

21-7617

ORIGINAL

No. _____

Supreme Court, U.S.
FILED

APR 07 2022

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Stevie Wyre — PETITIONER
(Your Name)

vs.

Bobby Lumpkin — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals 5th Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Stevie Wyre
(Your Name)

Wainwright Unit 21665 Prison Bldg
(Address)

Lovelady, Texas 75851
(City, State, Zip Code)

936-636-7321
(Phone Number)

QUESTION(S) PRESENTED

- 1). Whether Wyre is entitled to relief, or an Evidentiary hearing, where the United States Court of Appeals, 5th Circuit and the United States District Court for the Southern District of Texas violated federal rights and Wyre's right to Due Process, by imposing a sanction, barring his petition of Actual Innocence accompanied by a claim of constitutional violation, where newly discovered evidence is presented as clear and convincing evidence, that is being barred from review and relief.
- 2). Whether Wyre is entitled to relief, or an Evidentiary hearing, where the Prosecution engaged in misconduct, in a Brady violation, by allowing perjury testimony from the State's witness, a presentence investigation (PSI) report that contains false perjury information that contradicts and contributed to the conviction, where the introducing of some hearsay statement that could not be cross-examined at the hearing.
- 3). Whether Wyre is entitled to relief, or an Evidentiary hearing, where the Confrontation Clause requires that a defendant in a criminal case, be allowed to impeach the credibility of a prosecution witness, where the defendant was denied Due Process right under the 5th 6th 8th and 14th Amendments and federal right, pertaining to his criminal conviction that is being barred from review and relief.

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

[✓] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

- Wyre v. Lumpkin No. 4:21-cv-0462, United States District Court for the Southern District of Texas, Judgment entered: February 11, 2021
- Wyre v. Lumpkin, No. 21-20134, United States Court of Appeals, 5th Circuit, Judgment entered: March 2, 2022

RELATED CASES

- 1) Cooper v. Woodford, 358 F.3d 1117-24 (9th Cir. 2004)
- 2) Finley v. Johnson, 243 F.3d 215, 218 at A, 1-4, 219 at 6-7; 220 at B, II; 221 at 12, 13; 222, III (5th Cir. 2001)
- 3) Milke v. Ryan, 998-99, 1000-1010; 1011-19, 1020-25 (9th Cir 2013)
- 4) Rodriguez v. Johnson 104 F.3d 694-700 (5th Cir. 1997)
- 5) United States v. Wright, 43 F.3d 491-94, 497, 500 (10th Cir 1994)
- 6) United States v. Wolfe, 435, F.3d. 1289, 1292-99, 1300-04 (10th Cir 2006)

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Appendix U - Decision of U.S. Court of Appeals, 5th Cir.
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Appendix V - Petitioner Wyre's Documents in Support of
this petition, that states:

1). Only on Fox 26 News: CPS caseworker accused
of lying under oath. Date 4/15/2020 (3 pages)

2). Houston Chronicle featured: CPS sanction the
Agency payed \$127K penalty by State Court Judge
(7 pages)

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix U to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix D to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 2, 2022.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment - No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

Sixth Amendment - in all criminal prosecution the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Eighth Amendment - excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Fourteenth Amendment - All person born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, nor deny to any person within its jurisdiction the equal protection of the law.

28 U.S.C § 2244(b)(2)(B)(i)(ii)

B -

- (i) - the factual predicate for the claim could not have been discovered previously through the exercise of due process, and
- (ii) - the fact underlying the claim, if proven and viewed in light of the evidence as a whole would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(d)(1)(2)

§ 2254(d)(1) - the state court proceedings resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; OR

§ 2254(d)(2) - the state court proceedings resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

28 U.S.C. § 2244(b)(3)(C)

The Court of Appeals may authorize the filing of a second or successive application only, if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

28 U.S.C. § 2244(d)(1)(A)

The date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

28 U.S.C. § 2244(d)(1)(D)

the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Fed. Rule Crim P. 32

(1)(3)A - provides that it may accept any undisputed portion of the presentence report as a finding of fact;

(c)(3)(D) - provides that a defendant may challenge factual inaccuracies contained in the presentence investigation report

Fed. Rule 9(b) - provides that a judge may dismiss a second or successive habeas petition. if the judge find that it fail to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge find that failure of the petitioner to asserts those grounds in a prior petition constitutes an abuse of writ.

The Supreme Court determined that raising a new or different claim in a subsequent habeas petition constitutes an abuse of writ unless the petitioner can demonstrate both cause for his failure to asserts the claim in an earlier petition and prejudice if the court fails to consider the new claim.

STATEMENT OF THE CASE

The Clerk record reflects that on May 9, 2013. A presentence investigation hearing was held in Cause No. 1364440. The State of Texas v. Stevie Wyre (C.R. II-1). The record reflect the Applicant plead guilty to the charge of Aggravated Sexual Assault of a child under 14. There was NO Agreed Recommendation in the case. There was NO finding of guilt and sentencing was deferred to a pre-sentence investigation (PSI) hearing (C.R. II-3).

The first witness called by the State was KAREN PARKER (C.R. II-5). Ms. Parker is employed with the Department of Family and Protection Service (C.R. II-5). Ms. PARKER, became involved in the case on December 5, 2012 and met with the children individually their parents and with Mr. Wyre the Applicant, where he was incarcerated (C.R. II-6).

Ms. PARKER stated that the children had alot of fear in them and a hard time disclosing and talking about the abuse, but it slowly coming out. (C.R. II-6) Ms. PARKER stated that one of the children "Anabel" told her, She did not want to celebrate her birthday, because the Applicant, Raped her on her birthday (C.R. II-7).

Ms. PARKER met with the Applicant, Mr. Wyre two times in the jail on San Jacinto to explain to him, what a family plan of service is, and to see, if he was interest in working with the service (C.R. II-7-8). Ms. PARKER said, she did it because the Applicant, Mr. Wyre's children "Love Him (C.R. II-8).

On the Second visit Ms. Parker stated advised by tell him that, if He signed the family plan of service, He would be able to get out of jail (C.R. II-9). Ms. Parker stated that, she would be the caseworker for the girls and they were in a safe environment (C.R. II-10). Ms. Parker stated she had some unsworn statement and introduced them to the Court (C.R. II-10) Ms. Parker then asked to be excused from Courtroom (C.R. II-10).

The Court noted that the State had provided the Court with some letters (C.R. II-10). The State agreed that the State had provided the Court with some letters which had been tendered to the Defense (C.R. II-10). The Defense Counsel had no objection to the letters being admitted into evidence and into the PSI report (C.R. II-10).

In Closing the State asked the Court to look at the letters and consider all the evidence in the PSI report (C.R. III-12). The State's Exhibited "1", the PSI report was entered into evidence, prior to sentencing (C.R. III-12).

The Presentence Investigation Report states on page 13. At V Evaluation

- The complainant were not interviewed for the PSI but their CPS caseworker will be in Court to testify during the hearing.

Also; it states: The Following Topic, Hearing has been Addressed to comply with Article 42.12, section 9 and should Not Be interpreted As A Recommendation for sentencing.

Summary of Argument

Petitioner, Wyre asserts, The United States Court of Appeals and The United States District Court for the Southern District, rejected and failure to ~~entertain~~ his petition of Actual Innocence accompanied by claim of a constitutional violation, that resulted in a Miscarriage of Justice.

Accordingly to the requirement in *McQuinn v. Perkins*, 569 U.S. 383 (2013) (quoting) *Schlup v. Delo*, 513 U.S. 298, 130 L.Ed.2d. 808, 115 S.Ct. 851 (1995), under 28 U.S.C. § 2244(b)(2)(B)(i)(ii), (b)(3)(C). "Refer to: No. 21-20134, Wyre v. Lumpkin, USDC No. 4:21-cv-0462"

Standard of Review

The AEDPA of 1996 - give a state prisoner one year to file a federal habeas petition starting from . . . the date on which the judgment became final, 28 U.S.C. § 2244(d)(1)(A).

But, if the petition alleges newly discovered evidence, the filing deadline is one year from the date on which the factual predicate of the claim . . . could have been discovered through . . . due diligence § 2244(d)(1)(D) quoting *McQuinn v. Perkins* 569 U.S. 383; S.Ct. 1924; 185 L.Ed.2d. 1019 (2013)

Congress did not simply incorporate the miscarriage of Justice exception into 28 U.S.C. § 2244(b)(2)(B) and § 2254(e)(2). Rather Congress constrained the application of the exception Prior to enactment of the AEDPA of 1996 - A court could

GRANT relief on a second or successive petition, then known as an abusive petition, if the petitioner could show that a fundamental miscarriage of Justice would result a failure to entertain the claim section § 2244(b)(2)(B)(i)(ii) quoting *Schlup v. Delo*, 513 U.S. 298, 130 L.Ed.2d. 808, 115 S.Ct. 851 (1995).

In *Cooper v. Woodford*, 358 F.3d. 1117-24 (9th Cir. 2004). The Ninth Circuit Court found that Cooper had made a claim of Actual Innocence accompanied by a claim that the State violated *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d. 215, 83 S.Ct. 1194 (1963). Because Cooper makes a claim of Actual Innocence accompanied by a claim of a Constitutional violation where he is making a gateway claim under *Schlup v. Delo*, 513 U.S. 298, 130 L.Ed.2d. 808 115 S.Ct. 851 (1995).

To make a successful claim under *Schlup* - a petitioner must show that in light of all the evidence, including new evidence it is more likely than not that, no reasonable juror would have found petitioner guilty beyond a reasonable doubt. *Carriger v. Stewart*, 132 F.3d 463, 478 (9th Cir. 1997) (en banc) quoting *Schlup* 513 U.S. at 327.

The Supreme Court in *Schlup* "emphasized that in considering all the available evidence the Court is not bound by the rules of Admissibility, but must consider all the evidence, including that alleged to have been illegally, Admitted (but with due regard to any unreliability of it) and evidence tentatively claimed to have become available only after the trial Id.

The Anti-Terrorism and Effective Death Penalty Act (AEDPA) - requirements for a second or successive application are stricter than the Schlup standard in two ways. First § 2244(b)(2)(B)(i) - "Requires that the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." There is no requirement under Schlup that the factual claim was not discoverable through the exercise of due diligence. Second § 2244(b)(2)(B)(ii) - "Require that the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." under Schlup - requires only that an applicant show that it is more likely than not that no reasonable factfinder would have found him guilty.

By prima facie showing the Court, understand simply a sufficient showing of possible merit to warrant a fuller exploration by the district court. "Woratzek v. Stewart, 118 F.3d. 648, 650 (9th Cir. 1997) (quoting) Bennett v. United States, 119 F.3d. 468, 469 (7th Cir. 1997)

In Cooper at 358 F.3d. 1120, II, Cooper attached two new declaration to his application both signed in January 2004. These declaration, if believe appear to indicate that a Brady violation has taken place and that crucial evidence introduced at trial was not reliable, only two pieces of evidence at trial connected Cooper to the Ryan House, one was a bloody tennis shoes print found on a sheet in Doug and Peggy's bedroom, The other was a

single spot of blood found on a wall in the hallway.

Cooper attached to Application a sworn declaration of Midge Carroll who was Warden of CIM at Chino while Cooper was incarcerated there, Warden Carroll's declaration dated January 30, 2004.

The declaration of Warden Carroll declaration and Counsel's declaration that Cooper first became aware of the information in the Carroll declaration on that same date together make out a prima facie case that the information could not have been previously discovered through the exercise of due diligence.

Ulster Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d. 215 83 S.Ct. 1194 (1963) - the prosecution has a constitutional obligation to turn over exculpatory evidence to the defendant. The obligation is independent of any specific request by the defendant for such information *United States v. Agurs*, 427 U.S. 97, 107, 49 L.Ed.2d. 342, 96 S.Ct. 2392 (1976).

Evidence is material, if there is a reasonable that had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682, 87 L.Ed.2d. 481 105 S.Ct. 3375 (1995) (see also) *Strickler v. Greene*, 527 U.S. 263, 280 144 L.Ed.2d. 286, 119 S.Ct. 1936 (1999); *Kyles v. Whitley*, 514 U.S. 419, 433 -34, 131 L.Ed.2d. 490, 115 S.Ct. 1555 (1995).

In the Case No. 21-20134, *Wyre v. Lumpkin* 2USDC No. 21-cv-0462 Wyre attached two: "3 pages documents"

that states: 1). Only on Fox 26 News, CPS caseworker accused of lying under oath dated 4/15/2020 and 2). Houston Chronicle New Article that featured the information on CPS caseworker, where the Agency was sanctioned \$127K penalty by State Judge, dated 7/18/2020

Wyre attached these documents to his post application 11.07 in Tr. Ct. No. 1364440-E and C.C.A. No. WR-83,236-07 4/2020. The State Court's dismissed as Subsequent Application on 6/3/2020 Wyre filed a federal writ and Motion for Authorization and Motion for En Banc Review with the same documentation to the U.S. Court of Appeals 5th Cir and the U.S. District Court for the Southern District of Texas. Both Courts rejected and failed to entertain Wyre's 'Actual Innocence Claims' in the proceedings.

Wyre asserts, due to the newly discovered evidence he made a prima facie showing that the documents present could not have been previously discovered through the exercise of due diligence § 2244(b)(2)(B)(i) (ii) and Schlup Standard.

Wyre contends, that a Brady and Giglio violation has taken place, where Wyre became aware of the information in 2020. Because there was no other witness, Ms. Parker the CPS caseworker testimony was essential to the case without it there could not have been a conviction, there was no evidence shown, there was no cross-examination of the State's witness, Ms. Parker introduced some unsworn statements, then asked to be excused (C.R. II-10) and all the evidence was admitted into the PSI report. (C.R. III-12).

In *Finley v. Johnson*, 243 F.3d. 215, 218, -19, 20; 3, 11 (5th Cir. 2001)
The Fifth Circuit Court states - In order to obtain a Certificate of Appealability (COA) from the district Court, Finley had to make a substantial showing that he had been denied a federal right. *Newby v. Johnson* 81 F.3d. 567, 569 (5th Cir. 1996). To do this he had to demonstrate that the issue are debatable among jurist of reason, that a court could resolve the issues in a different manner, or that the questions are adequate to deserve encouragement to proceed further. *James v. Cain*, 50 F.3d. 1327, 1330 (5th Cir. 1995).

The district court held that he made such a showing with regard to whether dismissal of his petition on the grounds of procedural default might result in a fundamental miscarriage of justice.

In *Finley* 243 F.3d. at 220, 3, 11
Procedural default of a federal claim in state court bars federal habeas review of that claim unless the petitioner can show cause for the default and prejudice, attributable thereto. *Murray v. Carrier*, 477 U.S. 478, 485, 106 S.Ct. 2639, 91 L.Ed.2d. 397 (1986) or demonstrate that failure to consider the federal claim will result in a fundamental miscarriage of justice. *Id* at 485, 106 S.Ct. 2639.

The fundamental miscarriage of justice exception to the rule that state procedural default bars federal habeas review is limited to cases where the petitioner can make a persuasive showing that he is actually innocent of the charge against him. (see *Coleman*, 501 U.S. at 750, 111 S.Ct. 2546; *Ward v. Cain*, 53 F.3d. 106, 108 (5th Cir. 1995).

Essentially, the petitioner must show that, as a factual matter, He did not commit the crime for which he was convicted. Fairman, 188 F.3d. At 644. Under these circumstances, the district court's conclusion that Finley cannot show "Actual innocence" seems a too restrictive interpretation of the requirement. The purpose of the exception is to prevent a miscarriage of justice by the conviction of someone who is entitled to be acquitted because he did not commit the crime of conviction. Fairman, 188 F.3d. At 644.

To establish the requisite probability that he was actually innocent, the petitioner must support his allegations with new reliable evidence that was not present at trial and show that it was more likely than not that no reasonable juror would have convicted him in light of the new evidence." Fairman 188 F.3d. At 644, quoting Schlup v. Delo 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed. 2d. 808 (1995)

In Fairman, the petitioner claim of self-defense at trial was supported years later by an eyewitness who recanted his earlier trial testimony to the contrary Id

The Court held that the petitioner had satisfied the Ward threshold for showing actual innocence because belief in [the eyewitness] testimony could firm [the petitioner's] claim of self-defense such that it was not just possible but more likely than not that no reasonable juror would have convicted him Id at 645.

In the Case at Hand No. 21-20134, Wyre v. Lumpkin USDC No. 4:21-cv-0462, Wyre filed his COA, then the United States Court of Appeal reinstated his appeal on 5/3/2021

10 months (see Appendix U) the Court of Appeals 5th Cir. Court Denied Wyre's claim, failure to grasp the significance of Wyre's Actual Innocence Claim accompanied by a claim of constitutional violation, ignoring the claim in the petition and the Exhibits "Documents that contains judicial findings. due to the newly discovered evidence.

In *Wilke v. Ryan* 711 F.3d. 998-1000, 01, 03, 04, 1005-1010, 11, 12 1013-20, 1023-1025 (4th Cir. 2013).

This Court review of the district Court's Ruling is de novo. *Walters v. Mass*, 45 F.3d. 1355, 1357 (4th Cir. 1995) - A federal Court review of a State Court judgment is constrained by 28 U.S.C. § 2254 (d)(1) - contrary to clearly established federal law; and 28 U.S.C. § 2254(d)(2) - based on an unreasonable determination of the fact in light of the evidence presented in the state court proceeding.

An Application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State Court shall not be grant with respect to any claims; that was adjudicated on the merits in state court proceeding, unless the adjudication of the claims

- 1). resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States, or;
- 2). resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.

Under AEDPA, the Court may grant habeas relief if the state court proceeding "resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States 28 U.S.C. § 2254(d)(1); or if the proceedings "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding id § 2254(d)(2).

A state court decision that provides no explanation is entitled to AEDPA deference, *Horroton v. Richter* 131 S.Ct. 770, 784 178 L.Ed.2d 624 (2011). but a state court decision that fails to apply the record correct controlling authority is contrary to, "... established Federal law" and not entitled to AEDPA deference *Beno v. Lambert*, 283 F.3d. 1040, 1051 (9th Cir. 2002) (internal quotation marks omitted); *Shackleford v. Hubbard* 234, F.3d. 1072, 1077 (9th Cir. 2020) (internal quotation marks omitted).

Brady and its progeny require the state to disclose all material evidence that could exculpate the defendant, including evidence that could be used to impeach one of the prosecution's witnesses or undermine the prosecution's case. The prosecution must turn over exculpatory evidence to the defense; this doctrine applies to impeachment evidence as well.

The law requires the prosecution to produce Brady and Giglio material whether or not the defendant request any such evidence, *Strickler v. Greene* 527 U.S. 263, 280 119 S.Ct. 1936, 144 L.Ed. 2d 286 (1999); *United States v. Agurs*, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed. 2d. 342 (1976)

In Milke, she argued that her "right to a fair trial" had been compromised by her inability to get access to impeachment evidence in Saldate's personnel file. She asserted that the truthfulness and veracity of Saldate were material to her case and that, under federal and state law "the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial."

Accompanying her impeachment evidence claim, Milke attached document from cases in which Saldate had committed misconduct see her Appendix. None of the document had been disclosed by the state at trial.

To support this proposition, she cited the Supreme Court's decision, discussion of Brady disclosure obligation in *Donnelly v. DeChristoforo*, 416 U.S. 637, 647, 94 S.Ct. 1868, 40 L.Ed. 2d. 431 (1974). Indeed, Milke's reference to "egregious misconduct" come directly from DeChristoforo's use of that phrase to discuss Brady. See id. at 647-48 (referring to the sort of egregious misconduct held in Brady to amount to a denial of constitutional due process).

Contrary to clearly established Federal law, Long-established Supreme Court precedent holds that the prosecution must turn over exculpatory evidence to the defense. *Brady* 373 U.S. at 87 (see also) *Bagley* 473 U.S. at 674-78. This doctrine applies to impeachment evidence as well, *Giglio*, 405 U.S. at 154-55; see also *Bagley*, 473 U.S. at 676. In *Giglio*, the prosecution's case depended almost entirely on the testimony of an unindicted co-conspirator. *Giglio* 405 U.S. at 151, 154. Without his testimony there could have been no indictment and no evidence to carry the case to the jury. Id. at 154.

The Court document and the information in the personnel file fit within the broad sweep of Giglio. And it was the prosecutor duty to learn of any favorable evidence known to the other acting on the government's behalf in the case, including the police "Kyles v. Whitley 514 U.S. 419, 437-38, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

Milke's claim was straightforward: She couldn't effectively cross-examine Saldaña because the state had failed to disclose significant impeachment evidence.

Instead of examining this claim in light of Giglio - asking whether the evidence was favorable, whether it should have been disclosed and whether the defendant suffered prejudice. see Strickland 527 U.S. at 281-82 the state court focused on the discoverability of the evidence and the specificity of the claim. This is not the inquiry called for by long-standing Supreme Court caselaw. Because the state court focused on the wrong question in denying Milke's impeachment evidence claim, it applies the wrong legal framework; its decision is thus "contrary to... clearly established Federal law and unworthy of AEDPA deference see Ben 283 F.3d at 1051; Shackelford 234 F.3d at 1077.

Unreasonable determination of the fact. The state court's decision is also not entitled to AEDPA deference because it seriously mischaracterized key evidence that supported Milke's claim. Section 2254(d)(2) authorizes federal habeas relief when the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Such unreasonable determination "come in several flavor" one of them being "where the fact-finding process itself is defective Taylor v. Maddox, 306 F.3d 992, 1000, 1001 (9th Cir. 2004).

The prosecution had an inescapable "Constitutional" obligation under Brady and Giglio to produce the evidence. *Kyles* 514 U.S. at 438. its failure to comply with that requirement rendered the fact-finding process employed by the state court . . . defective." see *Taylor*, 366 F.3d at 999. In light of the evidence presented in the state court proceeding "28 U.S.C. §2254(d)(2) - evidence that was materially incomplete due to the prosecution's misfeasance - the state court's fact-finding was fatally undermined by the absence of evidence that the state was required by Brady and Giglio to produce.

In *United States v. Kiszewski*, 877 F.2d 210 (2nd Cir 1989) Reliable evidence of a law enforcement officer's misconduct in unrelated case is admissible to impeach that officer's credibility particularly where credibility is the central issue in the case and the evidence present at trial consists of opposing stories presented by the defendant and government agent at 216.

The prosecution in *Kiszewski* didn't turn over any Brady material, so shortly before trial, the defense subpoenaed the personnel files of two FBI agents. 877 F.2d. at 215. The government admitted that one of the agents had a few complaints against him including one for which he had been reprimanded *Id.*

Due process imposes an inescapable "duty on the prosecutor to disclose known, favorable evidence rising to a material level of importance" *Kyle* 514 U.S. at 438. Favorable evidence includes both exculpatory and impeachment material that is relevant either to guilt or punishment. see *Brigley* 473 U.S. at 674-76. *Giglio* 405 U.S. at 154. The prosecutor is charged with knowledge of any Brady material of which the prosecution's office or the investigation police agency is aware (see *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006) (per curiam)).

In *Rodriguez v. Johnson*, 104 F.3d 694 - 700 (5th Cir. 1997)

Where Rule 9(b) - provides that a judge may dismiss a second or successive habeas petition. if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those ground in a prior petition constituted an abused of the writ Rule 9(b), Rules Governing Section 2254

In *McCleskey v. Zant* the Supreme Court determined that raising a new or different claim in a subsequent habeas petition constitutes an abused of the writ unless the petitioner can demonstrate both cause for his failure to assert the claim in an earlier petition and prejudice if the court fails to consider the new claim 409 U.S. 467, 111 S.Ct. 1454, 1470, 113 L.Ed.2d. 517 (1991); *Saahir v. Collins* 956 F.2d. 115. (5th Cir 1992); *Woods v. Whitley*, 933 F.2d 321, 323 (5th Cir. 1991)

The Cause standard requires a habeas petitioner to show that "some objective factor external to the defense" prevented the petition from raising the claim *McCleskey*, 111 S.Ct. at 1470 quoting *Murray v. Carrier* 477 U.S. 478 106 S.Ct. 2639, 2645 91 L.Ed.2d. 397 (1986). Example of external impediment include active government interference or the reasonable unavailability of the factual or legal basis for the claim 111 S.Ct. at 1472. if a petitioner fails to demonstrate cause, the court need not consider whether there is actual prejudice *Saahir* 956 F.2d. at 118.

The government bears the burden of pleading Abuse of writ. *McCleskey*, 499 U.S. at 493, 111 S.Ct. at 1470; *Woods* 933 F.2d. at 323. The government satisfies this burden "if with clarity and particularity, it notes petitioner's prior writ history, identifies the claims that appear for the first time and alleges that petitioner has abused the writ. *McCleskey* 499 U.S. at 494, 111 S.Ct. at 1470. The burden to disprove abuse then shifts to the petitioner, *Id.*

Finally, even if the petitioner cannot demonstrate cause he may ultimately prevail if, he can demonstrate that a fundamental miscarriage of Justice" would result from failure to entertain the new or successive habeas claim *Id.*

This class of cases is exceedingly narrow, resulting from extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime, *Id.* [The term actual innocence' means factual as opposed to legal innocence — legal innocence, of course would arise whenever a constitutional violation by itself requires reversal, whereas actual innocence, as the Court stated in *McCleskey* means that the person did not commit the crime. *Johnson v. Hargett*, 978 F.2d. 855, 859-60 (5th Cir. 1992) emphasis in original cert. denied, 507 U.S. 1007, 113 S.Ct. 1652 123 L.Ed.2d. 272 (1993).

In *United States v. Wright* 43 F.3d. 491 (10th Cir. 1994)

The Tenth Court of Appeal held Pleading guilty does not preclude a defendant from claiming that his plea was produce of prosecutorial, threat, duress, misrepresentations or improper promises.

Under certain limited circumstances, the prosecution's violation of Brady can render a defendant's plea involuntary as the court stated in *Fambo v. Smith*, 433 F. Supp. 590, 598-99 (1994) (W.D.N.Y.) aff'd, 565 F.2d 233 (2d Cir. 1977) (per curiam) Without (the clearly exculpatory) evidence before it, the trial court which accepted the plea could not in fact, satisfy itself in any meaningful sense that petitioner's guilty plea was voluntarily and intelligently made by an informed defendant with adequate advice of counsel, and that there was nothing to question the accuracy and reliability of this defendant's admission that he committed the crime with which he had been charged 433 F. Supp. at 599. Thus a defendant who has pleaded guilty is not automatically barred from claiming in Section 2255 that the prosecution withheld material evidence. Of course, even if a Brady violation established habeas relief would clearly be the exception *White* 858 F.2d 422.B.

A defendant is procedurally barred from presenting any claim in a Section 2255 petition that he failed to raise on direct appeal unless he can demonstrate ~~cause~~ for his procedural default and prejudice suffered thereby, or that the failure to hear his claim would result in a fundamental miscarriage of justice. 2 *United States v. Warner* 23 F.3d 287, 291 (10th Cir. 1994).

The duties imposed by Brady and Giglio, do not require a prosecutor to ~~deliver~~ his entire file to defense counsel but only disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial" *Baeley* 473 U.S. at 675 (footnote omitted) As the Court stated

in Brady, the prosecution's suppression of exculpatory or impeachment evidence violates due process only when the evidence is material either to guilt or to punishment 373 U.S. at 87. In this context, evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability, is a probability sufficient to undermine confidence in the outcome. Ballinger v. Kerby 3, F.3d 1371 1376 (10th Cir. 1993) quoting Bagley 473 U.S. at 682 (opinion of Blackmun J)

A defendant who has made an affirmation of voluntariness and has pled guilty . . . carries a heavy burden in subsequently claiming that his plea was involuntary. United States v. Whalen 476 F.2d 1346, 1348 (10th Cir. 1992). Nevertheless, such statements do not stand as an absolute bar to post-conviction relief Blackledge v. Allison, 431 U.S. 63, 74-75, 52 L.Ed.2d 136 97 S.Ct. 162 (1977). Appellant may claim that his representation at the time his guilty plea was accepted were so much the product of such factor as misunderstanding, duress or misrepresentation "that they rendered his guilty plea a constitutionally inadequate basis for imprisonment Id at 75

A defendant must demonstrate either cause or prejudice or a fundamental miscarriage of Justice. Warner, 23 F.3d at 291.

To show prejudice, Appellant, must demonstrate that He was denied fundamental fairness "Murray v. Carrier, 477 U.S. 478, 494, 91 L.Ed.2d 397, 106 S.Ct. 2639 (1986); or that but for the error he might not have been convicted "Reed v. Ross, 468

U.S. 1, 12, 82 L.Ed. 2d. 104 S.Ct. 2901 (1984). In the context of a guilty plea, Appellant must show that there is a reasonable probability that absent the alleged coercion he would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59, 88 L.Ed. 2d. 106 S.Ct. 366 (1985).

Appellant has alleged that but for the threats against his family, he would have proceeded to trial. Under these circumstances, the government threats, if they were made, were clearly prejudicial. Thus if Appellant can establish the factual bases for demonstrating cause (including that the prosecution engaged in misconduct).

Once a Brady violation has been established a federal habeas Court is required to evaluate all information in the case, not just information relevant to the Brady violation, other evidence in the case.

In *United States v. Wolfe*, 435 F.3d. 1289, 1299-1300 (10th Cir. 2006) this District Court has an affirmative duty to ascertain the reliability and accuracy of the PSR or PSI report. Under Fed. Rule 32 triggered when a PSR or PSI report contains contradictory factual inaccurate information.

Once a defendant make a specific allegation of factual inaccuracy the government bear the burden of showing by preponderance of evidence the finding reliability.

Under Fed. Rule Crim. P. 32(c)(3) D and 32(i)(3)(A)

Fed. Rule Crim. P. 32(c)(3)(D) - provides that a defendant may challenge factual inaccuracies contained in a PSI Report.

Fed. Rule Crim. P. 32(i)(3)(A) - provides that at sentencing the Court . . . may accept any undisputed portion of a presentence report as a finding of facts. In United States v. Booker 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) - has not relieved a defendant of his obligation under 32(c)(3)(D) and 32(i)(3)(A) to point out factual inaccuracies in the PSR or PSI report, and require a defendant to challenge any factual inaccuracies in the PSR or PSI report before or during sentencing, permits the district court to address those objections at a time and place when the district court is able to resolve those challenges.

REASONS FOR GRANTING THE PETITION

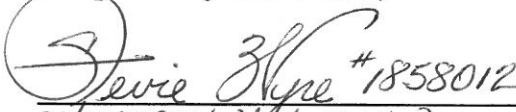
Where the United States Court of Appeals, Fifth Circuit decision conflict with its own and other Circuit Court's opinion(s), and The United States District Court for the Southern District of Texas decision to Bar Wyre's petition as unauthorized and dismissed without prejudice, due to an imposed sanction to an indigent Appellant; Where: the failure to grasp the significance of Wyre's Actual Innocence Claims, accompanied by a claim of constitutional violation, because both Courts ignored the claims in the petition and the "documents" in Wyre's Affidavit that containing judicial findings rather than mere allegation, where the Courts rejected and the failure to entertain Wyre's claims that establish clear and convincing evidence and newly discovered in the whole proceedings. ... see Appendix at V

CONCLUSION

Petitioner Wyre asserts, that A Denial of Due Process in this case, is
A FLAGRANT violation of Federal law, only A Supreme Court decision may cure.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

 #1858012
WAINWRIGHT Unit, 2665 Prison Rd #1
Lovelady, Texas 75851
Date: MARCH 31, 2022

United States Court of Appeals
for the Fifth Circuit



A True Copy
Certified order issued Mar 02, 2022

Styke W. Cuyler
Clerk, U.S. Court of Appeals, Fifth Circuit

No. 21-20134

STEVIE WYRE,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice,*
Correctional Institutions Division,

Respondent—Appellee.

Application for Certificate of Appealability from the
United States District Court for the Southern District of Texas
USDC No. 4:21-CV-462

ORDER:

Stevie Wyre, Texas prisoner # 1858012, seeks a certificate of appealability (COA) from the dismissal of his 28 U.S.C. § 2254 application challenging his conviction for aggravated sexual assault of a child under the age of 14. The district court initially found that the § 2254 was an unauthorized successive application and that Wyre was barred from challenging his conviction because he had not paid a \$100 sanction imposed by this court for his repeated frivolous attempts to file successive § 2254 applications. The district court then noted that Wyre recently paid the \$100

No. 21-20134

sanction but that the application was nonetheless successive and unauthorized.

Wyre's arguments about perjury and the withholding of evidence pertaining to his sentence fail to show "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, Wyre's motion for a COA is DENIED because he does not make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because Wyre's argument concerning the lack of an evidentiary hearing is raised for the first time on appeal, this court will not consider it. *See Leverette v. Louisville Ladder Co.*, 183 F.3d 339, 342 (5th Cir. 1999).

The \$100 sanction has not deterred Wyre from continuing to raise frivolous challenges to his conviction and sentence. Wyre is therefore SANCTIONED in the amount of \$200. Wyre is again WARNED that any future frivolous or repetitive filings in this court or any court subject to this court's jurisdiction will subject him to additional sanctions.



KURT D. ENGELHARDT
United States Circuit Judge

ENTERED

March 04, 2021

Nathan Ochsner, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STEVIE WYRE,

Petitioner,

v.

BOBBY LUMPKIN,

Respondent.

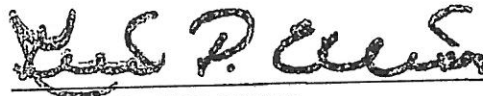
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CIVIL ACTION NO. H-21-0462

ORDER

Petitioner's *pro se* motion for a certificate of appealability (Docket Entry No. 7) is
DISMISSED AS MOOT. The Court denied a certificate of appealability in its order of
dismissal dated February 11, 2021.

Signed at Houston, Texas, on this the 4th day of March, 2021.



KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Stevie Wyre — PETITIONER
(Your Name)

VS.

Bobby Lumpkin — RESPONDENT(S)

PROOF OF SERVICE

I, Stevie Wyre #1858012, do swear or declare that on this date, March 31, 2022, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Mr. Edward Larry Marshall, Office of the Attorney General
Criminal Appeals Division, P.O. Box 12548
Austin, Texas 78711-2548

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 31, 2022

Stevie Wyre #1858012
(Signature)