



alleging:

- (1) the denial of due process and of a fair trial based upon the state's direct examination of Trooper Larry Dudgeon;
- (2) the state failed to disclose that it had entered into a plea bargain with state's witness Doug Wright in exchange for his testimony against petitioner; and
- (3) ineffective assistance of direct appeal counsel because counsel failed to raise the claim that the state failed to prove petitioner's guilt beyond a reasonable doubt.

### **BACKGROUND**

The trial evidence that supports the jury's verdicts indicates the following. On August 26, 1995, petitioner Albert Schleicher, Doug Wright, and Cory Hawkins from Hermann, Missouri, went to a hog roast in Owensville, Missouri. (Resp. Ex. B at 99.) Petitioner drove them to the roast. (Id. at 100.)

Later, Wright, armed with a pistol, robbed Doris Klein, who was at work closing up a gas station in Owensville. He took approximately \$200 while Hawkins waited outside. (Resp. Ex. D at 2; Resp. Ex. B at 106.) Wright and Hawkins then returned to Schleicher's car, and Schleicher drove them back to Hermann. (Resp. Ex. B at 107-08.) At trial, Doris testified that neither of the men she saw that evening at the gas station was Schleicher. (Id. at 93.)

Wright testified for the state at trial that Hawkins needed money to pay the hospital bills for his newborn baby, that Schleicher was present when they made their plan to rob the Delano gas station, and that Schleicher knew that Hawkins had stored a gun underneath the car seat. (Id. at 104-05.) Wright said that he and Hawkins got out of Schleicher's car, and he told Schleicher to park the car in a nearby alley and wait. (Id. at 105.) Schleicher drove them back to Hermann, taking an indirect route. (Id. at 108-

09.) The next morning, Hawkins said that he still did not have enough money for the hospital bills, and he wanted to rob another place. (Id. at 112.) Wright and Hawkins robbed a gas station in Columbia; again, Schleicher drove the getaway car. (Id. at 113, 115.) The three men were pulled over and arrested soon after the Columbia robbery. (Id. at 115-16.)

Wright testified on direct examination about any promise made to him by the state in exchange for his testimony in petitioner's trial. He answered, "I wasn't promised anything, but I fought with them long enough to where I could get at least three years knocked off my sentence." (Id. at 130.) Wright testified that he had pled guilty to first degree robbery and armed criminal action, arising out of the Delano robbery, for which Schleicher was then on trial. Wright had already been sentenced to twelve years for the robbery and three years for the armed criminal action, all to run concurrent with other sentences and parole revocations he had. The state agreed to this sentence in exchange for his testifying in Schleicher's case. (Id. at 130-33.) More specific information about the plea bargain was brought out on cross-examination by the defense. (Id. at 133-35.)

Following Wright's testimony the state called Missouri State Trooper Larry Dudgeon. (Id. at 152-57.) Dudgeon testified about being called out to interview Wright after Wright, Hawkins, and Schleicher had been arrested; Dudgeon had had a working relationship with Wright. Wright told Dudgeon that all three, including Schleicher, were involved in the robbery. Wright told him that Schleicher was the driver and knew what was going on. (Id. at 156, 163.) Dudgeon added that he had known Wright since 1982 and believed that Wright always told the truth. (Id. at 157-59.)

Q. (Prosecutor) And do you have an opinion on or do you know of Doug Wright's reputation or have an opinion on Doug Wright's reputation for telling the

truth?

- A. To me in my dealing with Doug Wright I have always found him to be truthful. In my professional dealings with Doug Wright, I found him to be truthful in what he told me in regard to incidents.

\* \* \*

- Q. . . . [I]n your professional dealings with Doug Wright, you always consider that he told you the truth?

- A. Yes, sir, I did.

(Id. at 158-59.)

Hawkins, who acted as the lookout man in the Delano robbery, testified under subpoena for the defense that Schleicher did not participate in that robbery. (Id. at 185.) While Schleicher went inside a bar, Wright and Hawkins stayed outside and made plans to rob the gas station. (Id. at 183.) Wright handed Hawkins some of the money from the robbery and said not to tell Schleicher. (Id. at 185.) Hawkins said that Schleicher did not receive any money, did not know about the robbery, and did not take an indirect way home. (Id. at 187-88.)

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## **DISCUSSION**

### **EXHAUSTION OF STATE REMEDIES AND PROCEDURAL BAR**

\_\_\_\_\_ In order for a state prisoner to obtain federal court relief under § 2254, he must have fully exhausted all remedies available in the state courts for each ground he intends to present in federal court. 28 U.S.C. § 2254(b); Coleman v. Thompson, 501 U.S. 722, 731 (1991); Sloan v. Delo, 54 F.3d 1371, 1381 (8th Cir. 1995), cert. denied, 516 U.S. 1056 (1996). Respondent concedes that petitioner has exhausted his available state remedies, either because he has afforded the state courts a full and fair opportunity to review the claims or because there is no non-futile

state remedy for him to pursue. Coleman, 501 U.S. at 731.

However, a failure to raise a claim in the state courts erects a procedural bar to relief in federal court. Sweet v. Delo, 125 F.3d 1144, 1149-51 (8th Cir. 1997), cert. denied, 523 U.S. 1010 (1998). Petitioner may avoid the procedural bar to federal habeas review if he can demonstrate cause for the default and prejudice resulting from it, or if he can demonstrate that failure to review the claim would result in a fundamental miscarriage of justice. Coleman, 501 U.S. at 750. To establish cause for a procedural default, petitioner must demonstrate that some objective factor external to the defense impeded his efforts to comply with state procedural requirements. Id. at 750-52.

Petitioner may also obtain federal habeas review if he shows that failure to review his grounds for relief would result in a fundamental miscarriage of justice. Id. A fundamental miscarriage of justice would occur if petitioner was actually innocent. Murray v. Carrier, 477 U.S. 478, 495-96 (1986). A habeas petitioner asserting actual innocence to support his allegations of constitutional error must do so with new, reliable evidence. Schlup v. Delo, 513 U.S. 298, 324 (1995). Without new evidence of innocence, even a meritorious constitutional claim is not sufficient to allow a habeas court to reach the merits of a procedurally defaulted claim. Id. at 316.

Respondent argues that petitioner has procedurally defaulted each of his grounds for relief under § 2254.

#### **STANDARD OF REVIEW ON THE MERITS**

This court's review of a state court decision is limited to situations when adjudication of the claim:

- (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.

28 U.S.C. § 2254(d) (1)-(2). "A state court's decision is contrary to clearly established law 'if the controlling case law requires a different outcome either because of factual similarity to the state case or because general federal rules require a particular result in a particular case.'" Tokar v. Bowersox, 198 F.3d 1039, 1045 (8th Cir. 1999) (quoting Richardson v. Bowersox, 188 F.3d 973, 977-78 (8th Cir. 1999), cert. denied, 529 U.S. 1113 (2000)), cert. denied, 531 U.S. 886 (2000). The issue a federal habeas court faces when deciding whether a state court unreasonably applied federal law is "whether the state court's application of clearly established federal law was objectively unreasonable." Williams v. Taylor, 529 U.S. 362, 410 (2000) (plurality opinion).

#### **GROUND 1**

\_\_\_\_\_Petitioner alleges in Ground 1 that his rights to due process and a fair trial were violated by the state's direct examination of Trooper Dudgeon, who vouched for the reliability of Doug Wright, the state's key witness against petitioner. Respondent argues that petitioner has procedurally defaulted Ground 1 because he did not raise it on direct appeal and failed to acknowledge the default in the habeas corpus petition. Contrary to respondent's argument, this ground is not procedurally barred under § 2254 because petitioner raised Ground 1 before the circuit court (Resp. Ex. A at 39) and on direct appeal (Resp. Ex. D at 8). On appeal, the Missouri Court of Appeals summarily affirmed the circuit court's judgments of conviction. Schleicher, 999 S.W.2d at 751-52. Because petitioner has avoided any potential procedural bar, the

merits of this claim should be addressed.

Generally, the admission of evidence is a question of state law that will not form the basis for habeas corpus relief. Mansfield v. Dormire, 202 F.3d 1018, 1022 n.4 (8th Cir. 2000), cert. denied, 531 U.S. 1154 (2001); Clark v. Goose, 16 F.3d 960, 963 (8th Cir.), cert. denied, 513 U.S. 834 (1994). Such a ruling can form the basis of a federal constitutional ground for habeas relief only if it violated a specific federal constitutional right or was so prejudicial that it violated due process. Murray v. Goose, 106 F.3d 812, 815 (8th Cir.), cert. denied, 522 U.S. 851 (1997); Bailey v. Lockhart, 46 F.3d 49, 50 (8th Cir. 1995); Ford v. Armontrout, 916 F.2d 457, 460 (8th Cir. 1990), cert. denied, 499 U.S. 964 (1991).

Generally, under Missouri and federal evidentiary law, the credibility of a witness, who has been impeached, may be rehabilitated by another witness's opinion that the other witness had a reputation for being credible. Fed. R. Evid. 608(a); United States v. Cortez, 935 F.2d 135, 139 (8th Cir. 1991), cert. denied, 502 U.S. 1062 (1992); Haynam v. Laclede Elec. Co-op., Inc., 827 S.W.2d 200, 205 (Mo. 1992) (en banc); United States v. Geston, 299 F.3d 1130, 1136 (9th Cir. 2002); United States v. Sanchez-Lima, 161 F.3d 545, 548 (9th Cir. 1998). Counsel may not ask one witness to comment on the veracity of the testimony of another witness; it is the jurors' responsibility to determine credibility by assessing the witnesses and witness testimony in light of their own experience. Geston, 299 F.3d at 1136.

In the present case, two conflicting versions of the incident were presented to the jury by Wright and Hawkins. It was within the province of the jury to resolve the disputed testimony. During the cross-examination of Wright, defense counsel implied that Wright had an improper motive for testifying, leniency in his criminal sentence in the same case. In response to this

impeachment, the state produced the testimony of Trooper Dudgeon, who had interviewed Wright the day he was arrested, prior to the time the plea bargain was struck. Dudgeon's testimony--vouching for Wright's reliability--referred only to his character for truthfulness and did not constitute improper bolstering. Dudgeon had known Wright through his past dealings with him. His knowledge based on these past contacts is sufficient to provide a basis upon which he could form a reliable opinion concerning Wright's character for truthfulness. Dudgeon's testimony spoke to Wright's general character for truthfulness; it did not merely express his belief in the story Wright told him and the jury. Under the circumstances of this case, the prosecutor's questioning of Dudgeon about the veracity of Wright did not violate petitioner's rights to due process and a fair trial.

Thus, the state courts' decisions on this ground did not involve an unreasonable application of federal law and were not based on unreasonable determinations of the facts. Ground 1 is without merit.

## GROUND 2

\_\_\_\_Petitioner alleges in Ground 2 that his rights to due process, effective assistance of trial counsel, and a fair trial were violated by the state's failure to disclose that it had entered into a plea bargain with Wright for lesser sentences in exchange for his testimony against petitioner. Petitioner did not present this ground either to the circuit court (Resp. Ex. H at 8- 26) or to the Missouri Court of Appeals. (Resp. Exs. D at 8-9, J at 6-7). Consequently, this ground is procedurally barred from review in this court. See Sweet, 125 F.3d at 1149-51.

Petitioner contends that his failure to raise this claim in state court is excused under the "cause and prejudice" exception because he did not learn of the plea bargain with Wright until

after his state remedies were exhausted. The record recounted above indicates otherwise; the provisions of Wright's plea bargain were entirely aired before the jury at petitioner's trial. Petitioner has not shown legally sufficient cause. See Coleman, 501 U.S. at 750. Therefore, the court need not consider whether he was prejudiced because he has not established cause. See id. He also has not presented new and reliable evidence to support a claim of actual innocence. See Schlup, 513 U.S. at 324. Thus, there is no basis for petitioner to claim that his conviction resulted in a fundamental miscarriage of justice. See id.

Ground 2 should be dismissed.

### **GROUND 3**

In Ground 3, petitioner alleges ineffective assistance of direct appeal counsel for failing to raise the claim that the state failed to prove petitioner's guilt beyond a reasonable doubt. Petitioner did not present this ground to the Missouri Court of Appeals on appeal from the denial of his Rule 29.15 motion for post-conviction relief. (Resp. Ex. J at 6-7.) Consequently, this ground is procedurally barred from review in this court. See Sweet, 125 F.3d at 1149-51.

Petitioner argues that the assistant appellate public defender who represented him in the appeal from the denial of his Rule 29.15 motion omitted this claim, after petitioner had alleged it in his original pro se motion. This argument is without merit. There is no constitutional right to an attorney in state post-conviction proceedings. Coleman, 501 U.S. at 752. Consequently, his counsel's failure to include his allegation in the Rule 29.15 proceeding is not a legally sufficient cause for the default; petitioner must bear the risk of any deficiencies in his counsel's performance that resulted in the procedural default. See id. at 752-53. Thus, because petitioner has not shown legally sufficient

cause, the court need not consider whether he was prejudiced. See id. at 750.

Petitioner claims that the evidence presented at trial was insufficient to prove his guilt beyond a reasonable doubt. He claims that a conviction based on insufficient evidence constitutes "a fundamental miscarriage of justice." However, he has not presented new and reliable evidence to support a claim of actual innocence. See Schlup, 513 U.S. at 324. Without new evidence of innocence, even a meritorious constitutional claim is not sufficient to allow this court to reach the merits of a procedurally defaulted claim. Id. at 316. Thus, there is no basis for petitioner to claim that his conviction resulted in a fundamental miscarriage of justice. See id.

Ground 3 should be dismissed.

For these reasons,

**IT IS HEREBY RECOMMENDED** that the habeas petition of Albert Schleicher be denied and the action dismissed.

The parties are advised they have ten days to file written objections to this Report and Recommendation. The failure to file timely, written objections will result in the waiver of the right to appeal issues of fact.

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**DAVID D. NOCE**  
**UNITED STATES MAGISTRATE JUDGE**

Signed this \_\_\_\_\_ day of August, 2003.