No. 18-3544

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: KEVIN KEITH,

Movant.

O R D E R

Before: CLAY, GILMAN, and WHITE, Circuit Judges.

Kevin Keith, an Ohio prisoner proceeding with counsel, has filed a fourth-in-time habeas corpus petition in the district court. The district court construed the petition as a successive petition that required authorization from a court of appeals and transferred the action to this Court. *See* 28 U.S.C. § 2244(b)(3)(A); *In re Wogenstahl*, 902 F.3d 621, 624 (6th Cir. 2018).

Currently before this Court are (1) Keith's motion to retransfer/remand his habeas petition to the district court (R. 11), and (2) Keith's application for order authorizing the district court to consider his second or successive application for relief (R. 12). For the reasons explained below, the Court **DENIES** Keith's motion to retransfer/remand and **GRANTS** his application for authorization to file a successive habeas corpus petition.

In 1994, an Ohio jury found Keith guilty of three counts of aggravated murder and three counts of attempted aggravated murder. Keith received a death sentence. The state court of appeals and the state supreme court affirmed his convictions and sentence. *See State v. Keith*, 684 N.E.2d 47 (Ohio 1997). Keith petitioned the trial court for post-conviction relief. That court denied his petition, and the state court of appeals affirmed. *State v. Keith*, No. 3-98-05, 1998 WL 487044 (Ohio Ct. App. Aug. 19, 1998), *appeal not allowed*, 703 N.E.2d 326 (Ohio 1998). The governor of Ohio commuted Keith's death sentence to a sentence of life in prison in September 2010.

In 1999, Keith filed his first § 2254 petition. The district court denied that petition, and we affirmed. *Keith v. Mitchell*, 455 F.3d 662, 668-79 (6th Cir. 2006). He subsequently filed § 2254 petitions in the district court in 2008 and 2014, and in each instance, the district court transferred his petition to us pursuant to *In re Sims*, 111 F.3d 45 (6th Cir. 1997). We denied both applications, and we affirmed the district court's subsequent denial of his motion for reconsideration of the decision to transfer his 2008 petition. *See In re Keith*, No. 14-3290 (6th Cir. Dec. 8, 2014) (order); *Keith v. Bobby*, 618 F.3d 594, 601 (6th Cir. 2010); *Keith v. Bobby*, 551 F.3d 555, 559 (6th Cir. 2009) (Clay, dissenting).

Keith filed the current § 2254 petition in March 2018. Keith claims that he has newly discovered evidence that the government violated *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, Keith contends that the government withheld impeachment evidence concerning G. Michele Yezzo, a forensic analysist for the Ohio Bureau of Criminal Investigation ("BCI") whose testimony concerning license plate impressions and tire tracks linked Keith to the crime. Keith also asserts that the government deliberately ignored a subpoena request for police phone log records prior to his trial and argues that these phone logs would have contradicted the government's theory of the case and undermined the credibility of its star witness.

I. The Court Will Deny Keith's Motion to Remand Because His Petition is a Successive Petition Under 28 U.S.C. § 2244(b)(3)(A)

Keith argues that this Court should retransfer/remand his petition to the district court without evaluating it under § 2254(b) because it does not constitute a second or successive petition. (*See* R. 12.) This argument is without merit.

It is true that "not every numerically second petition is 'second or successive' for purposes of AEDPA." *In re Bowen*, 436 F.3d 699, 704 (6th Cir. 2006) (citing *Slack v. McDaniel*, 529 U.S. 473, 487 (2000)). As this Court recently stated, "'[a] numerically second petition is not

properly termed second or successive to the extent it asserts claims whose predicates arose after the filing of the original petition.'" *In re Wogenstahl*, 902 F.3d at 627 (quoting *In re Jones*, 652 F.3d 603, 605 (6th Cir. 2010)). This Court recently held that *Brady* claims become ripe when the alleged violations occurred, even if the petitioner was unaware of the *Brady* violations at the time he filed his previous habeas petition. *See In re Wogenstahl* at F.3d 621 at 627–28 (rejecting petitioner's argument that his habeas petition was not successive and explaining that petitioner's "claims were not unripe at the time he filed his initial petition because the purported *Brady* violations . . . had already occurred when he filed his petition, although [petitioner] was unaware of these facts").

Keith's current petition is properly categorized as successive. *See In re Wogenstahl*, 902 F.3d at 628; 28 U.S.C. § 2244(b)(3)(A). Keith claims are based on purported conduct that occurred prior to his 1994 trial and that Keith did not raise in his previous habeas petitions.[1] Accordingly, Keith must satisfy § 2254(b) to obtain the merits review he seeks. *In re Wogenstahl*, 902 F.3d at 628; *In re Tibbetts*, 869 F.3d 403, 408 (6th Cir. 2017).

II. The Court Will Grant Keith's Application for Order Authorizing the District Court to Consider His Second or Successive Application for Relief Because Keith Has Made a *Prima Facie* Showing Under § 2254(b)(2)

Under 28 U.S.C. § 2244(b)(2), this Court will dismiss a claim raised in a second or successive habeas petition that does not rely on a new rule of constitutional law unless:

> **(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

[1] The Court notes that Keith raised *Brady* claims in one of his previous habeas petitions. *See Keith*, 551 F.3d at 556. But the *Brady* claims he raises here are different claims; here, Keith alleges that the government withheld different exculpatory material than alleged in his previous *Brady* claim. *See In re Wogenstahl*, 902 F.3d at 628 n.4 (citing *Cullen v. Pinholster*, 563 U.S. 170, 186 n.10 (2011)).

> 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). "The applicant must make a prima facie showing that the application satisfies the statutory requirements." *In re Wogenstahl*, 902 F.3d at 628 (quoting 28 U.S.C. § 2244(b)(3)(C)). This Court has repeatedly explained that "'[p]rima 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*. (quoting *In re Lott*, 366 F.3d 431, 433 (6th Cir. 2004)); *In re Siggers*, 615 F.3d 477, 479 (6th Cir. 2010) (same); *In re McDonald*, 514 F.3d 539, 544 (6th Cir. 2008) (same). "This court has described this standard as 'not a difficult standard to meet' and 'lenient.'" *In re Wogenstahl*, 902 F.3d at 628 (quoting *In re Lott*, 366 F.3d 432–33); *In re McDonald*, 514 F.3d at 544 (quoting *In re Lott*, 366 F.3d 432).

The Court must view the facts underlying Keith's *Brady* claim "in light of the evidence as a whole." 28 U.S.C. § 2244(b)(2)(B)(ii). Accordingly, the Court will summarize the evidence supporting Keith's conviction and the evidence presented in Keith's 2008 habeas petition. As explained below, the Court holds that Keith has made a *prima facie* showing that his habeas petition satisfies § 2244(b)(2). Therefore, the Court will authorize Keith to file a successive habeas petition.

A. Evidence Supporting Keith's Conviction and Evidence Presented in Keith's 2008 Habeas Petition

In its decision on Keith's 2008 habeas petition, the Court summarized the evidence presented at trial as follows:

> The prosecution's theory of the case was that Keith murdered family members of Rudel Chatman to exact revenge for Chatman's assistance in an investigation that led to a drug trafficking raid and indictments against Keith and members of his family. Two victims survived the shooting.
>
> The prosecution's star witness at trial was Richard Warren, an adult surviving victim, who selected Keith from a photo lineup and reiterated the identification at

> trial. The prosecution also presented Nancy Smathers, who testified that on the night of the murders, she heard shots, looked outside her window, observed a large stocky man jump into a car, and observed the car crash into a snow bank. In her first two statements to the police Smathers was unable to identify the assailant, but in her third statement, made after seeing Keith on a television news story, she identified the assailant as Keith. There was also eyewitness testimony from Quanita Reeves, a seven-year-old surviving victim, but Reeves told police that she was shot at by her "daddy's friend, Bruce" and excluded the picture of Keith from a photo lineup.
>
> Keith was also connected to the crime by circumstantial physical evidence. Investigators made a cast of a tire tread and a cast of a partial license plate indentation from the snow bank identified by Smathers. The partial license plate number, "043," matched the last three numbers of a car to which Keith was known to have access. The prosecution presented evidence that prior to the shooting, the car's owner had purchased tires that were "similar in tread design" to the tread in the snow bank. Investigators testified that they had collected spent gun casings from the crime scene, and found a matching casing at the entrance to a General Electric plant where Keith picked up his girlfriend from work on the night of the murders.
>
> The defense challenged the identification made by Warren, presenting evidence that Warren had been improperly influenced and that the identification was inconsistent with other statements he had made. The defense also presented an alibi for Keith and attempted to cast suspicion on the Melton brothers, who had been arrested in a string of pharmacy burglaries and who had told Rudel Chatman that his family had been shot because of Chatman's snitching. Finally, the defense challenged the testimony of Smathers, arguing that her description of the assailant was consistent with Rodney Melton, and submitting evidence that the license plate "043" matched the first three numbers of a license plate registered to Melton. At the conclusion of the jury trial, Keith was convicted of the murders and sentenced to death.

Keith, 551 F.3d at 560–61 (Clay, J., dissenting).

This Court also discussed the new evidence that Keith presented in support of his 2008 habeas petition. This Court explained that "[t]his [*Brady*] evidence falls into two categories: new evidence that supports a contention that Rodney Melton committed the murders, and new evidence that relates to the identification made by eyewitness Richard Warren." *Id*. at 560.

The Court summarized the first type of evidence—i.e. evidence that Rodney Melton, not Keith, committed the murders—as follows:

> . . . The new evidence includes: (1) evidence from a file in another investigation in which an informant told police that, two weeks before the shooting, Rodney Melton stated that "he had been paid $15,000 to cripple the man who was responsible for the raids in Crestline, Ohio last week"; (2) evidence that police conducted an interview in which Melton's accomplice in the pharmacy burglary ring told the police that Melton had stated that he would kill anyone who snitched on him and that he was paid to kill Chatman; (3) evidence that two investigators in Keith's case were part of the interview of Melton's accomplice but that Keith was never informed of the interview; and (4) evidence that it was Melton's habit to wear a mask like the one described by witnesses to the shooting.
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> … Previously-existing evidence that implicates Melton includes:
>
> > • evidence that the partial licen[s]e plate number obtained from the snow bank identified by Smathers, "043," also matches the first three numbers of a license plate registered to Melton;
> > • evidence that Melton owned and drove a yellow Chevy Impala, which matched Smathers' description of a "real light" colored car that was white, cream, or light yellow;
> > • evidence that defense counsel had been contacted by a relative of Rodney Melton, who told him that Rodney "is in on the killings";
> > • evidence that Melton appeared at the crime scene, knew the type of bullets involved in the killings, and "made sure to affirmatively tell" the police that his car, which matched the description of the car given by Smathers, was broken down that night; and
> > • evidence that Quanita Reeves told police that she was shot by her "daddy's friend Bruce."
>
> Notably, "Bruce" is the name of the brother of Rodney Melton, and the defense argued that seven-year-old Reeves confused the brothers, both of whom were friends with her father, and that Reeves had actually attempted to identify Rodney Melton. . . .

Id. at 561–62.

The Court also discussed the new evidence regarding Warren's alleged identification of Keith as the shooter:

> Keith also submits new evidence that, contrary to the testimony of a police captain, the state's primary eyewitness did not identify Keith as the shooter to a nurse.
>
> An understanding of this evidence requires a bit of context. At Keith's trial, Captain John Stanley testified that a nurse named "Amy Gimmets" called him and stated that Warren, a survivor of the shooting, had gained consciousness after surgery and identified Keith as the shooter. The alleged statement would have

> taken place before Warren was contacted by police investigators, and undermined allegations by the defense that Warren was improperly influenced. The prosecution did not call the nurse at trial and the defense was unable to locate her.
>
> Keith now alleges that a report prepared by Captain Stanley states that the nurse who called him regarding Warren's identification of Keith was "Amy Wishman" and not "Amy Gimmets." Based on this new information, defense counsel located the nurse, who provided an affidavit stating that: (1) she was the nurse who treated Warren after his surgery; (2) she does recall calling Captain Stanley after Warren could speak; (3) that she never told the captain that Warren had given her a name for the shooter; and (4) that Warren had never told her the shooter's name.
>
> This new evidence is significant, most notably because the nurse's alleged statement was strong corroboration for Warren's otherwise questionable identification. At trial, Warren's identification of Keith had been challenged by Warren's previous statements that he did not know who shot him, by his statements that the shooter was wearing a mask, by another eyewitness's exclusion of Keith as the shooter, and by evidence that Warren had been given Keith's name by officers. The defense used this evidence to argue that Warren had been improperly influenced by police officers.
>
> However, the otherwise compelling argument of improper influence was directly undermined by Captain Stanley's testimony that Warren had provided Keith's name to his nurse *before* he had spoken to any law enforcement officials. The nurse's statement, offered through Stanley, bolstered Warren's otherwise questionable identification, and could likely have convinced the jury that the identification was reliable. . . .

Id. at 561–63.

Ultimately, a divided panel of this Court denied Keith's motion for authorization to file his second or successive habeas petition. *See Id*. at 556–63. The majority reasoned that Keith's evidence regarding Melton and Nurse Wishman "did not contradict" the "core" of the case against Keith. *Id*. at 558. To the majority, the "core" of the case against Keith consisted of five pieces of evidence: (1) Warren's "eyewitness testimony" identifying Keith; (2) "[a] partial imprint of the license plate made from the snowbank where the getaway car crashed" that "matched the license plate of a car that [Keith] was known to have access to;" (3) eyewitness identification of Keith as the driver of the car that crashed into the snowbank; (4) a bullet cartridge recovered from where Keith picked up his girlfriend that matched those recovered from

the scene; and (5) the fact that Keith was indicted "as a result of the drug raid precipitated by the victim's relative." *Id*.

B. New Evidence Presented in the Current Habeas Petition

In the current habeas petition, Keith presents *Brady* evidence that falls into two categories. First, evidence that impeaches the credibility of Yezzo, the forensic analysist whose testimony regarding the license plate linked Keith to the crime scene. Second, evidence that suggests that the Bucyrus Police Department acted in bad faith by deliberately ignoring Keith's pre-trial subpoena for phone log records. The Court will discuss these categories of evidence in turn.

1. New Evidence Regarding Yezzo's Psychological Instability, Professional Integrity, and Racial Bias

Keith has presented evidence that would have greatly impeached Yezzo's credibility and called into question the accuracy of her findings, thus weakening the "core" of the state's case. Keith has presented several internal BCI memoranda from 1989 to 1994 that reveal significant concerns about Yezzo's mental state and professional integrity. For instance, a May 1989 report from BCI's assistant superintendent states that "the consensus opinion" is that Yezzo "suffers a severe mental imbalance and needs immediate assistance." (R. 1-16 at PageID #144.) The assistant superintendent also reported that Yezzo's "perceived problem affects her overall performance. Her findings and conclusions regarding evidence may be suspect. She will stretch the truth to satisfy a department." (*Id*. at PageID #145.) A report on September 1989 states that Yezzo threw a book at a co-worker and told her co-worker she was going to "deck her." (R. 1-20 at PageID #170.) Moreover, in August 1993, Yezzo was placed on administrative leave for "threatening co-workers and failure of good behavior" after Yezzo experienced several fits of rage and threatened to kill co-workers. (R. 1-17 at PageID #148.) Notes taken during the

investigation into Yezzo's conduct in August 1993 report that Yezzo had a "reputation of giving dept. answer [it] wants if [it] stroke[s] her." (R. 1-18 at PageID #161.) The same notes indicate that an analyst assigned to one of Yezzo's cases would have reached a different result than Yezzo had reached on a footprint and blood analysis. (*Id*.) Yezzo also had a documented history of racist outbursts: she made a comment about a "ni**er in a woodpile" and once referred to a co-worker as a "ni**r bitch." (*See* R. 1-20 at PageID #173.) In fact, Yezzo was *still under investigation* when she testified against Keith. (*See* R. 1-21 at PageID #177.)

The state did not provide any of this evidence to Keith prior to his trial. Accordingly, Keith was unable to use any of this evidence to impeach Yezzo's credibility and contest her forensic analysis that linked Keith to the scene of the crime. Yezzo's testimony was particularly important because no physical evidence linked Keith to the murders.

2. New Evidence Regarding Bad Faith by the Bucyrus Police Department That Undermines the Government's Theory of the Case

Keith also has presented evidence that suggests that the Bucyrus Police Department acted in bad faith by ignoring his pre-trial subpoena. On May 13, 1994, Keith subpoenaed the Bucyrus Police Department for "all records, including radio dispatch logs, of all call-ins from February 12, 1994 to the present time." (R. 1-29 at PageID #218.) The government did not answer the subpoena at trial. (Br. in Sup. for Successive Habeas, p. 11.) Keith has obtained the Bucyrus Police Department's copy of the subpoena. (R. 1-29 at PageID #218) The words "ignore for now" are written towards the top of the document and underlined. (*Id*.) Keith states that because of unrelated litigation, he obtained the call log records for the day in question. (Habeas Petition at PageID #13.) The logs did not show a call from one of Warren's nurses to the Bucyrus Police Department. (*Id*.)

This new evidence goes to the "core" of the government's case. At trial, the government claimed that it first got Keith's name from John Foor, a nurse who called the Bucyrus Police Department and reported that Warren, who had recently emerged from surgery, identified Keith as the shooter. The Bucyrus Police Department's ignoring the subpoena—particularly coupled with the fact that the logs did not show a call from Warren's nurses—undermines Warren's identification of Keith. If Foor did not call the Bucyrus Police Department and provide Keith's name, it is less likely that Warren spontaneously remembered that Keith was the shooter and more likely that Warren had been improperly influenced to identify Keith.

C. Keith Has Made a *Prima Facie* Showing Under § 2254(b)

Keith satisfies § 2244(b)(2)(B)(i) because the factual predicates for his *Brady* claim could not have been previously discovered through the exercise of due diligence. Keith has diligently pursued exculpatory and impeachment evidence. Keith requested discovery during pre-trial proceedings—in fact, he requested the police call logs at issue here (*see* R. 1-29 at PageID #218)—and, since his conviction, Keith has filed at least three previous public records requests. (*See* Habeas Petition at PageID #9–10, 13.[2]) Faced with a similar scenario, this Court in *In re Wogenstahl* stated,

> [t]hat [the petitioner] did not obtain the evidence he now presents until that final [discovery] request is hardly attributable to a lack of reasonable due diligence on his part. The prosecution has a constitutional obligation under *Brady* to provide material exculpatory and impeachment evidence, *see, e.g.*, *Montgomery v. Bobby*, 654 F.3d 668, 678 (6th Cir. 2011) (en banc), and the defendant is not required to request continuously *Brady* information in order to show due diligence.

In re Wogenstahl, 902 F.3d at 629. Like the petitioner in *In re Wogenstahl*, Keith has diligently attempted to obtain exculpatory and impeachment evidence before trial and in post-conviction

[2] In 2004, Keith filed a public records request for the nurse's handwritten notes memorializing Warren's alleged statement that Keith was the shooter. (Habeas Petition, PageID #9.) In 2007, Keith filed a public records request to the Ohio Pharmacy Board that produced documents revealing that Melton had been paid to "cripple" the informant whose family members were murdered. (*Id.*) Also in 2007, Keith filed a public records request for the Bucyrus Police Department call logs. (*Id.* at PageID #13.)

proceedings. And like the petitioner in *In re Wogenstahl*, Keith cannot be faulted for the fact that his previous attempts failed to uncover the *Brady* material that he recently obtained. Accordingly, the Court finds that Keith satisfies § 2244(b)(2)(B)(i).

Keith also satisfies § 2244(b)(2)(B)(ii). Keith alleges that the government violated his due process rights by suppressing *Brady* material. "Three factors must be satisfied to establish a *Brady* violation: '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.'" *In re Wogenstahl*, 902 F.3d at 629 (quoting *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999)). Keith has satisfied each of these three elements.

The new evidence is impeaching. The evidence concerning Yezzo's psychological instability, professional integrity, and racial bias reduces the credibility of her testimony. The impeachment value of this evidence cannot be understated, particularly given that Yezzo's forensic analysis of the license plate was one of the "core" elements of the government's case against Keith. *Keith*, 551 F.3d at 558. The evidence regarding the Bucyrus Police Department's deliberately ignoring the subpoena is also significant impeachment evidence; it undermines the government's theory that the police learned about Keith's identity as the shooter from a nurse who called the Bucyrus Police Department after Warren emerged from surgery.

The state suppressed the evidence. The state did not disclose the evidence in Yezzo's personnel file at the time of trial. In fact, Keith did not receive this evidence until he successfully requested it in 2016. The state did not disclose the phone logs at the time of trial, either, even though Keith *explicitly* requested the material through a subpoena.

Finally, viewing his current claims "in light of the evidence as a whole," 28 U.S.C. § 2244(b)(2)(B)(ii), Keith has made a *prima facie* showing that no reasonable fact finder would

have found him guilty. *See In re Wogenstahl*, 902 F.3d at 629. That is to say, Keith's *Brady* claims "'warrant a fuller exploration in the district court.'" *Id*. (quoting *In re Lott*, 366 F.3d at 433).

CONCLUSION

For the reasons explained above, the Court **DENIES** Keith's motion to retransfer/remand and **GRANTS** his application for authorization to file a successive habeas corpus petition.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk