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COURT OF APPEALS
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PORTAGE COUNTY, OHIO

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO

State of Ohio,	:	Case No. 2011-PA-00018
Plaintiff-Appellee,	:	Trial Court Case No. 95 CR 220
vs.	:	Regular calendar
Tyrone Noling,	:	
Defendant-Appellant.	:	**This is a death penalty case.**

APPELLANT TYRONE NOLING'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

Jennifer A. Prillo – 0073744
Assistant State Public Defender
Office of the Ohio Public Defender
250 E. Broad Street, Suite 1400
Columbus, Ohio 43215
(614)466-5394
Fax: (614)644-0708 (Fax)

And

James A. Jenkins – 0005819
1370 Ontario, Suite 2000
Cleveland, Ohio 44113
(216)363-6003
(216)363-6013 (Fax)

COUNSEL FOR DEFENDANT-APPELLANT

Portage County Prosecutor's Office
Victor Vigluicci
Pamela J. Holder
241 South Chesnut Street
Ravenna, Ohio 44266
330-297-3850

COUNSEL FOR PLAINTIFF-APPELLEE

ORIGINAL

TABLE OF CONTENTS AND ASSIGNMENTS OF ERROR

Statement of the Case

Statement of Facts

The State asserts that "Jill Hall testified that Wolcott came to her house and implicated Noling in the murders." (*See* Appellee's Brief, p. 1.) This representation is inaccurate. Not only was Hall's testimony excluded as hearsay, (*see* T.p 934), it is wholly unbelievable. Hall's claim that she told police about the Atwater murders in 1990, (*see* T.p. 936-37), is contradicted by a police report documenting Hall's 1990 statements, which mentions only the Alliance robberies. *See State v. Noling*, 11th Dist. No. 2007-P-0034, 2008-Ohio-2394 at ¶ 77 ("First, he points to a 1990 police interview with Jill Hall. In the interview Hall does not mention the murder; however, in 1992, she claimed Wolcott told her about the murder.") It was not until investigator Ron Craig, *see id.,* the man who coerced and manipulated inculpatory statements from Noling's co-defendants, got involved in 1992 that Hall mentioned the murders.[1]

Statement of Procedural History[2]

At page 2 of its Brief, the State references the Sixth Circuit Court of Appeals recent decision in Noling's case, *In re Noling*, Nos. 07-3989, 083258-10-3884, 2011 U.S. App. LEXIS 13264 (6th Cir. June 29, 2011). In sweeping language, the State notes that the Sixth Circuit found no constitutional error warranting habeas relief and then suggests that this language relates to Noling's claims regarding Dan Wilson. (*See* Appellee's Brief at p. 2.) This is simply wrong.

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[1] *See, e.g.,* Noling's Merit Brief at p. 4 (citing T.D. 258, 261-64, Ex. EE), *State v. Noling*, No. 2007-P-0034 (Portage Ct. App. July 6, 2007); *id.* at 24 (citing T.d. 205, Exs. F, Y).

[2] Addressing procedural history related to Claim One, the State claims, without citation to the record, that "[o]n June 2, 1993, with only 35 days remaining to try Noling for the Hartig murders, the State was forced to nolle the charges to have time to react to information belatedly provided in discovery by Defense Counsel." (Appellee's Brief, p. 9.) There is no indication in the record why the case was nolle'd, perhaps explaining the State's failure to offer a record citation for its claim. (*See* T.d. 103, *State v. Noling*, No. 1992 CR00261, Nolle Prosequi filed June 2, 1993.)

The Sixth Circuit addressed two separate and distinct pieces of litigation. First, Noling's federal habeas corpus appeal, which raised three issues: due process/ prosecutorial misconduct related to the impeachment of Gary St. Clair and a capital specification. The Court rejected those claims finding there was no constitutional error warranting habeas relief. *Noling*, 2011 U.S. App. LEXIS 13264 at *7 ("As long as our justice system depends on men and women to make decisions, it will invariably make mistakes. We know not whether it has made one here where Ohio sends Noling to his final reckoning, but our duty requires us to soberly affirm the district court where no constitutional error occurred as to warrant habeas relief.").

Second, the court addressed Noling's request for permission to file a second habeas petition, which would raise violations of *Brady v. Maryland*, ineffective assistance of counsel, and actual innocence. The Sixth Circuit denied leave to file a second petition finding Noling did not meet the miscarriage of justice standard. *Noling*, 2011 U.S. App. LEXIS 13264 at *9-10.

The State incorrectly suggests that the Sixth Circuit's language finding no error warranting habeas relief meant that the Circuit reviewed, and rejected, the substantive claims raised in Noling's request for leave to file a second habeas application.[3] (Appellee's Brief, p. 2.)

Clearly established Federal law easily clarifies the court's ruling and demonstrates the State's misunderstanding. The Anti-Terrorism and Effective Death Penalty Act (AEDPA) controls and constrains federal courts' ability to grant relief to capital habeas petitioners. With respect to a second habeas petition, the AEDPA mandates a habeas petitioner "obtain leave from

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[3] The State suggests that Noling has misled this Court by failing to reveal the Sixth Circuit's decision in his Merit Brief, which according to the State was filed more than two weeks after the Sixth Circuit's decision. (*See* Appellee's Brief, p. 20.) The State's representation is inaccurate. **Noling's opening brief was filed on June 24, 2011, five days prior to the Sixth Circuit issuing its opinion**. This Court struck Noling's brief and ordered correction of his citation format. *See* Judgment Entry, *State v. Noling*, No. 2011 PA 00018 (Portage Ct. App. July 5, 2011). It would have been improper for Noling to add substantive matter to his brief.

the court of appeals before filing a second habeas petition in the district court."[4] *Felker v. Turpin*, 518 U.S. 651, 664 (1996). This transfers to the circuit court of appeals a "screening function." *Id.* Before reaching the merits, Noling was required to demonstrate due diligence and that "*no reasonable factfinder* would have found [him] guilty of the underlying offense." *Noling*, 2011 U.S. App. LEXIS 13264 at *8. Until leave is granted to file a second habeas petition, no substantive merits consideration occurs; the court only considers whether the petitioner has met 28 U.S.C. § 2244. *In re Byrd*, 269 F.3d 585, 590 (6th Cir. 2001) (Jones, J., concurring in remand) (internal citations omitted). The Sixth Circuit's discussion of Noling's second habeas petition addressed the miscarriage of justice exception found in 28 U.S.C. § 2244, not the substantive merits of the underlying peition.[5]

Reply Assignment of Error No. I

The State argues consideration of this Assignment is foreclosed because it was not properly raised below. (Appellee's Brief, p. 21.) Noling raised this challenge during the February 18, 2011 hearing. (Hrg. T.p. 119.) Counsel argued that, while Noling had demonstrated that he was unavoidably prohibited from presenting the evidence earlier, "under the *Brady* standard . . . that actually imposing a special burden on [Noling] is probably

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[4] "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28. U.S.C. § 2244(b)(3)(A).

[5] In rejecting Noling's request, the Sixth Circuit summarized Noling's claims as "[a] man with a troubled past may have smoked a cigarette left in the Hartigs' yard." In fact, the evidence is far more compelling—Wilson's foster brother implicated him as the Hartigs' killer. Coupling that with the State's inability to exclude Wilson as a possible source of the genetic material found on a cigarette butt at the crime scene, makes Wilson a viable suspect. But, Noling cannot correct this error as the denial of leave to file a second habeas petition may not be appealed. 28 U.S.C. § 2244(b)(3). ("The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari."). Similarly, the Sixth Circuit, like the trial court below, failed to consider Noling's claim of ineffective assistance of counsel. Again, Noling can do nothing to correct this error. *See* 28 U.S.C. § 2244(b)(3).

unconstitutional." (*Id.*) This alerted the trial court to the constitutional challenge, and Noling "provided that court with all of the facts necessary to give application to the constitutional principle upon which [Noling] relies." *See Daugharty v. Gladden*, 257 F.2d 750, 758 (9th Cir. 1958). The trial court could have, but opted not to, review the constitutional challenge.

Even if this Court finds the issue waived, this Court can still review it. A constitutional challenge not raised at the trial court level, is waived and "*need not* be heard for the first time on appeal." *State v. Awan*, 22 Ohio St. 3d 120, 489 N.E.2d 277, syl. (1986) (emphasis added). But the waiver doctrine is discretionary. *In re M.D.*, 38 Ohio St. 3d 149, 151, 527 N.E.2d 286, 288 (1988).[6] "Presumably this is because a constitutional issue is one of law requiring no deference to the trial court's determination and consideration." *State v. Condron*, No. 16430, 1998 Ohio App. LEXIS 1162 at *12 (Montgomery Ct. App. March 27, 1998). Moreover, this is a case involving rights and interest warranting review. *In re M.D.*, 38 Ohio St. 3d at 151, 527 N.E.2d at 288.

Reply Assignment of Error No. II

Corrections to the State's Misunderstanding of the Sixth Circuit's Decision.

As Noling clarified in his procedural history, and incorporates herein by reference, the State is incorrect in asserting that Noling's claim that no court has reviewed the evidence with which he seeks to pursue a new trial is untrue. (*See* Appellee's Brief, p. 20.)

As evidenced by its very language, the miscarriage of justice standard is far more onerous than the standard to obtain leave to file a new trial motion. To file a second habeas petition, Noling needed to demonstrate that "***no reasonable factfinder*** would have found [him] guilty of

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[6] Several Ohio Courts of Appeal have reviewed constitutional challenges even when they were not raised in the trial court. *See State v. Condron*, No. 16430, 1998 Ohio App. LEXIS 1162 at *12 (Montgomery Ct. App. March 27, 1998); *State v. Williams*, 12th Dist. No. 2008-02-029, 2008-Ohio-6195; *State v. Wood*, 5th Dist. No. 09-CA-205, 2010-Ohio-2759 ¶ 28-29.

the underlying offense." *Noling*, 2011 U.S. App. LEXIS 13264 at *8 (emphasis added). However, a court should grant leave to file a new trial motion where "new evidence is discovered material to the defendant, which he could not with reasonable diligence have discovered and produced at trial." O.R.C. § 2945.79(F). A finding of materiality and diligence warrants granting leave to file a new trial motion is proper under O.R.C. § 2945.79(F).

Open file discovery does not demonstrate that the State has met its *Brady* obligations.

The State argues that Noling has not demonstrated that it failed to provide the documents at issue prior to trial, asserting that it engaged in open file discovery and that defense counsel acknowledged receiving "considerable discovery, running at a minimum of three very large binders for the last trial and we still have those." (Appellee's Brief, p. 11.) But open file discovery is only as complete as what is contained in the open file.

Strickler v. Greene, 527 U.S. 263 (1999), is instructive. In *Strickler*, the prosecutor recalled that some disputed exhibits were in his open file. *Id* at 275, n.ll. Lead counsel disputed receiving these documents, while co-counsel was equivocal. *Id.* Resultantly, the Supreme Court proceeded as if Strickler went to trial without the disputed documents. *Id.* at 275. Herein, trial counsel testified that they had no recollection of the evidence at issue. (Hrg. T.p. 46, 51, 53, 80, 81, 82). But, "[t]he most persuasive indication that the defense did not possess this evidence is the fact that the defense never used this evidence at trial." *State v. Larkins*, 8th Dist. No. 82325, 2003-Ohio-5928 at ¶ 28 (citing *United States v. Stifel*, 594 F. Supp. 1525 (N.D. Ohio 1984)). Given that the defense theory at trial was that someone else murdered the Hartigs (*see* T.p. 642-

45; Hrg. T.p. 42), counsel would have used evidence that indicated someone else may have had perpetrated the crime.[7] *See id.*

The State's citation to a discovery receipt fails to prove the disputed evidence was in the open file. (Appellee's Brief, p. 9.) The State insists that the documents at issue were contained in items described as "Miscellaneous Hartig papers," "Miscellaneous: reports—calendar—personal papers," and/or "Blood analysis reports."[8] It is nothing more than a stab in the dark to say that the evidence at issue was contained in the broad categories noted by the State.

What was in the open file is in dispute. Particularly in light of the defense strategy at trial—that Noling did not kill the Hartigs—Noling should be afforded the same presumption as Strickler. These materials were not in the open file. *Cf. Strickler,* 527 U.S. at 275.

***Brady* mandates disclosure, not a game of hide and seek.**

The United States Supreme Court has been clear, "[o]ur decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such materials has been disclosed." *Banks v. Dretke*, 540 U.S. 668, 695 (2004). Defense counsel believed they had been provided with that which was required under the law. (*See, e.g.,* Hrg. T.p. 45, 76-77.) Despite the clarity of the law, the State spends eight pages of its brief explaining how Noling could have discovered the evidence related to Wilson and the VanSteenbergs. (*See* Appellee's Brief, pp. 12-20.)

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[7] As Noling discussed in his merit brief at pp. 23-25, the trial court limited Noling's ability to develop questions relating to strategy, which would have bolstered Noling's claims that the State failed to provide the disputed evidence in discovery.

[8] The State's citation to the transcript supports Noling's contention that trial counsel were unaware of the testing conducted on Wilson, counsel only references Noling and his co-defendants. (Appellee's Brief, p. 16; "it's pretty exculpatory evidence, your honor, shows that the saliva on the cigarette was inconsistent with any of the individuals involved in this case, so --".). Had defense counsel been aware that the same evidence pointed to Wilson, reference to such would be expected.

Defense counsel is not required to go searching for *Brady* evidence. Counsel may rely on the State's assertion that all *Brady* material is in the open file. *Strickler*, 527 U.S. at 283, n.23. In fact, where open file discovery was conducted, defense counsel has even less reason suspect that there is exculpatory evidence being withheld. *Banks*, 540 U.S. at 695 (*citing Strickler*, 527 U.S. at 285) ("In light of the State's open file policy, we noted, 'it is especially unlikely that counsel would have suspected that additional impeaching evidence was being withheld.'"). Noling's justification in relying on the State's representation is even stronger than Strickler's or Bank's because Noling took the extra step of filing formal requests for the disclosure of all *Brady* material in both his 1992 and 1995 trials, (Feb. 18, 2011 Hrg, T.d. 345, Ex. 1.) *See Walker v. Kelly*, 195 Fed. Appx. 169, 174 (4th Cir. 2006) ("Walker's reliance argument is much stronger than that found in both *Strickler* and *Banks* in a notable respect: Walker filed a formal, explicit request for the disclosure of all *Brady* material."). Neither Strickler nor Banks filed such motions. *Id.* The State's burden-shifting of its discovery obligations is inconsistent with clearly established Federal law. *See id.*; *see also Banks*, 540 U.S. at 696 ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."); *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) ("[T]he prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.").

Assuming arguendo that Noling can be faulted for relying on the State's representations, ignoring decades of jurisprudence, Noling could not have discovered the evidence in question within the 120-day period required by Ohio R. Crim. P. 33(B). The disputed documents were maintained in the State's exclusive control. For example, had counsel known that Wilson was a

suspect,[9] such knowledge would not lead them to assume: (1) that Wilson's foster brother implicated him in the murders, or that (2) forensic evidence failed to exclude Wilson from the scene.[10] While the State cites to newspaper articles detailing Wilson as a potential suspect, none of these articles reference Chesley's statements or the blood-type testing. These facts were not a matter of public record.

Of course, even were those facts detailed in the articles, clearly established Federal law would not have required that Noling seek them out. In *Banks*, even when a newspaper examined a witness' trial testimony along with a letter written by that witness, counsel was not required to go looking for *Brady* evidence because it would have been "unlikely that counsel would have suspected that additional impeaching evidence was being withheld" because of the open file discovery policy. *Banks*, 540 U.S. at 695 (*citing Strickler*, 527 U.S. at 284).

The State also argues that since the murder weapon was not found, Noling should have reviewed the Sheriff's investigation into weapons that were tested as possible matches. (Appellee's Brief, p. 19.) The State does not suggest that the VanSteenbergs or this mysterious gun were a matter of public record, or it was a matter of public record that any other .25 caliber handgun was tested as a possible murder weapon.

Additionally, all of the disputed documents were in the State's exclusive control. Noling's only recourse was to file his discovery requests and presume that he was receiving that which he was entitled to under the law. The law did not require Noling to play twenty questions, hoping that he might ask the right one and happen upon exculpatory evidence that the State claimed it was already producing. Obtaining evidence, particularly *Brady* evidence, cannot be

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[9] Both counsel testified they were unaware that Wilson was a suspect. (Hrg. T.p. 66, 93-94.)
[10] Noling requested DNA testing of the cigarette butts specific to Wilson That matter is currently on appeal to the Ohio Supreme Court. *See* Memorandum in Support of Jurisdiction, *State v. Noling*, No. 2011-0778 (Ohio Sup. Ct. May 9, 2011).

turned into a game of asking the right questions of the right state players. *State v. Russell*, No. 94345, 2010 Ohio App. LEXIS 4865, 2010-Ohio-5778 at ¶ 31; *see also Banks*, 540 U.S. at 696 ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."). "If the prosecution is aware that material exculpatory evidence exists it must provide it to defense counsel." *Id.*; *see Brady v. Maryland*, 373 U.S. 83 (1963).

The State failed to provide the exculpatory evidence to Noling before trial—evidence that it was constitutionally required to provide. The fact that Noling obtained this information, years after his trial, was sheer luck. The State's contention that Noling could have and should have discovered this evidence within 120 days of trial, cannot stand.

Failure to address the issues of ineffective assistance of counsel and actual innocence.

The State fails to address Noling's alternative argument that the trial court abused its discretion when it failed to consider the impact of Noling's innocence and ineffective assistance of counsel claims on his request for leave to file a new trial motion. If counsel had the documents at issue at the time of trial, they were ineffective for failing to investigate and pursue this evidence. *Strickland v. Washington*, 466 U.S. 668, 691 (1984). Defense counsel has a duty to present evidence "that demonstrates his client's factual innocence or that raises sufficient doubts as to that question to undermine confidence in the verdict." *Reynoso v. Giurbino*, 462 F.3d 1099, 112 (9th Cir. 2002). Thus, even if this Court finds that the documents at issue were not withheld from trial counsel, Noling is still entitled to file a new trial motion to raise allegations that his trial counsel rendered ineffective assistance of counsel as well as his companion claim of actual innocence.

Conclusion

Due to the constraints of the AEDPA, the Sixth Circuit could not act to address the very real concerns Tyrone Noling's case raises. *Noling*, 2011 U.S. App. LEXIS 13264 at *5. This Court is not similarly constrained. This Court can act. This Court can give Noling his day in court by vacating the trial court's order and granting Noling leave to file his new trial motion. Based on the arguments raised in this Reply Brief, as well as the arguments raised in his Merit Brief, Noling respectfully requests that this Court vacate the trial court's order and remand with directions that Noling be granted leave to file his new trial motion.

Respectfully submitted,

Jennifer A. Prillo - 0073744
Assistant State Public Defender
Counsel of Record
Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394; (614) 644-0708 (FAX)

and

James A. Jenkins - 0005819
1370 Ontario, Suite 2000
Cleveland, Ohio 44113
(216)363-6003; (216)363-6013 (Fax)

By: _____
Counsel for ~~Defendant-~~Appellant

Certificate of Service

I hereby certify that a true copy of the foregoing APPELLANT TYRONE NOLING'S REPLY BRIEF was forwarded via regular mail to Prosecutor Victor Vigluicci, 241 South Chestnut St. Ravenna, Ohio 44266 on this 15th day of August, 2011.

_____
Jennifer A. Prillo ~~(0073~~744)
Counsel for Defendant-Appellant

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
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State of Ohio,	:	Case No. 2011-PA-00018
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APPENDIX TO APPELLANT TYRONE NOLING'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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* CURRENT THROUGH THE LEGISLATION PASSED BY THE 129TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH FILE 21 AND 23
The provisions of 2011 SB 5 are subject to referendum and will not become effective unless approved at the November 2011 general election. *

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2945. TRIAL
NEW TRIAL

Go to the Ohio Code Archive Directory

ORC Ann. 2945.79 (2011)

§ 2945.79. Causes for new trial

A new trial, after a verdict of conviction, may be granted on the application of the defendant for any of the following causes affecting materially his substantial rights:

(A) Irregularity in the proceedings of the court, jury, prosecuting attorney, or the witnesses for the state, or for any order of the court, or abuse of discretion by which the defendant was prevented from having a fair trial;

(B) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;

(C) Accident or surprise which ordinary prudence could not have guarded against;

(D) That the verdict is not sustained by sufficient evidence or is contrary to law; but if the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and pass sentence on such verdict or finding as modified, provided that this power extends to any court to which the cause may be taken on appeal;

(E) Error of law occurring at the trial;

(F) When new evidence is discovered material to the defendant, which he could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing of said motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as under all the circumstances of the case is reasonable. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.

HISTORY:

GC § 13449-1; 113 v 123(195), ch 28; Bureau of Code Revision. Eff 10-1-53.

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*** CURRENT THROUGH PL 112-24, APPROVED 7/26/2011 ***

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 153. HABEAS CORPUS

Go to the United States Code Service Archive Directory

28 USCS § 2244

Review expert commentary from The National Institute for Trial Advocacy

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255 [*28 USCS § 2255*].

(b) (1) A claim presented in a second or successive habeas corpus application under section 2254 [*28 USCS § 2254*] that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 [*28 USCS § 2254*] that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) 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.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.