

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN**

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STEPHEN TOLIVER,

Petitioner,

v.

Case No. 02-C-1123

GARY R. McCAUGHTRY,

Respondent.

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**DECISION AND ORDER**

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On November 18, 2002, the petitioner, Stephen Toliver, filed a new pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petitioner challenged his January 30, 1992, conviction of first-degree intentional homicide, as a party to a crime, on several grounds. This court denied his petition by a decision and order dated January 31, 2006. The petitioner appealed that decision to the United States Court of Appeals for the Seventh Circuit. On August 27, 2008, the court remanded the case for further determinations on two of the petitioner's grounds: (1) that he received ineffective assistance of trial counsel, and (2) that his Fourteenth Amendment right to due process was violated when the prosecutor failed to disclose exculpatory evidence.

**RELEVANT FACTUAL AND PROCEDURAL BACKGROUND**

The facts giving rise to the petitioner's conviction were well summarized in the appellate court's August 27, 2008, opinion:

Mr. Toliver's state conviction arose out of the murder of Tina Rogers. In 1991, Mr. Toliver and his brother, Oliver Toliver, were living with Commosie Thompson, Jo-Etta Foster and Tina Rogers. Thompson was selling drugs out of the residence and discovered that \$1,800 in drug proceeds was missing. Thompson told Mr. Toliver, who had been serving as Mr. Thompson's drug courier, about the missing money. Mr. Toliver informed Thompson that Rogers had taken it.

Mr. Toliver then told his brother Oliver to "strap up;" both men grabbed firearms and went looking for Rogers. Both Foster and Thompson testified that, from their observations that evening, they did not believe that Mr. Toliver or Oliver intended to harm Rogers upon finding her. Mr. Toliver testified that he had told Oliver to "strap up" because their house had been "shot up" several weeks after Rogers had moved into the house and they suspected that Rogers' boyfriend, whom Mr. Toliver believed to be violent, had been involved in the shooting.

Upon finding Rogers, Mr. Toliver and Oliver brought her back to the residence; upon their arrival, Thompson, Corey Henry, Darian Robinson and Foster were present. Once inside, Mr. Toliver began questioning and arguing with Rogers about the missing money; Rogers denied taking it. Foster testified that Oliver, who had a TEC-9 handgun in his hand, went over to Mr. Toliver, who was also holding a firearm, and whispered something. Mr. Toliver then began yelling at Rogers.<sup>1</sup> Mr. Toliver then tossed his sawed-off shotgun next to Thompson and told him to shoot whomever he thought had stolen the money (including Mr. Toliver himself); Thompson did not respond and Mr. Toliver picked up the shotgun.

At this point, Oliver moved aggressively toward Rogers, but Mr. Toliver pushed him away. Henry testified that Mr. Toliver had told Oliver to "chill out and sit down." Mr. Toliver then asked Thompson what he intended to do. Thompson responded, "Whatever is clever." Robinson testified that Mr. Toliver had asked Thompson whether he was sure. Thompson testified that Mr. Toliver then had stepped back. Oliver then got up and shot Rogers once in the forehead at point-blank range.

What Mr. Toliver said next remained in dispute at trial. Thompson and Robinson each testified that they heard Mr. Toliver say some variation of "[k]ill that bitch, kill her." Foster testified that, after hearing the first gunshot, she reentered the room and saw both Mr. Toliver and Oliver standing by Rogers, who was slumped on the floor bleeding profusely; Oliver had his gun pointed at Rogers' head. Foster testified that she then heard Mr. Toliver say "shoot the bitch." Mr. Toliver,

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<sup>1</sup> At this point, Foster testified that she, thinking that this would be a long argument, left the room to cancel a reservation that she just had made. Foster further testified that she did not reenter the room until after she heard the first gunshot.

however, testified at trial that he had said, “you done killed the bitch.” After Mr. Toliver’s comment, Oliver again shot Rogers in the head.

Toliver v. McCaughtry, 539 F.3d 766, 769-70 (7th Cir. 2008).

A review of the procedural history of this case is helpful to an understanding of the issues before this court. Following his 1992 conviction, the petitioner filed a pro se appeal, arguing that there was insufficient evidence to support his conviction. The conviction was upheld and the Supreme Court of Wisconsin denied his petition for review.

On October 19, 1998, the petitioner filed a federal habeas petition under 28 U.S.C. §2254, which was conditionally granted. The state was ordered either to release the petitioner or allow him to re-file his direct appeal with the assistance of counsel. The state reinstated the petitioner’s direct appeal rights. With the assistance of counsel, the petitioner raised several challenges to his conviction including those at issue here – that he had received the ineffective assistance of trial counsel and that the prosecution had failed to disclose exculpatory evidence.

In support of his ineffective assistance of counsel claim, the petitioner asserted that his trial counsel had failed to call two witnesses to testify on his behalf, Angeal Toliver and Harvey Toliver. The petitioner submitted affidavits from each person. Angeal’s affidavit recounted a conversation she had with Jo-Etta Foster, who had been present in the house on the day Ms. Rogers was murdered. Ms. Foster told Angeal that she was in her bedroom when she heard a gunshot. When she looked out of her bedroom, she saw the petitioner trying to wrestle the gun away from Oliver Toliver and yelling at Oliver, “you shot [her], or something like that.” (Petitioner’s Memorandum in Support of Application for Writ of Habeas Corpus [Petitioner’s Memorandum], Exh. 1 at 8). Then, according to Ms. Foster, Oliver shot Ms. Rogers again and then the petitioner “finally got the gun away from him.” Id. Ms. Foster said that she had told the

police that the petitioner was involved because the police had threatened to charge her as well. Angeal stated that she provided this information to the petitioner's trial counsel, who told her "that he was putting [her] on Stevie's witness list to testify." Id. However, Angeal was never called to testify.

Harvey Toliver's affidavit recounts a conversation he witnessed between the petitioner and Oliver Toliver when they gave him a ride home shortly after Ms. Rogers' murder. Harvey asked the petitioner why the police were questioning them about the murder. The petitioner immediately responded that it was because Oliver had killed her. Harvey asked why and Oliver said that he had never liked Ms. Rogers, that she had made him angry by laughing at one of Commosie Thompson's questions, and that she "deserved to die." (Petitioner's Memorandum, Exh. 1 at 5). The petitioner told Oliver he should not have killed Ms. Rogers and said that if they got arrested, the petitioner would not take the blame for what Oliver had done. According to the affidavit, the petitioner called Harvey after he was arrested and asked Harvey to tell his attorney about this conversation. Harvey was reluctant to take sides between the brothers, but agreed to speak with the petitioner's attorney. The petitioner said that his attorney would contact Harvey soon, but the attorney never contacted him.

In support of his claim that the prosecutor had failed to disclose exculpatory evidence, the petitioner submitted an affidavit from Cornell Smith stating that he had written a letter to the assistant district attorney, Mark Williams, on June 10, 1991. According to the affidavit, the letter recounted a conversation Mr. Smith had with Mr. Thompson and Mr. Henry shortly after Ms. Rogers was shot. Mr. Henry told Mr. Smith that the petitioner had held Oliver back from Ms. Rogers at one point and that Oliver was the person who killed Ms. Rogers. Mr. Henry said that Oliver did not like Ms. Rogers "because she wouldn't give him any action sexually." (Petitioner's

Memorandum, Exh. 1 at 2). Mr. Smith wrote that he was hoping to receive clemency in exchange for providing this information to the assistant district attorney. The affidavit said that the assistant district attorney responded on June 17th or 18th, 1991, stating that the letter did not shed any new light on the case and that he could not help Mr. Smith get clemency because he was convicted in a different jurisdiction.

Based on this evidence, the trial court denied the petitioner's post-conviction motion, which was upheld on appeal. The Wisconsin Court of Appeals found that the evidence against the petitioner was overwhelming and that there was no reasonable probability of a different result even if the petitioner's counsel had called Angeal and Harvey Toliver to testify or if the contents of Mr. Smith's letter had been disclosed to the petitioner's counsel. The Wisconsin Supreme Court denied the petitioner's request for review and the petitioner filed this second petition for a writ of habeas corpus.

After the petitioner's second habeas petition was denied by this court on January 31, 2006, he timely appealed. In the appellate court's August 27, 2008, decision, the court found that the state court unreasonably applied Strickland v. Washington, 466 U.S. 668 (1984), clearly established Supreme Court law, when it rejected the petitioner's ineffective assistance of counsel claim. The court observed that the state court did not address the first prong of the Strickland test, which asks whether counsel's performance fell below an objective standard of reasonableness, because the state court rejected the claim based on its analysis of the second prong. Thus, the appellate court's review of the first prong was de novo. See Wiggins v. Smith, 539 U.S. 510, 534 (2003). It stated that:

Nothing in the record before us suggests how Angeal Toliver's and Harvey Toliver's testimony could have harmed Mr. Toliver's defense. On this record, the only reason that we can discern for not calling Angeal and Harvey was their

relationship with Mr. Toliver and the resulting possibility of bias . . . Nevertheless, given the nature of Mr. Toliver's defense . . . and the probative and corroborative testimony that Angeal and Harvey would have provided, these witnesses' possible bias does not provide a basis for counsel's failure to call them.

Toliver, 539 F.3d at 775. The court also stated that "counsel could not have made a reasonable strategic decision not to call Harvey without interviewing him in order to evaluate his proposed testimony, his credibility or his demeanor." Id.

The second prong of the Strickland test addresses whether there is a reasonable probability that, but for counsel's errors, the result of the case would have been different. The court found that the state court's finding that the petitioner was not prejudiced by his trial counsel's errors was unreasonable, stating that:

[C]ounsel's double failure to call Angeal to testify and to interview or call Harvey was prejudicial. The combination of Angeal's and Harvey's testimony no doubt would have enhanced significantly the chances of the jury's accepting Mr. Toliver's characterization of the facts, thereby affording Mr. Toliver a reasonable probability of a different result at trial.

Id. at 776.

In addressing the petitioner's claim that the prosecutor did not disclose exculpatory evidence, specifically the letter from Mr. Smith, the court found that the state court unreasonably applied the law when it found that Mr. Smith's letter did not constitute material, exculpatory evidence. The appellate court held that the state court failed to analyze this evidence in light of the petitioner's overall defense and, therefore, failed to appreciate how it would bolster the petitioner's case. Thus, the court held that the "letter, if it actually was received by the prosecutor, constitutes material, exculpatory evidence that the State was required to disclose" to the petitioner's trial counsel. Id. at 782.

The court remanded the case to this court with a specific directive to resolve two issues of fact.

The state courts never resolved, under the first prong of the Strickland analysis, whether Mr. Toliver's counsel was ineffective in not interviewing Harvey and in not calling Angeal. Therefore, issues of fact concerning counsel's competence were never resolved. Similarly, the state courts never resolved whether the prosecutor had received the letter allegedly sent by Smith. On remand, the district court should resolve these issues. On the basis of its findings, the court then should determine whether the writ ought to be granted.

Id. at 782.

### **ANALYSIS**

This court held an evidentiary hearing on March 5, 2009. At the hearing, the court was advised for the first time that the petitioner's trial counsel had passed away. The date of his death is unknown, but it was at least as early as January 25, 1997. (Transcript of Evidentiary Hearing held March 5, 2009 [Hearing Tr.] at 5). Assistant District Attorney (ADA) Mark Williams, Cornell Smith, and the petitioner testified at the evidentiary hearing. The petitioner also relies on the previously submitted affidavits of Angeal Toliver, Harvey Toliver, and Cornell Smith. Following the hearing, at the request of counsel, this court granted a number of extensions of time for the filing of post-hearing briefs.

ADA Williams testified that he now is the lead prosecutor in the Homicide Unit at the Milwaukee County District Attorney's Office and has been since 1993. ADA Williams estimated that at the time of the petitioner's trial, he handled approximately 15 to 20 homicides at one time and approximately 40 homicides per year.

ADA Williams did not recall all of the details of the petitioner's trial, but he reviewed Mr. Smith's affidavit before he testified. He stated that he had no recollection of receiving Mr.

Smith's letter. He went through his file and the police file before the hearing and also before the petitioner's reinstated direct appeal sometime around the year 2000. He did not locate a copy of the letter either time. ADA Williams testified that his case files usually consist of "all the Police reports and correspondence that would have occurred in that case." (Hearing Tr. at 20). He further stated that his "normal practice and procedure is to put every letter into a file." (Hearing Tr. at 21). He said that not keeping Mr. Smith's letter "would violate things I do every day. My habit and procedures." (Hearing Tr. at 34). ADA Williams also testified that at the time of the petitioner's trial, the district attorney's office followed an open file policy. Pursuant to this policy, his "procedure would be to give [the letter] to the defense lawyer, and then to make a copy and put it in my file." (Hearing Tr. at 35). ADA Williams also acknowledged that "sometimes the standard procedure get[s] deviated from." (Hearing Tr. at 20).

With respect to whether he had written a responsive letter to Mr. Smith, ADA Williams testified that "[w]ith some certainty I can say I don't believe that's true." (Hearing Tr. at 24). ADA Williams had "almost total certainty" that if a letter was sent to Mr. Smith, a copy would have been retained in his file. (Hearing Tr. at 37). ADA Williams' searches of the files in 2000 and before the hearing did not disclose a responsive letter to Mr. Smith.

ADA Williams testified that in August 1991, he received a letter from Anthony Prince in relation to the petitioner's case. ADA Williams stated that he did not disclose this letter to the petitioner's counsel until the day before the trial because Mr. Prince was incarcerated at the same prison as the petitioner and "we didn't want Mr. Prince getting hurt." (Hearing Tr. at 41).

Mr. Smith testified that in June, 1991, he was incarcerated at the Waupun Correctional Institution on a sexual assault charge from Kenosha County. Confirming the information in his affidavit, Mr. Smith testified that he received information about Ms. Rogers' murder from

Commosie Thompson and Corey Henry, who is his nephew, and that he made ADA Williams aware of this information by writing a letter to him on June 10, 1991. Mr. Smith hoped to get some credit toward his sentence in exchange for providing information to ADA Williams. He further testified that it was on “about June 17 or June 18 that I received a response from Mark Williams saying that the information I provided for him didn’t shed no light on the case.” (Hearing Tr. at 45). Mr. Smith does not have a copy of either letter. He explained that there was a lot of theft at the prison and that several of his legal documents were missing.

The petitioner testified that he told his trial counsel about the conversation Harvey Toliver had heard between himself and Oliver Toliver and how Harvey would testify. His counsel had responded that “Harvey was related to [the petitioner] and might not be believable.” (Hearing Tr. at 53). The petitioner’s lawyer never spoke with Harvey and told the petitioner “we didn’t need him.” Id. The petitioner also told his lawyer about how Angeal Toliver would testify and his lawyer interviewed Angeal. However, he did not call her to testify, telling the petitioner “they wouldn’t believe her because she was the mother of my children.” (Hearing Tr. at 55).

In his post-evidentiary hearing brief, the petitioner maintains that ADA Williams did receive the letter from Mr. Smith and kept this exculpatory evidence from him. The petitioner points out that ADA Williams had a very demanding schedule, did not recall details of this case, and acknowledged that he does not always follow his practices and procedures. In fact, the petitioner asserts that ADA Williams violated his practices and procedures at least once during the petitioner’s trial when he received a letter from Mr. Prince and did not disclose it to the petitioner’s counsel until the day before trial.

The petitioner also reiterates that his trial counsel’s performance was deficient. He states that his trial counsel’s concern that Angeal and Harvey Toliver’s testimony would be considered

biased has already been found by the appellate court to be an unreasonable basis for not calling them to testify. The petitioner maintains that his trial counsel's decision not to call Harvey Toliver is not entitled to a presumption of reasonableness because counsel failed even to interview Harvey. The petitioner also cites case law demonstrating that attorneys may be found ineffective even when the attorney is no longer living at the time such determination is made.

The respondent asserts that the evidence fails to establish that ADA Williams ever received Mr. Smith's letter. The respondent also contends that the petitioner must overcome a strong presumption that his trial counsel's decisions not to call Angeal and Harvey Toliver were based on sound trial strategy. The respondent states that because the petitioner's trial counsel has died, the best evidence on this issue has never been presented and the petitioner is relying solely on surmise and speculation.

With respect to the letter Mr. Smith said he sent to the prosecutor, it is well established that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963). The court of appeals for this circuit already determined that the contents of Mr. Smith's letter to the prosecutor, if received, "constitutes material, exculpatory evidence that the State was required to disclose to Mr. Toliver's defense." Toliver, 539 F.3d at 782. This court must only make the factual determination "whether the prosecutor had received the letter allegedly sent by Smith." Id.

ADA Williams and Mr. Smith presented conflicting testimony at the evidentiary hearing regarding this letter. ADA Williams did not recall receiving a letter from Mr. Smith. ADA

Williams searched his files and the police files for this case more than once and did not locate a copy of Mr. Smith's letter, even though his practices and procedures include keeping copies of all correspondence he receives in a case. ADA Williams had "almost total certainty" that he did not write and send a responsive letter to Mr. Smith because his files would contain a copy of that letter and no such copy was found. (Hearing Tr. at 37).

Mr. Smith did not have a copy of either the letter he sent to ADA Williams or the letter he received in response. Despite the petitioner's contentions that ADA Williams must have deviated from his practices and procedures and misplaced Mr. Smith's letter, there is no evidence before the court to support this conclusion. Although both witnesses appeared to be credible, the petitioner bears the burden to establish that the letter was received. See Collier v. Davis, 301 F.3d 843 (7th Cir. 2000); United States v. Young, 20 F.3d 758, 764 (7th Cir. 1994). Accordingly, this court concludes that ADA Williams did not receive the letter from Mr. Smith. The evidence fails to support that the prosecution violated the requirement in Brady to disclose exculpatory evidence to the defense.

In Strickland, the Court stated that the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." The Court held that a convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. The Court stated that "unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." Id.

The court of appeals for this circuit has already determined that "counsel's failure to call Angeal to testify and to interview or call Harvey was prejudicial" to the defendant. Toliver, 539 F. 3d at 778. Thus, this court need only determine the performance prong of the Strickland analysis. When evaluating the performance of a trial attorney, the petitioner "has a heavy burden in proving a claim of ineffectiveness of counsel." Jarrett v. United States, 822 F.2d 1438, 1441 (7th Cir. 1987) (citing Strickland, 466 U.S. at 687). Courts are to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. The performance of trial counsel should not be deemed constitutionally deficient merely because of a tactical or strategic decision made at trial that in hindsight appears not to have been the wisest choice. See id. However, "choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id. at 690-91.

In Rolan v. Vaughn, 445 F.3d 671 (3d Cir. 2006), the petitioner sought a writ of habeas corpus on the ground that his trial counsel was ineffective for several reasons, including that the attorney failed to investigate and call two potential witnesses to testify in support of the petitioner's self-defense claim. Similar to this case, the petitioner's trial counsel died before the habeas petition was filed. In addition, one of the potential witnesses that the trial counsel did not investigate also had passed away.

When determining whether the trial counsel's performance was unreasonable, the court recognized that "counsel's strategic decisions will not be second-guessed by *post-hoc*

determinations that a different trial strategy would have fared better.” Id. at 682. However, the court found that “only choices made after a reasonable investigation of the factual scenario are entitled to a presumption of validity.” Id. (citing Strickland, 466 U.S. at 690-91). Therefore, the court assessed whether the trial attorney’s failure to interview the two potential witnesses was objectively reasonable. The court found that “[f]ailure to conduct any pretrial investigation is objectively unreasonable.” Id. While the attorney’s decision not to pursue a self-defense claim may be a strategic decision entitled to the presumption of validity, the court found that the attorney’s decision “cannot be accorded the normal deference to strategic choices because it was uninformed.” Id. (citing United States v. Kauffman, 109 F.3d 186, 190 [3d Cir. 1991]).

In this case, a review of the record shows that the petitioner’s trial counsel told the petitioner that he was not going to call Angeal Toliver to testify because “they wouldn’t believe her because she was the mother of [his] children.” (Hearing Tr. at 55). He also told the petitioner that he had not met with Harvey Toliver because “Harvey was related to [the petitioner] and might not be believable.” (Hearing Tr. at 53). As the appellate court found, in light of the defense and the testimony these witnesses would have provided, their “possible bias does not provide a basis for counsel’s failure to call them.” Toliver, 539 F.3d at 775. Moreover, counsel could not have made a reasonable strategic decision that Harvey’s testimony would be unhelpful or unbelievable because counsel did not even interview Harvey. See Strickland, 466 U.S. at 690-91; Rolan, 445 F.3d at 682. The failure to interview Harvey not only means that counsel was unable to make a strategic decision as to the helpfulness or credibility of Harvey’s testimony, it also means that counsel was unable to “determine whether [Harvey] might have other information potentially valuable to the defense” beyond that which the petitioner had communicated to counsel. Rolan, 445 F.3d at 682. Therefore, the presumption of validity does

not apply to counsel's decision not to call Harvey because that decision was uninformed. See id. Under these circumstances, this court finds that the petitioner's trial counsel's performance was insufficient.

In conclusion, this court finds that the prosecutor did not withhold exculpatory evidence from the petitioner or his counsel in violation of Brady because the prosecutor did not receive the letter sent by Mr. Smith. However, this court finds that the performance of the petitioner's trial counsel was deficient because he failed to call Angeal Toliver to testify and did not interview Harvey Toliver or call him to testify. Thus, petitioner's trial counsel was ineffective. Accordingly, the petition for a writ of habeas corpus will be granted.

**ORDER**

**NOW, THEREFORE, IT IS ORDERED** that the petitioner's petition for a writ of habeas corpus be and hereby is **granted**. The petitioner shall be released from custody unless the State of Wisconsin commences proceedings to afford the petitioner a new trial within 90 days from the date of this order.

**IT IS FURTHER ORDERED** that this action be and hereby is **dismissed**.

**IT IS ALSO ORDERED** that the Clerk of Court enter judgment accordingly.

Dated at Milwaukee, Wisconsin this 11th day of February, 2011.

BY THE COURT:

s/Patricia J. Gorence  
PATRICIA J. GORENCE  
United States Magistrate Judge