UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GLEN VARY #511275,

Petitioner,

v.

BLAINE LAFLER,

Respondent.

CASE NO. 2:09-CV-13943
HONORABLE GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE
HONORABLE MONA K. MAJZOUB
UNITED STATES MAGISTRATE JUDGE

PHILLIP D. COMORSKI (P46413)
Attorney for Petitioner
2500 Buhl Building
Detroit, Michigan 48226
(313) 963-5101

MICHAEL A. COX
ATTORNEY GENERAL

Andrew L. Shirvell (P70472)
Assistant Attorney General
Attorney for Respondent
Appellate Division
P.O. Box 30217
Lansing, MI 48909
(517) 373-4875

**PETITIONER'S REPLY TO**
**RESPONDENT'S RESPONSE TO**
**PETITION FOR WRIT OF HABEAS CORPUS**

Petitioner, GLEN VARY, by and through his counsel, Phillip D. Comorski, and in Reply to Respondent's Response to Petitioner's previously filed Petition for a Writ of Habeas Corpus, states as follows:

**Petitioner's Reply to Respondent's Response**

Petitioner was convicted in the Circuit Court for the County of Genesee, of first-degree premeditated murder, M.C.L. § 750.316(1)(a); first-degree felony murder, M.C.L. § 750.316(1)(b); assault with intent to murder, M.C.L. § 750.83; assault with intent to rob while armed, M.C.L. § 750.89; and possession of a firearm in the commission of a felony, M.C.L. § 750.227b. Petitioner was sentenced to concurrent terms of life imprisonment on the first-degree-murder conviction, 18.75 to 40 years' imprisonment on both the assault with intent to rob and assault with intent to murder convictions, and a mandatory 2-year consecutive term of imprisonment on the felony-firearm conviction.

Petitioner has exhausted all state remedies available to him with regard to the constitutional issues raised in this petition, and has filed a Petition for a Writ of Habeas Corpus in this Court. This Court subsequently entered an Order directing Respondent to file a Response to the Petition.

The Respondent filed a Response to the Petition on April 28, 2010, claiming that the instant Petition must be denied because some of the claims were not cognizable on federal review [great weight of evidence and newly discovered evidence claims], some of the claims did not run contrary to, nor involve an unreasonable application of clearly established Supreme Court law [ineffective

assistance of counsel claim], and some of the claims were "procedurally defaulted" [the remaining claims], and that Petitioner "cannot establish prejudice nor demonstrate . . . that a miscarriage of justice would ensue in order to excuse the procedural default." (Respondent's Response, pp 3-4).

**A. "Great Weight of Evidence" Issue**

In part of its response, Respondent argues that even if Petitioner's allegations concerning the claim of the verdict being against the great weight of the evidence are true, the claim must be denied because such a claim is not cognizable on habeas review (Respondent's Response, pp 11-12). While it is true that a federal habeas court has no power to grant habeas relief on the ground that a state conviction is against the great weight of the evidence, *Cukaj v. Warren*, 305 F. Supp. 2d 789, 796 (E.D. Mich. 2004); *Dell v. Straub*, 194 F. Supp. 2d 629, 648 (E.D. Mich. 2002), a claim that a verdict went against the great weight of the evidence is of constitutional dimension, for habeas corpus purposes, when the record is so devoid of evidentiary support that a due process issue is raised. *Cukaj*, 305 F. Supp. 2d at 796; *Dell*, 194 F. Supp. 2d at 648.

In this case, the record is so devoid of evidentiary support that a due process violation has occurred as a result of the convictions. The victim who survived the shooting (the driver, Darwin McMullen) testified that when he spoke to Sgt. Ellis

during the ongoing investigation, he informed him that he "heard" from other third parties (namely an individual named Alex) that Petitioner was one of the persons involved in the incident (T, Vol II, pp 108-111; 119; 143-144). It was then that he was able to "identify" Petitioner from a photograph, because he did not even know Petitioner or the other defendant, and was suppled the information concerning their complicity from third parties (T, Vol II, pp 143-145). This is hardly identification testimony that is "merely flawed"; rather, the evidence presented at trial clearly demonstrates that the identification of Petitioner (the only real evidence that implicated him in the crime) was generated by hearsay and rumor information supplied by third parties. In this regard, a due process violation has occurred and Petitioner is entitled to relief on this issue.

**B. Newly Discovered Evidence Issue**

Petitioner next contends that the state court's refusal to grant a new trial, which was based upon newly discovered evidence, resulted in a denial of his due process rights. The Michigan Court of Appeals reviewed Petitioner's newly discovered witness issue and was not persuaded to grant Petitioner a new trial. At the appellate level, Petitioner attempted to persuade the court that the codefendant Relerford's proposed testimony was newly discovered; and therefore a new trial was warranted. The Michigan Court of Appeals did not agree and stated as follows:

> Vary asserts that he "was informed and believes, and advised his counsel that Codefendant [Relerford] was requesting [to] appear at Appellant's sentencing and testify that Appellant was wrongly accused and was not involved in this incident." When a defendant asserts that newly discovered evidence entitles him to a new trial, he must file an affidavit or make an offer of proof to support his contention of newly discovered evidence. Here, Vary never filed an affidavit nor made an offer of proof showing that codefendant Relerford was indeed willing to testify that Vary was not involved, or the substance of Relerford's proposed testimony. Vary also failed to submit an affidavit from trial counsel. Vary's self-serving statement in his appellate brief is insufficient to substantiate his claim of newly discovered evidence.

(*People v. Vary*, Mich. Ct. App. No. 259499, p. 3).

First, the record does not indicate that Petitioner failed to tell his attorney about the above referenced witness. However, it appears that the appellate court assumed that since there was no sworn testimony from Petitioner either in an offer of proof or in an affidavit (from the witness or the attorney), that he must have been dilatory and failed to inform the courts about this witness. Therefore, the silence in the record worked against Petitioner in the appellate court in that they placed the entire blame on Petitioner for not raising the newly discovered evidence issue appropriately. The appellate court goes on to place the entire onus of properly producing the newly discovered evidence upon Petitioner, by stating the following: "Here, Vary never filed an affidavit nor made an offer of proof showing that codefendant Relerford was indeed willing to testify that Vary was not involved, or the substance of Relerford's proposed testimony. Vary also failed to submit an affidavit from trial counsel. Vary's

self-serving statement in his appellate brief is insufficient to substantiate his claim of newly discovered evidence." (*People v. Vary*, Mich. Ct. App. No. 259499, p. 3).

It is true that a client should assist his or her attorney in preparing for trial or any post conviction motions. However, for an attorney to be completely absolved of any responsibility if the client is not diligent in properly submitting issues to an appellate court appears to be an unfair shift in duties and obligations in the attorney/client relationship.[1] In any event, in Petitioner's habeas claim, he asserts that the newly discovered evidence he wanted to present at a new trial would have proven his actual innocence.

A denial of a new trial based upon newly discovered evidence is generally not a ground for habeas relief, *Kirby v. Dutton,* 794 F.2d 245, 246-247 (6th Cir. 1986); *Monroe v. Smith*, 197 F.Supp.2d 753, 763 (E.D. Mich. 2001); *Herrera v. Collins*, 506 U.S. 390, 400 (1993), and "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief ***absent an independent constitutional violation occurring in the underlying state criminal proceeding***." *Herrera,* 506 U.S. at 400 (emphasis added).

---

[1] The Michigan Court of Appeals surprisingly concluded that the attorney's failure to properly preserve and/or present the newly discovered evidence issue was not ineffective assistance of counsel, even though such failure was the basis for not reviewing the newly discovered evidence claim. See, (*People v. Vary*, Mich. Ct. App. No. 259499, p. 4).

When a defendant in federal court makes a motion for a new trial based upon newly discovered evidence, a defendant must show: (1) the evidence was discovered after trial; (2) the evidence could not have been discovered earlier with due diligence; (3) the evidence is material and not merely cumulative or impeaching; and (4) the evidence would likely produce an acquittal if the case was retried. *United States v. Turns*, 198 F.3d 584, 586-587 (6th Cir, 2000).

In this case, Petitioner received ineffective assistance of counsel at trial and appeal relative to his attorney's combined failure to produce the issue properly by failing to produce and affidavit or offer of proof -- both before sentencing and during the appeal. Therefore, an independent constitutional violation under the Sixth Amendment occurred in the underlying state criminal proceeding. Second, Petitioner has met the standard required for a new trial based upon newly discovered evidence. The codefendant's referenced affidavit is new, reliable, and trustworthy evidence that was not presented at trial. The obvious reason being that codefendant Relerford was on trial at the same time as Petitioner. As a result, the finder of fact was never aware of this information.

The substance of this affidavit exculpates Petitioner, or at a minimum demonstrates that an acquittal is likely if the case were retried, in light of the lack of evidence in the first place. Therefore, the writ must be granted on this issue.

**C. Ineffective Assistance of Counsel Issue (failure to move for a new trial when newly discovered evidence in the form of an affidavit from codefendant Relerford exonerating Petitioner came to light during jury prior to sentencing)**

In order to establish ineffective assistance of counsel, a defendant must demonstrate that(1) the performance of his counsel was deficient and (2) the deficient performance thereby prejudiced the defense and deprived the defendant of a fair trial, a trial with a reliable result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In determining whether counsel's performance was deficient, *Strickland* dictates that the inquiry "must be highly deferential": A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . [A] court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . . A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. *Strickland* at 689-690. In determining whether counsel's performance was prejudicial, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* at 694. The *Strickland* Court further held that a "reasonable probability is a probability sufficient

to undermine the confidence in the outcome." *Strickland* at 694. Finally, it should be noted that courts are not required to conduct an analysis under both prongs of the *Strickland* test; indeed, the court need not address the question of competence if it is easier to dispose of the claim due to a lack of prejudice. *Id.* at 697; *Mallet v. United States*, 334 F.3d 491, 497 (6th Cir. 2003).

Petitioner next claims that his trial counsel was ineffective because that counsel did not move for a new trial once the verdict was handed down based on the scant evidence presented at trial, and based on trial counsel's and appellate counsel's failure to properly move for a new trial based on newly discovered evidence. Petitioner's brief establishes both that (1) the performance of his counsel was deficient in this respect, and (2) the deficient performance thereby prejudiced the defense and deprived the defendant of a fair trial.

Petitioner contends that Mr. Relerford's averments in his affidavit directly contradicted the prosecutor's theory of the case, namely misidentification. Petitioner thus is at a loss to explain the degree of incompetence of counsel when provided with particular evidence, signed and notarized by a crucial witness admitting his own guilt, and exonerating Petitioner of the conviction charges. In this regard, Petitioner can show each element of *Strickland* under these facts. First, his trial counsel was deficient. Petitioner's trial counsel waited to have codefendant Relerford appear at

Petitioner's sentencing hearing without also moving for a new trial on the basis of newly discovered evidence. This "strategy" allowed the Court of Appeals to ignore the issue outright for lack of proper preservation. Nevertheless, appellate counsel could have also filed such a motion, but failed to do so, which again permitted the Court of Appeals to ignore the issue. Accordingly, the failure to properly raise the issue resulted in Petitioner losing the chance of receiving a new trial, or at least a proper evidentiary record for appellate review. This "strategy" surely fails to meet the deferential standard of *Strickland* set out above.

Second, Petitioner can also show prejudice. Indeed, the statements of codefendant Relerford are more powerful than any other witness who testified at trial. Furthermore, to the extent that the Court of Appeals denied Petitioner's newly discovered evidence claim solely on procedural grounds, there is a reasonable probability that the outcome would have been different if Petitioner's trial and/or appellate counsels had moved for a new trial. Indeed, the other evidence introduced hardly established Petitioner's involvement in the crime.

The main eyewitness' testimony, discussed above, was far from reliable or overwhelming. Accordingly, Petitioner has shown both prejudice and deficient performance, and the contrary position on this issue by the Respondent ignores the established record below.

**D. Remaining Issues and Procedural Default**

Respondent also maintains that the remaining issues "are procedurally defaulted as a matter of law because Petitioner failed to present them to the Michigan Court of Appeals during his direct appeal." (Respondent's Response, p 18). This claim misconstrues the law because Petitioner did not procedurally default his claims. The trial court did not deny relief based on any procedural default; rather, when denying the issues, trial court addressed the issues on their merits before issuing an Opinion and Order denying relief. Moreover, the State Appellate Courts merely referenced MCR 6.508(D) generally as the basis for denying leave to appeal.

MCR 6.508(D) states that "[t]he defendant has the burden of establishing entitlement to the relief requested", and MCR 6.508(D)(1), (2), and (3) specifically list procedural grounds for denying a motion for relief from judgment. A court may also deny relief from judgment under MCR 6.508(D) for the non-procedural reason that the defendant simply failed to meet his burden of "establishing entitlement to the relief requested." Therefore, the Appellate Courts' citation to MCR 6.508(D) in each of the Orders denying Petitioner leave to appeal (Michigan Court of Appeals Docket No. 284110); (Michigan Supreme Court Docket No. 138152) does not demonstrate that either of the Appellate Courts denied him leave to appeal on the basis of a procedural default, or on the procedural ground described in MCR 6.508(D)(3).

However, even if the courts did find procedural default because the claims were raised post-appeal of right, Petitioner is still entitled to federal review because he established "cause for noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation", as well as a "showing of a fundamental miscarriage of justice." (Respondent's Response, p 19). Firstly, it must be stressed that Petitioner never had his newly discovered evidence issue properly briefed in his appeal of right. Once defense counsel failed to file a motion for new trial on the issue, the Petitioner appealed, and appellate counsel failed to properly present the issue as well. Petitioner's appellate counsel basically did nothing else on Petitioner's behalf other than list the issue in his brief, apparently hoping that the Court of Appeals would do something. Only when Petitioner re-raised the issue on his own in a Motion for Post-Conviction Relief was the issue properly presented for appellate review. However, at that time, the issue was denied by the trial court because it had already been raised (albeit incorrectly) in the Court of Appeals.

What the above circumstances reveal is that Petitioner did everything he could to advance an appeal, but his efforts were thwarted by the courts and the representation he received immediately after his conviction and during his direct appeal. Hence, Petitioner could not raise the aforementioned issues in his appeal of right due to his appellate attorney's failure to perfect the issue on appeal for him.

Petitioner acknowledges that federal courts are not forums in which to re-litigate state trials. While this Court must, on habeas review, defer to a state court fact finding, it must be stressed that the state appellate courts' findings of fact on many critical points here is clearly unreasonable and need not be deferred to -- particularly since neither the Michigan Court of Appeals nor the Michigan Supreme Court gave clear or concise findings of fact on the most important issue (newly discovered evidence). Moreover, of even more importance, all of the issues presented meet the "different result probable" test concerning the application of law to the facts, and should be reviewed *de novo* by this Court. See, *United States v Lloyd*, 71 F 3d 408, 411 (CADC, 1995).

Despite the muddled efforts of the State Court to prevent Petitioner from presenting this evidence in a courtroom, this evidence, once presented, is likely to resolve the case in Petitioner's favor. See, *United States v Garland*, 991 F2d 328 (CA 6, 1993). Petitioner clearly has the right to have a new jury pass on his guilt or innocence with this critical additional information provided to them. The distortions utilized by the trial court and the Michigan Court of Appeals with respect to the record in this matter deprived Petitioner of his right to a trial by jury. This is both a federal and state constitutional right. *Kyles v Whitley*, 514 US 419; 115 S Ct 1555; 131 L Ed 2d 490 (1995).

It must be concluded that the Court of Appeals' Opinion in the appeal of right, affirmed by Michigan's appellate courts, and the trial court's opinion, affirmed by Michigan's appellate courts, are contrary to clearly established Federal law and was based on an unreasonable determination of fact considering the evidence presented at the state evidentiary hearing. Petitioner urges this court to grant his petition for a writ of habeas corpus.

## Relief Sought

**WHEREFORE**, Petitioner GLEN VARY respectfully request that this Honorable Court grant his of Writ of Habeas Corpus.

Respectfully submitted,

s/Phillip D. Comorski
PHILLIP D. COMORSKI (P 46413)
Attorney for Petitioner
2500 Buhl Bldg.
Detroit, Michigan 48226
(313) 963-5101
alexaudrey@sbcglobal.net

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2010, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send a notification of such filing to the following:

Andrew L. Shirvell

s/Phillip D. Comorski
PHILLIP D. COMORSKI (P 46413)