

No. 17-9332

IN THE SUPREME COURT OF THE UNITED STATES

KARL VINSON,

Petitioner,

v.

MICHIGAN DEPARTMENT OF CORRECTIONS,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. Respondent Mischaracterizes The Underlying Ineffective Assistance Of Counsel Claim.

Respondent repeatedly misstates the underlying ineffective assistance claim in this habeas case as if it involved the 2009 discovery of Petitioner's true status as a Type-AB secretor. *See, e.g.*, Brief in Opposition (BIO) at 9 ("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."); *id* at 5-6 (discussing and quoting post-conviction counsel's argument on whether trial counsel should have known to seek retesting of Vinson's secretor status).

In fact, the underlying ineffectiveness claim concerns trial counsel's failure to ask a specific question of the State's serology expert at trial—the answer to which would have excluded Petitioner as the perpetrator to a high degree of certainty *even with the incorrect secretor result that was introduced at trial*. *See generally* Pet. 2, 5; Pet. App. 43a (quoting State's serologist testifying that the Type-O antigens found in the stain "would have to be the donor of the semen, or . . . a remote possibility, from the victim.") (Emphasis in original).

When the Sixth Circuit granted Petitioner leave to file a second habeas petition, it did so only regarding his claims that "his trial counsel was ineffective for failing to adequately cross-examine the State's forensic witness," and "his appellate counsel was ineffective for failing to raise the inadequate-cross-examination claim on direct appeal." Pet. App. 18a, 20a. The Sixth Circuit explicitly denied leave as to the claims regarding discovery of Petitioner's secretor status, and Petitioner does not contest that decision here.

Despite this, Respondent somehow concludes that "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.” BIO 9 (emphasis added). This misstatement of the underlying issue is odd given that Respondent correctly identified the issues before the Sixth Circuit on the prior page. *Id.* at 8. Respondent’s single accurate statement of the issue is nestled among numerous misleading references to prior litigation regarding the discovery of Mr. Vinson’s secretor status. *See id.* at 4–8. Respondent then continues to use this false framing of the issue throughout its brief. *See, e.g. id.* at 16.

II. Respondent Invents Prior Counsel Petitioner Never Had To Avoid The Absurdity Of The Sixth Circuit’s Argument That Petitioner’s Trial And Appellate Attorneys Should Have Discovered Their Own Ineffectiveness.

As explained above and in the petition, the actual issue before this Court is whether Petitioner is barred from raising his ineffective assistance claims in a successive petition because the same trial and direct appellate attorneys who performed deficiently (by failing to conduct a reasonable investigation, which would have equipped them to ask the State’s serology expert the key question that would have exonerated Petitioner) should have discovered their own ineffectiveness.

Respondent argues that Petitioner’s claim “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.” BIO at 14 (emphasis added). There are critical problems with Respondent’s argument: First, one of Petitioner’s claims is that appellate counsel was ineffective for failing to grasp the serology, and it is absurd to suggest that he should have discovered and litigated his own ineffectiveness. Second, *Vinson had no first habeas counsel*—he litigated that first habeas petition *pro se*,¹ and he had no post-conviction counsel of any kind until 2009, years

¹ *See* Petition for a Writ of Habeas Corpus, *Vinson v. Vasbinder*, 1:06-cv-10850-TLL-CEB (E.D. Mich. Feb. 11, 2006), ECF No. 1.

after the earlier habeas petition. And third, as an incarcerated layman, Vinson had no way of learning about the ineffectiveness of his prior counsel until the retesting of his secretor status in 2009 (paid for by the charity of a concerned citizen) led to him obtaining *pro bono* post-conviction counsel who finally asked the right question of the State's serologist at a post-conviction hearing.

Despite Respondent's attempt to invent earlier lawyers who should have discovered the ineffectiveness of trial counsel and direct appellate counsel before Petitioner filed his first habeas petition in 2006, the Sixth Circuit recognized that the only prior attorneys who could have discovered trial and appellate counsel's ineffectiveness were trial and appellate counsel themselves. Pet. App. 7a (panel concluding 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."). This reading of 28 U.S.C. §2244(b)(2)(B)(i) bars Petitioner, who could not have reasonably discovered that he received ineffective assistance at the time he filed a first habeas petition, from filing a successive petition on the unreasonable ground that his ineffective attorneys should have discovered their own ineffectiveness.

III. Respondent Misrepresents The Forensic Science That, If Properly Explored By Counsel, Would Have Almost Certainly Changed The Outcome Of Petitioner's Trial.

Respondent argues that a reasonable factfinder could still convict Petitioner even with proper presentation of the serological evidence. However, Respondent elides crucial testimony and important parts of the record that establish the opposite conclusion.

The serological evidence—both old and new—underlying Petitioner's conviction eliminates Petitioner as the source of the stain on the bedsheet with scientific near-certainty. As two separate Sixth Circuit panels found, no reasonable factfinder would convict Petitioner but for trial and appellate counsels' ineffectiveness. Pet. App. 19a, 44a. Petitioner's case is thus an excellent one

to resolve the statutory question presented.

A. The eyewitness identification was weak and would have been entirely undermined if effectively challenged by the serological evidence at trial.

Respondent contends that Petitioner's conviction rested "primarily" on the victim's eyewitness identification. BIO 3. Respondent also contends that a reasonable factfinder could convict Petitioner even if it considered the new "uncertain" serological evidence. BIO 17–18.

A reasonable factfinder at the 1986 trial may well have convicted Petitioner on the victim's eyewitness identification alone. But the issue is whether a reasonable factfinder would *still* convict Petitioner solely on the basis of the victim's eyewitness identification *in the face of the overwhelming exculpatory serological evidence*. The record compels an answer in the negative.

First, the victim's eyewitness identification of Petitioner was weak. Initially, the victim was unable to identify her attacker. Trial Tr. R. 5-3, Page ID # 361–62. Only after her mother suggested Petitioner's name did the victim identify him as her attacker. Trial Tr. R. 5-3, Page ID # 361–62. The victim had last seen Petitioner three years prior to the attack through Petitioner's wife, the victim's babysitter at the time. Trial Tr., R. 5-3, Page ID # 346–48. The victim could not remember the faces of other people she had seen more recently and more frequently than Petitioner, including her first-grade teacher. Trial Tr., R. 5-4, Page ID # 404–06.

Second, the serological evidence is not merely uncertain and non-inculpatory as Respondent contends. It is highly *exculpatory*. At the evidentiary hearing in 2010, the State's serologist, Paula Lytle, testified that had she been asked where the Type-O antigens in the bedsheet sample originated, she would have responded that they could not have come from Petitioner. Pet. App. 3a, 16a-17a. She also testified that, if she had known that Petitioner was a Type-AB secretor at his trial, she would have determined that the serological evidence excluded him as the source of the

semen. Pet. App. 3a. And, most critically, to the underlying ineffective assistance claim here, she would have testified (even while erroneously believing Petitioner to be a Type-AB non-secretor), that the Type-O antigens found in the bedsheet stain almost certainly came from the rapist because there was only a “remote possibility” they came from the victim. Pet. App. 41a, 43a.

B. The bedsheet sample that tested positive for Type-O antigens contained semen, contrary to Respondent’s implication.

Respondent repeatedly alludes to the possibility that the bedsheet sample tested by Ms. Lytle did not contain any semen from the attacker. BIO 4, 7, 18. Thus, Respondent claims, there is a good explanation for the absence of Petitioner’s Type-AB antigens. But this claim is contrary to the scientific evidence in the record, which indicates that the attacker’s semen was unambiguously present in the stain.

State forensic analyst Ronald Badascewski performed an acid phosphatase test on a small cutting near the center of the bedsheet stain, which confirmed the presence of semen. Trial Tr., R. 5-4, Page ID # 445; Evid. Hrg., R. 5-18, Page ID # 1071–72. That test always destroys the tested material. *See* Evid. Hrg., R. 5-18, Page ID # 1071–1072. Ms. Lytle thus necessarily needed another small cutting from the stained area to perform the blood typing test. The small strip of the bedsheet she received was cut from a portion of the stain *directly adjacent* to the portion Badascewski tested for semen. Evid. Hrg., R. 5-18, Page ID # 1092–93. Both cuttings were very small: three-millimeter squares. Evid. Hrg., R. 5-18, Page ID # 1091.

Respondent engages in insupportable speculation by hypothesizing that the tiny piece of bedsheet, taken from the center of the stain, that Ms. Lytle tested might have been materially different from the tiny piece of the stain, *directly adjacent to the other one*, that tested positive for the presence of semen. Furthermore, Ms. Lytle testified at the evidentiary hearing that the acid phosphatase test performed on the initial cutting produced the *strongest possible reaction* for the

presence of semen, and she agreed that this result made her “confident that there was a very high presence of semen in the stain [she] tested.” Evid. Hrg., R. 5-18, Page ID # 1071–73, 1087.

Respondent’s claim that perhaps there was no semen in the bedsheet sample Ms. Lytle tested is therefore contrary to the record.

C. The Type-O antigens found in the bedsheet stain almost certainly came from the rapist, not the victim.

In almost the same breath it claims there may have been no semen in the bedsheet sample, Respondent misleadingly claims that Lytle “testified that the O antigens she found in the [sample] could have come from the victim.” BIO 17. In fact, Ms. Lytle testified to almost precisely the opposite point: that the Type-O antigens almost certainly came from the rapist, and there was only a remote possibility that they could have come from the victim.

Ms. Lytle and another expert in forensic serology, Arthur Young, both testified at the evidentiary hearing regarding the nature of the testing performed on the bedsheet sample. Lytle explained the test was designed to detect blood-type antigens in substances *other than blood* (e.g., saliva, semen). The test, to her knowledge, has never picked up antigens from blood itself. Evid. Hrg., R. 5-18, Page ID # 1083–1084. The victim’s blood therefore could not be the source of the Type-O antigens in the stain. Both Lytle and Young also testified that it is very unlikely, given the victim’s age, that she would have produced vaginal fluid. Evid. Hrg., R. 5-18, Page ID # 1088; Evid. Hrg., R. 5-19, Page ID # 1189. They also both testified that it is even more unlikely that she would have produced enough fluid to detect any Type-O antigens because vaginal fluid contains very few ABO antigens. Evid. Hrg., R. 5-18, Page ID # 1088; Evid. Hrg., R. 5-19, Page ID # 1189. Semen, by contrast, contains highly concentrated antigenic material. Evid. Hrg., R. 5-19, Page ID # 1189.

In other words, the possibility that the Type-O antigens came from the victim's blood or vaginal fluid is extremely remote, as the State's own serologist testified. Instead, it is almost certain that the Type-O antigens detected in the stain came from the rapist's semen (which exonerates Mr. Vinson, who is an AB secretor and has no Type-O antigens).

IV. There Are Inter- And Intra-Circuit Splits As To Whom The Diligence Requirement Of 28 U.S.C. § 2244(b)(2)(B)(i) Applies: The Petitioner As An Individual Or The Defense Team.

A. There is an inter-circuit split as to whom the diligence requirement applies.

Respondent does not dispute that some circuits have held the diligence requirement applicable to the defense team. Nonetheless, Respondent does dispute that there is a circuit split on the issue, writing that no circuit court has found that the requirement applies to a petitioner individually. BIO 12.

Respondent has incorrectly read the caselaw. Some circuits do apply the diligence requirement to the petitioner and some apply it to the counsel, creating an inter-circuit split.

First, Respondent selectively cites from the Second Circuit's *Herrera-Gomez* opinion. BIO 10. However, on the very same page to which Respondent cites, the Second Circuit explicitly states that "under pre-AEDPA law, a prisoner was required to... demonstrate[] that he had conducted a *reasonable and diligent investigation*... There is nothing to suggest Congress intended to eliminate that requirement." *Herrera-Gomez v. United States*, 755 F.3d 142, 147 (2nd Cir. 2014) (italics in original, underlining added). The Second Circuit considers the claimant's actions the proper point of inquiry for the diligence standard.

Respondent's explanation of *Cooper v. Woodford*, 358 F.3d 1117 (9th Cir. 2004), is also incorrect. Respondent asserts that Cooper satisfied the diligence requirement when his investigators discovered the relevant new information. BIO 11. But Respondent ignores this

crucial language: “Cooper first became aware of the information in the Carroll declaration on that same date [that his investigators discovered the new information].” *Cooper*, 358 F.3d at 1121. If the discovery by Cooper’s investigators alone was enough to satisfy the due diligence requirement, the Ninth Circuit’s would not have bothered to mention that Cooper *himself* learned of the information.

Respondent also misreads *In re Boshears*, 110 F.3d 1538, 1540 (11th Cir. 1997), where the Eleventh Circuit identified the claimant as the singular individual to whom the diligence requirement applies: “[2244(b)(2)(B)] means that an *applicant* seeking permission to file a second or successive habeas motion must show some good reason why *he or she* was unable to discover the facts supporting the motion before filing the first habeas motion.” (Emphasis added). The court only proceeded to analyze what Boshears’ counsel could have known *after* determining that Boshears himself was the relevant point of inquiry, and even then it is best read as faulting Boshears for failing to bring an ineffective assistance of counsel claim:

While his arguments do suggest that *he and his counsel* lacked actual knowledge of the facts underlying his *Brady* claim, Boshears fails to explain why a reasonable investigation would not have uncovered these facts... Boshears gives no indication as to whether *he or his attorney* contacted Dr. Welty. *He* has offered no reason for us to believe that Dr. Welty would not have alerted *Boshears* that another doctor had performed the examination. A diligent investigation would certainly have included some contact with Dr. Welty, which in turn would likely have alerted *Boshears* of the need for further investigation.

Id. at 1540–41 (emphasis added). If the diligence requirement attached to both claimant and counsel, the Eleventh Circuit would not have identified both and then reverted to the singular Boshears. To accept Respondent’s interpretation of the case would be to add language not present in the opinion.

Some circuits apply the diligence requirement to the claimant. Other circuits apply the requirement to a habeas petitioner’s counsel. Therefore, there is a circuit split concerning the

interpretation of the diligence requirement of 28 U.S.C. § 2244(b)(2)(B)(i), and this Court should grant this petition to resolve that split.

B. The Sixth Circuit's handling of this case demonstrates the lower courts' confusion.

As Petitioner has already documented, Pet. at 8, the different Sixth Circuit panels to consider this case reached diametrically opposite results on the question of to whom the diligence requirement applies. The panel that granted Petitioner leave to file a successive petition characterized Petitioner's two-decade effort to obtain DNA testing as diligent and noted that Petitioner only discovered the deficiencies with his trial and appellate counsel's understanding of the serology evidence after a concerned citizen paid for new secretor testing in 2009. Pet. App. 19a. But the panel that later rejected that successive petition concluded that Petitioner was barred from litigating a successive habeas petition because trial counsel should have discovered the evidence at the time of trial. Pet. App 6a-7a.

The fact that two panels of the same court read the same statutory provision differently in the course of adjudicating the same case is powerful evidence that this Court should clarify the meaning of 28 U.S.C. § 2244(b)(2)(B)(i).

V. Petitioner Only Asks This Court To Answer The Question Of Who Bears The Due Diligence Requirement Under 28 U.S.C. § 2244(b)(2)(B)(i).

Much of Respondent's brief addresses 28 U.S.C. § 2244(b)(2)(B)(ii). Respondent's arguments to this effect are irrelevant, as Petitioner only asks this Court to decide the question presented: to whom does the diligence requirement apply under § 2244(b)(2)(B)(i)? If this Court reverses the Sixth Circuit's ultimate conclusion that Petitioner cannot raise the ineffective assistance of his trial and direct appellate counsel because they should have discovered their own

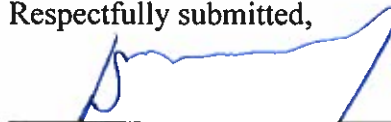
ineffectiveness, this Court should remand the case to the Sixth Circuit to consider the remaining question.

But even if the § 2244(b)(2)(B)(ii) were relevant to this petition, it is clear that the serology evidence that trial and appellate counsel failed to develop would very likely satisfy that standard, as the first two panels of the Sixth Circuit (the one that permitted the successive habeas and the one that later granted a certificate of appealability) explicitly recognized. As the panel that allowed the successive petition put it, “the factual predicate underlying [Petitioner’s] remaining claims is that the semen found on the victim’s bed could not have belonged to him.” Pet. App. 19a. No rational juror would convict after hearing the State’s own serologist testify that Petitioner is almost certainly excluded as the source of semen found in a young victim’s bed after a rape. Indeed, this Court has itself recognized the extraordinary exculpatory power of exclusion by the secretor status test like the one performed here. *See Arizona v. Youngblood*, 488 U.S. 51, 56-58 (1988).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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Dated: November 6, 2018