

**United States Court of Appeals
FOR THE EIGHTH CIRCUIT**

No. 10-1375

Ricky Kidd,	*
	*
Appellant,	*
	*
v.	* Appeal from the United States
	* District Court for the
	* Western District of Missouri.
Jeff Norman,	*
	*
Appellee.	*

Submitted: April 11, 2011
Filed: August 29, 2011

Before **BYE**, **COLLTON**, and **GRUENDER**, Circuit Judges.

BYE, Circuit Judge.

A Missouri jury found Ricky Kidd guilty of first-degree murder. He received a sentence of life imprisonment without the possibility of parole. After exhausting his state court remedies, Kidd filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his petition, Kidd alleged a Schlup¹ "gateway" claim of actual innocence hoping to resurrect ineffective-assistance-of-counsel claims which had been procedurally defaulted in his post-conviction proceedings. Applying this court's definition of what constitutes "new" evidence under Schlup, see Amrine v. Bowersox,

¹Schlup v. Delo, 513 U.S. 298 (1995).

238 F.3d 1023, 1029 (8th Cir. 2001) ("[E]vidence is new only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence"), the district court² found Kidd failed to present new reliable evidence in support of his claim and denied the petition. Kidd obtained a certificate of appealability. On appeal, Kidd claims Amrine's definition of "new" evidence is inconsistent with Schlup, as well as the Supreme Court's intervening decision in House v. Bell, 547 U.S. 518 (2006). We conclude we are bound to follow Amrine, and therefore affirm the district court.

I

On February 6, 1996, at about 11:30 in the morning, George Bryant and Oscar Bridges were shot and killed at Bryant's home on Monroe Street in Kansas City, Missouri. After an investigation, Kidd and another man, Marcus Merrill, were charged with first-degree murder in the deaths of the two men. The evidence against Kidd and Merrill included testimony from Bryant's daughter, Kayla, who was four years old at the time of her father's death and present in the Bryant home when the shootings occurred. During the investigation, Kayla told police three men visited her father on the day of the shootings. Kayla picked Merrill out of a photo and video lineup as one of the three men involved in the shootings. She reaffirmed her previous identifications of Merrill during trial, but did not make an in-court identification of him. Kayla had picked Kidd out of a video lineup during the investigation, but failed to reaffirm her previous identification of him during trial. She also failed to make an in-court identification of Kidd.

The evidence against Kidd also included testimony from Richard Harris, one of Bryant's neighbors on Monroe Street. Harris testified he was walking down

²The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri.

Monroe Street at the time of the shootings, and saw Bryant's garage door opening while he passed Bryant's house. He saw Bryant duck underneath the garage door, heard Bryant yell for help, and saw a blood stain on the front of his shirt. Another man, who Harris identified as Gary Goodspeed, Jr.,³ chased after Bryant. Goodspeed, Jr., caught Bryant and dragged him behind a car parked near Bryant's carport. Harris then saw a second pursuer exit the house. The second man walked over to where Bryant was lying wounded and shot Bryant twice with a gold .45 caliber handgun. During the investigation, Harris identified Kidd as the shooter in both a photo and video lineup. At trial, Harris testified he was "2001% sure" Kidd was the man who shot Bryant as he lay wounded near the carport. Appellant's App'x at 159.

During the investigation, the police questioned Kidd and his girlfriend, Monica Gray, about their whereabouts on the day of the shootings. Both indicated they picked up Kidd's car at his sister's place of employment in downtown Kansas City about 11:00 a.m. and then drove to the Jackson County (Mo.) Sheriff's office near Lake Jacomo (approximately a half hour from downtown Kansas City) to fill out an application to purchase a handgun. Kidd then visited his daughter, who lived with Kidd's former girlfriend, Kelly McGill, in Blue Springs, Missouri. Kidd's alibi was partially supported by the fact the Jackson County Sheriff's office ran a background check on Kidd's handgun permit application at 1:47 p.m. on the day of the shooting.⁴

At trial, Kidd presented evidence of his alibi through himself, his sister, his sister's coworker, his girlfriend, and his former girlfriend. The jury rejected Kidd's

³Despite Harris's identification of Goodspeed, Jr., as one of the men involved in the shootings, Goodspeed, Jr., was not charged along with Merrill and Kidd.

⁴The state argued the gun permit application could have been delivered the day before the shootings, or Kidd could have mailed or faxed the application or had someone else bring it to the Sheriff's office.

alibi, however, and found him guilty. The jury also found Merrill guilty. Both were sentenced to life in prison without the possibility of parole.

Kidd filed a direct appeal, which was unsuccessful. State v. Kidd, 990 S.W.2d 175, 186 (Mo. Ct. App. 1999). Kidd then brought a motion for post-conviction relief alleging his direct appeal counsel was ineffective for failing to argue Kidd should not have been sentenced as a prior offender. The Missouri Court of Appeals determined Kidd suffered no prejudice from appellate counsel's failure to challenge Kidd's prior offender status, and affirmed the denial of his motion for post-conviction relief. State v. Kidd, 75 S.W.3d 804, 815 (Mo. Ct. App. 2002). Notably, Kidd did not challenge the effectiveness of his trial counsel in his post-conviction action.

Kidd filed a timely habeas petition in federal district court. His habeas petition was initially dismissed, but he obtained new counsel and filed a successful Rule 60(b) motion to have the petition reopened. The amended petition raised eight new claims, including five claims alleging the ineffectiveness of Kidd's trial counsel. Kidd admitted all eight claims had been procedurally defaulted by failing to raise them in his state court post-conviction proceeding, but claimed he could overcome the default by showing his actual innocence. Specifically, Kidd alleged the three men who murdered Bryant and Bridges were Merrill, Gary Goodspeed, Jr., and Gary Goodspeed, Sr. Kidd had an affidavit from Merrill admitting his own role in the two murders, and stating Kidd was not involved. Merrill averred that Kidd "was mistaken for [Goodspeed, Sr.] since they favor." State App'x at 109.

The federal district court held an evidentiary hearing. Merrill testified on behalf of Kidd. He said he and the Goodspeeds committed the murders. Merrill gave a detailed description of the shootings, which matched the physical evidence found at the crime scene. Merrill stated Kidd was not involved. On cross-examination, however, Merrill admitted he and Kidd communicated with one another while the two were incarcerated after being found guilty. Merrill acknowledged he did not come

forward with his current story exonerating Kidd until he had exhausted all of his own appeals.

Several letters between Merrill and Kidd were introduced into evidence. In the first letter, Merrill sent a message to Kidd through another inmate which said Merrill could help Kidd get out of jail, but that in return, Merrill wanted to get out of jail as well. Kidd responded to Merrill, stating:

If Sean [my attorney] can . . . play you decent (which I am confident he can) let say three to five more. Okay, you do the first 15 and let [the Goodspeeds] do their share of the rest. . . . Sean and I figured out that's where you could come in at. Indeed he is not the DA's office, but I do believe he can bring you within a range of time you can deal with.

Id. at 116-17.

Merrill admitted he understood this letter to mean if he testified for Kidd, he might get his life sentence reduced. Merrill responded to the letter by asking Kidd, "[a]lso it's needed to be known what is needed of me and what do I receive in return?" Id. at 124. Kidd responded: "I imagine the D.A. Office will, at least, want an outline of what you would be speaking on. . . . They would then be in a position to offer you what you want (within reason). . . . at this stage you become valuable – more to them than to me." Id. at 119-20. Merrill admitted his testimony was based on his self interest in reducing his life sentence.

Kidd also testified at the hearing, restating his alibi evidence. In addition, Kidd claimed for the first time that Gary Goodspeed, Jr., contacted him the day before the murders. Kidd met with the Goodspeeds. During the meeting, Goodspeed, Sr., asked Kidd about Bryant's status in the drug community and asked Kidd if he would be interested in robbing Bryant. Kidd declined. Kidd further testified that Goodspeed, Sr., called Kidd on the night of the murders and said Bryant was dead, claiming

someone had robbed Bryant before Goodspeed, Sr., had a chance to do so. According to Kidd, Goodspeed, Sr., later met with him and admitted to the murders. On cross-examination, Kidd acknowledged not revealing any of this information to the police in the initial investigation, and admitted lying to the police and changing his story after he discovered he was a suspect.

Richard Harris also testified at the hearing. Although Harris still maintained Kidd was the shooter, Kidd's habeas counsel was able to discredit much of Harris's eyewitness testimony, pointing out discrepancies in his testimony and generally impeaching Harris's credibility. For example, Harris claimed Bryant's shooter had a red do-rag on his head with hair flowing out the back, but it was undisputed Kidd had a shaved head at the time of the murders. In addition, habeas counsel established that Harris frequently used drugs with Bryant, and Harris was upset with Bryant because Bryant wanted to kill Harris's best friend. Furthermore, on the morning of the shootings, Harris admitted smoking marijuana at a neighbor's house before walking past Bryant's house. Harris was walking back to his house to get some food because he was hungry, the implication being he was under the influence of marijuana at the time he witnessed Bryant's shooting. See Webster v. Beary, 228 F. App'x 844, 846 (11th Cir. 2007) (alluding to the connection between the use of marijuana and the "munchies").

In addition, habeas counsel elicited testimony from Harris indicating he observed both Goodspeeds and a third man enter Bryant's garage at the time Harris first walked to his neighbor's house earlier in the morning. Harris admitted he never revealed this information to the police during the investigation. Harris also acknowledged "editing" the information he revealed to the police because he believed himself to be a suspect in the shootings. Habeas counsel also established other witnesses never saw Harris in front of Bryant's house at the time of the shooting.

The district court denied Kidd's habeas petition. The district court noted "Kidd must identify new reliable evidence that was not available at the time of his trial" to support his claim of actual evidence. Addendum at 10. The district court then determined the only new evidence Kidd presented was Merrill's testimony, but found Merrill not to be a reliable witness. The district court specifically referred to "Merrill's blatant attempts to use his recent identification of the Goodspeeds as participants in the murders as a bargaining chip to reduce his own sentence" as the reason for rejecting Merrill's credibility. Id. at 8.

Kidd successfully obtained a certificate of appealability. This appeal followed.

II

On appeal, Kidd challenges the district court's limitation of Kidd's "new" evidence to Merrill's testimony, arguing the new evidence in support of a Schlup claim of actual innocence should include any evidence not presented at the original trial. Because Kidd challenges the legal standard used by the district court to review his habeas petition, we apply de novo review. Riddle v. Kemna, 523 F.3d 850, 851-52 (8th Cir. 2008).

Kidd claims a reexamination of all the evidence in his case establishes his actual innocence. In addition to the evidence recounted above, Kidd refers to additional evidence which could have been discovered and presented by his original trial counsel. Merrill traveled with the Goodspeeds from Georgia to Kansas City just a few days before the murders. Merrill shared an apartment with Goodspeed, Jr., in Georgia and was employed by Goodspeed, Sr. Merrill paid for a hotel room occupied by Goodspeed, Sr., the night before the murders. Goodspeed, Sr., rented a white Oldsmobile which matched the description of the vehicle several witnesses saw leaving Monroe Street immediately after the murders, occupied by three men. Testimony from an individual named Eugene Williams places Merrill and the two

Goodspeeds together the morning of the shootings. Williams also connects Merrill and the Goodspeeds to the weapons used in the murders, and knew the three men were going to rob someone that morning.

Kidd also points to additional evidence which implicates the Goodspeeds in the murders. Goodspeed, Jr., admitted to police he and Merrill had been to Bryant's house a few days before the murders and Kayla told police the men who shot her father had been to her house a few days before the murders. Bryant was known to refer to Gary Goodspeed, Jr., as his "brother" and Kayla twice told police on the day of the shootings that "Daddy's brother killed Daddy." Merrill and the Goodspeeds all gave consistent alibis placing themselves together with one another at the time of the shootings and making no mention of Kidd.

Kidd argues additional evidence also could have been presented at his original trial to strengthen his alibi. Susan Jordan, the dispatcher who processed his gun permit application, confirmed Kidd's application was received the same day as the shootings, refuting the state's claim at trial that Kidd may have delivered the application the day before the shootings. Video monitors near his sister's place of employment may have confirmed he was in downtown Kansas City at 11:00 am on the day of the shootings. Kidd says he made a phone call to his former girlfriend from a public pay phone near the Jackson County Sheriff's office shortly after dropping off his handgun permit application, and thus phone records may have confirmed the timeline of his alibi.

Finally, Kidd relies upon evidence his trial counsel could have used to impeach Harris's eyewitness identification. This evidence includes Harris's drug connections to Bryant, his use of marijuana at the time of the shootings, the inconsistencies between Harris's description of the shooter's appearance (the shooter "had a head of hair" and "wasn't bald-headed at the time") and Kidd's appearance (it is undisputed Kidd's head was shaved completely bald at the time of the shootings), and the

inconsistencies between Harris's description of the shootings and other eyewitnesses who did not see Harris outside Bryant's home at the time.

In Schlup v. Delo, the Supreme Court recognized a habeas petitioner could present a claim of actual innocence as a "gateway" to resurrecting procedurally defaulted claims of constitutional error which occurred in the underlying trial, but "[t]o be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." 513 U.S. at 324. Kidd claims a full examination of all the evidence "old and new, incriminating and exculpatory," House v. Bell, 547 U.S. at 538 (internal quotation marks omitted), is required under Schlup. He claims the standard articulated in Amrine, which stated evidence is not "new" under Schlup unless it was "not available at trial and could not have been discovered earlier through the exercise of due diligence," 238 F.3d at 1029, is inconsistent with Schlup. He also argues Amrine's limitation on "new" evidence is inconsistent with House's requirement for the plenary review of all evidence, old and new.

Subsequent to Schlup, the circuits have disagreed upon what the Supreme Court meant by the "new" part of "new reliable evidence."⁵ The Seventh and Ninth Circuits have interpreted this phrase to mean evidence is "new" for purposes of a Schlup analysis so long as it was "not presented" at trial. Gomez v. Jaimet, 350 F.3d 673, 679-80 (7th Cir. 2003); Griffin v. Johnson, 350 F.3d 956, 962-63 (9th Cir. 2003). The Third Circuit agrees with ours that evidence is "new" only if it was not available at the

⁵Kidd challenges the district court's determination that Merrill's testimony failed the "reliable" part of the Schlup standard, arguing the district court did not consider substantial evidence which supported the truthfulness of Merrill's testimony. The district court found Merrill was not credible, however, and this credibility determination is virtually unreviewable on appeal. See United States v. Cisneros-Gutierrez, 598 F.3d 997, 1103 (8th Cir. 2010).

time of trial through the exercise of due diligence. See Hubbard v. Pinchak, 378 F.3d 333, 341 (3d Cir. 2004).

Both interpretations have been subject to some criticism. The more restrictive definition articulated in Amrine has been criticized when the procedurally defaulted claim which a petitioner hopes to resurrect under Schlup is an ineffective-assistance-of-counsel claim against trial counsel for not discovering and presenting the exculpatory evidence that proves the petitioner's innocence:

Yet arguably it is unfair to a petitioner to apply the Amrine statement of the law in cases in which the petitioner claims that he had had ineffective assistance of counsel by reason of his attorney not discovering exculpatory evidence when the petitioner is relying on that very evidence as being the evidence of actual innocence in a gateway case to reach the ineffective assistance of counsel claim. As we have indicated, the rule that Amrine sets forth requires a petitioner, such as Houck, in effect to contend that his trial counsel was not ineffective because otherwise the newly presented evidence cannot be new, reliable evidence for Schlup purposes.

Houck v. Stickman, 625 F.3d 88, 94 (3d Cir. 2010).

This same problem was identified by the Seventh Circuit when it adopted the broader definition of "new" evidence as any evidence not presented at trial:

Particularly in a case where the underlying constitutional violation claimed is the ineffective assistance of counsel premised on a failure to present evidence, a requirement that new evidence be unknown to the defense at the time of trial would operate as a roadblock to the actual innocence gateway. Here, the very premise of the ineffectiveness claim is that the trial counsel knew of yet failed to present evidence that Gomez is alleging proves his innocence. If procedurally defaulted ineffective assistance of counsel claims may be heard upon a showing of actual innocence, then it would defy reason to block review of actual innocence

based on what could later amount to the counsel's constitutionally defective representation. The burden for proving actual innocence in gateway cases is sufficiently stringent and it would be inappropriate and unnecessary to develop an additional threshold requirement that was not sanctioned by the Supreme Court.

Gomez v. Jaimet, 350 F.3d at 679-80 (footnote omitted).

The broad definition adopted by the Seventh and Ninth Circuits has been criticized as well, however, because "it seems to go beyond what is needed to remedy the particular problem that [the Seventh Circuit] identified because it is not anchored to a claim that there had been ineffective assistance of counsel by reason of counsel's failure to present evidence of the petitioner's innocence." Houck, 625 F.3d at 94. The Third Circuit suggested a modified approach in a situation such as the one faced by Kidd, where the procedurally defaulted claims include ineffective-assistance-of-counsel claims against trial counsel for not presenting the very evidence a petitioner claims proves his or her innocence:

Overall we are inclined to accept the Amrine definition of new evidence with the narrow limitation that if the evidence was not discovered for use at trial because trial counsel was ineffective, the evidence may be regarded as new provided that it is the very evidence that the petitioner claims demonstrates his innocence.

Houck, 625 F.3d at 94.

We conclude the district court correctly interpreted Amrine as requiring Kidd to come forward not only with new reliable evidence which was not presented at trial, but to come forward with new reliable evidence which was not available at trial through the exercise of due diligence. Whatever the merits of a modified approach in situations like the one faced by Kidd, our panel is not at liberty to ignore Amrine because we have already applied Amrine in situations like Kidd's. See Nance v.

Norris, 392 F.3d 284, 291 (8th Cir. 2004) (applying Amrine's definition of new evidence even when one of the procedurally defaulted claims was an ineffective-assistance-of-counsel claim for failure to investigate, argue, and present evidence that allegedly would have proved the petitioner's innocence); Osborne v. Purkett, 411 F.3d 911, 919-20 (8th Cir. 2005) (same); see also United States v. Reynolds, 116 F.3d 328, 329 (8th Cir. 1997) ("One panel may not overrule another.").

We also reject Kidd's contention the Supreme Court's intervening decision in House v. Bell casts doubt on Amrine's standard. In House, the Supreme Court specifically noted the State of Tennessee conceded the petitioner presented some new reliable evidence to open the gateway for a plenary consideration of all evidence, old and new. 547 U.S. at 537. The relevant dispute in House was which standard of review applied assuming a petitioner presented some new reliable evidence of innocence – Schlup's "more likely than not" standard or the more stringent standard of review contained in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The Supreme Court held the Schlup standard still applied to petitioners seeking relief based on a claim of actual innocence post-AEDPA. Id. at 539. Thus, House does not help resolve the current circuit split on the meaning of "new" evidence in cases where one or more of the procedurally defaulted claims are claims involving trial counsel's alleged ineffectiveness in failing to discover or present evidence of the petitioner's innocence.

III

For the reasons stated, we affirm the denial of Kidd's habeas petition.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RICKY L. KIDD,)
)
 Petitioner,)
)
 vs.) Case No.: 03-0079-CV-W-SOW
)
 DONNA McCONDICHIE,)
)
 Respondent.)

ORDER

Before the Court is petitioner's Amended Petition for Writ of Habeas Corpus (Doc. #51). The Court held an evidentiary hearing in this matter on June 22-23, 2009 and July 16, 2009. The parties have submitted post-hearing briefs as well.

I. Background

George Bryant and Oscar Bridges were murdered on February 6, 1996 at George Bryant's home. George Bryant was shot and killed in the front yard. Police found the body of Oscar Bridges in the basement of the home. Bridges' hands, feet, and mouth had been bound with duct tape and he had been shot in the head with a .45 caliber gun.

Marcus Merrill and petitioner Ricky Kidd were tried and convicted of these murders. The evidence adduced at their trial, and again before this Court, shows that three men were involved in the murders.

Petitioner claims that the murders were committed by Marcus Merrill, Gary Goodspeed, Sr., and Gary Goodspeed, Jr. Petitioner alleges that his trial counsel failed to investigate his case properly and failed to present critical evidence to the jury and that he is actually innocent.

A. Marcus Merrill

At the evidentiary hearing before this Court, Marcus Merrill testified for the first time that Kidd was not one of the three men who robbed and murdered George Bryant and Oscar Bridges. Merrill now claims that the crimes were committed by him, Gary Goodspeed, Sr., and Gary Goodspeed, Jr. Merrill acknowledged that he did not come forward with this information until after he had exhausted all of his appellate options. Merrill also acknowledged that he is hoping that by coming forward, exonerating Kidd, and offering to testify against the Goodspeeds, he might be able to get some relief from his current sentence of life without the possibility of parole.

It is undisputed that Merrill initiated contact with petitioner Kidd through another inmate. In that first contact Merrill stated that he wanted an avenue to get himself out on appeal. At the hearing before this Court, Merrill made it clear that he was coming forward now in the hope that he could testify against the Goodspeeds in exchange for a reduction in his own sentence.

It has been established that Marcus Merrill, Gary Goodspeed, Sr., and Gary Goodspeed, Jr., flew to Kansas City, Missouri from Georgia the week prior to these murders. Merrill is a cousin of the Goodspeeds. Also, Merrill was employed by Gary Goodspeed, Sr. at a pet grooming business in Georgia at the time of the murders.

Although Merrill now claims that he was with the Goodspeeds at Bryant's home, and committed the murders with them, petitioner Kidd testified before this Court and admitted that he had met with Gary Goodspeed, Sr. the day prior to the murders and that Goodspeed, Sr. wanted Kidd to murder Bryant. Kidd claims that he told Goodspeed, Sr. that he would not murder Bryant. Kidd's testimony before this Court contradicts his trial testimony that he did not meet with the Goodspeeds at any time in 1996 and, specifically, did not meet with them in February of 1996.

Similarly, Kidd's girlfriend, Monica Gray, told police on February 14, 2006 that Kidd had not told her anything about the murders. Gray testified before this Court that she knew Kidd met with the Goodspeeds both before and after the murders.

According to Marcus Merrill, on the morning of the murders, Merrill was at the home of Eugene Williams. Merrill claims that Gary Goodspeed, Sr. paged him and he subsequently met up with the Goodspeeds at Eugene Williams' home. Merrill testified before this Court that Goodspeed, Sr. informed him that he was going to George Bryant's house to buy cocaine and wanted Merrill to go with him. Williams has testified that the three men were planning to rob Bryant. Both Merrill and Eugene Williams have now testified that on the morning of the murders, Goodspeed, Sr. was armed with a .45 caliber pistol, Goodspeed, Jr. had a .38 revolver, and Merrill had a nine millimeter pistol.

Merrill gave the following testimony before this Court about how the murders were committed: when Merrill and the Goodspeeds arrived at George Bryant's home, Bryant raised his garage door and welcomed the three men into the home. Once they were all inside the home, Goodspeed, Sr. pulled out his gun and told Bryant to "give it up." Bryant rushed Goodspeed, Sr., Goodspeed, Sr. fired his gun, and Bryant went down. Bridges was taken down to the basement and shot. Bryant attempted to escape through the garage and Merrill shot Bryant in the back with his nine millimeter pistol. Goodspeed, Sr. then came out and shot Bryant again.

Despite Merrill's claim that he shot Bryant in the back with a nine millimeter pistol, the bullets recovered from the bodies of Bryant and Bridges were all fired from the same .45 caliber gun. A lead fragment found on the floor of the garage came from a second gun of unknown caliber. Two months after the murders, Connie Bryant, George Bryant's wife, found a spent nine millimeter

cartridge in the garage.

Merrill testified before this Court that the murders were committed by him and the Goodspeeds. Merrill testified that petitioner Kidd was not present during the murders and was not involved in the murders. Prior to testifying before this Court, Merrill had never exonerated petitioner Kidd.

B. Richard Harris

At the jury trial, Richard Harris testified as an eyewitness and identified petitioner Ricky Kidd as the person who shot George Bryant outside Bryant's home. Harris was a neighbor of George Bryant and explained that he was approaching Bryant's home on foot when he saw Bryant run out of the garage. Harris testified that Bryant was followed outside by a man he identified as Kidd who shot Bryant. At the jury trial, Harris testified that he was "2001 percent sure" that petitioner Kidd was the man who shot George Bryant. Kidd claims that Harris is lying and is an unreliable witness.

When he testified before this Court, Harris admitted that he had falsified and edited the information that he gave to the police at the time of the murders. Harris explained that he was concerned that he might be a suspect in the murders and that he wanted to direct the police away from him. It is undisputed, however, that Harris identified Kidd as the shooter in a pre-trial photo line-up. He identified Kidd as the shooter in a deposition in this habeas action. Finally, Harris stood by his identification of petitioner Kidd as the shooter when he testified before this Court.

Specifically, Harris indicated that he was troubled by Marcus Merrill's new claim that petitioner Kidd was not involved in the crimes. Despite Merrill's claim, Harris testified that he still maintains Kidd was the person who shot George Bryant outside Bryant's home. When asked if he would still identify petitioner Kidd as the man who shot George Bryant if he were called to testify

at a new jury trial, Harris said that he probably would still identify Kidd as the shooter.

Kidd argues that Harris is not a reliable witness and relies heavily on certain inconsistencies in Harris' testimony. Specifically, Kidd relies on the fact that during an August 9, 2007 deposition, Harris described the shooter as having long-hair. Kidd's head was shaved completely bald at the time of the murders. Also during the August 2007 deposition, Harris stated that the shooter was wearing a "fawn-colored" jacket. Other eyewitnesses described the three men fleeing from Bryant's house as wearing long black coats, black pants, and black stocking caps.

While Harris may have been inconsistent on a few details, Kidd's argument ignores the fact that the jury who heard his case had substantial reasons to question Harris' reliability as a witness. During the jury trial, Harris was disrespectful to the court, the jury, and the defense attorneys. Kidd's trial counsel asked the jury to disbelieve Harris because his descriptions of the murderers conflicted with the testimony given by other witnesses. Kidd's trial counsel questioned whether Harris could have seen Bryant being shot because another eyewitness did not see Harris near the scene of the crime. Kidd's trial counsel asked the jury not to believe Harris because he did not report the murder to the police and because he only subsequently talked to the police out of his own self-interest. The jury also knew that Harris had a criminal history. Yet, despite all of these issues, the jury chose to believe Harris' identification of petitioner Kidd as the shooter.

The discrepancies identified by Kidd in the August 2007 deposition are similar to those argued by Kidd's trial counsel during the jury trial.

C. Kidd's Alibi Defense

Petitioner Kidd told the police that he was with his girlfriend, Monica Gray, all day on February 6, 1996. Ms. Gray also told police that petitioner Kidd was with her throughout the day

of February 6, 1996.

Petitioner Kidd testified at his jury trial and told the jury about his alibi for the day of the murders. Monica Gray also testified at the trial as did his sister Nechelle and Nechelle's co-worker, Alana Wesley. A sheriff's deputy and Kelly McGill, Kidd's ex-girlfriend, were also called at the trial to support Kidd's alibi defense.

According to the testimony before this Court from petitioner Kidd, his sister, Nikki Kidd, and Monica Gray, Nikki Kidd stayed with them on the night of February 5, 1996. On the morning of February 6, Nikki Kidd drove petitioner's Toyota to her place of employment. Later, petitioner Kidd drove his 1981 Delta 88 to Nikki Kidd's place of employment to retrieve his Toyota. Petitioner Kidd and Ms. Gray dropped the Delta 88 at their apartment and took the Toyota to a McDonald's restaurant and then went to Lake Jacomo to apply for a gun permit at the Sheriff's Department. After applying for the gun permit, Kidd and Gray went to Kelly McGill's residence. This is the same evidence that was presented at Kidd's trial and rejected by the jury.

Petitioner Kidd faults his trial counsel for failing to obtain the video footage from the security surveillance cameras at Nikki Kidd's place of employment. In addition, Kidd claims that certain testimony could have established that he applied for a gun permit on the afternoon of February 6, 1996.

D. Ineffective Assistance of Counsel

Petitioner Kidd claims that he received ineffective assistance of counsel at trial. Kidd had an opportunity to raise claims against his public defender in the state court proceedings.

Mr. Kidd's current counsel argues that on direct appeal, Mr. Kidd's public defender challenged the hearsay testimony of detectives about Kayla Bryant's video line-up identification, but

failed to argue that the identification itself was unreliable. His appellate counsel also challenged the failure to sever petitioner Kidd's and Marcus Merrill's trial and argued that Kidd was improperly charged as a prior offender.

II. Standard

The United States Supreme Court has held that in order to show a "manifest injustice," a habeas petitioner must show that "a constitutional violation has resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 327 (1995)(quoting Murray v. Carrier, 477 U.S. 478, 496 (1986)). Based upon the procedural defaults that have occurred in this case, petitioner Kidd must show that "in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" House v. Bell, 547 U.S. 518, 537 (2006)(quoting Schlup, 513 U.S. at 327).

A petitioner must present "new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that was not presented at trial." Schlup, 513 U.S. at 324.

III. Discussion

A. Marcus Merrill

The Court does not find Marcus Merrill to be a credible witness. There is overwhelming evidence that Merrill was one of the three men who robbed and murdered George Bryant and Oscar Bridges. Therefore, Merrill has known the identities of the other two men involved in the crimes for over thirteen years. Yet, Merrill did not come forward to exonerate petitioner Kidd until he had exhausted every appeal and knew he would be spending the rest of his life in prison.

Both in his correspondence with Kidd and in his testimony before this Court, Merrill made it clear that he hoped by coming forward and stating that the Goodspeeds were the other two men involved in the crime, he would be given the opportunity to testify against the Goodspeeds in exchange for a reduction in his own sentence.

This Court must consider “how the timing of the submission and the likely credibility of the affiants bear on the probably reliability of that evidence.” House v. Bell, 547 U.S. at 537 (*quoting Schlup*, 513 U.S. at 331-32). The timing of Merrill’s claim that petitioner Kidd was not involved in the murders causes the Court to question Merrill’s credibility. Merrill’s blatant attempts to use his recent identification of the Goodspeeds as participants in the murders as a bargaining chip to reduce his own sentence further undercuts his credibility as a witness.

This Court must consider what a reasonable jury would do with Merrill’s testimony. *See House*, 547 U.S. at 538. For the same reasons this Court finds Merrill to be lacking in credibility, a reasonable, properly instructed jury would find Merrill to be lacking in credibility.

B. Richard Harris

There is no doubt that Richard Harris has given some inconsistent statements in this case between February of 1996 and continuing through the hearing before this Court. Despite those inconsistencies, Harris’ identification of petitioner Kidd as one of the men involved in the murders has not wavered.

This Court has undertaken a review of Richard Harris’ trial testimony as compared to his testimony before this Court. Harris has consistently maintained that he went to Michael Holland’s house on the morning of the murders and was returning to his own home along the east side of the street, a route that would have taken him directly in front of George Bryant’s house. Harris has

explained that as he approached Bryant's house, the garage door was going up and he heard Bryant "holler" for help. Harris has testified that one man grabbed Bryant and then a second man came out of the house and shot Bryant. Harris described these men as number one and number two. Harris identified number two, the shooter, as Ricky Kidd. Harris has never recanted on this identification.

At the hearing before this Court, Harris stated that while Mr. Kidd's current counsel had shown him Marcus Merrill's testimony, he would still identify Ricky Kidd as the shooter if a new trial were held.

C. Kidd's Alibi Defense

The jury heard Kidd's alibi defense and rejected it. Kidd has not identified any new evidence supporting his alibi defense that was not available at the time of his jury trial.

D. Ineffective Assistance of Counsel

Kidd has faulted his trial counsel for not obtaining certain items and for not presenting his case properly to the jury at trial. Specifically, Kidd claims that his trial counsel should have obtained the video footage captured by security surveillance cameras at his sister's place of employment. Kidd believes that such video footage would show that he was at his sister's place of employment at the time of the murders. Kidd has failed to demonstrate that such videotape footage actually existed in 1996 and could have been obtained by his trial counsel. No one from Kidd's sister's place of employment has been called as a witness to explain what types of video surveillance existed at the business in 1996, what areas of the business premises were under surveillance, and the likelihood that Kidd would have been captured on video if he visited the business premises on February 6, 1996.

Similarly, Kidd claims that his counsel should have made a stronger argument that he applied for a gun permit on the afternoon of February 6, 1996. There are two flaws with this argument. The first is that it has still not been definitively established that Kidd applied for the gun permit on February 6. Kidd has adduced evidence that applications were rarely submitted by mail and were generally processed either the day they were received or the following day. While the processing of his application included a background check that was run at 1:47 p.m. on February 6, this does not give Kidd an air-tight alibi. The sheriff's department does not mark when an application is received. The possibility exists that the application was delivered on February 5.

The second flaw in this theory is that even if Kidd's application was submitted on February 6, as he and his current counsel claim, Kidd could have submitted the application prior to or after committing the murders on February 6. The murders were committed around 11:30 a.m. and Kidd would have had time to drive out and submit the application prior to or after committing the murders.

As for the presentation of the case at trial, Kidd claims that his counsel did not properly cross-examine Kayla Bryant and Richard Harris. Kidd's trial counsel may have opted not to cross-examine Kayla Bryant about her identification of Kidd because she did not identify Kidd in court and because she was able to challenge the detectives with regard to Kayla's identification of Kidd in a video line-up. Kidd's trial counsel did point out to the jury that Harris' description of the murderers differed from that of other witnesses, that Harris could not have seen the crime, and that Harris failed to report the murders to the police and ultimately talked to the police only out of his own self-interest.

The difficulty for petitioner Kidd and his current counsel is that at this stage of the proceedings, Kidd must identify new reliable evidence that was not available at the time of his trial

and that shows he is actually innocent of the crimes. It is not enough for Kidd to blame his trial counsel or to question the credibility of Richard Harris or to challenge the reliability of Kayla Bryant's identification.

The only evidence that Kidd has presented to this Court that was not available to him at the time of his trial is the testimony of Marcus Merrill, claiming that Merrill committed the murders with the Goodspeeds. As discussed above, the Court does not find Merrill to be a reliable witness. Merrill appears to be testifying solely in the hope of convincing someone to reduce his own sentence.

A police detective testified during the jury trial that police received a tip that the murders were committed by Goodspeed, Jr., Merrill, and Kidd. Kidd has not eliminated this possibility with any of the testimony and evidence that he has presented to this Court. While Kidd has raised some serious concerns about how his trial counsel handled the case, Kidd has not convinced this Court that he is actually innocent of the crimes.

IV. Conclusion

For the reasons stated above, it is hereby

ORDERED that petitioner's Amended Petition for Writ of Habeas Corpus (Doc. #51) is denied.

/s/ Scott O. Wright

SCOTT O. WRIGHT

Senior United States District Judge

DATED: December 8, 2009

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 10-1375

Ricky Kidd

Appellant

v.

Jeff Norman

Appellee

Ad Hoc Group Against Crime

Amicus on Behalf of Appellant

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:03-cv-00079-SOW)

ORDER

The petition for rehearing *en banc* is denied. The petition for panel rehearing is also denied.

Judge Bye and Judge Melloy would grant the petition for rehearing *en banc*.

Judge Benton did not participate in the consideration or decision of this matter.

January 10, 2012

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 10-1375

Ricky Kidd

Petitioner - Appellant

v.

Jeff Norman

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:03-cv-00079-SOW)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

August 29, 2011

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RICKY L. KIDD,)
)
 Petitioner,)
)
 vs.) Case No.: 03-0079-CV-W-SOW
)
 DONNA McCONDICHIE,)
)
 Respondent.)

ORDER

Before the Court is petitioner's Application for Certificate of Appealability (Doc. #136).
Having reviewed the application, it is hereby

ORDERED that petitioner's Application for Certificate of Appealability (Doc. #136) is granted and petitioner is granted permission to appeal the following issues: (1) Whether this Court applied an excessively high burden of proof to petitioner's claim of actual innocence; and (2) Whether this Court's refusal to consider evidence available to ineffective trial counsel violated House v. Bell. The Court denies a Certificate of Appealability on the other issue identified by petitioner.

/s/ Scott O. Wright
SCOTT O. WRIGHT
Senior United States District Judge

DATED: February 16, 2010