

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PARRISH TOWNS,

Petitioner,

vs.

Case No. 99-75693

DAVID SMITH,

HON. AVERN COHN

Respondent.

_____ /

**MEMORANDUM AND ORDER CONDITIONALLY GRANTING
A WRIT OF HABEAS CORPUS**

I. Introduction

This is a habeas case under 28 U.S.C. § 2254. Petitioner Parrish Towns (Towns) is a state prisoner serving a non-paroleable life sentence. Respondent David Smith is the Warden at the correctional institution where Towns is incarcerated and is represented by the Attorney General's office. Although Towns sought a writ of habeas corpus on several grounds, the only claim before the Court is a claim of ineffective assistance of counsel. For the reasons that follow, the Court finds that Towns received ineffective assistance of counsel due to trial counsel's failure to investigate and call a witness, Michael Richard (Richard), whose testimony would likely have exonerated Towns. Trial counsel's failure casts serious doubt on Towns's guilt in light of the evidence against Towns at trial. Accordingly, Towns's application for a writ of habeas corpus will be conditionally granted.

II. Procedural Background

A.

On May 5, 1983, Towns was sentenced to life imprisonment for his convictions on first degree murder, armed robbery, and felony firearm. Towns filed an appeal with the Michigan Court of Appeals, raising the following issues: (1) the police lacked probable cause to arrest him and therefore the subsequent line-up should have been suppressed, (2) the line-up was unduly suggestive, and (3) the confession should have been suppressed because the arrest was without probable cause and the delay between the arrest and arraignment was used to extract the confession.¹ The court of appeals affirmed the convictions and sentence. People v. Towns, No. 71935 (Mich. Ct. App. Feb. 21, 1985) (unpublished) (per curiam). The record is not clear as to whether Towns sought leave to appeal in the Michigan Supreme Court.

Towns later filed a motion for relief from judgment in the trial court raising the same issues as in his appeal of right and additional issues. The trial court denied the motion finding, inter alia, that he failed to establish good cause as to the additional issues presented in the motion. People v. Towns, No. 82-06872 (Recorder's Ct. Aug. 2, 1994). A motion for reconsideration was denied on December 9, 1994.

Towns then filed a second motion for relief from judgment and an evidentiary hearing which was denied on August 7, 1997 where he raised, inter alia, a claim of

¹As the court of appeals noted, Towns did not actually confess. The statement he made to police after his arrest, which formed the basis for his claim, was as to his whereabouts at the time of the incident. As will be explained, Towns presented an alibi defense. The statement he made to police contradicted his alibi witnesses as to his whereabouts at the time of the incident. Thus, the statement was not a confession, but at most an inconsistent statement.

ineffective assistance of appellate counsel which was apparently based on a failure to raise the issue of ineffective assistance of trial counsel due to trial counsel's failure to investigate or call Richard as a witness. Reconsideration was denied on August 7, 1997. In denying Towns's motion for reconsideration on his ineffective assistance of counsel claim, the trial court stated:

Defendant's claim of ineffective assistance of appellate counsel is insufficient to show "good cause." It is well established that appellate counsel need not raise all possible claims of error on appeal. Moreover, the failure to do so does not support cause for excusing procedural default due to ineffective assistance of appellate counsel during direct appeal. If counsel is constitutionally deficient, then the proper remedy upon a finding of ineffective assistance of appellate counsel is to grant a new appeal.

On the basis of defendant's assertions, this Court will not second guess the strategies appellate counsel employed. The record clearly reflects that the constitutional rights afforded defendant under the United States and Michigan Constitutions have been protected. Even if this Court were to find appellate counsel's performance below the standard set forth in . . . something which this Court does not, this Court lacks the authority or jurisdiction to grant a new appeal.

On November 23, 1998, the court of appeals denied Towns's delayed application for leave to appeal for lack of merit. People v. Towns, No. 212666 (Mich. Ct. App. Nov. 23, 1998) (unpublished). The Michigan Supreme Court denied leave to appeal on the grounds that Towns failed to meet the burden of establishing entitlement to relief under M.C.R. 6.508(D). People v. Towns, 461 Mich. 898 (Mich. Oct. 26, 1999) (Table).

B.

Thereafter Towns, through counsel, filed the pending application for a writ of habeas corpus, presenting nine substantive claims. They are (1) ineffective assistance of counsel for failing to call a key witness, (2) erroneous jury instruction on elements of murder, (3) coercive jury deliberation, (4) coercive jury instruction on felony firearm, (5)

erroneous jury instruction regarding weighing of evidence, (6) failure to give proper alibi instruction, (7) prosecutorial misconduct, (8) impermissibly suggestive line-up, and (9) involuntary confession.

The matter was referred to a magistrate judge for all pre-trial proceedings, see Order of Reference to United States Magistrate Judge dated January 4, 2001. The Warden then filed a motion for summary judgment. The magistrate judge issued a report and recommendation (MJRR) recommending that (1) The Warden's motion to dismiss Towns's first claim (ineffective assistance of counsel) on the basis of laches be denied,² (2) Towns's second through seventh claims are procedurally defaulted, and (3) that an evidentiary hearing be held with respect to the claim that Towns is actually innocent to excuse his procedural default. Both parties objected. The Court adopted the MJRR, finding that Towns's ineffective assistance of counsel claim was not barred by laches, and ordered the magistrate judge to conduct an evidentiary hearing on Towns's claim of actual innocence as to his second through seventh claims. As such, the Court did not adopt the magistrate judge's recommendation that Towns's claims were procedurally defaulted but rather held the issue in abeyance pending the evidentiary hearing on actual innocence. See Order dated June 5, 2001.

Following an evidentiary hearing, the magistrate judge found that although Towns presented a "compelling" case for actual innocence, he failed to satisfy the stringent standard required under the actual innocence exception to procedural default. The magistrate judge therefore recommended that the Warden's motion for summary

²The Warden has not argued that Towns's ineffective assistance of counsel claim is procedurally defaulted.

judgment as to Towns's second through seventh claims are barred by procedural default. The magistrate judge finally noted that Towns's ineffective assistance of counsel claim remained for consideration on the merits. See MJRR dated October 31, 2002.

Towns objected to the MJRR. The Court conducted two hearings on the objections. The Court adopted the MJRR insofar as it found that Towns has failed to establish actual innocence to overcome his procedural default as to his second through seventh claims. However, the Court noted that the evidence regarding Towns's actual innocence directly relates his ineffective assistance of counsel claim. As to this claim, the Court stated that "[w]hile the Court is strongly inclined to find that Towns received ineffective assistance of counsel based on the current record, Respondent has not formally responded to the merits of this claim." The Court therefore afforded the Warden an opportunity to respond to this claim and Towns the opportunity to file a reply. See Memorandum and Order Adopting Report and Recommendation and Ordering Respondent to Respond to Petitioner's Ineffective Assistance of Counsel Claim Within 10 Days dated April 8, 2003.

The parties have filed papers as directed. The matter is ready for decision,

III. Factual Background

The MJRR of October 31, 2002 accurately sets forth the facts regarding pre-trial proceedings as well as the facts presented at Towns's trial which are substantially repeated here.

A. Pre-Trial

The victim, Wilma Steward, was killed during a robbery at her home. Roland Higgs was an eye witness and was also robbed. On October 7, 1982, Richard was arrested by police on an unrelated charge. At the time of his arrest, Richard was in the possession on a handgun. After his release, police identified the gun seized from Richard as the one used in the robbery. The police also learned that Richard had committed a number of robberies with a person named "Willie." Accordingly, the police, by a Sergeant Bernard Brantley, obtained an arrest warrant and search warrant for Richard. Although Richard was arrested in connection with the murder on October 8, 1982; he was never charged in connection with this incident.

Brantley interviewed Richard.³ Although Richard initially denied involvement, he later admitted to driving the get-away car and said that "Willie and his brother did it." Based on this information, Willie Towns, Towns's brother, was arrested on October 10, 1982. Brantley also obtained a search warrant for the Towns's residence. The search warrant states:

On October 9, 1982, affiant spoke to Michael Ray Richard . . . with the gun that fired the slug that killed Wilma Steward, and Michael Ray Richard informed affiant that he, Michael Ray Richard had driven the getaway car used in the robbery of Mr. Higgs on 10-1-82 and that two other black males Willie Towns and Kevin Towns, DOB 8-25-63 5' 10", 175 lbs, had robbed Mr. Higgs and shot Mrs. Wilma Steward. Mr. Richard told affiant the he drove Willie Towns and Kevin Towns away from [Wilma Steward's house] after the robbing on Mr. Higgs and the shooting of Wilma Steward. Mr. Richard further told affiant that Kevin Towns lived at

³As noted in the MJRR, this portion of Brantley's testimony was taken for purposes of Towns's motion to suppress and was not presented to the jury. At trial, the jury was presented with a stipulation that the gun used in the robbery/murder belonged to Richard.

[the Towns' residence].

The search warrant also states that Higgs positively identified Willie Towns in a lineup on October 11, 1982. When the police arrived to execute the warrant on October 13, 1982, Towns was present. Because Towns resembled one of the composite sketches prepared based on Higgs' description, the police asked Towns to accompany them to the station. Kevin Towns was not there. On October 14, 1982, Towns was placed in a live line up on October 14, 1982. Both Towns and Kevin Towns were described as being 5' 10" and 175 lbs. Higgs was told prior to the line up that there was a suspect in the line up. Higgs tentatively identified Towns, stating to Brantley that Towns "looks like" the perpetrator based on his height and weight, but that he was only "reasonably sure" of his identification. He also indicated that he "couldn't be sure of any identification" he made.⁴ At a photo show-up, however, Higgs focused on 2 photographs, indicating he was not sure. Neither photograph was Towns or Willie Towns.

B. The Trial

At trial, the prosecution relied in large part on Higgs' testimony as there was no direct evidence linking Towns to the crime. Higgs testified that on the day of the robbery he went to the Steward's house because she had recently become an Amway distributor and Higgs worked for Amway. He pulled into her driveway and two men approached him from the front of the house as he was gathering some items inside the car. The taller of the two men put a gun to his face and said "we mean business, we

⁴Apparently Kevin Towns was arrested in connection with the robbery/murder and put in a line-up. Higgs did not identify him in the line-up.

want your money.” The men told Higgs not to look at them. Higgs said he had about 20 seconds to look at the men before being ordered to look away, and he looked at the taller man twice. When Higgs tried to look up at the men, the taller one hit him with the gun and forced him to lie face down in the grass. Higgs identified Towns as the taller man and Willie Towns as the shorter man. One of the men took money out of Higgs’s pocket. Higgs was ordered to take his clothes off and lie back down. While lying down, Higgs heard the screen door to Steward’s house open and heard Towns say “get back bitch.” After hearing the door shut, Higgs heard 5 or 6 gun shots. When he looked up, no one was there. Higgs saw bullet holes in the door and called for Steward, who did not respond. Higgs described the men to police as being 5' 10" and that they looked like brothers. The jury was also informed that Higgs identified Willie Towns during a photographic line that same day and at a line up 10 days later, as well as that Higgs identified Towns at a live line up.

The prosecution also called Dale Terrell who was living with Richard in September of 1982. She testified that Willie Towns and Richard were friends. She also testified, however, that Richard and Towns were not friends and that she had never seen the two together.

Richard was originally listed as a prosecution witness. Although Towns and Willie Towns were initially granted separate trials (upon Willie Towns’s motion), counsel for Willie Towns withdrew this request when the prosecution indicated that it was not going to call Richard.

Towns presented an alibi defense through several witnesses. Towns’s mother testified that Towns came home the evening of the robbery/murder at about 1:00 a.m.

She also stated that Towns had helped a friend move and called her to tell her that the friend's grandfather would drive him home. She also testified that she had seen her son Willie Towns with Richard, but had never seen Richard with Towns.

Towns also called Marion Wimberly who testified that Towns helped her move on October 1, 1982. She testified that Towns came to her house at about 1:00 p.m. and that Towns helped her until about 7:35 p.m. when she went to get a trailer. When she returned around 8:00 or 8:15 p.m., Towns was still there. Towns helped her move until about 1:00 a.m., when her grandfather drove him home.

Towns also called Chester McCoy, Wimberly's grandfather. He testified that he arrived at Wimberly's home at 6:00 p.m. and that Towns was with him continuously until 1:00 a.m. when he drove Towns home.

Finally, Towns called Yolanda Wimberly, Marion Wimberly's sister, who testified that Towns helped in the move, that he arrived about noon or 1:00 p.m., that she and Towns went to a restaurant at 2:00 p.m., and that she was with Towns until 1:00 or 1:30 a.m.

Following Towns's alibi witnesses, the prosecution called Sergeant Dunn, over objection, as a rebuttal witness. Dunn testified that he took a four page handwritten statement from Towns on the day he was arrested, October 14, 1982. In the statement, Towns denied any involvement in the robbery/murder and said he was at an arcade on the day of the incident.⁵ Towns did not testify.

⁵Towns moved to suppress the statement on the grounds it was involuntary, that he was not properly arraigned, and because the prosecution failed to list the statement as evidence in the rebuttal notice. The motion was denied and as noted above, Towns raised the denial of the motion on direct appeal.

C. The Evidentiary Hearing

As noted above, the magistrate judge conducted an evidentiary hearing on whether Towns established actual innocence to overcome his procedural default. Although the magistrate judge ultimately concluded, and the Court agreed, that Towns failed to establish actual innocence, the testimony at the evidentiary hearing bears on Towns's claim of ineffective assistance of counsel. As such, it will be summarized here. Again, the following summary is taken from the MJRR of October 31, 2002.

Towns first presented the testimony of Darwin Fair, his attorney in collateral review in state court. Fair testified that prior to filing Towns's motion for relief from judgment, he spoke with Richard, who told him he was familiar with the facts and circumstances of Towns's conviction and that he had personal knowledge that Towns had nothing to do with the offenses for which he was convicted. Richard also told Fair that he would so testify under oath. Richard further stated to Fair that Towns's trial counsel did not contact him prior to Towns' trial, and if he had, he (Richard) would have testified that Towns was not involved. Fair prepared an affidavit for Richard based on this conversation; Richard did not sign the affidavit.

Towns's mother also testified. Her testimony essentially mirrored the testimony at Towns's trial. She stated that Towns came home around 1:00 a.m. the night of the robbery/murder and was dropped off by an older gentleman. She also testified that Richard was Willie Towns's friend, not Towns's. She further testified that the day before Towns's trial, she received a phone call from someone who identified themselves as Michael Richard. The caller indicated he was calling from the Wayne County Jail. The caller told her Towns was not involved in the crime.

Towns then indicated his intention to call Richard as a witness. Richard apparently expressed a reluctance to testify on Towns's behalf absent a grant of immunity. The magistrate judge then appointed a federal defender to represent Richard. After speaking to Richard,⁶ his counsel informed the magistrate judge and the parties that Richard was unwilling to testify unless granted immunity in connection with the robbery/murder. If called, Richard indicated he would invoke his Fifth Amendment privilege against self-incrimination.

Towns then testified. He denied any involvement in the robbery/murder. He testified that he originally told the police that he was at an arcade on the night of the incident because that was his normal routine and he had no specific recollection of his activities that day, which was about two weeks before he was questioned by police and gave a statement. Following his statement to police, he spoke with Yolanda Wimberly, who reminded him that he had helped her sister move that day.

Towns's brother, Willie Towns, was also brought to the evidentiary hearing under a writ of habeas corpus ad testificandum. Willie Towns indicated to Towns's counsel that he would invoke his Fifth Amendment privilege against self-incrimination. Towns did not call Willie Towns at the evidentiary hearing.

Finally, Towns called Michael Martin, an investigator hired by Fair in connection with Towns's motion for relief from judgment. Martin testified that he visited Richard in prison and showed him the affidavit prepared by Fair. Richard confirmed that the information in the affidavit was true. Martin also testified that although Richard wanted

⁶Richard is in state custody for an unknown time on apparent robbery convictions.

to minimize his own involvement in the robbery/murder, he admitted that he and Willie Towns committed a number of armed robberies together and were “partners in crime.” Richard also told Martin that he, Willie Towns, and Kevin Towns were the only persons involved in the robbery/murder.

Martin further testified that he visited Richard a second time in connection with Towns’s habeas case, in preparation for the actual innocence hearing. Richard again indicated that Towns was not involved and stated that he was prepared to testify at Towns’s trial. Richard said he had been transferred from the Marquette prison to Wayne County for that purpose. He also stated that at the time of trial he was not worried about incriminating himself because his attorney had worked out a deal for him. However, Richard now indicated his fear of incriminating himself because the people involved in his purported deal were no longer “in place” and would not back him up. Richard then stated he refused to sign the affidavit absent a grant of immunity.

At the conclusion of the evidentiary hearing, the magistrate judge allowed the parties time to consult with the Wayne County Prosecutor’s office to attempt to arrange immunity for Richard. The parties informed the magistrate judge that no deal could be arranged.

The magistrate judge thereafter issued the MJRR recommending that Towns’s claims, with the exception of his ineffective assistance of counsel claim, be barred by procedural default because Towns failed to establish actual innocence.

D. Court Hearings

The Court held two hearings regarding Towns’s objections to the MJRR. At the first hearing, Richard’s appointed counsel again confirmed that Richard would not testify

on behalf of Towns absent a grant of immunity. The Court then asked counsel for the Warden why Richard was not given immunity.⁷ The Warden replied that they had no clear answer, as this was a decision for the Wayne County Prosecutor's Office, not the Attorney General's Office. Accordingly, the Court adjourned the hearing and required the presence of a representative from the Wayne County Prosecutor's Office to appear with an explanation.

At the second hearing, a representative from the Wayne County Prosecutor's Office stated that "we see absolutely no reason" to grant Richard immunity. He further suggested that the prosecutor at Towns's trial would be in a better position to recall why the prosecutor decided not to call Richard.⁸ When asked by the Court why Richard was initially listed as a prosecution witness and then withdrawn, he replied that it was probably because the prosecution considered him untrustworthy. The prosecutor stated that Towns's trial counsel made a choice not to call Richard, as reflected in the record, and noted that Towns's trial counsel is now deceased and unable to explain his actions.

When the Court asked as to the whereabouts of Kevin Towns, counsel for the Warden said it had tried to serve him twice. Towns's counsel replied that Kevin Towns would assert the Fifth Amendment "probably for good reason."

⁷The magistrate judge was "deeply troubled" by the Wayne County Prosecutor's refusal to grant immunity to Richard, noting that "[t]here appears to be simply no reason the prosecutor should refuse to grant [him] immunity." MJRR dated October 31, 2002 at p. 19.

⁸The prosecutor at Towns's trial has since become a Wayne County Circuit Court judge. The prosecutor at oral argument stated he spoke with the judge who indicated he had no recollection of Towns's trial.

III. Analysis

A.

Towns's ineffective assistance of counsel claim is based on the claim that trial counsel was ineffective for failing to investigate and call Richard and he was prejudiced as a result. Although the focus of this case has been on whether Towns has established actual innocence so as to overcome his procedural default, all of the evidence regarding his actual innocence bears directly on his ineffective assistance of counsel claim. However troubling the refusal of the Wayne County Prosecutor to grant Richard immunity may be, as explained in the Order of April 8, 2003, Richard's unwillingness to present an affidavit or testimony as to Towns's innocence does not necessarily defeat his claim of ineffective assistance of counsel for failing to adequately investigate and call Richard as a witness. This claim is now addressed.

B.

Because the state courts never addressed the merits of Towns's ineffective assistance of counsel claim in a reasoned opinion, the Court reviews the claim de novo. See McKenzie v. Smith, 326 F.3d 721, 727 (6th Cir. 2003) (stating that "[i]f deference to the state court is inapplicable or inappropriate, we 'exercise our independent judgment' and review the claim de novo"). Here, although the trial court apparently was presented with Towns's ineffective assistance of counsel claim on collateral review, it denied the claim without addressing the merits.

The Sixth Amendment of the United States Constitution provides that: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The Supreme Court identified the

purpose of the Sixth Amendment right to counsel as a means of “assur[ing] that in any criminal prosecution the accused shall not be left to his own devices in facing the prosecutorial forces of organized society.” Moran v. Burbine, 475 U.S. 412, 430 (1986) (quotations and citations omitted).

Towns must show that counsel’s performance was constitutionally deficient under the standard set forth by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984).⁹ Strickland requires that a habeas petitioner first prove that counsel’s performance was deficient. This “requires a showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed by the Sixth Amendment.” Id. at 687. Second, a habeas petitioner must show that counsel’s deficient performance prejudiced petitioner. A habeas petitioner may establish prejudice by “showing that counsel’s errors were so serious as to deprive the defendant of a fair trial.” Id. Prejudice also requires that a habeas petitioner show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. Id. at 694. The Sixth Circuit, applying the Strickland standard, has held that a reviewing court therefore must focus on whether counsel’s alleged errors “have undermined the reliability of and confidence in the result.” McQueen v. Scroggy, 99 F.3d 1302, 1311 (6th Cir. 1996).

⁹ The Strickland standard applies to claims of ineffective assistance of appellate counsel as well. Bowen v. Foltz, 763 F.2d 191, 194 (6th Cir. 1985).

C.

1.

The Warden argues that a careful review of record demonstrates that Towns's trial counsel made a deliberate strategic choice not to call Richard which is within the protected realm of trial strategy. Thus, the Warden argues that trial counsel was not deficient in failing to call Richard. The Warden also argues that Towns cannot show prejudice because he has not established that Richard would exonerate him at trial.

Towns argues that the Warden has failed to address whether trial counsel was ineffective for failing to interview and investigate Richard, which is the initial basis for his claim. Towns says that there is no excuse based on the record as to why trial counsel failed to at least interview Richard and that this clearly shows deficient performance. Towns also argues that trial counsel's failure to call Richard resulted in a complete failure to present a valuable defense which cannot be said to be sound trial strategy. While the Warden offers theories as to why trial counsel failed to call Richard, Towns says none of these theories are supported by the record. Towns also argues that he has shown prejudice; he claims his innocence and the record supports this fact even if it does not support the "actual innocence" standard required to overcome a procedural default. He also argues that to the extent that the Warden argues Towns has failed to show prejudice because Richard will not testify, it is the Warden (through the Wayne County Prosecutor's Office) that is preventing Richard from testifying because of their refusal to grant him immunity.

2.

It is clear that Towns's counsel was aware of Richard prior to trial. The following discussion took place between the trial court and the parties prior to trial regarding the calling of Richard as a witness.

Towns's counsel: I would like to have some further discovery as to the police writeup. Michael Richard pled guilty to five cases in this court. I want to know if he was promised anything in this case. I would like to have the writeup on the cases that he pled guilty to, that he was sentenced to on January 10, 1983.

The Court: You can punch that right out in the computer.

Towns's counsel: I know the results. I want to be able to question him as to the method of operation and what happened in this [si]tuation.

The Court: You can ask him.

Towns's counsel: I know, but I don't have the write up.

The Court: The police wiretap.

The prosecutor: I would be happy to see that [Towns's counsel] gets that information.
I would indicate though on the supplemental witness list Mr. Michael Richard's name appears as a possible prosecution witness.
I would indicate to defense counsel and the Court at this time I would move to strike the name of Michael Richard. I do not intend to call him. He was endorsed by Mr. Bruno as an accomplice and we have no obligation to present an accomplice.
I would indicate to the Court and to the defense that Mr. Richard is here in the Wayne County Jail and he is available and can be called by the defense, but the People do not intend to call him as a prosecution witness in our case in chief.

The Court: You move to strike him, because he is an accomplice?

Towns's counsel: I would ask the Court to have him brought down.

The Court: He wants his name struck as a People's witness.

Towns's counsel: I would object. He is an accomplice in this matter.

The Court: They are not obligated to call an accomplice.

Towns's counsel: What I would inform the court is this, I intend to speak with Mr. Richard in the County Jail if he is in.

The Court: He said he was. What does that have to do with striking his name as a witness?

Towns's counsel: I just don't want him sent back.

The prosecutor: Okay.

The Court: Any objections?

Towns's counsel: In the case of People vs. Parrish Towns, my client, Richard[] can be struck as a witness.

Willie Towns's counsel: If he is not an accomplice I would object to that on the basis of Michael Richard's statement.

The Court: You want [the prosecutor] to call him?

Willie Towns's counsel: I don't want him sent back. I want him available.

The Court: Will you strike him as a People's witness?

Willie Towns's counsel: I want him available to us as a defense witness.

The Court: He is struck in that case as well, the People vs. Willie Towns.

The prosecutor: There is another matter with regards to what [Towns's counsel] said in terms of wanting to know the details in the inquiry into the M.O. and getting behind. In other words, the fact that Mr. Richard has been convicted. I believe it has been four or five times of robberies. I would submit that if the Court is going to allow the defense to go behind the convictions and get into the fact and circumstances of those convictions, --

The Court: He's not a People's witness. Are you going to call him and

ask him about his convictions?

Towns's counsel: I would like to have the opportunity to visit him in the County Jail.

The prosecutor: Your Honor, if I might just briefly mention my concerns, if the Court rules it is permissible to go into the facts and circumstances in order for them to assert a defense, I think that opens the door for me then to ask Mr. Richard[], okay, you did do all these things and who did you do it with, did you do it alone. I could involve a multitude of hold-ups and attempts. I think Mr. Richard may be saying yes, but I did it with Parrish Towns and Willie Towns. I think we need to go into that before the defense.

The Court: That is something that you ought to consider.

Willie Towns's counsel: We're not held to an immediate decision.

The Court: Well, you are held to a decision when you decide to call him as a witness.

The prosecutor: Or if there is an opening statement and they say, we're going to show you, ladies and gentlemen, of the jury, that Michael Richard committed the crime, because he committed five other just like that, it may very well be probative and relevant to introduce that evidence. It is a two way street, I would say.

Towns's counsel: That was the reason for the severance. I didn't ask for the severance [Willie Towns' counsel] did. The reason for it was if I am going to speak to Mr. Michael Ray Richard, I am going to give notice to the prosecution to accompany, to sent an officer with me to talk to him, I am not going to influence his testimony. I want to know what his testimony would be.

The Court: All right.

Towns's counsel: And if I find his testimony is in the best interest of my client, if I find it won't be, I won't call him as a witness. I have to speak to him first.

The Court: Do you have to talk to him?

The prosecutor: No. Let me say just on this point, [Towns's counsel] make the determination after talking with Mr. Michael Richard that he is not going to be a witness for him, I would think that would most likely eliminate the need for two juries. It is my understanding that the basis of the motion for separate trials in on behalf of the defendant, Parrish Towns. That is [Towns's counsel's] client.

Willie Towns's counsel: As far as the undressing of the persons that he robbed, the M.O., the undressing of the people did not belong to their one of these defendants.

The Court: Let's assume that we did call him, couldn't we --

The prosecutor: I think the problem is if you have Michael Richard up here saying that Parrish Towns had nothing to do with it, because I committed the offense with that man, Willie Towns, that put --

The Court: Can we eliminate that part of the answer? You don't want it apparently, do?

The prosecutor: Well, once [Towns's counsel] talks to Mr. Richard, we will know.

The Court: You will talk to him this afternoon, right?

Towns's counsel: Yes, right, Your Honor. He is in the County Jail next door here?

The Court: Yes.

Towns's counsel: In this search warrant [the search warrant discussed above] there is a Dave Allen who took a gun from Richard. This gun turned out to be the gun.

The Court: Is he a police officer?

Towns's counsel: He is a civilian.

The prosecutor: He was mugged.

Towns's counsel: He attempted to rob him and apparently he took the gun away from Mr. Richard. There was a police officer that got the gun from Dave Allen. Michael D. Wolf conveyed the gun

to the firearms examination section of the Detroit Police Department and the firearms examiner, Dale Johnston, said he compared the gun with the slug on evidence, the slug taken from the body of the deceased in this matter and that they matched. I would like to show the jury that this gun was taken from Michael Richard on the day after the shooting of the deceased in this matter and it was the gun that also killed the deceased. I would like to show it to the jury, that Michael Richard had the gun and it was in his possession.

- The Court: You want the jury to know that these people obtain the gun from this guy Richard?
- Towns's counsel: On the day after the killing and the robbery.
- The Court: I guess you can do that. Why are you asking me about that?
- Towns's counsel: Well, first of all –
- The Court: Maybe we will agree with that.
- The prosecutor: Sure.
- The Court: You will stipulate.
- Towns's counsel: I have no way of serving these officers and the firearms expert.
- The Court: He may just stipulate to it. Why bring witnesses in?
- Towns's counsel: Fine.
- The Court: You're not trying to hide the fact that the gun came from Richard?
- The prosecutor: No. I have no objections doing it through the testimony of Sgt. Dunn or Sgt. Brantley to the effect that on the 2nd of October a man by the name of Michael Richard was arrested and the murder weapon was confiscated from him.
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- The Court: He is not going to tell the jury that we had a statement from Mr. Richard, that he drove the car, that these two men committed the murder, that isn't going to get in front of the jury unless you bring it in.

The only thing he is going to put in here about Richard[] is that a civilian took a gun away from his the next day and the gun was taken over to the police. Is that right, [the prosecutor]?

The prosecutor: This is right, Your Honor.

Willie Towns's counsel: That, coupled with the fact that is the gun which killed Wilma Steward,

The Court: Yes.

Willie Towns's counsel: The only people associated - this man is not charged with it. That is important.

The Court: You can argue that to the jury. You can argue to the jury where is Richard[], he apparently had the gun, why didn't they charge him?
Anything else now?

Willie Towns's counsel: No.

Trial Transcript Vol. I, pp. 78-88.

The next day, Towns's counsel and Towns appeared in court for the start of trial where the following colloquy took place.

The prosecutor: There are a couple matters that I would like to put on the record before we proceed with jury selection this morning. Yesterday when we were here [Towns's counsel] indicated that he wanted to see the writeup from the five cases that Mr. Michael Ray Richard had pled guilty on. I think the record should reflect that I, this morning, gave [Towns's counsel] copies of those wiretaps and I also indicated that I had made arrangement with Lt. Morrison in the Armed Robbery Section so that [Towns's counsel] can go over and examine the entire files, the police files, on those cases if he so chooses. So, I think he has been provided with as much information as is necessary in order for him to make a decision as to

whether or not he intended to call Michael Ray Richard.¹⁰ I want the record to reflect that secondly, it is my understanding that the defense of Mr. Parrish Towns does not intend to call Mr. Michael Ray Richard to testify.

Towns's counsel: Your Honor, I did not speak with Mr. Michael Richard. I did speak with my client, Parrish Towns. We discussed the calling of Michael Richard as a witness. I can see no reasons to call Michael Richard as a witness as such and my client, Parrish Towns, agrees with me.

The Court: Is that correct, Mr. Towns?

Towns: Yes.

Trial Transcript Vol. II, pp. 91-92.

Based on the above, it is clear that Towns's counsel never talked to Richard, despite his several statements indicating that he would and that he needed to speak to Richard in order to know if it was in Towns's best interest to have Richard testify. Yet, after having apparently reviewing some writeups on Richard, Towns' counsel simply says that he sees no reason to call him. Counsel's failure to at least interview Richard amounts to deficient performance. Counsel had a duty to investigate all potential relevant witnesses; a duty he recognized but then refused to follow. Although the Warden characterizes the issue as only trial counsel's failure to call Richard, the issue is really trial counsel's failure to speak to Richard despite indicating an intention to do so

¹⁰The substance of these wiretaps is not known. However, Richard, by his own admission, was involved in other robberies with Willie Towns and Kevin Towns. Whether the wiretaps implicated Towns in other crimes, which is unlikely based on the evidence that Towns was not friends with Richard and in light of Richard's statements to police, does not alter the fact that trial counsel never spoke with Richard despite his earlier indication that he would. Having never spoken to Richard, it cannot be said, as the prosecutor urged, that trial counsel had sufficient information from which to make a decision as to whether or not to call Richard as a witness. In any event, it was for trial counsel to determine whether he had sufficient information, not the prosecutor.

and recognizing the importance of talking to Richard prior to being able to decide whether to call Richard as a witness. Only after Towns' counsel talked to Richard could he have made an informed decision about whether to call him. Counsel's failure to talk to Richard deprived Petitioner of an opportunity to present a critical component of his defense.

As to the failure to call Richard, the Warden says that Richard was "a wild card" and suggests that Richard was not called because he might implicate Towns in other robberies. The record, however, belies such an argument. Because Towns's counsel never talked to Richard, it cannot be said he made an assessment that he was a wild card. Also, the record shows that Richard was going to implicate Willie Towns and Kevin Towns, not Towns. The prosecutor stated as much. It is also clear why the prosecution withdrew Richard as a witness; they knew he would implicate Willie Towns but exculpate Towns. Indeed, when Towns's counsel decided not to call Richard, the prosecution immediately noted that there was no longer a need for separate trials. Having failed to even speak with Richard, it cannot be said that Towns's counsel's decision not to call him was reasonable. Although Towns' trial counsel is now deceased and therefore unable to offer an explanation for his actions, the record simply fails to reveal any legitimate reason for why Towns's counsel made the decision not speak to Richard.

The Warden also argues that Towns's claim fails because there is no evidence that Richard named Kevin Towns as an accomplice. In support, the Warden relies on Brantley's pre-trial testimony that Richard told him "Willie and his brother did it" and that Brantley got the name Kevin Towns from other police officers, not Richard. The

Warden also points to Brantley's testimony when he explained that although the warrant said Kevin Towns, he did not write the affidavit; the prosecutor did. As Towns points out, however, although Brantley may have gotten the name Kevin Towns from other police officers, not Richard, these other police officers got the name from Richard because they also talked to Richard. Thus, that Richard may never have told Brantley that Kevin Towns was involved does not mean that Richard never said Kevin was involved and Towns was not. The fact is that from what Richard told the police, the police got a search warrant and an arrest warrant for Kevin Towns, not Towns.

It is noted that Towns stated in court that he agreed not to call Richard as a witness. However, at the evidentiary hearing before the magistrate judge, and in an affidavit attached to the response to the Warden's motion for summary judgment, Towns says that he was illiterate at the time of the trial, that he was a high school student in special education, that he wanted Richard to testify and for his trial counsel to interview him, and that his trial counsel did not inform him of a reason for not calling Richard but rather just said he intended not to call him. Thus, there is a real question as to the weight of Towns's statement. The Warden also does not heavily rely on Towns's in court statement to argue that Towns's counsel acted effectively.

Overall, Towns has demonstrated that his trial counsel was deficient for failing to interview Richard before making a determination as to whether to call him as a witness.

Towns has also shown prejudice resulting from trial counsel's failure to interview Richard. At the same time Richard has consistently maintained to the police and to others that Towns was not involved in the robbery/murder, Towns has maintained his innocence. Towns has been incarcerated since 1983. As noted in the MJRR, the

evidence against Towns was not overwhelming. It rested solely on the eyewitness testimony of Higgs, whose initial identification of Towns was equivocal. On the other hand, Towns presented, as the magistrate judge noted, a “formidable” alibi defense through the testimony of several witnesses. Although Towns made a prior statement to police that he was at an arcade on the night in question, Richard’s testimony would no doubt have bolstered his defense. Had Richard testified as he claims he would have - that Towns was not involved - it cannot be said that the result of the trial would have been the same.

The Warden makes much of the fact that Richard has not stated under oath that Towns was not involved in the robbery/murder. The Warden also notes that the magistrate judge found Fair and Martin’s statements as to what Richard told them to be unreliable. As Towns points out, however, the magistrate judge found Fair and Martin’s statements unreliable in terms of establishing actual innocence under Schlup. The magistrate judge specifically stated that he does “not doubt the veracity of either Fair’s or Martin’s recollection of Richard’s statement to them” MJRR at p. 17. That Richard has not exculpated Towns under oath is solely due to the failure of the Wayne County Prosecutor’s Office to grant him immunity. The Court simply cannot understand why the Wayne County Prosecutor’s Office will not grant Richards immunity for a crime in which he admitted his participation from the outset and was never charged. Given that Richard has never been charged in this twenty year old crime, the likelihood that he would ever be charged is remote. The Wayne County Prosecutor’s Office offered no legitimate reason to the Court for why it would not give Richard immunity. As the Court indicated at the hearing on Towns’s objections where a representative from the Wayne

County Prosecutor's Office was present, it has the right to draw whatever inference is reasonable based the refusal to grant Richard immunity. The inference the Court draws is that the Wayne County Prosecutor's Office wants to maintain a conviction even when there is a real possibility that the wrong person was convicted.

Because Towns has established that his trial counsel was constitutionally deficient and that he was prejudiced by this deficient performance, he is entitled to the issuance of a writ of habeas corpus.

IV. Conclusion

For the reasons stated above, a writ of habeas corpus is **CONDITIONALLY GRANTED**. Unless a date for a new trial is scheduled within ninety days, Towns must be unconditionally released.

SO ORDERED.

_____/s/_____
AVERN COHN
UNITED STATES DISTRICT JUDGE

Dated: June 25, 2003
Detroit, Michigan