**UNITED STATES COURT OF APPEALS**
FOR THE SIXTH CIRCUIT

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Re: Case No. 17-1280, *In re: Fredrick Freeman*
Originating Case No. : 2:07-cv-10350

Dear Sir or Madam,

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Bryant L. Crutcher
Case Manager
Direct Dial No. 513-564-7013

cc: Mr. David J. Weaver

Enclosure

No mandate to issue

No. 17-1280

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



In re: FREDRICK FREEMAN,

Movant.

O R D E R

Before: KEITH, SILER, and STRANCH, Circuit Judges.

Fredrick Freeman, a Michigan prisoner proceeding through counsel, moves this court for an order authorizing the district court to consider a second or successive habeas corpus petition to be filed under 28 U.S.C. § 2254. The State has filed a response opposing the motion, to which Freeman has replied.

In 1987, a jury convicted Freeman of first-degree murder for the shooting death of Scott Macklem, the fiancé of his ex-girlfriend, Crystal Merrill, in the parking lot of St. Clair Community College in Port Huron, Michigan. The State's proof at trial consisted primarily of Merrill's testimony about her relationship with Freeman; the contents of telephone conversations between Merrill and Freeman before and after the murder; testimony of a jailhouse informant, Philip Joplin, who claimed Freeman had confessed to the murder; and testimony of two individuals, Rene Gobeyn and Richard Krueger, who placed Freeman near the scene of the crime on the morning of the murder. Freeman relied on an alibi defense, presenting testimony from nine witnesses who testified to seeing him hundreds of miles from the crime scene, in Escanaba, Michigan, at different times on the day of the murder. The court sentenced him to life imprisonment without the possibility of parole. His direct appeal and first attempt at post-conviction relief in the state courts were unsuccessful.

In January 2007, Freeman filed his first federal habeas corpus petition, raising several claims. The district court found that the petition was untimely, but concluded that Freeman had

presented new evidence that undermined the court's confidence in the outcome of the trial so as to equitably toll the statute of limitations. *Freeman v. Trombley*, 744 F. Supp. 2d 697, 727 (E.D. Mich. 2010). This consisted of: evidence that Freeman's trial counsel, David Dean, was addicted to drugs at the time he represented Freeman; Freeman's affidavit attesting to the fact that Dean prevented him from testifying in his own defense; an affidavit from Freeman's girlfriend, Michelle Woodworth, stating that she was with Freeman at their home in Escanaba at the time of the murder; and evidence that jailhouse informant Philip Joplin had recanted his trial testimony incriminating Freeman. *Id*. The court concluded that Freeman was entitled to relief on three of his claims and conditionally granted the writ. *Id*. at 733. On appeal, this court reversed the district court's order, concluding that Freeman failed to carry his burden of showing either actual innocence or entitlement to an evidentiary hearing. *Freeman v. Trombley*, 483 F. App'x 51, 67 (6th Cir. 2012).

In 2008, after Freeman had filed his first federal habeas petition, a private investigator working on his behalf discovered in the police file the original photographic array from which witnesses Gobeyn and Krueger identified Freeman as the person they had seen at St. Clair Community College around the time of the murder. These photographs were not shown to the jury at trial. Instead, the prosecution prepared a composite exhibit using enlarged, but cropped, versions of each of the photographs from the array. Where the original photographs showed each individual's shoulders and upper torso area and a police department placard, the photos on the composite exhibit showed only the individuals' heads.

Based on this discovery, Freeman filed a motion for relief from judgment in the state trial court, asserting that he was entitled to a new trial in light of the photographs. Freeman argued that the original, uncropped photographs reveal that the photo array shown to Gobeyn and Krueger was unduly suggestive. He asserted that the prosecutor's failure to disclose the original photos violated *Brady v. Maryland*, 373 U.S. 83 (1963), and, alternatively, that if trial counsel had seen the original photos, he was ineffective for failing to use them to challenge the identifications. The trial court initially denied the motion as an improper successive motion for

relief from judgment, *see* Mich. Ct. R. 6.502(G)(2), and the Michigan Court of Appeals denied Freeman's delayed application for leave to appeal. The Michigan Supreme Court, in lieu of granting leave to appeal, remanded the case to the court of appeals "as on leave granted" with instructions to remand the case to the trial court for an evidentiary hearing. *People v. Freeman*, 839 N.W.2d 492 (Mich. 2013) (Mem.). The trial court held an evidentiary hearing and denied the motion, concluding that Freeman "failed to meet the requirements of [Michigan Court Rule] 6.502(G)(2) and show his motion is based on new evidence that was not discovered before the first such motion." On appeal, the Michigan Court of Appeals held that the trial court erred in determining that Freeman had not met the threshold requirements for filing a successive motion for relief from judgment, explaining that, by remanding the case for an evidentiary hearing on the merits of the claims, the Michigan Supreme Court impliedly determined that Freeman's motion met the Rule 6.502(G)(2) criteria. *People v. Freeman*, No. 311257, 2015 WL 4599481, at *5 (Mich. Ct. App. July 30, 2015). The court, however, affirmed the trial court's ultimate determination that the original photographs were not new evidence that would warrant a new trial and that there were no grounds for concluding that the prosecutor violated *Brady* or that trial counsel was ineffective. *Id*. at *8. The Michigan Supreme Court denied leave to appeal. *People v. Freeman*, 885 N.W.2d 296 (Mich. 2016) (Mem.).

In March 2017, Freeman filed this motion for an order authorizing the district court to consider a second or successive § 2254 petition. He proposes to raise the same *Brady* and ineffective-assistance claims that he raised in his successive motion for relief from judgment along with a freestanding claim of actual innocence.

We may authorize the filing of a second or successive habeas petition only if the applicant makes a prima facie showing that it contains a new claim that relies on: 1) "a new rule of constitutional law . . . that was previously unavailable"; or 2) new facts that "could not have been discovered previously through the exercise of due diligence" and that, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found

the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2), (b)(3)(C). "'Prima facie' in this context means . . . sufficient allegations of fact together with some documentation that would 'warrant a fuller exploration in the district court.'" *In re McDonald*, 514 F.3d 539, 544 (6th Cir. 2008) (quoting *In re Lott*, 366 F.3d 431, 433 (6th Cir. 2004)). For purposes of this provision, courts require that the new evidence could not have been discovered at the time of the applicant's previous habeas petition or, at the latest, at the time of the applicant's last federal filing. *See In re Siggers*, 615 F.3d 477, 480 (6th Cir. 2010); *In re McDonald*, 514 F.3d at 545 n.4.

The State argues that Freeman has failed to show that the uncropped photographs constitute "new" evidence within the meaning of § 2244(b) because they "were made available to the defense by the prosecution through its open file policy well before the original trial." Freeman, on the other hand, sets forth the efforts he made over the years to obtain these photographs, which are also recounted in the Michigan Court of Appeals' 2015 decision on Freeman's successive motion for relief from judgment. The state appellate court's decision notes that, during the evidentiary hearing held on direct appeal, Freeman's appellate attorney mentioned that he had requested copies of the original photographs, and the prosecutor stated that a search for the photos had been conducted, but they were not located. *Freeman*, 2015 WL 4599481, at *2. Detective John Bowns testified that he did not know where the photographs were. *Id.* At the 2014 evidentiary hearing, Freeman's direct-appeal attorney confirmed that he never saw the original, uncropped photos and stated that he had visited trial counsel's office to review his files, but never found the photos. In 2004, the attorney who represented Freeman on his first motion for relief from judgment attempted to obtain the photos through a Freedom of Information Act request to the Port Huron Police Department. The response stated, "Photos not in the possession of this department." Although the State asserts that the photographs were available to Freeman under the open file policy, Freeman's unsuccessful attempts to obtain the photos on direct appeal and collateral review call into question the completeness of the prosecution's file. Thus, Freeman has made a prima facie showing that the original photographs

"could not have been discovered previously through the exercise of due diligence." 28 U.S.C. § 2244(b)(2)(B)(i).

The State also argues that, if it is determined that the photographs could not have been discovered earlier through due diligence, then Freeman's ineffective-assistance-of-counsel claim necessarily fails because it "has, as a necessary factual predicate, the evidence already being in possession of the defense at the time of trial." It is true that Freeman could not succeed on both a *Brady* claim and an ineffective-assistance claim because, if counsel had the photographs and failed to use them at trial, then they could not have been unlawfully suppressed by the State. Indeed, that is why Freeman has presented them as alternative claims. But it does not follow that the same factual predicate underlying both claims—the original, uncropped photos—can be considered "new" within the meaning of § 2244(b) only in the context of a *Brady* claim. The State argues that the ineffective-assistance claim requires a showing that the photographs were in the possession of the defense at the time of the trial, and therefore they cannot be considered new evidence. But the fact that trial counsel may have seen or possessed the photographs does not compel a conclusion that Freeman was aware of that or that he could have discovered the photographs on his own through due diligence and raised an ineffective-assistance claim in his first § 2254 petition. Freeman's prima facie showing that he was unable to obtain the original photographs through the exercise of due diligence from the time of his direct appeal until 2008 is sufficient as to both his *Brady* claim and his alternative ineffective-assistance claim.

As for the second prong of the prima facie showing, Freeman's allegations and supporting documentation "warrant a fuller exploration in the district court" as to whether, absent the alleged constitutional violations, no reasonable juror would have found him guilty of Macklem's murder. *In re McDonald*, 514 F.3d at 544 (quoting *In re Lott*, 366 F.3d at 433). First, Freeman has made a prima facie showing of a constitutional violation. A defendant claiming a *Brady* violation must establish the following three components: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or

inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). As to whether the evidence is favorable, the original uncropped photographs reveal several differences between Freeman's photos and those of the four police fillers that are not clear in the composite exhibit shown to the jury: Freeman's photo features a striped background while the others have solid backgrounds; Freeman's profile photo is of his left side, and the others are taken from the right; Freeman's body is facing forward in his profile shot, and the other profile photos show the men turned to the side; both of Freeman's photos include the police placard while the police fillers' photos only have the police placard in the forward-facing photos; only Freeman's placard bears the name of a city other than Port Huron; Freeman's front-facing and profile photos are separated by a white gap, and the others were joined with no gap; and Freeman's photograph bore the most recent date. At the state post-conviction evidentiary hearing, an expert in eyewitness identification testified that the differences between Freeman's photographs and the other photographs could have affected the reliability of Gobeyn's and Krueger's identifications. *Freeman*, 2015 WL 4599481, at *3. She characterized the photo array as "highly suggestive." *Id.* Freeman has therefore made an initial showing that the new evidence has, at the very least, some impeachment value. Additionally, the evidence suggesting that the prosecutor's file was incomplete and did not contain the photographs shows that the State suppressed the photos, even if inadvertently. And, with respect to the prejudice prong, given that Gobeyn and Krueger were the only two witnesses who put Freeman at the scene of the murder while nine other witnesses placed him hundreds of miles away on that day, evidence showing that their identifications were not reliable "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

Freeman has also made a prima facie showing of ineffective assistance of counsel. Given the importance of Gobeyn's and Krueger's identifications to the prosecution's case, this case warrants further exploration by the district court into whether counsel's possible failure to use the original photographs to seek suppression of, or to impeach, the identifications fell below an

objective standard of reasonableness and affected the outcome of the trial. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

Second, Freeman has made an adequate prima facie showing that, had he had access to the original photographs at trial and been able to use them in his defense, no reasonable factfinder would have found him guilty. The State argues that the uncropped photographs "are, at best, of limited value as impeachment evidence" and "do not actually demonstrate, by clear and convincing evidence, that, but for the alleged constitutional errors, no reasonable factfinder would have found guilt." But it is not this court's role at this stage to make that determination. We "simply must determine whether there are 'sufficient allegations' . . . so as to require a district court to engage in additional analysis in order to ascertain whether but for the constitutional error, no reasonable factfinder would have found [the applicant] guilty of the underlying offense." *In re McDonald*, 514 F.3d at 547. Freeman has satisfied this standard, which "is not a difficult standard to meet." *In re Lott*, 366 F.3d at 432. There was no direct evidence linking Freeman to the crime and Gobeyn and Krueger were the only witnesses to place him at the scene. Nine other witnesses placed him in Escanaba on the day of the murder. Moreover, Gobeyn's and Krueger's identifications were not entirely sound. Gobeyn's initial description stated only that the driver was a white male around twenty-five years old, and Gobeyn underwent hypnosis to aid his memory. Although he picked Freeman out at the physical lineup, he admitted to knowing two of the other men used in the lineup. And while Krueger also selected Freeman from the photo array, he did not pick Freeman at the physical lineup. In view of the evidence as a whole, Freeman's allegations, which are supported by "some documentation" suggesting that Gobeyn's and Krueger's identifications were based on an unduly suggestive identification procedure, "warrant a fuller exploration in the district court." *In re McDonald*, 514 F.3d at 544 (quoting *In re Lott*, 366 F.3d at 433).

Finally, the State argues that Freeman's freestanding claim of actual innocence is not a cognizable habeas claim. The Supreme Court has never held that freestanding actual-innocence claims can provide an independent basis for habeas relief. *See McQuiggin v. Perkins*, 133 S. Ct.

1924, 1931 (2013). ("We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence.") Both this court and the Supreme Court have recognized that a freestanding claim of actual innocence may be cognizable if a petitioner in a capital case makes "a truly persuasive demonstration of 'actual innocence.'" *Herrera v. Collins*, 506 U.S. 390, 417 (1993); *see Cress v. Palmer*, 484 F.3d 844, 854-55 (6th Cir. 2007). But this is not a capital case, and Freeman cannot pursue a freestanding actual innocence claim. Although he maintains that he wishes to pursue such a claim, Freeman makes his arguments of actual innocence only in the context of showing that he has satisfied, with respect to his *Brady* and ineffective-assistance claims, § 2244(b)(2)(B)(ii)'s requirement that the newly discovered facts are "sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii). Having made a prima facie showing of a constitutional violation, it is unclear why Freeman seeks to raise a freestanding claim of actual innocence. To the extent that he wishes to do so in order to again attempt to obtain relief on the basis of Woodworth's alibi testimony and Joplin's recantation of his trial testimony, he may not do so. Freeman has already unsuccessfully raised constitutional claims based on this evidence in his previous habeas petition, and § 2244(b)(1) requires dismissal of a claim raised in a second or successive habeas petition that was presented in a prior application.

Accordingly, Freeman's motion for an order authorizing the district court to consider a second or successive § 2254 petition is **GRANTED** as to his *Brady* and ineffective-assistance-of-counsel claims.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk