IN THE IOWA DISTRICT COURT FOR DES MOINES COUNTY

GLENN L. McGHEE, Applicant, vs. **STATE OF IOWA**, Respondent.	CAUSE NO. PCLA 002126 **FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND ORDER DENYING POST-CONVICTION RELIEF**

I. INTRODUCTION

Glenn L. McGhee is serving three (3) life sentences following convictions in January 1973 for three counts of murder, three counts of robbery with aggravation, and two counts of assault with intent to commit murder. The fighting issue in this post-conviction relief case is whether the State of Iowa withheld material exculpatory evidence, which could have been used to show the eyewitness identifications of McGhee were suggestive or to impeach the testimony of the eyewitnesses.[1] McGhee asserts the State withheld Exhibits 2 – 5, which contain material, exculpatory evidence about the accuracy of eyewitness testimony placing McGhee at the scene of the shootings and robbery. At trial, McGhee claimed eyewitnesses Stouffer and Arnee had misidentified him. McGhee seeks a new trial.

The State denies it withheld exculpatory evidence from McGhee. McGhee's trial counsel, J. Hobart Darbyshire, testified he had access to Exhibits 2, 3 and 5 relating to

[1] Research shows the single greatest cause of wrongful convictions nationwide is eyewitness misidentification.

the identification of McGhee by State witnesses. Therefore, the State requests McGhee's Application be denied.

For the reasons stated below, the Court **FINDS** McGhee has failed to establish any of his claims for post-conviction relief by a preponderance of the evidence. Consequently, his Application must be **DENIED**.

II. BACKGROUND FACTS

On January 19, 1972 six men were involved in a robbery at the Shamrock Tavern in Davenport, Iowa. The bartender and two of the bar's patrons were shot and killed during the robbery. Other bar patrons were injured. Glenn McGhee, then age 17, was charged with three counts of murder and aggravated robbery and two counts of assault with intent to commit murder. Attorneys J. Hobart Darbyshire and John Molyneaux were appointed to represent McGhee. Darbyshire acted as lead defense counsel. He had graduated from law school in 1967, and then served as a law clerk to Iowa Supreme Court Justice Clay LeGrand. Attorney Molyneaux assisted Darbyshire with legal research and trial preparation.

During pretrial stages, defense counsel filed a number of Motions, including a Motion To Produce exculpatory evidence. See paragraph 4. A major fact issue at trial was the ability of eyewitnesses to positively identify McGhee as a perpetrator of the robberies and shootings. Darbyshire also filed a Motion To Suppress and Motion For Voir Dire of Identification Witnesses Out Of The Presence Of The Jury (Motion). In the Motion, counsel alleged that police conducted a number of photo lineups during which the alleged victims were shown pictures of the defendants, including McGhee. Counsel argued the lineups were suggestive, tainted and conducted in violation of

McGhee's rights under the Fifth and Sixth Amendments of the United States and Iowa Constitutions.

Counsel further argued that McGhee had been required to participate in multiple lineups without the benefit of counsel. Darbyshire alleged that one such lineup occurred on May 5, 1972 while he was present in the building where the lineup occurred but was not permitted to be present in the room where the lineup took place. Finally, Darbyshire requested the Court to examine identification witnesses outside the presence of the jury during trial. See Motion filed January 2, 1973.

On January 10, 1973 Darbyshire also filed a Motion In Limine stating that witnesses Allen C. Stouffer and William Arnee testified on May 24 – 25, 1972 (the Sherman White trial) during an "in-court identification that they could not identify McGhee as a participant in the robbery/shootings at the Shamrock Tavern." McGhee's counsel argued that because the witnesses were unable to identify McGhee before trial, they should not be allowed to make an in-court identification during trial. This Motion was eventually denied after hearing.

The Court heard arguments on the Motion To Produce and Motion To Suppress on January 15, 1973. The Court granted paragraph 2 but denied paragraphs 1, 3 and 4 of the Motion To Produce. See trial transcript pages 5 – 6. The Court granted the Motion To Suppress to the extent the Court authorized the Defendant to voir dire each identification witness outside the presence of the jury. Trial transcript page 6, lines 5 – 19.

At the Motion hearing, counsel stipulated there was only a single in-person identification involving McGhee. This was held May 5, 1972 with defense counsel in the general area but while not in the room with the individuals making the identification.

Following a week-long jury trial in mid-January 1973, McGhee was convicted of all charges and sentenced to serve life in prison. McGhee appealed the convictions and sentences to the Iowa Supreme Court. The sole issue raised on appeal was whether the trial court improperly denied him a psychiatric evaluation to determine his criminal responsibility at the time of the offense. 220 N.W.2d 908 (Iowa 1974). The Court affirmed the convictions and sentences.

McGhee later brought a federal habeas action which was denied at the district court level and circuit court level. See McGhee v. Nix, No. 4-89-CV-80683 S. D. Iowa, 43 F. 3d 675 (8th Cir. 1994). This Court also believes McGhee brought a state court post-conviction action, which was denied. McGhee v. State, 468 N.W.2d 473 (Iowa 1991). Neither party provided the Court with copies of the briefs, arguments, or rulings filed in either the post-conviction action or federal habeas action. McGhee filed the current post-conviction action on May 15, 2003, almost ten years ago. The Court appointed counsel for him later.

At the trial on the merits held in this action, the parties appeared by counsel. The Court received into evidence Petitioner's Exhibits 1 – 5, and Respondent's Exhibit A. Exhibits 2 – 5 are the documents McGhee asserts the State withheld from him. The Court also received the depositions of Mr. McGhee and his trial counsel. The Court took judicial notice of the trial court file State v. McGhee, Scott County Cause No. 16012, Des Moines County Cause No. 6871 (on change of venue) and the trial court

transcript (one volume). Final arguments were heard August 3, 2012, at which time the case was deemed submitted for ruling.

III. APPLICATION FOR POST-CONVICTION RELIEF: GROUNDS PRESENTED

When McGhee filed his pro se Application on May 15, 2003,[2] he alleged "there exists evidence of material facts, not previously presented and heard, that requires vacation" of his convictions and sentences. He argued (1) the State of Iowa withheld evidence; (2) he was denied effective assistance of counsel; and (3) there was unspecified newly discovered evidence. In support of these contentions, he cited White v. Helling, 194 F. 3d 937 (8th Cir. 1999). Sherman White was one of McGhee's co-defendants. He was granted a new trial recently. The decision of White v. Helling is discussed in greater detail below.

On June 22, 2004 McGhee wrote the Court stating:

> "My post-conviction needs to be amended because I didn't really know how to fill it out."

On May 26, 2009 the State filed an Answer generally denying McGhee was entitled to any relief.[3] On November 9, 2009 the Court entered an Order requiring McGhee's counsel "to recast the application" by January 2, 2010. In spite of this order, the application was not recast by January 2, 2010. On September 21, 2010 the Court appointed substitute counsel to represent McGhee.

On June 9, 2011 McGhee, acting pro se, filed a Motion For New Trial asserting the "D.A. withheld material evidence," citing White v. Helling, supra. On January 10,

[2] This case has taken far too long to litigate due to a variety of factors, including multiple changes of counsel for Mr. McGhee. The delay has been embarrassingly long, and reflects no credit on the judicial system. See White v. Helling, 194 F. 3d 937, 946 n. 6 (8th Cir. 1999).

[3] It appears from McGhee's deposition that he filed an application for post-conviction relief and a federal habeas corpus action at an earlier time, but, if so, the record does not demonstrate the basis for these legal actions or the disposition of either.

2012 McGhee, acting pro se, filed a lengthy "Statement of Facts." He filed several similar documents after that time. Unfortunately, however, no recast or amended Application has ever been filed. Such shortcoming leaves the Court with less guidance than it would like to have about McGhee's claims. In the absence of a single document identifying McGhee's claims, the Court has carefully reviewed the multiple letters he authored and the Statements of Facts he submitted. Also, McGhee gave a deposition for use at trial. Collectively, these documents appear to set out all of McGhee's concerns.

From a review of these documents, the Court has identified these issues upon which McGhee relies to seek a new trial:

1. The Scott County prosecutor withheld exculpatory evidence from McGhee's trial counsel. Specifically, McGhee alleges there were several police reports, Exhibits 2 – 5, relating to whether the State's witnesses could identify McGhee as a perpetrator of the crimes at the Shamrock Tavern.

2. Witness Alberta Taylor was a "heroin addict" and "prostitute" and the State did not disclose this to his trial counsel. See letter of May 14, 2012.

3. Trial counsel, Mr. J. Hobart Darbyshire, was ineffective because he:

a) failed to properly and completely cross-examine State's witness Stouffer about his ability to identify the defendants;

b) failed to have State witness Arnee precluded from testifying based upon improper identification;

c) failed to investigate witness Alberta Taylor, and cross-examine her about her drug addiction and prostitution;

d) failed to investigate the use of mug shots by the State to reinforce witness identifications; and

e) failed to cross-examine witnesses about a .22 caliber gun, or to bring out inconsistencies in the testimony of witnesses.

The Court now discusses these grounds, the applicable facts, and relevant case law.

IV. CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter.

2. The Court must decide this case based solely upon the evidence and law. Evidence is testimony in person, exhibits received by the Court, stipulations of the parties, and any other matter admitted at trial. Uniform Jury Instruction 100.4.

As a fact finder, the Court may not consider sympathy, bias or prejudice toward any party. Here, as is true in most cases, there are some facts that were not put on the record. There may be one or more reasons for this. The parties must realize that the Court can decide the issues only on the evidence presented. The Court cannot go outside the record made in court to find evidence. Where the record is incomplete or evidence is lacking for any reason, the Court is required to fashion its remedy and do equity as best it can with the information, even though imperfect, found in the record.

3. This proceeding is a civil action. McGhee has the burden of proof. That burden is preponderance of the evidence. Preponderance of the evidence means evidence that is more convincing than opposing evidence. Preponderance of the evidence does not depend upon the number of witnesses testifying on one side or the other.

4. When the State filed its Answer, it did not assert a statute of limitations defense. This defense was first raised in a Motion For Summary Judgment filed February 22, 2010. At the time, there was considerable confusion about the particular grounds for relief alleged by McGhee. This Court is not certain the precise grounds for relief have since been more definitively identified, with the possible exception of the allegation relating to the alleged failure to disclose exculpatory evidence. Nevertheless, it is clear that McGhee claims his trial counsel was ineffective. This Court chooses to decide McGhee's claims on the merits.

A. WHETHER TRIAL COUNSEL WAS INEFFECTIVE

1. Principles Of Ineffective Assistance Of Counsel

The principles relating to ineffective assistance of counsel are well established. To prevail on an ineffective-assistance-of-counsel claim, a defendant must show: "(1) counsel failed to perform an essential duty; and (2) prejudice resulted." State v. Maxwell, 743 N.W. 2d 185, 195 (Iowa 2008). Proof of the first prong of this claim requires a showing that counsel's performance fell outside the normal range of competency. "Trial counsel's performance is measured objectively by determining whether counsel's assistance was reasonable, under prevailing professional norms, considering all the circumstances." State v. Vance, 790 N.W. 2d 775, 785 (Iowa 2010) (quoting State v. Lyman, 776 N.W. 2d 865, 878 (Iowa 2010)).

Proof of the second prong requires a showing by the applicant of a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. State v. Artzer, 609 N.W. 2d 526, 531 (Iowa 2000). "In determining whether this standard has been met, the Court must consider the totality of

the evidence, what factual findings would have been affected by counsel's errors, and whether the effect was pervasive or isolated and trivial." State v. Graves, 668 N.W. 2d 860, 882 – 83 (Iowa 2003) (citing Strickland v. Washington, 466 U. S. 668, 695 – 96, 104 S.Ct. 2052, 2069, 80 L. Ed. 2d 674, 698 (1984)). "[I]t is the defendant's burden to demonstrate a reasonable probability of a different result." State v. Reynolds, 746 N.W. 2d 837, 845 (Iowa 2008).

Claims of ineffective assistance involving tactical or strategic decisions of counsel must be examined in light of all the circumstances to ascertain whether the actions were a product of tactics or inattention to the responsibilities of an attorney guaranteed a defendant under the Sixth Amendment." Anfinson v. State, 758 N.W. 2d 496, 501 (Iowa 2008) (quoting Ledezma v. State, 626 N.W. 2d 134, 143 (Iowa 2001)). No person has a constitutional right to a perfect trial.

Trial counsel Darbyshire represented McGhee on direct appeal. Darbyshire did not allege he was ineffective at trial. This Court is uncertain whether McGhee has ever before alleged that his trial counsel was ineffective. Significantly, he has not alleged that Darbyshire was ineffective for not asserting more grounds for relief on direct appeal such as the suggestiveness of the police lineup or photo identifications.

2. Alberta Taylor

McGhee claims his trial counsel failed to properly investigate the background of State witness Alberta Taylor. See McGhee Deposition page 13, lines 3 – 19. McGhee testified he knew Ms. Taylor at the time of his trial. He further stated he knew her reputation. He was not asked whether he conveyed his knowledge to his attorney.

Ms. Taylor, then age 20, testified as a State witness at trial. See trial transcript pages 348 – 373. Taylor testified she was acquainted with McGhee and co-defendants Cunningham and Orr. She stated she saw McGhee, Cunningham and Orr the evening of January 19, 1972 at her home on E. Sixth Street. Transcript page 349, lines 1 – 8. Taylor testified McGhee had a pistol in his possession, and Cunningham had a shotgun. Transcript page 349, lines 18 – 22. She further claimed the two men with guns fired the weapons from her back porch. Transcript page 351, lines 2 – 4.

When trial counsel cross-examined Taylor, she testified she did not know Glenn's last name but she had seen him numerous times at her house. Transcript page 360, lines 15 – 24. She was sure Glenn was the person who came to her home on the 19th of January. Taylor also gave testimony about finding a shotgun shell on the back porch on January 20. This shell was turned over to Davenport police. The shell was introduced into evidence as Exhibit 3(a). Taylor was not asked about her drug usage or if is she was a prostitute.

McGhee offered no expert testimony or opinion disclosing how Darbyshire is alleged to have failed during cross-examination of Taylor. McGhee has not presented evidence that Darbyshire could have used information about Taylor's background or lifestyle to impeach her. McGhee has failed to show that his trial counsel did not have full knowledge of Taylor's background or, more importantly, that counsel failed to properly cross-examine Taylor. There is no evidence of any prejudice to McGhee based upon the manner or method by which trial counsel handled the witness Taylor. McGhee has failed to demonstrate counsel was ineffective regarding witness Taylor. Thus, the Court must deny McGhee relief on this ground.

McGhee also asserts the State failed to disclose to his counsel that Taylor was a prostitute and heroin addict. However, there is little evidence in the record to support this allegation. Moreover, McGhee stated he knew Taylor's background. McGhee failed to prove the State withheld evidence about Taylor. Furthermore, there is no evidence the information about Taylor's lifestyle would have been admissible. Finally, the Court is unable to conclude McGhee was prejudiced. His claim for relief on this ground must therefore be denied.

3. Failure To Properly Cross-Examine Other Witnesses

McGhee alleges several general deficiencies in performance by his trial counsel. The Court carefully reviewed the case file and trial transcript. Counsel filed a number of pretrial motions. Both before and during trial, he consistently and repeatedly challenged the identification of McGhee as a participant in the Shamrock murders and robberies. McGhee has offered no expert testimony, indeed little evidence from any source, to criticize trial counsel or to suggest trial counsel should have done something more to challenge the identification testimony of witnesses Stouffer and Arnee. Likewise, McGhee produced no evidence to support his contention trial counsel should have cross-examined other witnesses differently or investigated the case more thoroughly. As noted, there is no expert testimony claiming trial counsel failed to perform any essential duty or was ineffective in any respect. Furthermore, McGhee has not specifically shown the outcome of his case would likely have been different if trial counsel had done something more or different.

4. .22 Caliber Pistol

McGhee also contends that trial counsel should have argued that evidence about the number of shots fired from a .22 caliber pistol he allegedly brandished could not be true because the gun held only six bullets and seven shots were fired. The Court finds this argument unpersuasive and there is no substantial evidence that counsel neglected an essential duty by not pursuing a line of questions on this subject.

Under the well-established case law, McGhee has failed to establish either prong of the Strickland test. His unsupported claims of ineffective assistance of counsel must therefore fail.

B. WHETHER THE STATE OF IOWA WITHHELD MATERIAL, EXCULPATORY EVIDENCE AND WHETHER THERE IS NEWLY DISCOVERED EVIDENCE

1. Introduction

McGhee asserts the State of Iowa withheld material, exculpatory evidence from him consisting of five police reports relating to eyewitness identifications of McGhee. See Exhibits 2 – 5. He further contends these reports are newly discovered evidence. McGhee relies in substantial part upon the holding in White v. Helling, 194 F. 3d 937 (8th Cir. 1999) discussed below.

The prosecution has a duty to disclose material, exculpatory evidence. Brady v. Maryland, 373 U. S. 83 (1963). The government violates a defendant's right to due process when it suppresses evidence "favorable to the accused ... where the evidence is material either to guilt or to punishment ...." 373 U.S. at 87. Under Brady, the burden is on McGhee to show the State of Iowa suppressed evidence, that the evidence was exculpatory, and that the evidence was material to his guilt or punishment. Evidence is material "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." U.S. v. Bagley, 473 U.S. 667, 682 (1985).

2. Discussion

The critical issue at McGhee's trial was whether the State's witnesses could identify McGhee as a perpetrator of the robbery/shootings. Several witnesses placed McGhee in the Shamrock Tavern at the time of the shootings. First, witness Michael Mann testified he drove his father's car to the Shamrock Tavern on January 19 with McGhee, Vesey, Orr, Sherman White and Cunningham. He stated McGhee and White went into the Shamrock for about three minutes. Transcript page 46, lines 2 – 7. The group returned to the Shamrock several minutes later. Mann testified McGhee, White, Cunningham and Orr went into the Shamrock. Mann stated Orr had a shotgun. Mann also knew McGhee had a pistol earlier in the evening. After a few minutes, the four returned to the car where Mann was waiting. Mann testified when the group returned he heard someone ask Glenn whether he shot them all, and Glenn replied yes. Transcript page 54, lines 2 – 12. The group then drove to Vesey's home where the guns were disposed of. Transcript pages 52 – 53. McGhee did not testify at trial and thus did not deny he made these comments. It appears Mann was never prosecuted for his role in the incident.

Guy Abbott testified he was playing cards at the Shamrock on January 19, with Al Stouffer, Bill Arnee, and Harold McFarland, when a robbery occurred. Transcript page 212, lines 21 – 25. He stated "they busted the front door in, came in with a shotgun, and said: 'This is a holdup. Raise your hands and get on the floor.' He then

heard a shot or two and got shot himself in the head." Transcript page 213, lines 22 – 25. He testified he could identify only one man who came into the bar – Tommy Cunningham. Transcript page 215, lines 1 – 10. Abbott participated in two lineups arranged by police. He was unable to identify any of the other defendants, including McGhee. Transcript page 217.

When the State of Iowa called Al Stouffer to the stand, defense counsel requested to voir dire the witness without the jury present. The Court granted the request. Transcript pages 224 – 225. The voir dire consumed almost 40 pages of transcript. Stouffer testified he viewed pictures of suspects shown to him by police at the hospital on or about January 20. Stouffer stated he thought police showed him 10 or so pictures. Transcript page 226, lines 19 – 21. He was unable to positively identify anyone at that time. Over the course of the next several days, police showed Stouffer pictures on perhaps as many as a dozen different occasions. Transcript page 227, lines 19 – 23. He observed pictures both at the hospital and at home. Transcript page 228. He was unable to identify anyone when police showed him pictures at home. Transcript page 229. Stouffer testified he was "shown a lineup" at the Davenport Police Department, at which time he "think[s] I picked White." Transcript page 229, lines 10 – 18.

Police showed Stouffer pictures before the Sherman White trial in May. At that time, he identified Sherman White. Transcript page 230. Stouffer attended a lineup on May 5 at the Scott County Jail. Stouffer stated he picked McGhee out of this lineup. Transcript page 236. He testified there was no doubt in his mind then about the

identification. (emphasis added) Transcript page 236. Stouffer denied that anyone tried to influence his identification of McGhee or any other defendant.

One of the lead investigators on the case testified that police started off with pictures of 10 – 12 suspects. This group did not include a photo of McGhee. Transcript page 243, lines 1 – 7. Police secured a photo of McGhee about January 23. Transcript page 243, lines 20 – 23. The police presented this photo to Stouffer at his residence about January 23 – 24. According to police, Stouffer told police that he could not be sure McGhee was involved. Transcript page 244, lines 14 – 19. Police officer Hoeper testified Stouffer looked at McGhee's picture, hesitated, and said: "Well, maybe but I don't want to say absolutely positive. Not until I see him in person." Transcript page 246, lines 1 – 6.

Police later showed Stouffer additional photos. Hoeper testified Stouffer said "This is the man" in reference to McGhee's photo. This occurred about March 15, just a few days before the defendants were arrested. Trial counsel asked Hoeper if he kept notes of his meetings with Stouffer. Hoeper stated he kept some. Counsel asked for the notes but Hoeper did not have them with him at trial. Counsel asked to see the notes. Transcript page 248. The State objected stating the notes were properly turned over to defense counsel only after Hoeper testified and after in camera inspection. The Court stated the State's position was correct under State v. Mayhew. Transcript page 248. When the officer testified later during the trial in the presence of the jury, defense counsel did not renew his request for the officer's notes. When Stouffer testified before the jury, he stated McGhee was the person who shot him. Transcript page 268, lines 1 – 4. His testimony was very brief on direct. On cross, Stouffer admitted he drank 8 – 9

beers between 5 – 5:30 p.m. and 9 p.m. He denied he was drunk. Transcript pages 271 – 272. Stouffer did not recall seeing any gun other than a shotgun.

Stouffer claimed he looked directly at McGhee in the Shamrock. Transcript page 273, lines 19 – 22. However, he then stated he could not "swear to it" that it was McGhee who shot him. Transcript page 276, lines 6 – 8. Stouffer admitted he testified under oath at the White trial in May he was not sure he could identify McGhee, transcript page 276, lines 12 – 19, but could only say McGhee looked familiar. Transcript pages 276 – 277. This occurred with McGhee present. When asked to explain how he was not sure about McGhee at White's trial but was certain at McGhee's trial, Stouffer stated he was scared to identify McGhee at the White trial. Transcript page 277.

Officer Hoeper testified that he showed four photos to Stouffer while he remained hospitalized. McGhee's photo was not in this group. Several days later, about January 25, Hoeper went to Stouffer's home with about twelve pictures. Stouffer made no positive identification but said he wanted to see the persons face-to-face. Transcript page 385. On March 15, Hoeper again showed Stouffer pictures of suspects including McGhee. As he did in January, Stouffer hesitated on McGhee's picture and stated he wanted to see the subject face-to-face. Transcript page 386.

Hoeper testified further that at the lineup held May 5, Guy Abbott was unable to identify McGhee, but Arnee and Stouffer did identify McGhee. Transcript page 392. The cross-examination of Hoeper was very brief. See Transcript page 396 – 399. No mention was made of any of the reports, Exhibits 2 – 5, admitted in the post-conviction relief action. McGhee alleges these reports were withheld by the State.

The police reports introduced into evidence as Exhibits 2 – 5 at the post-conviction trial state Stouffer gave police "nothing on identification" as of March 1, 1972. See Exhibit 2. The report from March 15, 1972 states police showed Stouffer about 15 mug shots, and he "picked out the mugs of Orr, Cunningham, and McGhee." The report states: "[Stouffer] could not make positive identification at this time, but recalls seeing this group in the tavern." Exhibit 3. The report states further:

> "Out of the group of mugs, he picked out that of McGhee as the man who shot him." Exhibit 3.

A report from May 14, 1972 states that Stouffer was shown five mug shots, including a mug of McGhee. Stouffer picked out "White as the man he gave his billfold to." Exhibit 5. This report says nothing about Stouffer identifying McGhee's mug shot in any respect. Trial counsel did not ask either Stouffer or either of the police officers in charge of the investigation any questions about the contents of this report.

William Arnee testified McGhee participated in the robbery. Transcript page 317, lines 1 – 9. He also testified he heard four gunshots. Transcript page 318. Without doubt, the testimony of Arnee and Stouffer was critical to the prosecution's case against McGhee. The testimony of Stouffer was also critical to the conviction of co-defendant Sherman White. White's conviction was set aside in 1999 by the Eighth Circuit Court of Appeals. Because McGhee relies heavily on this case to support his claims the prosecution withheld evidence and this evidence is newly discovered, the Court discusses White in detail.

3. Sherman White v. Helling

Witness Allan C. Stouffer was a major witness against White as he testified White was the person to whom he gave his wallet during the Shamrock robbery. Such

testimony was directly inconsistent with White's defense that he was coerced to go to the Shamrock and only watched and did not participate directly. 194 F. 3d at 944.

White conducted discovery during his federal habeas action and uncovered several police reports, not previously disclosed to his trial counsel, which he argued were material evidence with which he could attack the credibility of witness Stouffer. This material evidence included Exhibits 2 – 5 introduced in these proceedings by McGhee.

The Court of Appeals found these documents to be significant in several respects. The report of March 1, 1972, Petitioner's Exhibit 2, states "Stouffer – nothing on identification." In Exhibit 3, a memo from March 15, 1972, it is reported Stouffer picked out the mug shot of Cunningham as the man he believed took his wallet. Significantly, Cunningham told authorities at about this same time he took two billfolds from a couple of men on the floor of the Shamrock. Thus, Cunningham apparently admitted he – not White – took Stouffer's billfold. 194 F. 3d at 945.

Three days later a lineup was held. Stouffer stated he was "almost sure" of two of the participants – Orr and White. This was the first time Stouffer identified White. Stouffer also stated at the lineup he was "not positive" about Cunningham. See Exhibit 4. In May 1972 police interviewed Stouffer again and he picked out Sherman White as the man he gave his billfold to. See Exhibit 5.

After reviewing these reports detailing Stouffer's history of identifications, the federal Court of Appeals concluded:

> "This sequence of events . . . would have provided powerful ammunition for attacking the credibility of Mr. Stouffer's in-court identification of [White] as the man who took his wallet."

The Court continued:

> "Indeed, the inference of suggestiveness is so strong that the evidence might have led the trial court to exclude the Stouffer identification altogether."

Further, the Court noted that the police reports would have been used to impeach police witnesses on the subject of the circumstances of Stouffer's preparation for testimony and pretrial identification of White. The Court explained that Stouffer was asked at trial whether he ever identified Cunningham. Stouffer replied I don't think so, and I don't remember. The Court called this testimony "very likely false" in view of the March 15, 1972 report stating Stouffer picked Cunningham as the person who took his wallet.

McGhee asserts that these same police reports were improperly withheld from his trial counsel. However, trial counsel testified that he had access to the reports, except for Exhibit 4, prior to trial. Darbyshire Deposition page 12, lines 16 – 21. McGhee testified he had not seen the reports nor been advised of them prior to or during his trial. Trial counsel was not asked whether he shared the reports with McGhee and, if not, why not. If the reports were not shared, McGhee's young age and lack of substantial education may help explain counsel's decision. Further, there may be a conflict between Darbyshire's testimony he received the critical reports and his request during trial for Officer Hoeper's notes regarding the meetings he held with Stouffer. On the present record, it is impossible for the Court to know whether Hoeper's "notes" were different than the "reports" Darbyshire insisted he possessed. If the documents are the same, Darbyshire's testimony and his request for the notes are difficult to reconcile.

As noted, the State objected at trial to the release of Hoeper's notes. If those notes had been given to Darbyshire earlier, there would have been no reason to object. Neither McGhee's counsel nor the State asked questions to clarify this apparent conflict.

There are some legitimate questions that could be asked of trial counsel concerning the reports, such as:

1. If you had the reports, why did you not mention them directly in cross-examination? Why did you ask Hoeper for his notes?;

2. If you had the reports, why did you not cross-examine officers or identification witnesses about these items:

(a) Exhibit 3 – police refer to Abbott as the best of the witnesses yet he could not identify McGhee;

(b) Exhibit 3 – police note if Stouffer is "coached properly" he could remember much more. To the Court it seems very important that the officers used the term "coached." This certainly raises the possibility that improper suggestiveness of eyewitnesses occurred;

(c) Exhibit 5 – police note Stouffer went over the five mug shots including one of McGhee, and picked out Sherman White as the man he gave the billfold to. There is no mention made of McGhee. Also, there is a clear indication Stouffer had now identified <u>both</u> Cunningham and White as the person who took his wallet. Arguably, this shows both confusion and the possibility of suggestiveness by law enforcement.

These questions arguably amount to "second-guessing" counsel or "Monday-morning quarterbacking." There are undoubtedly other difficult questions that could be asked of trial counsel with the benefit of hindsight. This Court must avoid the temptation to use hindsight to require that trial counsel's performance have been perfect. The Sixth Amendment demands only "reasonable competence, the sort expected of the ordinary fallible lawyer." 194 F. 3d at 941.

In the end, the only evidence McGhee produced that the State withheld Exhibits 2, 3 and 5 is his testimony, the inference that can be drawn from the failure to mention the reports at trial and the request for Hoeper's notes, and the suggestion that if the State didn't produce the documents to White's counsel, it likely did not produce them for Darbyshire. Balanced against this evidence is Darbyshire's testimony that he had Exhibits 2, 3, and 5. When this evidence is weighed, the Court cannot conclude that McGhee has proved by a preponderance of the evidence that the State withheld material, exculpatory evidence.

The distinctions between White's case and McGhee's case are many. First, White did not have access to the police reports that McGhee's counsel testified he saw and read. Next, witness Stouffer did not give directly inconsistent identifications about McGhee like he did of White and Cunningham. This inconsistency caused the Eighth Circuit to conclude Stouffer's identification of White constituted "an inference of suggestiveness so strong" that the trial court might have excluded it. This inconsistency allowed the Court to find that Stouffer's testimony was "very likely false." This Court declines to draw these same conclusions about Stouffer's testimony vis-à-vis McGhee.

In McGhee's case, counsel attempted without success to show the identifications were suggestive.

Finally, White defended his case on the basis that McGhee coerced him to participate rather than on the basis of misidentification. The Iowa Court of Appeals described White's coercion defense as "credible." White v. State, 380 N.W.2d 1, 5 (Iowa Ct. App. 1985). The State correctly argues these differences are so substantial that the Eighth Circuit's holding in White can be distinguished from McGhee's case.

To the extent McGhee asserts Exhibit 4 is material, exculpatory evidence not produced to his counsel, the Court concludes McGhee failed to show Exhibit 4 contains material exculpatory evidence. Exhibit 4 is a report of Detectives Rubley and Hoeper dated March 21, 1972. The report details a photo lineup police held with several State witnesses, including Arnee and Stouffer. However, McGhee's photo was not one of the photos displayed. Under these circumstances, the Court believes McGhee cannot show the report was material or exculpatory.

CONCLUSION

Based upon this analysis, the Court concludes that McGhee failed to establish by a preponderance of the evidence that his trial attorney was ineffective in any manner. Next, McGhee did not establish by a preponderance of the evidence that the State withheld police reports or other material evidence, or exculpatory evidence under Brady v. Maryland, 373 U. S. 83 (1963). Accordingly, the Application For Post-Conviction Relief is **DENIED**. The taxable costs, including reasonable attorney fees, are taxed to Applicant. Judgment is entered accordingly.

IT IS SO ORDERED.

Dated and signed this 15th day of February, 2013.

/s/_____
Michael J. Schilling
District Court Judge
Eighth Judicial District of Iowa
michael.schilling@iowacourts.gov

Certificate of Service: The undersigned certifies that a true copy of this document was served on each person named (and checked) below, including attorneys of record, or the parties where no attorney is of record, by **electronic mail** and/or enclosing this document in an envelope addressed to each named person at the respective addresses disclosed by the pleadings of record herein, with postage fully paid, by depositing the envelope in a United States depository or hand-delivered via courthouse mail on: _____ (date).

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	_____	_____	Kimberly Shepherd
	_____	_____	Glenn L. McGhee, Inst. # 075700 ASPC/Eyman/SMU-1 Unit, PO Box 4000, Florence, AZ 85132

By: _____