not one reasonable juror could possibly have voted to convict this defendant, based on all of the

evidence this Court heard at trial and at the evidentiary hearing. You cannot say that the prosecutor would not have done additional testing.

The state of the evidence at trial is not the state of the evidence now. You cannot say that the People would not have done additional testing, would not have brought in additional evidence, and would not have presented additional testimony.

The fact that there were a lot of questions that weren't asked, they weren't particularly pertinent. The science was not at issue here. Science does not trump the testimony of individuals. Science cannot know everything.

As Ms. Swander told the Court, the problem with the secretor testing was that when you didn't get a result, you could not say that person was excluded.

And Paula Lytle told the Court at this evidentiary hearing that she could not exclude this defendant as the rapist. Ms. Swander did as well.

The only witness who wouldn't go so far was the Defense witness, whose testimony, I would submit, was not of a scientific and objective nature that the Court heard from Ms. Lytle and from Ms. Swander.

For the remainder of my argument, your Honor, I would rest on my brief unless the Court has questions. Thank you.

THE COURT: Thank you.

MR. KRIGER: Your Honor, I think we have lost perspective on what this case is all about, and I'm not sure exactly how this has happened. But I want to go back.

I've been trying cases for 31 years, your Honor, and I have real courtroom experience. I don't -- I do both appellate work and trial work, but most of my practice is trial work.

What do we know in this case? We know that at trial, the only question was whether or not they could prove beyond a reasonable doubt, beyond a reasonable doubt that Mr. Vinson committed this crime. In other words, a doubt.

THE COURT: Reasonable.

MR. KRIGER: Reasonable.

THE COURT: You forgot the word "reasonable."

MR. KRIGER: Is it reasonable to say "I'm not sure"? That's the test. Is there a reason to say "I'm not sure"?

So let's take that standard, is there a reason to say I'm not sure, with this new evidence, and say would have a jury come to that conclusion?

And I don't think, your Honor, given what we have here, that there is any doubt, any doubt -- and it's not beyond any doubt, because I think it proves his innocence. But let's put that aside.

We're not asking this Court to acquit Mr. Vinson here today. What we're asking this Court to do is to say whether or not this new evidence probably would have raised a reasonable doubt. That's the test we've got here today.

MS. EISENBRAUN: Your Honor, I object. That's not the test.

MR. KRIGER: It is.

MS. EISENBRAUN: The test is whether no reasonable juror would convict.

REBUTTAL

MR. KRIGER: Upon retrial, would probably have caused a different result. That's the test. Upon retrial, would this evidence probably have caused a different result? In other words, would it have raised a reasonable doubt? That is the test,

So let's look at the evidence in the perspective of the trial. We had testimony that there was a stain on the bed sheet. The prosecutor argued, and there was never any dispute at trial by anybody, that that stain came from anyone other than the rapist and the victim.

There is no evidence on this record, your Honor, that anyone else slept in that bed earlier. In fact, I think Mr. Talon -- and I understand, your Honor, that what he says is not evidence. But the fact of the matter wasn't in dispute by anybody; by the defense attorney or by the prosecutor.

And what he says is, "What do we know? We know that a stain was found on the bed sheet. We know where that stain came from. It came from the defendant, meaning the perpetrator, and Camille Wilson. And what was that stain made up of? It was made of a mixture of blood and seminal fluid, with a sperm being found in that seminal fluid. We know it came from the man that raped her." That's his argument.

That was never in dispute, and there was no evidence that that stain came from anybody other than the rapist and the victim.

We now know that the test that was performed was really a test, not for blood, to see if you could find blood type in blood, but in fluids other than blood.

So, now as we build this case towards closing argument for the Defense --

THE COURT: Go back. You lost me.

MR. KRIGER: Okay. The test that was performed, the acid -- I'm sorry, not the acid -- the absorption inhibition test was a test that was to test for blood type in fluids other than blood. That's what we know now, and that's what would have come out at trial.

And so you're building towards establishing reasonable doubt to this --

THE COURT: That's what would have come out in trial, or that's what came out at trial? You've lost me.

MR. KRIGER: Paula Lytle testified at the evidentiary hearing that this was a test. This was a test to test for blood type in fluids other than blood.

THE COURT: That's what she testified in 2010; right?

MR. KRIGER: Correct.

THE COURT: Okay.

MR. KRIGER: Okay.

THE COURT: But at trial, that was not brought out.

MR. KRIGER: Right.

And as Ms. McCormack says, your Honor, I believe that had the defense attorney been properly prepared, she would have looked at the literature and found that out.

THE COURT: You know, I --

MR. KRIGER: But let's put that aside for a minute. Let's put that aside.

What we do know, your Honor, is that everybody conceded at the trial, at the trial itself, that it came from the victim and the rapist.

We also know that he couldn't be excluded. In fact, Mr. Talon says, well, he put it at one in five it could have been this man because he is a nonsecretor.

But now we know, now we know without any doubt, a shadow of a doubt, that he is an AB secretor, and that Ms. Lytle would have testified that she believed that if -- well, there's no question that she would have testified, if that sample came from the rapist, he would have been excluded.

In fact, what she said was, "I would have told the prosecutor" -- these are her words -- "that he was excluded as having deposited that sample in the bed sheet."

MS. EISENBRAUN: Excuse me, your Honor, I object. In the nature of rebuttal, yeah, this is just a repeat. This is two shots at arguing the entire case to the Court again.

THE COURT: Well, so what. I get paid for it.

MS. EISENBRAUN: Oh, okay.

MR. KRIGER; So, we know that. So, we have a defense attorney who now comes to closing argument, and a prosecutor who now comes to closing argument. He can no longer say that there's a twenty percent chance he's included because that testimony wouldn't have been available.

He can't say anymore that this test doesn't exclude him, because Paula Lytle would have testified in her mind, at least, in her mind that this sample that she tested included the semen of the rapist; and if he had been a secretor, it would have showed.

That, in and of itself, your Honor, by itself, demonstrates a reasonable doubt; and that's all we're here to decide. We're not here to decide whether or not the victim's identification was reliable or unreliable. What we are here to decide is whether or not this evidence probably would have raised a reasonable doubt.

Now, if this had been DNA --

THE COURT: I don't even want to go there because it is not.

MR. KRIGER: Well, Judge --

THE COURT: We don't have DNA.

MR. KRIGER: Right.

THE COURT: There's no reason to argue something that's not in the evidence, and that is speculative at most, and is television-worthy only.

MR. KRIGER: Okay.

THE COURT: It's not in this case.

MR. KRIGER: Fair enough, Judge.

And I would make the same argument as to someone else depositing sperm in that bed; that that's speculative because there is absolutely no evidence, and nobody argued that, and nobody disputed that it came from those two people.

Your Honor, I think we've lost -- what we've lost perspective here is that we live in a system of justice that says a man is entitled to a fair trial on the basis of the real evidence. The real evidence in this case is that he was an AB secretor, and that Connie Swander would have excluded him as a donor of the semen that was found in the stain. And everybody at trial conceded that that stain came from the rapist.

I think that, quite clearly, ends the inquiry. Ends the inquiry. And if the prosecution wants to come back and say "he's known him for three years; there was another incident," so be it. But just let this man have a fair trial, based on what the evidence should have been. That's the argument here, your Honor.

THE COURT: Anything from the People?

MS. EISENBRAUN: No, thank you, your Honor.

THE COURT: Okay. First of all, the question of ineffective assistance of trial counsel is dead. You had all kinds of Motions For Relief From Judgment before where it could have been raised; appellate issues.

Because you're talking about the O, which we knew. And there are other things that you don't put into it. You don't put in the totality. Counsel, trial counsel has to look at everything they've got. Everything they have.

And when you've taken all the things that trial counsel had, first of all, I really think it's barred because it should have been raised before, and it was not.

But also, I think trial counsel did everything that was reasonable under the circumstances, and she did her best as any other attorney/defense counsel would have done. The man flunked a polygraph.

The young girl had a reason to know who he was. And I think -- I don't remember because I haven't reread all the transcripts over all these years -- that the issue was raised. She didn't want that to come out at trial, which would have supported her identification and her reason for it.

So, ineffective assistance of counsel is gone.

All you've got now is, quote, "newly discovered evidence."

I had the defendant's Presentence Report pulled because there was an argument that it was impossible for anyone to have known what a secretor status was at the time; and I'm not so sure about that. I'm trying to find -- oh, here it is. "The defendant enlisted in the U.S. Army at the age of seventeen."

I don't know what kind of testing they did back then. I don't know what his dog tags would have shown. But I do know this; that he was the one who provided the sample. And because Paula Lytle didn't do it herself, none of us can have real confidence, real confidence in concluding whether the swab that was presented for this testing was -- why would you, if you're sitting there as a defendant, you already flunked a polygraph, why would you give him a good swab test? I don't know. So maybe that's why her test wasn't right. But her test was not right.

I also remember some of the things about this trial, and I remember them because it is such a horror to sit here as a woman and to hear how a nine-year-old girl was split like a chicken. And I remember listening to Paula Lytle's testimony, and hearing her say she could not exclude him from having left the stain.

I also had heard things, listening to the testimony during the trial, and I sat there, and as common sense and everyday experience, life -- I don't know where you guys -- what kind of a tower you guys are living in. But life experience ... I didn't hear any testimony that that stain had to come from the rapist only. I didn't hear that.

And I listened to the prosecutor's argument, and I don't think everybody agreed, because I know I didn't think necessarily that what had come -that stain.

Because if it had been, it should have shown AB something. It should have shown his blood type. So I don't know whose stain that was.

I know whose blood it was. The little girl who bled all over the sheets.

Did he have a fair trial? I think it was exceedingly fair because everyone did the best that they could.

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. Thank you very much.

MS. EISENBRAUN: Thank you, your Honor.

MS. McCORMACK: Thank you, your Honor.

MR. KRIGER: Thank you, your Honor.

(At about 10:44 a.m., proceedings concluded.)

CERTIFICATE OF REPORTER

STATE OF MICHIGAN)
) ss
COUNTY OF WAYNE)

I certify that this transcript, in the matter of The People of the State of Michigan vs. KARL F. VINSON, case number 86-000214, consisting of 41 pages, is a

complete, true, and correct transcript of the proceedings held in this matter on Monday, March 28, 2011, before the Honorable Vera Massey Jones.

April 1, 2011

Janice I. Payne

JANICE I. PAYNE, CSMR 3521

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