No. 06-4120

IN THE

United States Court of Appeals for the Sixth Circuit

IN RE: DEWITT MCDONALD JR.,

Movant.

On Motion For An Order Authorizing A Second Or Successive Petition For A Writ Of Habeas Corpus Pursuant To 28 U.S.C. § 2244(b)(3)(A)

MOTION OF DEWITT MCDONALD JR.

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INTRODUCTION

Movant Dewitt McDonald Jr. is currently serving a sentence of 20 years to life on a conviction secured largely on the strength of one woman's testimony, Krista Harris.

Nearly two years after Mr. McDonald's first § 2254 petition had been denied, Ms. Harris came forward and admitted that she had provided false testimony at Mr. McDonald's trial. She filed a sworn affidavit in state court, in which she accused Mr. McDonald's prosecutor, Kevin Baxter, of having knowingly procured her perjured testimony through threats and a coerced sexual relationship. These accusations have been corroborated, under oath, by Mr. Baxter's brother, Edward Baxter.

Mr. McDonald now moves this Court, pursuant to 28 U.S.C. § 2244(b)(3), for an order authorizing the United States District Court for the Southern District of Ohio to consider a second § 2254 petition. His application easily satisfies the "lenient prima facie standard" that governs such motions. *In re Lott*, 366 F.3d 431, 433 (6th Cir. 2004). As is most relevant here, he has made the required showing that it is *possible* that the District Court may ultimately conclude, on a more fully developed record, that no reasonable factfinder would have convicted him based on the overall, newly supplemented record. *See* 28 U.S.C. § 2244(b)(2)(B), (b)(3)(C). Accordingly, this Court should grant his motion.

STATEMENT OF JURISDICTION

This is an original motion filed in the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 2244(b)(3)(A). A three-judge panel is authorized to consider this motion pursuant to 28 U.S.C. § 2244(b)(3)(B). If this Court should grant the motion, then the United States District Court for the Southern District of Ohio would have jurisdiction to consider Movant's underlying petition for a writ of habeas corpus pursuant to 28 U.S.C. §§ 2241, 2254. Because Movant is currently in custody in the Southern District of Ohio but was convicted and sentenced in a state court in the Northern District of Ohio, venue would lie in either judicial district pursuant to 28 U.S.C. § 2241(d).

STATEMENT OF THE ISSUE PRESENTED

Dewitt McDonald is incarcerated for aiding and abetting two other men in the commission of a 1994 drive-by shooting that resulted in the death of one woman and the injury of another. From the beginning, the State proceeded on the theory that Mr. McDonald was present at the time of the shooting. As a consequence, the State's case against him faltered when Krista Harris told both investigators and a grand jury that Mr. McDonald had been with her at that time. It was resurrected, however, when Ms. Harris changed her story and testified, among other things, that Mr. McDonald had not been with her. She provided this and

other evidence necessary to secure both Mr. McDonald's indictment and conviction.

Years later, after Mr. McDonald's first § 2254 petition had been denied, Ms. Harris filed a sworn affidavit in state court, in which she asserted that Mr. McDonald's prosecutor coerced her into providing false testimony at Mr. McDonald's trial. Other evidence corroborates the accusations in her affidavit and supports Mr. McDonald's claims that his conviction was secured through constitutional error. These claims include: (1) the knowing use of perjured testimony, (2) the failure to disclose information that could have been used to impeach important inculpatory evidence, and (3) the denial of the right to present witnesses in his own defense.

This motion presents the following issue:

1. Whether Mr. McDonald has made a "prima facie showing" (i) that the facts underlying his claims "could not have been previously discovered through the exercise of due diligence," (ii) that those facts, "if proven and viewed in the 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," and (iii) that his claims have not been "presented in a prior application." 28 U.S.C. § 2244(b)(1), (b)(2)(B), (b)(3)(C).

STATEMENT OF THE CASE

In June 1995, Dewitt McDonald Jr. was convicted of complicity to commit the following offenses: (1) aggravated murder with a firearm specification, OHIO REV. CODE ANN. §§ 2903.01, 2923.03; (2) the lesser included offense of murder with a firearm specification, *id.* §§ 2903.02, 2923.03; (3) improperly discharging a firearm into a habitation with specifications for harm and a firearm, *id.* §§ 2923.161, 2923.03; (4) felonious assault with a firearm specification, *id.* §§ 2903.11(A)(2), 2923.03; (5) attempted aggravated murder with a firearm specification, *id.* §§ 2903.01(A), 2923.02, 2923.03; and (6) felonious assault with a firearm specification, *id.* §§ 2903.11(A)(2), 2923.03. (A0063.) The trial judge merged Mr. McDonald's conviction for aggravated murder with his conviction for murder and sentenced him principally to a term of life in prison with no eligibility for parole for 20 years. (A0064-A0066.) A final judgment was entered in the Erie County Court of Common Pleas on June 27, 1995. (A0063.)

Mr. McDonald pursued direct appeals through the Ohio court system. On February 7, 1997, the Ohio Court of Appeals for the Sixth Appellate District affirmed the judgment of the trial court. *State v. McDonald*, No. E-95-046, 1997 WL 51221 (Ohio Ct. App. Feb. 7, 1997) (unpublished). On May 7, 1997, the Supreme Court of Ohio denied him leave to appeal. *State v. McDonald*, 679 N.E.2d 309 (Ohio 1997). Finally, on June 10, 1997, the Ohio Court of Appeals

denied an application by Mr. McDonald to reopen his appeal. *State v. McDonald*, No. E-95-046 (Ohio Ct. App. June 10, 1997) (unpublished).

On May 28, 1998, Mr. McDonald filed a timely petition for a writ of habeas corpus in the United States District Court for the Northern District of Ohio. (A0002.) On May 18, 1999, the District Court issued an opinion and order denying the petition. (A0031.) A certificate of appealability was likewise denied. (A0040-A0041.)

On June 16, 1999, Mr. McDonald filed a notice of appeal with the District Court. (A0042.) This Court construed the notice of appeal as an application for a certificate of appealability and denied that application in an order dated February 1, 2000. (A0044.)

Nearly two years later, Ms. Harris filed an affidavit in state court, in which she asserted that Erie County Prosecutor Kevin Baxter coerced her into providing false testimony at Mr. McDonald's trial. (A0045.) The affidavit was filed slightly more than six years after Mr. McDonald's trial. The statute of limitations for perjury is six years in Ohio. *See* OHIO REV. CODE ANN. §§ 2901.13(A)(1)(a), 2921.11(F).

On May 1, 2003, Mr. McDonald commenced the first of two state post-conviction proceedings in the Erie County Court of Common Pleas. Petition for McDonald, *State v. McDonald,* No. 94-CR-357 (Erie County Ct. of Common

Pleas). In the first proceeding, Mr. McDonald moved for post-conviction relief, a new trial, and an order declaring the Ohio statute governing post-conviction relief unconstitutional, *see* OHIO REV. CODE ANN. §§ 2953.21, 2953.23. Petition for McDonald, *State v. McDonald*, No. 94-CR-357 (Erie County Ct. of Common Pleas).

On January 21, 2004, the Court of Common Pleas denied Mr. McDonald's motions and entered judgment for the State. *State v. McDonald*, No. 94-CR-357 (Erie County Ct. of Common Pleas Jan. 21, 2004) (unpublished). The Ohio Court of Appeals for the Sixth Appellate District affirmed, *State v. McDonald*, 2005 Ohio 798 (Ohio Ct. App. 2005), and on July 13, 2005, the Supreme Court of Ohio denied leave to appeal, *State v. McDonald*, 830 N.E.2d 1169 (Ohio 2005).

On October 29, 2005, Mr. McDonald filed a second petition for State post-conviction relief. Petition for McDonald, *State v. McDonald*, No. 94-CR-357 (Erie County Ct. of Common Pleas). This petition was based on evidence not presented in the previous state post-conviction proceeding. *Id.*

On February 3, 2006, the Court of Common Pleas denied Mr. McDonald's motion and entered judgment for the State. *State v. McDonald*, No. 94-CR-357 (Erie County Ct. of Common Pleas Feb. 3, 2006) (unpublished). The Ohio Court of Appeals has since affirmed. *State v. McDonald*, 2007 Ohio 2148 (Ohio Ct. App. 2007).

On June 30, 2006, while his second petition for post-conviction relief was still pending in state court, Mr. McDonald sent to this Court a *pro se* motion for an order authorizing the United States District Court to consider a second or successive petition for a writ of habeas corpus. *See* Addendum C. The motion was filed on August 17, 2006. *Id.*

On March 19, 2007, this Court issued an order directing the Clerk of the Court to appoint counsel to represent Mr. McDonald. (A0001.) The Clerk appointed the undersigned counsel to prepare a revised motion and present oral argument on Mr. McDonald's behalf.

STATEMENT OF THE FACTS

Dewitt McDonald's incarceration stems from charges that he aided and abetted two other men in the commission of a drive-by shooting. Despite the flexibility inherent in those charges, the State proceeded on the theory that Mr. McDonald was present at the time of the shooting. (A0222-A0228, A0375-A0376, A0381, A0388-A0389.)

When the State first brought its case to a grand jury, it was unable to secure an indictment. (A0103, A0300-A0301.) At those proceedings, Krista Harris testified that she had made arrangements to meet Mr. McDonald at a motel room, that she had rented a room on the evening of the shooting, and that Mr. McDonald had arrived well before the shooting occurred. (A0122-A0124.)

Several months later, however, Ms. Harris suddenly reversed course. (A0125.) At a second grand jury proceeding, she testified, *inter alia*, that Mr. McDonald was not with her at the time of the shooting, that when he did arrive he appeared nervous and shaken, that he went to retrieve the gun used in the shooting later that morning, that he threatened to harm her if she cooperated with the police, and that he intended to use her as an alibi witness. (A00140-A0146, A0149-A0150, A0156, A0159.) The grand jury returned an indictment. (*See* A0103, A0300-A0301.)

At trial, the State did not present any evidence that Mr. McDonald had assisted the other men in the commission of the shooting. There was no evidence, for example, that he provided the other men with the car or the weapon used during the shooting. Similarly, there was no evidence placing him at the scene of the shooting. Instead, the State relied principally on Ms. Harris's testimony to obtain Mr. McDonald's conviction. (A0389-A0390.)

Ms. Harris has since admitted that she provided false testimony against Mr. McDonald. (A0045.) She contends that the prosecuting attorney knowingly procured her perjured testimony through threats and a non-consensual sexual relationship. (*Id.*)

A. The Shooting

In the early morning hours of June 6, 1994, Shawn Caston, Daryl Turner, and Dewitt McDonald were seen drinking at Whitlee's Bar in Sandusky, Ohio. (A0078-A0081.) At some point during the night, Shawn Caston got into an argument with another man, Jerome Caffey. (*Id.*; A0280-A0282.)

After the argument ended, Caston fumed about Caffey. (A0079-A0080.) He was overheard saying that Caffey did not know "who he [was] messing with." (A0080.) Caston also said, "[H]e better be glad I'm riding with someone else and they aren't ready to go." (*Id.*) "[I]f I had my little Chevy," Caston apparently continued, "Jerome would see who he was fuckin [sic] with." (*Id.*) And Caston would later remark, "[F]uck this, I am gonna to show that nigger." (*Id.*)

As Caston fumed, Daryl Turner said that "Caston should just take care of business." (A0079.) Apparently, Caston was also told that he should "just cap one of those little niggers." (A0080.)

At around 2:15 - 2:30 am, the three men left the bar in Mr. McDonald's car, a white Mercury Sable. (A0079, A0081, A0094, A0249-A0251, A0257, A0282, A0307.) They were seen later that evening at a Shell gas station. (A0079, A0249-A0251, A0257, A0282.) At the gas station, Shawn Caston was apparently asking other people for a ride so that he could go get a gun at Turner's house. (A0094, A0185-A0186.)

At around 3:00 am, a small, dark Chevrolet sat in the middle of East Parish Street, directly in front of Caffey's residence. (A0071, A0297, A0367.) As a woman stepped out from the house, someone from within the car began to open fire. (A0229, A0244, A0367.) The woman thought she saw two men sitting in the car. (A0371, A0171.)

As one of the last shots echoed in the night, people from within the house heard what sounded like glass popping. (A0172-A0173, A0368.) The car sped away, heading west on East Parish Street. (A0261.)

At almost the same time, Jerome Caffey exited the house, gun already in hand. (A0258, A0262.) He ran across the street to a neighbor's house—Russell Huff's residence. (A0258, A0263.)

A call was placed to the police at 3:00 am, moments after the shooting ended. (A0071, A0297.) Just five minutes after the police and paramedics arrived, however, a gun shot went off across the street at Russell Huff's house. (A0247, A0253.) The police ordered the house's occupants out onto the front lawn and arrested them. (A0072, A0264.) During a subsequent search of the house, the police found Jerome Caffey's gun hidden in a dryer. (A0265.) Apparently, Mr. Caffey had discharged the weapon while trying to remove a round from the chamber. (A0264.) He was eventually charged with unlawful possession of firearm by a felon under disability. (A0102, A0167-A0168.)

The paramedics treated Sharon McGill for a gunshot wound to the thigh. (A0071, A0253.) She had been in Caffey's house at the time of the shooting. The bullet remains lodged somewhere in her abdomen. (A0253-A0254.)

The paramedics also attended to Vivian Johnson, who was bleeding from both sides of her neck. (A0071-A0072, A0309, A0369, A0370.) Ms. Johnson had been sitting in a car that was parked in front of Caffey's house at the time of the shooting. (A0071-A0072, A0367-A0368.) The car's passenger and driver's side windows had been shot out. (A0190, A0242, A0368.)

Ms. Johnson was rushed to a hospital and eventually airlifted to a medical center in Cleveland. (A0072, A0369.) She died on the following day. (A0069-A0070, A0370.) On her emergency room report, the attending physician indicated that a bullet had entered the right side of her neck and exited out the left. (A0067.) The emergency room doctor's conclusion was consistent with the bullet having been fired from Caffey's residence, where Mr. Caffey had been seen exiting with a gun, not from the car that had fired upon the house from East Parish Street.

B. The Investigation

Almost immediately after the shooting, the police began to focus their attention on Caston, Turner, and McDonald. (A0081, A0300-A0303.)

The State quickly secured indictments against the former two. (A0088, A0095, A0294, A0296.) In addition to what is recounted above, the State had

learned that Caston's girlfriend owned a small, dark Chevrolet Celebrity. (A0083-A0084.) Although an initial search of the vehicle produced nothing of interest, on a subsequent inspection the police discovered a shell casing cradled between the windshield and the front hood. (A0083-A0084, A0087, A0292-A0294.) This casing matched casings that had been found at the crime scene. (A0294, A0330-A0333.) The State also had learned that Daryl Turner owned a gun that was capable of firing the bullets that had been found at the crime scene, and that Turner had given his gun to Caston on the night of the shooting. (A0085, A0090, A0291.)

In contrast, the State's investigation of Mr. McDonald revealed exculpatory evidence. (A0103, A0300-A0301.) The police had learned that Mr. McDonald had been with Krista Harris in a motel room at the time of the shooting. (A0305-A0306.) They also learned that Ms. Harris had, in fact, rented a room at the Budget Inn in Sandusky. (A0306.)

C. Harris's Initial Grand Jury Testimony

At the grand jury proceedings, Ms. Harris testified—consistent with her prior statements to the police—that Mr. McDonald had been with her at the time of the shooting. (A0122.) Specifically, she testified, under oath, that Mr. McDonald had arrived at the motel around 2:30 am. (A0124.) During this line of questioning, Kevin Baxter showed signs of anger; he threatened to charge Ms. Harris with being an accessory to murder. (A0111-A0112, A0355.)

At the conclusion of these proceedings, the State lacked probable cause to secure an indictment against Mr. McDonald. (A0103, A0300-A0301.)

D. Harris's Subsequent Grand Jury Testimony

Later that summer, however, Ms. Harris suddenly reversed course. At a subsequent grand jury proceeding, she testified that Mr. McDonald was not with her at the time of the shooting. (A0126, A0140.) She also testified that Mr. McDonald had called Daryl Turner on the morning of the shooting, that he had learned that the three men were rumored to have been involved in the shooting, and that upon learning this he told Turner that "things were all fucked up" and they needed to get the gun. (A00140-A0142, A0183-A0184, A0356-A0360.) She then testified that Mr. McDonald left the motel to pick up Turner, and when the two men returned, Turner was carrying a duffle bag. (A0143-A0146, A0184, A0356-A0360.) Finally, she testified that Mr. McDonald told her that he intended to use her as an alibi witness, and that he had made veiled threats to keep her from cooperating with the police. (A0149-A0150, A0156, A0159.) The grand jury returned an indictment. (*See* A0103, A0300-A0301.)

E. McDonald's Trial

Mr. Baxter tried the three men in separate jury trials before the same judge. Dewitt McDonald was the last to be tried.[1]

During opening statements, Mr. Baxter stated that the evidence would show that Shawn Caston had gotten into a fight with Jerome Caffey at a bar; that the three men were seen later that morning in a car at a gas station; that a different car was used during the shooting; that a neighbor saw three men sitting in the car; and that Mr. McDonald did not arrive at the motel until 3:15 am. (A0222-A0226.) He also stated that the evidence would show, *inter alia*, that Mr. McDonald went with Daryl Turner to retrieve the firearm, that he planned to use Ms. Harris as an alibi witness, and that he had threatened her. (A0226-A0228.)

Aside from Krista Harris's testimony, the State only presented three pieces of evidence that suggested that Mr. McDonald was involved directly in the shooting.

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[1] A jury found Daryl Turner guilty of complicity to commit the following offenses: (1) murder, (2) the lesser included offense of involuntary manslaughter, (3) improperly discharging a firearm into a habitation, (4) the felonious assault of Sharon McGill, and (5) the felonious assault of Jerome Caffey. (A0187-A0189.) He was found not guilty of complicity to commit aggravated murder and complicity to commit attempted murder. (*Id.*)

Shawn Caston was found guilty of complicity to commit the following offenses: (1) murder, (2) the felonious assault of Sharon McGill, (3) improperly discharging a firearm into a habitation, and (4) the felonious assault of Jerome Caffey. (A0217-A0219.) He was found not guilty of complicity to commit aggravated murder and complicity to commit attempted aggravated murder. (*Id.*)

First, Danielle Fenderson testified that, at Whitlee's Bar, she overheard Mr. McDonald tell Shawn Caston that "he wouldn't waste his time on one of them[; h]e would cap one of them." (A0282.) On cross-examination, Ms. Fenderson admitted that she did not initially tell the police that she had heard that statement, and she admitted that she had not previously attributed that statement to Mr. McDonald. (A0284-A0286.) She also admitted that, in the interim, the police had threatened her with charges of perjury. (A0287-A0288.)

Sharon McGill contradicted Ms. Fenderson's testimony. She testified that Mr. McDonald "didn't say anything." (A0256.) She also testified that Mr. McDonald did not appear to be upset.[2] (A0255.)

Second, the State presented evidence that Mr. McDonald was with the other men at a gas station at around 2:30 am. (A0249-A0251, A0257, A0283.) The men were seen in Mr. McDonald's white Mercury Sable—not the car that was used in the shooting. (*Id.*)

Finally, the State elicited from Terry McDonald—a distant relative of Dewitt McDonald but a close friend of Shawn Caston—testimony that he had observed Jerome Caffey get into an argument with Dewitt McDonald the day

[2] Similarly, another woman told the police that Mr. McDonald did not make any incriminating or suggestive remarks to Caston at the bar. (A0081.) Neither the State nor the defense called her to testify. (A0220-A0221.)

before the shooting. (A0313-A0315.) Even the State had reason to doubt the veracity of this testimony. (A0201-A0202, A0203-A0208.)

At Shawn Caston's trial, the defense had called Terry McDonald as its principal alibi witness. (A0192, A0216, A0318.) Terry testified that Mr. Caston was severely intoxicated on the night in question—that he was too drunk to have carried out the shooting. (A0196-A0200, A0323.) He also testified that he had observed Jerome Caffey and Dewitt McDonald get into an argument the day before the shooting. (A0193-A0195.)

Mr. Baxter responded with disbelief. (A0201-A0202.) When Terry McDonald appeared before the grand jury, he had testified that he did not have any information of relevance to the investigation of Dewitt McDonald. (*Id.*) During a vigorous cross-examination at Shawn Caston's trial, Mr. Baxter suggested that Terry McDonald was telling a different story to help his friend, Shawn Caston. (*Id.*; A0203-A0208.) And during his closing argument, Mr. Baxter stated that Terry McDonald had "lied." (A0216.)

None of that stopped Mr. Baxter from calling Terry McDonald as a witness at Mr. McDonald's trial. (A0311.) Even though Terry's prior testimony had been inconsistent with the State's case against Shawn Caston, Mr. Baxter proceeded to elicit the same testimony from him at Mr. McDonald's trial. (A0313-A0315, A0317, A0321-A0322; *cf.* A0203-A0208.) The witness who Baxter had accused

of lying to protect his friend now testified that Mr. McDonald had been in an argument with Mr. Caffey the day before the shooting. (*Compare* A0203-A0208, *with* A0316, A0323-0324, A0377-A0378.)

In addition to the three pieces of evidence that suggested that Mr. McDonald had some direct involvement in the shooting, the State presented evidence that there had been three men in the small car that had been used to carry out the shooting. (A0260.) Russell Huff testified that he had seen the shooting from his window across the street, and that there were three men in the car. (*Id.*)

Russell Huff's testimony, however, differed from his testimony before the grand jury, and it differed from the statement he had given to the police. (A0077-A0078, A0270.) At the grand jury, he testified—consistent with his prior statement to the police—that he did not see the shooting. (A0272.) He explained that he had been asleep in his living room at that time. (A0270; *cf.* A0078.) He awoke to the sound of gun fire but thought that the noise was coming from a television set that he had left on. (A0271.) It was only after he turned off the television set that he realized that actual shots were being fired. (*Id.*) Having grown up in a rough neighborhood in Cleveland, Mr. Huff said he knew what to do next: He fell to the ground and took cover. (A0272.)

Since testifying at the grand jury, however, Mr. Huff had pled guilty to passing bad checks and was serving the first of two 30-day sentences. (A0174,

A0267, A0275.) He also had an unrelated felony charge looming over his head. (A0274, A0279.) He told the police that he had lied to the grand jury. (A0267.) He was now willing to testify that he saw a small, four-door car fire upon Jerome Caffey's house. (A0191, A0259.) More importantly, he claimed to have seen three men sitting in the car. (A0260.) Based on these statements, Mr. Baxter was able to assist Mr. Huff in obtaining an early release from his second 30-day sentence.[3] (A0269, A0276, A0278.) At the time of Mr. McDonald's trial, Mr. Huff still had not gone to trial on his own felony charge. (A0175, A0274.)

In any event, Mr. Huff's new account contradicted another witness's testimony. (A0171, A0371.) The victim's own sister, Tammy Johnson, testified that she had seen only two men in the car at the time of the shooting. (*Id.*)

Mr. Baxter called Krista Harris as his second-to-last witness. (A0221.) She testified that Mr. McDonald did not arrive at the motel room until 3:15 am, and that when he did arrive he appeared shaken and nervous. (A0335-A0336.) She also testified that, later that morning, upon hearing of their rumored involvement, Mr. McDonald told Mr. Turner that "things were all fucked up and . . . that they had to get the gun." (A0337.) According to Ms. Harris, Mr. McDonald then went to pick up Turner, and when the two men returned, Turner was carrying a duffle

[3] During his closing statement, Mr. Baxter argued that by releasing Russell Huff from jail early, the judge had vouched for his veracity: "Does it make sense that Judge Ridge is going to let someone out who lied?" (A0376.)

bag. (A0337-A0338.) Ms. Harris then testified that, on another occasion, Mr. Turner admitted to her that he had given Shawn Caston his gun to take out Jerome Caffey, and that he (Turner) had been in the car at the time of the shooting. (A0340-A0341.) Finally, Ms. Harris testified that Mr. McDonald intended to use her as an alibi witness, and that he had made repeated and specific threats to her throughout the summer.[4] (A0339, A0341-A0345, A0364.)

The defense did not call any witnesses, and Mr. McDonald elected not to testify in his own defense. (A0372-A0373.)

During closing statements, Mr. Baxter argued that all of the evidence established that Mr. McDonald was "involved in the murder," but he neglected to explain how Mr. McDonald was involved. (A0374.) Instead, he emphasized that Mr. McDonald was present at the time of the shooting, and that he had helped Mr. Turner hide the weapon afterwards. (A0390.) He would go so far as to suggest that Mr. McDonald could be convicted solely on this basis: "All these things are so very evident of guilt, so very clear. The gun missing. Where's it at? They had to get the gun. Complicity." (*Id.*)

Mr. Baxter also argued that Ms. Harris had "stripped" Mr. McDonald of "any defense in this case." (A0389.) He continued, "Krista Harris is a hero in this case." (*Id.*) She "burie[d]" the defense. (A0390.)

[4] During cross-examination, counsel pointed out several discrepancies in Ms. Harris's testimony. (A0350-A0354, A0361-A0364.)

The jury deliberated for 16 hours before convicting Mr. McDonald on all counts. (A0392.) The trial judge sentenced him principally to a term of life in prison with no eligibility for parole for 20 years. (A0063-A0066.) At his sentencing hearing, Mr. McDonald stated:

> There [were] two tragedies done this past year, the first one being Miss Vivian Johnson's death, and the second one is me going to jail. I was innocent. I didn't have anything to do with it, and I think that's very tragic for a person to be a citizen of the United States and go to jail for something he did not do.

(A0391.)

F. McDonald's First § 2254 Petition

After pursuing direct appeals in the Ohio Court of Appeals for the Sixth Appellate District and the Supreme Court of Ohio, the specifics of which are recounted in the application attached to this motion, *see* Addendum B, Mr. McDonald filed a timely petition for a writ of habeas corpus in the United States District Court for the Northern District of Ohio. His petition raised six claims:

(1) "Due process and a fair trial were denied Petitioner when a principal witness for the State testified that the police had given the accused a polygraph test."

(2) "A due process violation occurred when the court failed to give a proper instruction of complicity. This follows because the given instructions did not advise the jury that an aider and abetter [sic] must act with the specific intent required for the commission of the charged offense or offenses."

(3) "The accused did not receive a fair trial consistent with the Sixth and Fourteenth Amendments to the Constitution when he was

victimized by a willful pattern of prosecutorial misconduct that permeated the trial." [5]

(4) "The accused did not have the benefit of the effective assistance of trial counsel under the Sixth and Fourteenth Amendments to the Constitution, when counsel failed to object to a considerable quantity of inadmissible, egregiously prejudicial evidence."

(5) "When a prosecution witness is permitted to testify regarding the contents of statements attributed (by the witness) to any alleged accomplice who, not only, confessed therein to supplying the gun used in the crimes alleged, but who also implicated Petitioner as a participant, the resultant effect was a denial of Petitioner's right of confrontation and to a fair trial."

(6) "It was a constitutional violation for the prosecutor, who called a witness a 'liar' in a separate trial of a co-defendant of Petitioner, to then vouch for his credibility when he called this same witness to testify in favor of the prosecution in the later trial of the Petitioner."

(A0009.)

On May 18, 1999, the District Court issued an opinion and order denying the petition. (A0030, A0031, A0040.) The Court held that Mr. McDonald had failed to exhaust claims one through four, and that those claims were now procedurally defaulted. (A0036, A0039.). The Court denied claims five and six on the merits. (A0039-A0040.) A certificate of appealability was likewise denied. (A0030, A0040-A0041.)

[5] Mr. McDonald's prosecutorial misconduct claim was based on certain statements that the prosecutor made during voir dire, testimony that he elicited at trial, and arguments that he made in closing. (A0020-A0022.)

On February 1, 2000, this Court also denied Mr. McDonald a certificate of appealability. (A0044.) This marked the end of Mr. McDonald's first application for federal collateral relief.

G. Harris's Recantation

Almost two years after Mr. McDonald's first petition had been denied, Ms. Harris filed an affidavit in State court, in which she asserted that Erie County Prosecutor Kevin Baxter coerced her into providing false testimony at Mr. McDonald's trial. (A0045.) Specifically, she stated that she had provided "false testimony in the trials of State v. Daryl Turner and State v. Dewitt McDonald." (*Id.*) She also stated that Erie County Prosecutor Kevin Baxter knowingly procured her perjured testimony through "threat of false criminal charges" and a "non-consensual sexual relationship." (*Id.*)

These accusations have been corroborated by Mr. Baxter's brother, Edward Baxter, who has likewise signed a sworn affidavit. (A0048.) In that affidavit, Edward Baxter states that he "has first[]hand knowledge that Erie County Prosecutor, Kevin Baxter, coerced Krista Harris to lie in a drive-by shooting [case] then forced her into a non[-]consensual sexual relationship." (A0051.)

H. Caston's § 2254 Petition

In the mean time, Shawn Caston had challenged his conviction in the United States District Court for the Northern District of Ohio. *See* Petition of Caston,

Caston v. Mitchell, No. 3:98-cv-7099 (N.D. Ohio). He alleged that he had received the ineffective assistance of trial and appellate counsel in failing to object and raise on appeal the introduction of statements that the police had obtained from Caston in violation of his constitutional rights. *Id.* Judge John Potter concluded that the police had violated Mr. Caston's constitutional rights, that the statements that the police had obtained were highly prejudicial, and that counsel's failure to move to suppress the statements at trial and to raise this argument on appeal were objectively unreasonable. *Caston v. Mitchell*, No. 3:98-cv-7099 (N.D. Ohio Oct. 13, 1999) (unpublished). He granted conditionally Caston's petition for a writ of habeas corpus and ordered that the writ would issue if the State failed to grant Caston a new trial within 90 days from date on which the order became final. *Id.* This Court affirmed in an unpublished opinion. *Caston v. Mitchell*, 12 Fed. Appx. 208 (6th Cir. 2001) (per curiam).

After this Court issued its decision, Shawn Caston negotiated a plea deal with Mr. Baxter. According to the terms of the deal, Mr. Caston agreed to plead guilty to a reduced charge of voluntary manslaughter and received credit for time served. (A0394.)

Before accepting his plea, however, the Erie County Court of Common Pleas ordered Shawn Caston to submit to a polygraph examination. During that examination, Mr. Caston stated that "he (Caston) drove by" Jerome Caffey's house,

pointed "a Tech 9 handgun" out the driver's side window, "and fired several times at the house." (A0058.) He also stated that "[a]fter driving by he turned off and while leaving the area threw the Tech 9 into the bushes on McKinley Street." (*Id.*) Mr. Caston did not state that Mr. McDonald was with him at the time of the shooting. (*Id.*) The examiner concluded that Caston had "told the substantial truth during the examination." (*Id.*)

I. McDonald's First Petition for State Post-Conviction Relief

Shortly after Ms. Harris filed her affidavit and Mr. Caston had taken his polygraph examination, Mr. McDonald filed in the Erie County Court of Common Pleas a petition for state post-conviction relief. The court denied the petition; the Ohio Court of Appeals affirmed; and on July 13, 2005, the Supreme Court of Ohio denied leave to appeal. *See* Addendum B.

J. Caffey's Confession

On September 19, 2005, Vivian Johnson's son, Jermaine Johnson, signed a sworn affidavit, in which he stated that Jerome Caffey had confessed to him, "I killed [your] momma." (A0061.) Mr. Johnson's wife, Jihan Johnson, signed a similar affidavit. (A0062.) These statements corroborated the emergency room doctor's conclusion that the bullet that killed Ms. Johnson had entered from the right side of her neck. (A0067.)

K. McDonald's Second Petition for State Post-Conviction Relief

On October 29, 2005, Mr. McDonald filed a second petition for state post-conviction relief based on the Johnson affidavits. Once again, the Erie County Court of Common Pleas denied the petition, and the Ohio Court of Appeals affirmed. *See* Addendum B.

L. McDonald's Second § 2254 Petition

On June 30, 2006, Mr. McDonald sent to this Court a *pro se* motion for an order authorizing the United States District Court to consider a second or successive petition for a writ of habeas corpus. *See* Addendum C. The Southern Christian Leadership Conference subsequently filed an *amicus curiae* brief in support of Mr. McDonald's motion and his claim of actual innocence.

On March 19, 2007, this Court issued an order directing the Clerk of the Court to appoint counsel to represent Mr. McDonald. (A0001.) The Clerk appointed the undersigned counsel to prepare a revised motion and present oral argument on Mr. McDonald's behalf.

Recognizing that Mr. McDonald's "motion presents a significant question that warrants further development and oral argument," this Court specifically directed counsel to "prepare a revised motion that addresses McDonald's claim involving the allegedly perjured testimony of Krista Harris as well as any other claims that counsel deems appropriate." (*Id.*)

SUMMARY OF ARGUMENT

Mr. McDonald is entitled to file a second petition for a writ of habeas corpus. In order to obtain the necessary authorization from this Court, he is simply required to make a "prima facie showing" (i) that the facts underlying his claims "could not have been discovered previously through the exercise of due diligence," (ii) that those facts, "if proven and viewed in the 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," and (iii) that his claims have not been "presented in a prior application." 28 U.S.C. § 2244(b)(1), (b)(2)(B), (b)(3)(C).

A prima facie showing "is not a difficult standard to meet." *In re Lott*, 366 F.3d 431, 432 (6th Cir. 2004). A movant is simply required to show that it is "'possible'" that the district court might ultimately conclude, on a more fully developed record, that the applicant has made the required showing under § 2244(b). *See id.* at 432-33 (quoting *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997)); *see also* 28 U.S.C. § 2244(b)(3)(C).

Mr. McDonald's motion easily satisfies this standard. *First*, he has made "a prima facie showing of constitutional . . . error that, if proved in the district court, may be sufficient to cause the fact finder to reach" the conclusion that the petitioner was not guilty of the underlying offense. *Lott*, 366 F.3d at 434.

Specifically, he has made a prima facie showing that Prosecutor Kevin Baxter prevented Krista Harris from providing critical, exculpatory evidence for the defense; that Mr. Baxter used threats and a non-consensual sexual relationship to coerce Ms. Harris into providing false, inculpatory testimony against Mr. McDonald; and that Mr. Baxter failed to disclose to the defense his relationship with Ms. Harris. Moreover, Mr. McDonald has made a prima facie showing that his conviction was secured through these constitutional violations—namely, (i) the knowing use of perjured testimony, (ii) the failure to disclose information that could be used to impeach inculpatory testimony, and (iii) the denial of right to present witnesses in one's own defense.

Second, Mr. McDonald has made a prima facie showing that the factual predicate for his claim "could not have been discovered previously through the exercise of due diligence." 28 U.S.C. § 2244(b)(2)(B)(i). He has demonstrated that Ms. Harris did not come forward until after his first § 2254 petition had been denied, that Ms. Harris could not come forward until after the statute of limitations for perjury expired, and that Mr. Baxter actively sought to hide the nature of his relationship with Ms. Harris.

Finally, none of Mr. McDonald's claims were presented in his previous § 2254 petition. These claims relate to evidence that was not previously available and therefore could not have been asserted in his prior petition.

ARGUMENT

I. MCDONALD IS ENTITLED TO FILE A SECOND § 2254 PETITION UNDER AEDPA.

A. This Court Evaluates A Second-Or-Successive Motion Under A Lenient Prima Facie Standard And Grants Such A Motion If It Presents Allegations Of Fact Sufficient To Warrant A Fuller Exploration In The District Court.

Section 106 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) established the court of appeals as a gatekeeper for petitions deemed "second or successive." Pub. L. No. 104-132, § 106, 110 Stat. 1214, 1220-21 (amending 28 U.S.C. § 2244). Under the Act, a prospective second-or-successive petitioner must file a motion in "the appropriate court of appeals for an order authorizing the district court to consider the [underlying] application." 28 U.S.C. § 2244(b)(3)(A). A three-judge panel should grant the motion "if it determines that the application makes a prima facie showing that the application satisfies the requirements of [§ 2244(b)]." *Id.* § 2244(b)(3)(B), (C).[6]

As relevant here, the Court must determine that the movant has made a "prima facie showing" (i) that the facts underlying his claims "could not have been discovered previously through the exercise of due diligence," (ii) that those facts,

[6] The statute also provides that the "court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion." 28 U.S.C. § 2244(b)(3)(D). However, this Court has held that the statutory deadline is "advisory or hortatory rather than mandatory." *In re Siggers*, 132 F.3d 333, 335 (6th Cir. 1997).

"if proven and viewed in the 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," and (iii) that his claims have not been "presented in a prior application." 28 U.S.C. § 2244(b)(1), (b)(2)(B), (b)(3)(C).

In *Lott*, this Court explained that a prima facie showing "is not a difficult standard to meet." *Lott*, 366 F.3d at 432. "'Prima facie' in this context means simply sufficient allegations of fact together with some documentation that would 'warrant a fuller exploration in the district court.'" *Id.* at 433 (quoting *Bennett*, 119 F.3d at 469). As a result, this Court simply must determine whether it is "'possible'" that the district court might conclude, on a more fully developed record, that applicant has made the required showing under § 2244(b). *Id.* at 432.[7] *See also* 28 U.S.C. § 2244(b)(3)(C).

[7] *Accord Cooper v. Woodford*, 358 F.3d 1117, 1119 (9th Cir. 2004) (en banc) ("By 'prima facie showing' we understand simply a sufficient showing of *possible* merit to warrant a fuller exploration." (internal quotation marks omitted)); *In re Johnson*, 322 F.3d 881, 882 (5th Cir. 2003) (per curiam) (stating that a prima facie showing is "simply a sufficient showing of possible merit to warrant a fuller exploration by the district court" (emphasis omitted)); *cf. Sustache-Rivera v. United States*, 221 F.3d 8, 15 (1st Cir. 2000) ("In judging whether to permit the filing of a second petition, the court of appeals, as gatekeeper, does not definitely decide these issues. Rather, . . . the precise question is whether 'jurists of reason' would find each of these points 'debatable.'"); *Bell v. United States*, 296 F.3d 127, 128 (2d Cir. 2002) (per curiam) ("A prima facie showing is not a particularly high standard. An application need only show sufficient likelihood of satisfying the

In this case, the Court must determine whether it is possible that the no reasonable fact finder "*would* have found the applicant guilty of the underlying offense" based on the "evidence as a whole," including the new "facts underlying the claim." 28 U.S.C. § 2244(b)(2)(B)(ii) (emphasis added). The Court does *not* engage in a sufficiency of the evidence inquiry to resolve that question—*i.e.*, whether "no rational trier of fact *could* have found proof of guilt beyond a reasonable doubt," *Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (emphasis added). *See Schlup v. Delo*, 513 U.S. 298, 323 & n.28 (1995) (explaining that the nearly identical use of the word "would" in *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992), resulted in a standard that "falls short of the *Jackson* standard governing habeas review of claims of insufficiency of the evidence"). Instead, the use of the word "would" has been interpreted to require a "federal court to assess how reasonable jurors *would* react to the overall, newly supplemented record." *House v. Bell*, 126 S. Ct. 2064, 2078 (2006) (applying *Schlup*). Accordingly, this Court simply must determine whether it is possible that the district court might ultimately conclude that no reasonable fact finder would have convicted the applicant based on the overall, newly supplemented record. *See* 28 U.S.C. § 2244(b)(2)(B)(ii); *see*

(continued…)

strict standards of § 2255 to 'warrant a fuller exploration by the district court.'" (quoting *Bennett*, 119 F.3d at 469)).

also House, 126 S. Ct. at 2078; *Schlup*, 513 U.S. at 323 & n.28; *Lott*, 366 F.3d at 432-33.

B. McDonald Has Made A "Prima Facie Showing" Under The Statute.

As explained below, Mr. McDonald's application easily satisfies the "lenient prima facie standard." *Lott*, 366 F.3d at 433. *First*, "[t]aking the evidence as a whole," his motion "makes a prima facie showing of constitutional . . . error that, if proved in the district court, may be sufficient" to establish, by clear and convincing evidence, that no reasonable factfinder would have convicted Mr. McDonald of the underlying offense. *Id.* at 434; *see also* 28 U.S.C. § 2244(b)(2)(B)(ii). *Second*, the facts underlying his claims could not have been discovered through due diligence prior to the filing of his first § 2254 petition. *See* 28 U.S.C. § 2244(b)(2)(B)(i). *Finally*, none of Mr. McDonald's claims has been presented in a prior application. *See id.* § 2244(b)(1).

1. McDonald Has Easily Made A Prima Facie Showing That, But For Constitutional Error, No Reasonable Factfinder Would Have Found Him Guilty Of The Underlying Offense.

Under the governing standard, Mr. McDonald is simply required to make "a prima facie showing of constitutional . . . error that, if proved in the district court, *may* be sufficient to cause the factfinder to reach" the conclusion that the petitioner was not guilty of the underlying crime. *Lott*, 366 F.3d at 434 (emphasis added). As this and other circuits have made plain, the showing is one of "possible"—not

certain—merit. *Id.* at 432-33 (quoting *Bennett*, 119 F.3d at 469); *accord Jordan v. Sec'y, Dep't of Corrs.*, 485 F.3d 1351, 1358 (11th Cir. 2007); *Cooper*, 358 F.3d at 1119; *Johnson*, 322 F.3d at 882. Mr. McDonald easily satisfies this requirement.

a. The Application Makes A Prima Facie Showing Of Constitutional Error.

The factual allegations in Mr. McDonald's application, together with the supporting documentation, make a prima facie showing of flagrant violations of Mr. McDonald's constitutional rights. Specifically, Mr. McDonald has proffered evidence (i) that Mr. Baxter knowingly used perjured testimony, *Napue v. Illinois*, 360 U.S. 264 (1959); (ii) that he failed to disclose information that could have been used to impeach important inculpatory testimony, *Giglio v. United States*, 405 U.S. 150 (1972); *see also Brady v. Maryland*, 373 U.S. 83 (1963); and (iii) that Mr. Baxter's conduct effectively rendered unavailable a witness that would have provided evidence critical to Mr. McDonald's defense, *see Webb v. Texas*, 409 U.S. 95 (1972) (per curiam); *see also Chambers v. Mississippi*, 410 U.S. 284 (1973). These are egregious examples of prosecutorial misconduct that cannot be countenanced.

i. The Knowing Use Of Perjured Testimony.

"'[A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *Kyles v.*

Whitley, 514 U.S. 419, 433 n.7 (1995) (quoting *United States v. Agurs*, 427 U.S. 97, 103 (1976)); *see also United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989). In order to establish such a denial of due process, a habeas petitioner "must show that the statement in question was false, that the prosecution knew it was false, and that it was material." *Byrd v. Collins*, 209 F.3d 486, 517 (6th Cir. 2000). A statement is material "'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles*, 514 U.S. at 434 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985) (plurality)). "[A] 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682 (internal quotation marks omitted).[8]

Mr. McDonald has proffered evidence that the attorney who prosecuted him, Kevin Baxter, knowingly procured false testimony through threats and a non-consensual sexual relationship. *See* A0045, A0051. This testimony was undoubtedly material.

[8] The Supreme Court has made clear that materiality is "not a sufficiency of the evidence test." *Kyles*, 514 U.S. at 434. In other words, "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Id.* at 434-35. Rather, materiality is demonstrated "by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435.

Although the State charged Mr. McDonald with complicity, it proceeded on the theory that he was present at the time of the shooting, A0222-A0228, A0375-A0376, A0381, A0388-A0389, and it did so for good reason: The jury was permitted to rely on Mr. McDonald's alleged presence in the car as evidence that he was complicit in the shooting—even though that evidence, standing alone, would have been insufficient to convict Mr. McDonald of complicity. *See State v. Johnson*, 754 N.E.2d 796, 799, 801-02 (Ohio 2001). No other witness—indeed, no other evidence—placed Mr. McDonald in the car at the time of the shooting.

The State's remaining evidence was contradictory and certainly does not instill confidence that the jury's verdict was unaffected by Ms. Harris's testimony: Mr. Huff testified that there were three people in the car, whereas Tammy Johnson only saw two; Ms Fenderson claimed to have heard Mr. McDonald say that "he wouldn't waste his time on" Caffey, "he would cap" him, whereas Ms. McGill heard nothing of the sort. A0255-A0256, A0260, A0281-A0282, A0371, *see also* A0171. And there were reasons to doubt the veracity of the State's witnesses on these points. A0266-A0268, A0284-A0288. Under these circumstances, Ms. Harris's testimony was not simply material; it was determinative. *See Jamison v. Collins*, 291 F.3d 380, 389-91 (6th Cir. 2002) (affirming a grant of the writ on a lesser showing that, even though the undisclosed evidence did not eliminate the petitioner as a perpetrator of the crime, the evidence nevertheless undermined the

prosecutor's theory of the case and contradicted the testimony of the prosecution's chief witness).

ii. The Failure To Disclose Information That Could Have Been Used To Impeach Important Inculpatory Testimony.

The well-established rule of *Brady v. Maryland* provides that the suppression by the State of evidence favorable to the accused violates the Due Process Clause where the evidence is material either to guilt or punishment, irrespective of the good or bad faith of the prosecutor. *Strickler v. Greene*, 527 U.S. 263, 280 (1999). To establish a *Brady* violation, a habeas petitioner must show (1) that the prosecution failed to disclose evidence, (2) that such evidence was favorable to the petitioner, either because it is exculpatory or it may impeach important inculpatory evidence, and (3) that such evidence is material. *See id.* at 280-81. As noted above, materiality is demonstrated "by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

Here, Mr. McDonald has proffered evidence that the attorney who prosecuted him, Kevin Baxter, failed to disclose his inappropriate sexual relationship with the State's key witness—evidence that could have been used to impeach her trial testimony. *See* A0045, A0051. This information was undoubtedly material. Although Mr. McDonald's trial counsel attempted to

impeach Ms. Harris based on her original grand jury testimony, he could not develop a favorable explanation as to why she had changed her testimony. A0382-A0386. In the absence of such an explanation, the prosecution was able to argue that Ms. Harris had decided to come clean after initially succumbing to Mr. McDonald's repeated—but undocumented—threats. A0379-A0380. Moreover, Ms. Harris admitted in her affidavit that the sexual relationship had an undue influence on her testimony. *See* A0045; *cf. Spirko v. Mitchell*, 368 F.3d 603, 613 (6th Cir. 2004) (explaining that, there, the petitioner had failed to explain "how [a witness's] testimony was affected by [her] alleged relationship with the [State's chief] investigator"). Given the otherwise thin evidence of guilt, there is a reasonable probability that, had the prosecutor's inappropriate sexual relationship been disclosed, the result of the proceeding would have been different. *See Napue*, 360 U.S. at 269 ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.").

iii. The Denial Of The Right To Present A Witness In One's Own Defense.

A defendant's right to present witnesses in his own defense is a fundamental element of due process and is protected by the Sixth Amendment. *See Chambers*, 410 U.S. at 302; *Webb*, 409 U.S. at 98; *Washington v. Texas*, 388 U.S. 14, 19

(1967). "Various prosecutorial and judicial actions aimed at discouraging defense witnesses from testifying deprive a defendant of this right." *United States v. Emuegbunam*, 268 F.3d 377, 400 (6th Cir. 2001). Thus, in *Webb*, the Supreme Court held that a trial judge's repeated admonishments about the dangers of perjury, "directed only at the single witness for the defense, effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment." 409 U.S. at 98. Similarly, in *United States v. Thomas*, this Court applied *Webb* to a case where a prosecutor had sent a Secret Service agent to communicate *ex parte* with a potential witness and threatened that witness with prosecution if he testified. 488 F.2d 334, 335-36 (6th Cir. 1973). In holding that the defendant's constitutional rights were violated after the witness took the stand but failed to testify on the defendant's behalf, the Court explained: "[T]he Government's action here substantially interfered with any free and unhampered determination the witness might have made as to whether to testify and if so as to the content of such testimony." *Id.* at 336.

Similarly, here, the prosecutor engaged in conduct that interfered with any free and unhampered determination by Ms. Harris as to the content of her testimony. A0045, A0051. Mr. Baxter achieved this interference through repeated threats of criminal prosecution and a coerced sexual relationship. *Id.* He not only prevented a key witness for the defense from testifying on Mr. McDonald's behalf,

but also he managed to coerce the witness into providing false testimony for the State. *Compare* A0122-A0124, *with* A0335-A0338. This conduct undoubtedly rises to the level of intimidation present in *Webb* and *Thomas*. *Cf. Davis v. Straub*, 430 F.3d 281, 287 (6th Cir. 2005) (affirming the denial of the writ after concluding, in that case, that the prosecutor's conduct—requesting a sidebar with the judge at which point he informed the court that the witness was a suspect and should be informed of his constitutional rights—"d[id] not rise to the level of intimidation present in *Webb* and *Thomas*"), *cert. denied*, 127 S. Ct. 929 (2007). Indeed, the contrasting outcomes between the first grand jury proceeding, where Mr. Baxter failed to establish probable cause to indict, and Mr. McDonald's trial "present the equivalent of a controlled experiment that demonstrates the critical nature of [Ms. Harris's] testimony to [Mr. McDonald's] defense." *Christie v. Hollins*, 409 F.3d 120, 126 (2d Cir. 2005) (Newman, J.).

b. The Application Makes The Required Showing That, But For The Constitutional Error, No Reasonable Factfinder Would Have Convicted McDonald Of The Underlying Offense.

Mr. McDonald also has made a prima facie showing that, but for the constitutional error, no reasonable fact finder would have convicted him of the underlying offense. As explained above, at the prima-facie-showing stage, Mr. McDonald merely has to show that it is "possible" that he will ultimately prevail. *Lott*, 366 F.3d at 432; *accord Jordan*, 485 F.3d at 1358; *Cooper*, 358 F.3d at 1119;

Johnson, 322 F.3d at 882; *Bennett*, 119 F.3d at 469. Applying that standard to the present motion, it is plain that Mr. McDonald has made the required showing.

Mr. McDonald was not only convicted based largely on Ms. Harris's false inculpatory testimony, but also he was denied the opportunity to present critical exculpatory evidence in the form of Ms. Harris's original grand jury testimony. As mentioned above, the fact that the State charged him with complicity does not alter this conclusion. The State sought to prove his involvement by arguing that he was present at the time of the shooting. A0222-A0228, A0375-A0376, A0381, A0388-A0389. Without this evidence, the State failed even to convince a grand jury that there was probable cause to indict Mr. McDonald. A0103, A0300-A0301.

The remaining evidence presented at trial does not even come close to overcoming the obvious effect of the prosecutor's misconduct. No other witness—indeed, no other evidence—placed Mr. McDonald in the car at the time of the shooting, and Ms. Harris's initial grand jury testimony would have put that issue to rest. A0122-A0124. Moreover, this Court is permitted to consider the likely effect that this new evidence would have had on "the credibility of the witnesses presented at trial." *See House*, 126 S. Ct. at 2078 (citation and internal quotation marks omitted). The already questionable testimony of Mr. Huff, Ms. Fenderson, and Terry McDonald is rendered even more questionable after a fact finder is presented with evidence that Mr. McDonald was not present at the time of the

shooting. Finally, just as the jury was permitted to rely on Mr. McDonald's alleged presence in the car as evidence that he was complicit in the shooting, *see Johnson*, 754 N.E.2d at 801-02, it was similarly entitled to infer, based on his absence, that he did not form the intent necessary to be convicted of complicity, *see id.* at 800 (explaining that, there, the defendant "could have abandoned the plan to kill" the intended victim at several points, but instead "he chose to continue on" in the car ultimately responsible for a drive-by shooting); *see also* OHIO REV. CODE ANN. § 2923.03(A) (requiring the State to prove that the defendant was "acting with the kind of culpability required for the commission" of the underlying offense).

In this way, Mr. McDonald's motion makes at least as strong a showing as the motion approved by this Court in *Lott*. There, the movant made a prima facie showing of *Brady* error based largely on the withholding evidence that related to the murder victim's dying description of his assailant. *Lott*, 366 F.3d at 433. As Chief Judge Boggs explained in his dissenting opinion, the difference between the victim's description and the movant's appearance was not all that dramatic, and other evidence tended to confirm the movant's guilt. *See id.* at 436-37 (Boggs, C.J., dissenting). Nevertheless, the Court determined that the movant had made a sufficient showing of possible merit to warrant adjudication in the district court. *Id.* at 434.

At a minimum, then, Mr. McDonald has presented "sufficient allegations of fact together with [the] documentation" necessary to "warrant a fuller exploration in the district court." *Id.* at 433 (internal quotation marks omitted).[9]

2. The Factual Predicate For McDonald's Claims Could Not Have Been Previously Discovered Through The Exercise Of Due Diligence.

Similarly, Mr. McDonald has made a prima facie showing that the factual predicate for his claim "could not have been previously discovered through the exercise of due diligence." 28 U.S.C. § 2244(b)(2)(B)(i). "Previously" in this context means prior to the filing of the first § 2254 petition. *E.g.*, *In re Provenzano*, 215 F.3d 1233, 1236 (11th Cir. 2000).

Here, no exercise of diligence could have revealed, prior to the filing of Mr. McDonald's first § 2254 petition, the inappropriate conduct of Mr. Baxter. Ms.

[9] Mr. McDonald has presented other, credible evidence that likewise casts doubt on his guilt and supports his claim of actual innocence. *First*, Mr. Caston's statements during his polygraph examination suggest that Mr. McDonald was not present at the time of the shooting. *See* A0058. This suggestion draws support from other evidence in the record, including statements that Mr. Caston allegedly made on the night of the shooting. For example, at least one witness overheard Caston say that Caffey was lucky that he did not have his "little Chevy" because Turner and McDonald "aren't ready to go." A0080.

Second, the victim's own son and daughter-in-law have signed sworn affidavits, in which they state that Jerome Caffey had confessed to them that he killed Vivian Johnson. A0061, A0062. These statements corroborate the emergency room doctor's conclusion that the bullet that killed Ms. Johnson entered from the right side of her neck—the side of her neck closest to the house where Caffey was seen holding a gun. A0067.

Harris only came forward after the statute of limitations for perjury expired, which was still more than a year after this Court denied Mr. McDonald's application for a certificate of appealability over the denial of his first § 2254 petition. Moreover, according to Ms. Harris, Mr. Baxter took significant steps to hide his conduct, including relocating Ms. Harris to Cleveland, Ohio. A0045, A0051. Under these circumstances, and in light of the fact that the vast majority of prosecutors act in good faith, it would be manifestly unfair to hold that a habeas petitioner must anticipate the sort of prosecutorial misconduct engaged in by Mr. Baxter and raise it in a first petition.

3. None Of McDonald's Claims Has Been Presented In A Prior Application.

Finally, none of Mr. McDonald's claims has been presented in a prior application. *Compare* Addendum B, *with* A0002-A0029. His new claims relate to evidence that was not previously available and therefore could not have been asserted in a previous petition. Thus, unlike *In re Fowlkers*, 326 F.3d 542, 545 (4th Cir. 2003), where the movant had previously presented the same claims and relied on the same evidence, here the movant relies on neither.

C. A Movant Is Not Required To Make A Prima Facie Showing Beyond The Requirements Of § 2244(b).

In its opposition to Mr. McDonald's *pro se* motion, the State argued that he must demonstrate that his underlying application satisfies requirements beyond

those specified in § 2244(b). *See* Opp'n to *Pro Se* Mot. at 7-10. This argument is contrary to AEDPA's plain text, which limits the scope of this Court's review to the requirements of "th[at] subsection." 28 U.S.C. § 2244(b)(3)(C).

The Act's hierarchy also makes plain the error in the State's argument. Whereas the court of appeals simply must ensure that any one claim satisfies *subsection (b)*, the district court must ultimately ensure that each claim satisfies the requirements of the *entire section*. *Compare id.* § 2244(b)(3)(C) (using the phrase "this subsection"), *with id.* § 2244(b)(4) (using the phrase "this section"). *See also Cooper*, 358 F.3d at 1123.[10] If Congress had wanted the court of appeals to analyze the requirements of the entire section, it very easily could have said so. Because it did not, the court of appeals should not concern itself with such requirements as the applicable limitations period, which resides in § 2244*(d)*, not § 2244*(b)*. *See* 28 U.S.C. § 2244(b)(3)(C); *see also* 2 HERTZ & LIEBMAN, *supra*, at 1447-48 & n.120 ("The statute limits the scope of review at [the motion] stage to the specific question whether the motion makes a *prima facie* showing that any of

[10] If the court of appeals grants a second or successive motion, then the district court must engage in a plenary review of the entire application that underlines that motion. *See* 28 U.S.C. § 2244(b)(4); *see also Jordan*, 485 F.3d at 1358; *Johnson*, 322 F.3d at 883; 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 1454 (5th ed. 2005). AEDPA requires the district court to "dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed" if the applicant cannot "show[] that the claim satisfies the requirements of [the *entire] section*." 28 U.S.C. § 2244(b)(4) (emphasis added).

the claims in the petition satisfy AEDPA's substantive successive standards, thereby evidently rendering irrelevant other possible grounds for dismissal such as ultimate lack of merit, nonexhaustion, procedural default, and the like." (citing authorities)).[11]

[11] There are a number of good reasons why Congress did not require the court of appeals to concern itself with the applicable statute of limitations at the motion stage. *First*, the statute of limitations is an affirmative defense that normally must be raised by the State in its answer. *See* FED. R. GOVERNING § 2254 CASES 5(b). *Second*, the limitations period must be evaluated on a claim-by-claim basis. *Third*, the applicable limitations period that will most often govern claims in a second-or-successive petition, § 2244(d)(1)(D), often requires factual development to determine when the factual predicate "could have been discovered." 28 U.S.C. § 2244(d)(1)(D). *Fourth*, the applicant may be entitled to statutory tolling, which again requires a detailed factual analysis, including an analysis of whether an application was "properly filed" in state court. *Id.* § 2244(d)(2). *Finally*, equitable tolling may be available, including tolling based on a showing of actual innocence. *See Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005).

CONCLUSION

For the foregoing reasons, the Court should grant Mr. McDonald's motion for an order authorizing the United States District Court for the Southern District of Ohio to consider his second petition for a writ of habeas corpus.

Respectfully submitted,

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Dated: July 26, 2007

CERTIFICATE OF COMPLIANCE

I hereby certify that, in accordance with the general requirements set forth in Federal Rule of Appellate Procedure 32(a) and (c)(2), this motion is proportionately spaced, has a typeface of 14-point, and contains **9,604** words, exclusive of the material not counted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). The Clerk's Office has informed counsel that no page or word limitation governs this motion.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of July, 2007, I sent an original and four copies of the foregoing motion to the Clerk of the United States Court of Appeals for the Sixth Circuit by Federal Express. In addition, on this same day, I served the foregoing motion by causing two copies to be sent to the following counsel by Federal Express:

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