

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO.: 13-10294

SCOTT ARTHUR GARDNER,

Applicant-Appellant,

versus

RICK THALER, Director, Texas Department of
Criminal Justice, Correctional Institutions Division,

Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

APPLICANT-APPELLANT'S BRIEF IN SUPPORT FOR
CERTIFICATE OF APPEALABILITY

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the Federal Rules Appellate Procedure and Rule 28.2.1 of the Fifth Circuit Rules, Applicant-Appellant submits that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

- 1) Scott Arthur Gardner (Applicant-Appellant)
- 2) Patrick Michael Megaro, Esq. (Attorney for Applicant-Appellant);
- 3) Brownstone, P.A. (Law Firm representing Applicant-Appellant);
- 4) John D. Nation, Esq. (Former Attorney for Applicant-Appellant);
- 5) Knox Fitzpatrick, Esq. (Former Attorney representing Applicant-Appellant);
- 6) Fitzpatrick, Hagood, Smith & Uhl (Former Law Firm representing Applicant-Appellant);
- 7) Douglas Skemp, Esq. (Former Attorney representing Applicant-Appellant);

- 8) Lynne Corsi, Esq. (Former Attorney representing Applicant-Appellant);
- 9) Assistant Attorney General Melissa L. Hargis (Attorney for Respondent-Appellee).

Robert L. Sirianni, Jr., Esq.

STATEMENT REGARDING ORAL ARGUMENT

In the event that Applicant-Appellant is granted leave to appeal the challenged decision, he would respectfully request oral argument in order to demonstrate his entitlement to relief on his Motion brought under 28 U.S.C. § 2255.

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STATEMENT OF JURISDICTION

This Jurisdictional Statement is submitted pursuant to Federal Rule of Appellate Procedure 28(a)(4)(A). Pursuant to Rule 22 of the Federal Rules of Appellate Procedure, Applicant-Appellant cannot take an appeal of the denial of his petition for a writ of habeas corpus brought under 28 U.S.C. § 2254 “unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c).” Fed. R. App. P. 22.

The District Court, which declined to issue Applicant-Appellant a certificate of appealability, had jurisdiction under 28 U.S.C. § 2255. Pursuant to 28 U.S.C. § 1291, this Court would have jurisdiction over this appeal if it were to grant the instant application.

STATEMENT OF THE ISSUES

Appellant seeks leave from this Court to appeal the following issues:

(1) Whether Appellant's guilty plea was rendered unknowing and involuntary where the prosecutor intentionally withheld exculpatory evidence that deprived Appellant the ability to completely and fairly evaluate the evidence against him and make an intelligent and informed decision as to whether to plead guilty or proceed to trial;

(2) Whether Appellant received ineffective assistance of trial counsel where trial counsel failed to interview the complaining witnesses out of fear that they would be subjected to prosecution for witness tampering; and

(3) Whether the state court and the District Court properly denied his claim of actual innocence where there was strong evidence of innocence coupled with an independent constitutional violation

STATEMENT OF THE CASE

Appellant Scott Arthur Gardner, by the undersigned attorney, respectfully submits this application for a Certificate of Appealability pursuant to 28 U.S.C. § 2253(c) and Rule 22(b) of the Federal Rules of Appellate Procedure. Appellant seeks to appeal from a Judgment of the United States District Court for the Eastern District of Texas, by the Honorable Jorge A. Solis, United States District Judge, entered February 20, 2013, and denying Appellant's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Applicant-Appellant was charged in two separate indictments with the offenses of aggravated sexual assault of a child, in violation of Texas Penal Code § 22.021(a)(1)(B)(i), in cause number F02-45405-SV and cause number F02-45407-SV, pending in the 292nd District Court of Dallas County, Texas.

After pleading guilty and receiving a sentence of 24 years imprisonment plus fines, Applicant-Appellant filed a direct appeal to the Court of Appeals of Texas, Fifth District (Dallas), which denied his appeal. Subsequently, Applicant-Appellant filed a petition for a writ of habeas corpus in the Texas state courts, upon which a hearing was held. The petition raised claims of denial of Due Process of law in the form of a Brady v. Maryland violation, ineffective assistance of counsel, and newly discovered evidence establishing actual innocence. The petition was denied, and Applicant-Appellant perfected an appeal to the Texas Court of

Criminal Appeals, which affirmed the denial of the petition for a writ of habeas corpus.

Applicant-Appellant then filed a petition in the United States District Court for the Northern District of Texas for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. That petition was denied on February 20, 2013 by the Honorable Jorge A. Solis, a Judge of the District Court. This Application for Certificate of Appealability follows.

STATEMENT OF THE FACTS

A. Proceedings in the Trial Court

Appellant was charged by indictment with the offense of aggravated sexual assault of a child, Brienna Gardner, his daughter, in cause no. F02-45405-SV, pending in the 292nd District Court of Dallas County, Texas. The State indicted Appellant for aggravated sexual assault of his other daughter, Samantha Gardner, in cause no. F02-45407-SV. Both indictments charged Appellant with violating Texas Penal Code § 22.021(a)(1)(B)(i), which penalizes the knowing or intentional penetration of the anus or sexual organ of a child by any means. The indictments alleged that Appellant “intentionally and knowingly cause[d] the penetration” of his daughters’ sexual organs “by . . . the fingers of the defendant.”

Appellant retained a local criminal defense attorney to represent him in the trial court and defend him upon the indictments, who in turn brought in a second attorney to assist him with the case. Trial counsel retained two child abuse

therapists to provide “counseling” to both complainants. Trial counsel did not, however, retain the services of an investigator to interview the complainants, gather evidence, take statements from them, or otherwise investigate. Neither of the two attorneys made any attempt to interview the complainants, apparently out of concern that they would be subjected to a possible witness tampering accusation.

Appellant pled guilty to both charges on March 29, 2004 without a promised sentence, and elected to request a jury to assess punishment only, a procedure available to him under Texas state law. On April 4, 2004, a jury was empanelled to decide punishment. In that proceeding, Appellant testified that he was a blackout drinker and did not remember the acts alleged in the indictments. Appellant’s trial counsel argued to the jury that he should receive a sentence of probation, a sentence only authorized under Texas law if a jury determined that to be the appropriate punishment. Texas Code of Criminal Procedure Article 42.12, § 4. The jury, however, elected to sentence Appellant to 12 years imprisonment on each count for an aggregate sentence of 24 years in state prison and \$20,000.00 in fines.

B. The Direct Appeal to the Court of Appeals of Texas, Fifth District

Appellant then perfected an appeal to the Court of Appeals of Texas, Fifth District, Dallas. That court affirmed his conviction in an unpublished decision on July 15, 2005. Gardner v. State, 2005WL1654590 (July 15, 2005).

C. The State Habeas Corpus Proceedings

Through new counsel, Appellant filed two state petitions for writs of habeas corpus on August 11, 2006, which were subsequently amended and supplemented. The petitions raised several issues: ineffective assistance of counsel, actual innocence, and deprivation of Due Process in the form of a Brady v. Maryland violation. The state habeas court conducted a hearing upon the petitions from January 18, 2011 through January 20, 2011. At the hearing, both of Appellant's daughters testified as witnesses on his behalf.

At the start of the hearing, the prosecution provided Appellant's new counsel with notes made by the assigned Assistant District Attorney of an interview with Brienna Gardner, one of the complainants. The notes reflected that Brienna Gardner told the assigned Assistant District Attorney that no vaginal penetration had occurred, contrary to her prior statements and contrary to the allegations contained in the indictment. The notes also reflected that this interview had taken place and was documented prior to the Appellant's guilty plea hearing.

Samantha Gardner testified that after Appellant's guilty plea hearing, she first saw the indictment containing allegations that Appellant had anally penetrated her. She further testified that she immediately told the assigned Assistant District

Attorney that those allegations were false and incorrect, and expected the Assistant District Attorney to take appropriate remedial measures.

After being given a forceful perjury admonition by the habeas court, Brienna Gardner testified that Appellant had never penetrated her vaginally, as alleged in the indictment. She persisted in this denial throughout her testimony at the habeas hearing. Both Samantha and Brienna Gardner testified at the habeas hearing that had trial counsel spoken with them, they would have told the truth about the alleged offenses.

Both of Appellant's original trial attorneys also testified at the habeas hearing that they had never received these notes prior to guilty plea hearing, and that they considered the notes to be exculpatory and material to the case and therefore affected the advice given to Appellant as to whether to plead guilty or proceed to trial.

The assigned Assistant District Attorney also testified at the habeas hearing, and admitted to documenting the interview with Brienna Gardner in which she retracted the allegations of vaginal penetration. She admitted to withholding the notes from Appellant and his trial counsel because in her opinion, the notes were not exculpatory.

The state habeas court made several findings at the conclusion of the hearing, finding that Appellant received effective assistance of counsel, specifically that trial counsel's concerns that they would be subjected to witness tampering

accusations was a reasonable trial strategy. The state habeas court also found that despite the complainants' testimony that no penetration had occurred, Appellant failed to establish actual innocence. Finally, the state habeas court found that no Brady violation had occurred. As a result, Appellant's petitions for state habeas relief were denied.

D. The Appeal to the Texas Court of Criminal Appeals

Following the denial of his petitions for writs of habeas corpus, Appellant appealed to the Texas Court of Criminal Appeals, the state's highest court for criminal appeals. In an unpublished opinion, the Texas Court of Criminal Appeals affirmed the denial of habeas relief on September 28, 2011. Ex Parte Gardner, 2011 WL 4485421 (September 28, 2011).

E. The Petition for Writ of Habeas Corpus in the United States District Court, Eastern District of Texas

On September 29, 2011, Appellant filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court, Eastern District of Texas. Appellee filed papers in opposition on January 1, 2012. Thereafter, Appellant filed a reply to Appellee's opposition on February 22, 2012.

In April 10, 2012, the District Court issued the Findings and Recommendation of the United States Magistrate Judge, recommending denial of the petition and denial of the issuance of a certificate of appealability. Appellant

filed timely objections to the Magistrate's findings and recommendation on April 24, 2012.

On February 20, 2013, the District Court issued an Order adopting the Findings and Recommendation of the United States Magistrate Judge, and entered a Judgment denying the petition. Appellant filed a Notice of Appeal in the District Court on March 14, 2013.

SUMMARY OF THE ARGUMENT

Appellant respectfully submits that, in the absence of an evidentiary hearing to resolve disputed issues of fact, reasonable jurists could disagree as to whether he was deprived Due Process of Law, effective assistance of counsel, and whether he established actual innocence. Accordingly, the District Court's decision was debatable, and the District Court erred in denying Appellant a certificate of Appealability.

ARGUMENT AND CITATIONS OF AUTHORITY

PART A - STANDARD FOR THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY

To demonstrate that the issuance of a Certificate of Appealability is appropriate under 28 U.S.C. § 2253(c)(2), an inmate need only make a substantial showing of the denial of a constitutional right by showing that jurists of reason

could disagree with the district court’s resolution of his constitutional claims. Miller-El v. Cockrell, 537 U.S. 322 (2003). “The Court of Appeal’s inquiry asks only if the District Court’s decision was debatable.” Id., See also Bradshaw v. Estelle, 463 U.S. 880, 893 n. 4 (1983) (Certificate of Appealability appropriate where party shows that “the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further”).

That threshold test “does not require a showing that the appeal will succeed” and a “court of appeals should not decline the application for a Certificate of Appealability merely because it believes the applicant will not demonstrate entitlement to relief.” Miller-El v. Cockrell, 537 U.S. 322, 337 (2003).

Lastly, in determining whether an applicant has established entitlement to a Certificate of Appealability, “[a]ny doubt regarding whether to grant a Certificate of Appealability is resolved in favor of the Appellant, and the severity of the penalty may be considered in making this determination.” Newton v. Drake, 371 F.3d 250, 254 (5th Cir. 2004), citing Fuller v. Johnson, 114 F.3d 491 (5th Cir. 1997).

PART B – ARGUMENT ON THE MERITS

POINT I - APPELLANT’S GUILTY PLEA WAS NOT KNOWING AND VOLUNTARY WHERE THE PROSECUTOR INTENTIONALLY WITHHELD

HIGHLY RELEVANT AND PROBATIVE EXCULPATORY EVIDENCE FROM APPELLANT

In the seminal case of Brady v. Maryland, 373 U.S. 83 (1963), the United States Supreme Court held that the Constitution's Due Process guarantees requires the prosecution to furnish the defendant any exculpatory material it has in its possession upon request. This duty exists even if there has been no request from the accused. United States v. Agurs, 427 U.S. 97 (1976). In order to comply with Brady, the prosecution has a duty to learn of any favorable evidence known to others acting on the government's behalf, including the police. Kyles v. Whitley, 514 U.S. 419 (1995).

Here, the Appellant's guilty plea and conviction was the direct result of the prosecutor's intentional withholding of exculpatory evidence. Accordingly, his conviction was obtained in violation of his Constitutionally-protected right to Due Process of Law.

A. The Prosecutor Intentionally Withheld Material Exculpatory Evidence

In Strickler v. Greene, 527 U.S. 263 (1999), the Supreme Court summarized the three elements of a prima facie case of a Brady violation: (1) the material at issue must be favorable to the defense, (2) the prosecution willfully or inadvertently fails to turn over the material to the defense, and (3) prejudice to the defendant occurs as a result. Id.

Here, the record demonstrates that at the state habeas hearing, the State of Texas first provided Appellant with the assigned Assistant District Attorney's notes regarding an interview with one of the complaining witness which reflected that the witness told the prosecutor that Appellant had never digitally penetrated her vagina. This was contrary to the allegations of the indictment and prior statements of this particular complaining witness, and as such could only be fairly regarded as a recantation. This disclosure came several years after Appellant had pled guilty and been sentenced. According to the same Assistant District Attorney, who testified at the state habeas hearing, she never turned over those notes to the Appellant because he did not consider them to be exculpatory.

A prosecutor's good-faith belief that the exculpatory evidence is unpersuasive does not excuse its nondisclosure. Brady, supra at 87 see also United States v. Beckford, 962 F Supp 804, 811 (E.D. Va 1997) (nondisclosure not justified by prosecutor's uncertainty as to sufficiency of evidence to establish a mitigating factor). “If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.” Strickler v. Greene, 527 U.S. 263, 288 (1999), quoting United States v. Agurs, 427 U.S. 97, 110 (1976).

Contrary to the District Court and the state habeas court's belief, this information was favorable to the defense. As many courts have recognized

(discussed infra), recantation by key witnesses as to material facts constitute Brady material that must be turned over to the defendant.

In assessing the materiality of undisclosed impeachment evidence, a court “must consider the nature of the impeachment evidence improperly withheld and the additional evidence of the defendant's guilt independent of the disputed testimony.” Wilson v. Whitley, 28 F.3d 433, 439 (5th Cir. 1994), quoting United States v. Weintraub, 871 F.2d 1257, 1262 (5th Cir.1989). As this Court has held, “[t]he materiality of Brady material depends almost entirely on the value of the evidence relative to the other evidence mustered by the state.” Wilson v. Whitley, 28 F.3d 433, 439 (5th Cir. 1994), quoting Edmond v. Collins, 8 F.3d 290, 293 (5th Cir.1993). It is beyond dispute that a prosecutor's duty of disclosing exculpatory material extends to disclosure of evidence impeaching the credibility of a prosecution witness whose testimony may be determinative of guilt or innocence. The prosecutor's duty is not lessened because Brady material may affect only the credibility of a government witness. “When the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within’ the Brady rule.” Giglio v. United States, 405 U.S. 150, 154 (1972), citing Napue v. Illinois, 360 U.S. 264, 269 (1959).

Here, the undisclosed impeachment evidence went to the heart of the case. This case rested almost entirely upon the testimony of Appellant’s two minor daughters, one of whom recanted and denied essential elements of the charged

crime to the Assistant District Attorney (who documented the same) before Appellant entered a guilty plea. There was no corroborating evidence other than the testimony of the two complainants. At the state habeas hearing, the other complainant denied the charges altogether, after being forcefully warned by the habeas court as to the potential consequences for perjury. Even after the complainant persisted in her denials that the conduct charged in the indictment and for which Appellant had pled guilty had occurred.

It is undisputed that the prosecution intentionally failed to turn over this information to the Appellant, because in her opinion it was not exculpatory. Thus, Appellant has made out the first two elements of a prima facie case of a Brady violation.

*B. The Prosecutor's Intentional Failure to Disclose
Exculpatory Evidence Prejudiced Appellant
Because It Directly Resulted in Appellant's Guilty Plea*

The record also demonstrates that prejudice to Appellant resulted from the prosecutor's willful and intentionally withholding of exculpatory evidence. Had he been aware of this evidence, he would have not pled guilty and proceeded to trial.

This Court has repeatedly held that while there is no specific time to disclose Brady material, Due Process requires that it must be provided in time for the defendant to use it effectively, i.e.; prior to trial or determination of guilt. Powell v.

Quarterman, 536 F.3d 325, 335 (5th Cir. 2008); United States v. O'Keefe, 128 F.3d 885, 898 (5th Cir.1997), cert. denied, 523 U.S. 1078 (1998); United States v. Ellender, 947 F.2d 748, 757 (5th Cir.1991); United States v. Campagnuolo, 592 F.2d 852, 860-61 (5th Cir.1979); see also United States v. Presser, 844 F.2d 1275, 1283-1284 (6th Cir. 1988); United States v. Higgs, 713 F.2d 39, 44 (3d Cir.1983) (holding no due process violation occurs if Brady material is disclosed **in time for its "effective use at trial"**)(emphasis added); United States v. Starusko, 729 F.2d 256, 262 (3rd Cir. 1984) (affirming the "longstanding policy" of "**prompt compliance with Brady**")(emphasis added); United States v. Coppa, 267 F.3d 132, 144 (2d Cir. 2001) ("we reiterate the longstanding constitutional principle that as long as a defendant possesses Brady evidence **in time for its effective use**") (emphasis added).

Here, the exculpatory material was not provided until years after the Appellant pled guilty and was sentenced. As a result, Appellant and his counsel were deprived of the opportunity to effectively use this information to fairly evaluate the evidence and make an informed decision as to whether to plead guilty or to proceed to trial.

C. The Brady Violation Rendered Appellant's Guilty Plea Unknowing and Involuntary

It is axiomatic that a guilty plea is valid only if entered voluntarily, knowingly, and intelligently, "**with sufficient awareness of the relevant**

circumstances and likely consequences." Bradshaw v. Stumpf, 545 U.S. 175, 183, (2005) (emphasis added), quoting Brady v. United States, 397 U.S. 742, 748 (1970). A plea is intelligently made when the defendant has "**real notice of the true nature of the charge against him**[" Sousley v. United States, 523 U.S. 614, 618 (1998), quoting Smith v. O'Grady, 312 U.S. 329, 334 (1941). Conversely, a guilty plea is involuntary if results from force, threats, improper promises, misrepresentations, or coercion. Brady v. United States, 397 U.S. 742, 748 (1970), United States v. Amaya, 111 F.3d 386, 389 (5th Cir. 1997).

Where the defendant pleads guilty without sufficient awareness of the relevant circumstances” and without “real notice of the true nature of the charge against him” because the prosecutor intentionally withholds exculpatory evidence, the guilty plea is rendered involuntary, unknowing and unintelligently. See Ferrara v. United States, 456 F.3d 278 (1st Cir. 2006).

In Ferrara v. United States, the defendant pled guilty to multiple charges and was sentenced. Ten years later, he discovered that the Government failed to disclose important exculpatory evidence to him, specifically, the recantation of a key witness of allegations made against him, and filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255. In granting the writ, the District Court ruled that the Government's failure to disclose a key witness's recantation of statements that inculpated the defendant constituted impermissible prosecutorial misconduct, and that absent the prosecutorial misconduct, there was a reasonable

probability that the defendant would not have pled guilty but, rather, would have rejected the proffered plea agreement and opted for a trial.

The Government appealed, and in affirming the District Court, the First Circuit cited this Court's decision in Matthew v. Johnson, 201 F.3d 353, 364 n. 15 (5th Cir.2000) (suggesting that, “[e]ven if the nondisclosure is not a Brady [v. Maryland] violation,” there may be situations in which the prosecution's failure to disclose evidence makes it “impossible for [a defendant] to enter a knowing and intelligent plea”).

Other circuits have likewise held that the withholding of Brady material renders a guilty plea unknowing and involuntary. See Miller v. Angliker, 848 F.2d 1312 (2d Cir. 1988); Sanchez v. United States, 50 F.3d 1448 (9th Cir.1995); United States v. Wright, 43 F.3d 491 (10th Cir.1994); Tate v. Wood, 963 F.2d 20 (2d Cir.1992); White v. United States, 858 F.2d 416 (8th Cir.1988), cert. denied, 489 U.S. 1029, 109 S.Ct. 1163, 103 L.Ed.2d 221 (1989); Campbell v. Marshall, 769 F.2d 314 (6th Cir.1985), cert. denied sub nom., Campbell v. Morris, 475 U.S. 1048 (1986).

Neither the Texas state courts nor the district court applied this standard. In this case, the District Court ruled that Appellant's guilty plea waived all non-jurisdictional defects, including his Brady claim. The District Court held that this “is decidedly the rule in the Fifth Circuit and the one that this Court is bound to apply.” This was a misapplication of established Supreme Court law.

In United States v. Agurs, the Supreme Court ruled that evidence that “creates a reasonable doubt that did not otherwise exist” as to the defendant's guilt must be considered material. 427 U.S. 97, 112 (1976). But “[t]his formulation **does not mean that the defendant must be able to show that the evidence would ‘probably lead to an acquittal,’** which is the standard that must be met for the granting of a new trial on the basis of newly discovered evidence from a source other than the government....” United States v. Srulowitz, 785 F.2d 382, 388 (2d Cir.1986) (emphasis added). Rather, as the Court has made clear, a “reasonable” probability suffices, and “ ‘[a] ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome’ ” of the case. Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987) quoting United States v. Bagley, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.). The instant case is precisely the situation that the Supreme Court had in mind when it recognized the rule of the Brady v. United States for cases in which guilty pleas had not been entered intelligently because of government misrepresentations or misconduct.

Both the state courts and the District Court disregarded and misapplied established Supreme Court law that a guilty plea not voluntarily and intelligently made has been obtained in violation of Due Process and is void. See McCarthy v. United States, 394 U.S. 459, 466 (1969). This Court has implicitly recognized that the law is well-settled that a guilty plea does not bar habeas review when a claim challenges the validity of the guilty plea itself. Matthew v. Johnson, 201 F.3d 353,

364 (5th Cir.2000), citing Hill v. Lockhart, 474 U.S. 52, 58 (1985); Haring v. Prosise, 462 U.S. 306, 320 (1983); Tollett v. Henderson, 411 U.S. 258 (1973).

Applying clearly-established Supreme Court case law, the general consensus among the various United States Courts of Appeal is that Brady claims are not waived by the entry of a guilty plea. Accordingly, this Court should review this case and definitively decide this issue for this particular Circuit in Appellant's favor.

**POINT II – APPELLANT RECEIVED INEFFECTIVE
ASSISTANCE OF COUNSEL WHERE COUNSEL'S
FAILURE TO INVESTIGATE WAS BASED UPON
CONCERNS OF PROSECUTION FOR WITNESS
TAMPERING INSTEAD OF STRATEGIC REASONS**

It is axiomatic that the United States Constitution guarantees each defendant in a criminal prosecution the right to the effective assistance of counsel. The fundamental right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a due process of law in an adversarial system of justice. United States v. Cronin, 466 U.S. 648, 658 (1984).

The United States Supreme Court has held that “[t]he benchmark of judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied

on having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984). Under the Strickland standard, ineffective assistance of counsel is made out when the defendant shows that (1) trial counsel’s performance was deficient, i.e., that he or she made errors so egregious that they failed to function as the “counsel guaranteed the defendant by the Sixth Amendment,” and (2) the deficient performance prejudiced the defendant enough to deprive him of due process of law. Id. at 687.

Here, the record establishes that trial counsel failed to interview the complaining witnesses before advising Appellant to plead guilty and subject himself to the 24-year sentence that was imposed upon him. The record also establishes that the primary motivation for the failure to interview the complainants was not based upon tactical or strategic reasons, but the concern that trial counsel would be accused of witness tampering, and possibly subject to criminal prosecution.

The state courts and the District Court below applied the correct standard pursuant to Strickland v. Washington, 466 U.S. 668, 686 (1984) but unreasonably applied the test by disregarding the clear obligation for counsel to conduct an investigation and by excusing this failure with Constitutionally inform reasons.

*A. Trial Counsel’s Performance Was Deficient
Because Counsel Failed to Conduct Proper
Factual Investigation and Interview the Complainants*

A court deciding a claim of ineffective assistance of counsel must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. “The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.” Strickland, supra at 690.

Effective assistance of counsel requires that trial counsel conduct a reasonable investigation into the facts of the case. See Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968) (holding “the defendant's right to representation does entitle him to have counsel ‘conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial’”); Scott v. Wainwright, 698 F.2d 427, 429–30 (11th Cir.1983) (defense counsel's failure to familiarize himself with the facts and relevant law made him so ineffective that the petitioner's guilty plea was involuntarily entered); Washington v. Strickland, 693 F.2d 1243, 1257 (5th Cir. 1982) (when counsel fails to conduct a substantial investigation into any of his client's plausible lines of defense, the attorney has failed to render effective assistance of counsel); Young v. Zant, 677 F.2d 792, 798 (11th Cir.1982) (where counsel is so ill prepared that he fails to understand his client's factual claims or the

legal significance of those claims, counsel fails to provide service within the expected range of competency).

Here, it is undisputed that trial counsel failed to interview the complainants. Instead of interviewing the complainants directly or having a trained defense investigator interview the complainants, trial counsel instead had two therapists speak with the complainants to provide “counseling” services for them. The record establishes that the therapists retained by trial counsel were not tasked with testing the accounts of the complainants, searching for and developing inconsistencies or prior inconsistent statements, exploring motives to fabricate, exploring any effects of undue suggestion by any other parties, or finding leads to other exculpatory evidence – all tasks that are the function of a partisan defense investigator with the same single-minded devotion to a client’s cause as defense counsel.

*B. Trial Counsel Was Motivated Primarily By
Unfounded Concerns that Counsel Would be
Subjected to Witness Tampering Allegations*

Clearly-established Supreme Court case law states:

“[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, **counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.** In any ineffectiveness case, **a particular decision not to investigate must be directly assessed for reasonableness in all**

the circumstances, applying a heavy measure of deference to counsel's judgments.” Wiggins v. Smith, 539 U.S. 510, 521-522 (2003) (emphasis added), quoting Strickland, *supra* at 690-691.

This Court has recognized this principle of clearly-established law on numerous occasions. See Brown v. Thaler, 684 F.3d 482 (5th Cir. 2012); Woods v. Thaler, 399 Fed.Appx. 884, 2010WL4272751 (5th Cir. 2010); Harrison v. Quarterman, 496 F.3d 419 (5th Cir. 2007); Martinez v. Quarterman, 481 F.3d 249 (5th Cir. 2007); Miller v. Dretke, 420 F.3d 356 (5th Cir. 2005); United States v. Drones, 218 F.3d 496 (5th Cir. 2000).

Here, the record establishes that the trial counsel failed to conduct a full investigation by either interviewing the complainants themselves, or delegating the task to a trained defense investigator to fully evaluate their prospective testimony, gauge the nature of the allegations, and develop evidence to assist the defense in cross-examining the complainants or challenging the prosecution’s account of the alleged conduct. Their primary motivation in this failure was not a reasonable, professional judgment to forego an investigation that might uncover more damaging evidence, possibly inflame the witnesses to press charges, or any other plausible reason.

Rather, the record establishes that trial counsel was worried that interviewing the complainants themselves, or in the alternative, sending a trained defense investigator to interview the complaints, would somehow subject them to

potential prosecution or at least an allegation of witness tampering. This belief was not only unfounded, but inexcusable and not the product of a professional judgment.

The Sixth Amendment guarantees a criminal defendant the right to present witnesses to establish his defense without fear of retaliation against the witness by the government,” and “the Fifth Amendment protects the defendant from improper governmental interference with his defense.” United States v. Bieganowski, 313 F.3d 264, 291 (5th Cir.2002) (internal quotation marks and citations omitted). “[A]s a general rule, witnesses, particularly eye witnesses, to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them.” United States v. Soape, 169 F.3d 257, 270 (5th Cir.1999) (quoting Gregory v. United States, 369 F.2d 185, 188 (D.C.Cir.1966)). As the Eleventh Circuit Court of Appeals has explained, “... so called ‘strategic’ decisions that are based on a mistaken understanding of the law, or that are based on a misunderstanding of the facts are entitled to less deference.” Hardwick v. Crosby, 320 F.3d 1127, 1186 (11th Cir. 2003) (citations omitted).

As stated above, effective assistance of counsel requires a criminal defense attorney to conduct an adequate factual investigation and evaluate the evidence. In a case such as the instant one, the evidence was the complaining witnesses. Their testimony was the alpha and omega of the prosecution’s case. The failure to

interview the complainants to assess not only their testimony, but the witness as a whole, constituted deficient performance.

C. Trial Counsel's Failure to Interview the Complainants Resulted in Substandard Legal Advice to Plead Guilty of First Degree Felonies Where Proper Investigation Would Have Revealed that the Allegations Supported Only Lesser-Included Offenses

Here, had trial counsel conducted a proper investigation, counsel would have found that the allegations did not support a charge for the first degree felonies charged in the indictments, but only supported a charge for the lesser-included second degree felonies that involved no penetration.

The difference between the first degree felony and the second degree felony was profound. Under Texas law, the maximum permissible sentence for a first degree felony is 99 years imprisonment, with a minimum of 5 years imprisonment. Texas Penal Code § 12.32. However, the sentencing range for a second degree felony is a minimum of 2 years imprisonment, and a maximum of 20 years imprisonment – 4 years less than the sentence Appellant actually received. Texas Penal Code § 12.33.

Had trial counsel properly investigated the case and found that Appellant was facing only second degree felony charges, counsel could have (and should have) advised Appellant that his sentencing exposure was much lower than

originally anticipated. Had counsel done so, Appellant could have made an intelligent, knowing and voluntary decision whether to plead guilty or to proceed to trial.

**POINT III – APPELLANT HAS ESTABLISHED A
CLAIM OF ACTUAL INNOCENCE THAT IS
DIRECTLY TIED TO TWO SEPARATE AND
INDEPENDENT CONSTITUTIONAL VIOLATIONS**

In Schlup v. Delo, 513 U.S. 298, 324 (1995), the Supreme Court described an actual innocence claim as one which “requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial.”

Here, Appellant has set forth a claim of actual innocence, as discussed above, and supported his claim with sworn testimony from the complaining witnesses themselves, recanting and refuting the allegations of sexual misconduct. The testimony of these witnesses also establish that they had informed the prosecutor that the allegations as set forth in the indictments against Appellant were not true and incorrect. At worst, Appellant was only guilty of a lesser included offense; viewed in a light most favorable to Appellant, he was actually innocent of the crimes for which he was convicted.

Nor could Appellant have presented this information at trial; the recantations as well as the discovery of Brady material only came to light years later at the state

habeas proceeding. Therefore, he could not have discovered the same with due diligence.

The claim of actual innocence is inextricably intertwined with the constitutional claims of ineffective assistance of counsel and denial of Due Process in the form of the Brady violation outlined supra. Thus, his claim of actual innocence does not stand alone, and is reviewable in a § 2254 petition.

CONCLUSION AND RELIEF REQUESTED

A. The Texas State Courts' Denials Were Contrary to Clearly Established Federal Constitutional Law

A state court decision is “contrary to” clearly established federal law where the state court arrives at a conclusion opposite to the Supreme Court on a question of law. Williams v. Taylor, 529 U.S. 362, 405 (2000). The Texas state court decisions concerning Appellant’s direct appeal and petition for a writ of habeas corpus were contrary to this clearly established Federal Constitutional law.

As stated above, established Supreme Court precedent is clear: Due Process requires a prosecutor to turn over exculpatory material to a defendant in time for him to make effective use of it. Here, that clearly did not happen. Appellant has established that a Brady violation occurred, and that he was prejudiced thereby. Further, Appellant has established claims of ineffective assistance of counsel and actual innocence.

*B. The Texas State Courts Unreasonably
Applied Clearly Established Federal Constitutional Law*

A state court decision involves an “unreasonable application” of Supreme Court precedent in either of the two following situations: (1) where the state court identifies the correct governing legal rule from Supreme Court cases but unreasonably applies it to the particular facts of a state prisoner’s case, or (2) the “state court either unreasonably extends a legal principle from Supreme Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.” Williams v. Taylor, 529 U.S. 362, 405 (2000). This application of Supreme Court precedent must be objectively unreasonable. Lockyer v. Andrade, 538 U.S. 63, 75 (2003).

In so ignoring these binding decisions, the Texas state courts unreasonably applied established Supreme Court precedent by unreasonably applying Strickland to the facts of this case, and ruling on Appellant’s Brady claim in direct violation of established Supreme Court precedent in Brady v. Maryland and its progeny.

Finally, the decision of the District Court below is clearly debatable, which necessitates review by this Court.

For the reasons set forth herein, this Court should grant this application.

WHEREFORE, it is respectfully requested that, since the decision of the District Court is clearly debatable, the Court grant this application in its entirety and issue a Certificate of Appealability, and for any other such relief as this Court deems just and proper.

Dated: Winter Park, Florida
March 27, 2013

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of March, 2013, I served a copy of the foregoing upon the parties listed below via the United States Postal Service

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii). This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in 14-point Times New Roman Font.

Robert L. Sirianni, Jr., Esq.