UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JUANE T. KENNELL,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 4:09-CV-407 AGF**
	)	
DAVE DORMIRE,	)	
	)	
Defendant.	)	

PETITIONER'S TRAVERSE

COMES NOW petitioner, Juane T. Kennell, by and through counsel, and hereby replies as follows to respondent's response to the order to show cause why a writ of habeas corpus should not be granted.

I. INTRODUCTION

This habeas corpus action presents the Court with an extraordinary case of governmental misconduct involving the state's failure to disclose material exculpatory evidence as required by the seminal case of *Brady v. Maryland*, 373 U.S. 83 (1963). As set forth in the prior first amended habeas petition, the state failed to disclose that its star witnesses, Jeffrey Shockley and Robert Stewart, had been arrested and charged with various offenses prior to testifying against petitioner and received favorable consideration on those charges in exchange for their testimony.

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(*See* Exh's 1,2). The state's concealment of its arrangements with these witnesses continued through the state post-conviction process. (*See* Exh's 3-6, attached hereto). Only through fortuitous circumstances did some of the evidence of the government's misconduct come to light in time for petitioner to seek redress and relief from his unconstitutional convictions in this federal habeas action. (*Id.*).

In opposing habeas relief on this claim, the attorney general predictably argues that the claim is procedurally defaulted because it was not raised during petitioner's 29.15 or in his direct appeal. (Resp. 4). Contrary to respondent's position, however, there is no procedural impediment to this Court's *de novo* review of this claim because the facts clearly establish cause and prejudice to overcome any default because the factual basis of the claim was not available to petitioner during prior state proceedings because the government "hid the ball" by concealing this evidence until it was fortuitously discovered in January of 2009. *See, e.g., Williams v. Taylor*, 529 U.S. 420, 443-444 (2000); *Banks v. Dretke*, 540 U.S. 668, 692-695 (2004).

Respondent also advances an absurd argument that there was no nondisclosure and that there was no deal with Shockley. (Resp. 4-5). This assertion is amply refuted by the documents attached to the first amended petition and to this traverse, indicating that Jeffrey Shockley received a favorable disposition on pending felony charges in exchange for his cooperation and that the state paid his expenses to move

to a different residence. (*See* Exh. 1). In addition, internal public defender documents clearly indicate that Shockley's attorney worked out a "deal" for Shockley to testify against petitioner and his co-defendant Christopher White, which required the St. Louis City Public Defender's Office to withdraw from representing Mr. Kennell. (*See* Exh. 4, p. 3).

Finally, respondent attempts to denigrate the impeaching impact of this nondisclosure, arguing that its value would have been minimal. (Resp. 5). This argument ignores a long line of *Brady* cases where new trials have been granted where key prosecution witnesses were given secret inducements and received lenient treatment on pending charges in exchange for their testimony. *See, e.g., Giglio v. United States*, 405 U.S. 150, 154 (1972). In addition, respondent conveniently ignores the fact that police reports from one of the prior arrests of Shockley and Stewart involved the seizure of a handgun that was linked to the shooting for which petitioner was convicted. (*See* Exh. 2). Respondent also ignores the fact that there is undoubtedly additional exculpatory evidence regarding the disposition of the charges against Shockley and Stewart that has not yet emerged because petitioner cannot obtain access, without a court order, to police, prosecution, court, and public defender records documenting the disposition of the arrests and charges in their cases.

(*See* Exh. 4). Thus, any discussion of materiality would be premature until these discovery issues are resolved and the record is fully developed.

In addressing petitioner's second claim for relief involving trial counsel's shortcomings in presenting petitioner's alibi defense to the jury, respondent seeks refuge under the standard of review provisions of the AEDPA. However, as will be demonstrated below, the 29.15 motion court's decision suffers from significant factual and legal flaws that remove any impediment to *de novo* review and the grant of habeas relief on this claim.

In this traverse, petitioner will reply to respondent's arguments on a claim by claim basis. Petitioner is confident that this Court, after granting discovery and allowing the factual record to be fully developed and, after a full and fair assessment of all the relevant facts and applicable law, will conclude that habeas relief is warranted.

II. ISSUES INVOLVING INDIVIDUAL CLAIMS FOR RELIEF

CLAIM 1 - - The *Brady* Claim

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. Later, in

Strickler v. Greene, 527 U.S. 263 (1999), the court more precisely articulated the three essential elements for establishing a *Brady* claim: "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the state, either willfully or inadvertently; and prejudice must have ensued." *Id.* at 281-282. It is also well settled that the *Brady* rule encompasses evidence "known only to police investigators and not the prosecutor...In order to comply with *Brady*, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in this case, including the police.'" *Id.* at 280-281 (quoting *Kyles v. Whitley*, 514 U.S. 419, 437-438 (1995)).

As a threshold matter, respondent has asserted a procedural bar defense arising from the undisputed fact that this *Brady* claim was not presented in petitioner's 29.15 or direct appeal. (Resp. 4). A habeas petitioner can overcome a procedural bar defense if he can show "cause" for not presenting his claims in state court and "prejudice" resulting from a Constitutional error, or a fundamental miscarriage of justice. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 750 (1991). "Cause" as defined in *Murray v. Carrier*, 477 U.S. 478, 488 (1986), is a factor external to the defense or a cause for which the defense is not responsible.

As the chronology of events set forth in the petition and in this traverse demonstrates, cause exists because the factual basis for the claim was not available to petitioner during prior proceedings because the government "hid the ball" until evidence indicating that Shockley and Stewart received secret inducements were fortuitously discovered by petitioner and undersigned counsel in January of 2009. *See, e.g., Williams v. Taylor*, 529 U.S. 420, 443-444 (2000). Thus, cause is established because interference by law enforcement officials made it impossible for the petitioner to advance his claims in state court in a timely and procedurally correct manner. *See Amadeo v. Zant*, 486 U.S. 214, 222 (1988); *Strickler*, 527 U.S. at 281-284.

The prejudice requirement to overcome a procedural bar is identical to the *Brady* materiality test. *Id.* at 282; *Banks v. Dretke*, 540 U.S. 668, 691 (2004). To establish *Brady* materiality, petitioner must show "a reasonable probability of a different result." *Kyles*, 514 U.S. at 434. In assessing prejudice or materiality, reviewing courts must consider the totality of the exculpatory evidence suppressed by the government and consider its cumulative impact in light of the whole case. *Id.* at 436-437.

In *Banks*, the Supreme Court noted that the cause and prejudice test in the context of a defaulted *Brady* claim "parallel two of the three components of the

alleged *Brady* violation itself." 540 U.S. at 691. Thus, if petitioner can demonstrate cause and prejudice and establish the third component of a *Brady* violation that the excluded evidence was favorable to him, he can establish his entitlement to habeas relief under *Brady*. *Id.*

Petitioner can clearly meet the first part of the Brady test because the excluded evidence was clearly favorable to him. The evidence currently before the Court establishes that Jeffrey Shockley was arrested twice on gun and weapons charges, and formally charged at least once, prior to his testimony against petitioner. (*See* Exh's 1, 2). Both the transcript of his guilty plea on the charges and internal public defender documents indicate that Shockley reached a deal with the state to testify against petitioner and his co-defendant. (*See* Exh's 1, 4). The guilty plea transcript also demonstrates that the government gave Shockley financial assistance to relocate prior to his testimony, a fact that was also not disclosed to petitioner or his trial counsel, which was clearly favorable to the accused. *See, e.g., Benn v. Lambert*, 283 F.3d 1040, 1056-1057 (9th Cir. 2002). Finally, it is also clear that the fact that a weapon seized from a car occupied by Shockley and Stewart that was linked by ballistics evidence to the shooting for which petitioner was convicted, (*See* Exh. 1), was also favorable to the accused. *See Graves v. Dretke*, 442 F.3d 334, 340-344 (5th Cir. 2006).

Regarding the second element of the *Brady* test, the attached affidavit of petitioner, and declarations from his current and past attorneys, clearly establish that the government suppressed this exculpatory evidence during the trial and the state post-conviction process until documents supporting this claim were fortuitously discovered by co-defendant Christopher White in January of 2009. (*See* Exh's 3, 4, 5, 6). Petitioner's affidavit indicates that he received the initial police reports and other documents in the mail from his co-defendant Christopher White in January of 2009, *after* he had exhausted his state court appeals. (Exh. 3). He turned over these documents to undersigned counsel who, after investigation, was able to uncover additional evidence of a secret deal with Shockley, as demonstrated by the guilty plea transcript attached to the habeas petition as Exhibit 1. (*See* Exh. 4).

Likewise, public defenders Scott Thompson and Melinda Pendergraph have provided declarations indicating that their review of the record in the case during the state post-conviction process did not reveal any hint that either Shockley or Stewart had been arrested or charged with any crime or received any favorable considerations for their testimony against petitioner and his co-defendant at trial. (*See* Exh's 5, 6). Apart from meeting the second prong of the *Brady* test, these facts clearly establish cause to overcome any procedural default because the factual basis of the claim was unavailable to petitioner during the state post-conviction process. *Banks*, 540 U.S.

at 691. Because cause is established, this Court is free to review petitioner's *Brady* claim and the prejudice arising therefrom, *de novo*. *See Manning v. Bowersox*, 310 F.3d 571 (8th Cir. 2002).

To establish materiality from the suppression of this evidence, petitioner does not have to demonstrate that it is more likely than not that he would have received a different verdict with the evidence; rather, "[a] 'reasonable probability' of a different result is ... shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles*, 514 U.S. at 434 (quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985)). It is not a close question that the suppression of the aforementioned impeachment evidence that would have utterly destroyed the credibility of star witnesses Jeffrey Shockley and Robert Stewart meets the *Brady* materiality test because these two witnesses were central to the prosecution's case and the excluded evidence "would have provided powerful and unique impeachment evidence demonstrating that [Shockley and Stewart] had an interest in fabricating [their] testimony." *Horton v. Mayle*, 408 F.3d 570, 579 (9th Cir. 2005).

In arguing that the evidence regarding secret deals with these witnesses was not material, respondent points out that these witnesses were cross-examined on other matters that may have adversely affected their credibility in the eyes of the jury.

(Resp. 5). This argument ignores the fact that both the United States Supreme Court and the Eighth Circuit have explicitly rejected government arguments that additional impeaching evidence was immaterial because the jury heard other reasons that would give the witness an interest in testifying against the defendant. *See United States v. Foster*, 874 F.2d 491, 494 (8th Cir. 1988); *Napue v. Illinois*, 360 U.S. 264, 269 (1959). As the Supreme Court stated in *Napue*, the fact that the witness was effectively cross-examined on other issues relating to credibility did not "turn [] what was otherwise a tainted trial into a fair one." *Id.* at 270.

The Ninth Circuit in *Benn* also rejected a similar argument made by the government in that case. As that court pointed out: "The fact that other impeachment evidence was introduced by the defense does not affect our conclusion. Where, as here, there is reason to believe that the jury relied on a witness' testimony to reach its verdict despite the introduction of impeachment evidence at trial, and there is a reasonable probability that the suppressed impeachment evidence, when considered together with the disclosed impeachment evidence, would have affected the jury's assessment of the witness' credibility, the suppressed impeachment evidence is prejudicial." 283 F.3d at 1056.

The evidence of petitioner's guilt was far from overwhelming. As respondent ironically pointed out in his response, both Shockley and Stewart had credibility

problems that arose during trial involving their use of drugs, prior inconsistent statements, and motives for falsely implicating petitioner. (Resp. 5).

Both Shockley and Stewart positively identified three other suspects in the shooting that police later exonerated. Stewart positively identified Corey Hughes, just after the shooting, as one of the assailants. (Trial Tr. 725, 735). After Hughes was arrested, Shockley told police that Hughes was not involved. (*Id.* 786). Shockley and Stewart also later positively identified "Little Wimpy" (Cartze) and "Weezey" as the third shooter. (*Id.* 548, 746-747). Police later exonerated Cartze and Weezey. (*Id.*). In fact, Cartze was in prison and thus had an airtight alibi. (*Id.*).

In light of the aforementioned evidence adduced at trial adversely affecting Shockley and Stewart's credibility, this newly discovered impeaching information regarding secret deals on pending charges, had it been disclosed to the jury, is sufficiently compelling to entitle petitioner to a new trial because there is a reasonable probability the result at trial would have been different. *Strickler v. Greene*, 527 U.S. 263, 289-290 (1999). *Brady* prejudice doubtlessly ensued because the credibility of the state's witnesses was pivotal and the excluded evidence would have adversely impacted the jury's assessment of Shockley and Stewart's credibility. *See Merriweather v. State*, 294 S.W.3d 52, 57 (Mo. banc 2009).

The materiality/prejudice issue here is similar to the facts confronted by the Second Circuit in *Jenkins v. Artuz*, 294 F.3d 284 (2d Cir. 2002). In that case, the Second Circuit granted relief to petitioner on a *Napue/Giglio* claim where one of the two eyewitnesses who identified Jenkins as the killer, falsely denied that he had received a plea agreement on pending charges in exchange for his testimony. *Id.* at 295-296. Like the witness in *Jenkins*, Shockley provided the only evidence of motive. *Id.* at 295. As in *Jenkins*, had the jury disbelieved Shockley, the remaining testimony was weak and problematic because the jury had other reasons to doubt the accounts of Shockley and Stewart based upon the aforementioned facts that call into question the accuracy of their accounts of the shooting. *Id.*

As noted earlier, the newly discovered evidence currently before the court adversely affecting the credibility of the state's two star witnesses is probably just the "tip of the iceberg." It is still unknown the extent to which deals were given to Shockley and Stewart involving their July 1, 2002 arrest on gun and weapons charges because petitioner's current counsel has been stonewalled in trying to find out additional information regarding the disposition of this arrest and potential charges. (*See* Exh. 4). Thus, further discovery on this issue is warranted before this Court fully considers and addresses the issue of *Brady* materiality.

CLAIM 2 - - Ineffectiveness Claim Involving Alibi

Unlike petitioner's *Brady* claim, this claim was advanced in petitioner's 29.15 motion and directly addressed by the motion court.[1] As a result, respondent argues that petitioner is not entitled to relief because the motion court's resolution of this ineffectiveness claim was reasonable under AEDPA. (Resp. 6-7). Before discussing the specific application of § 2254(d) of AEDPA to this ineffectiveness claim involving trial counsel's handling of the alibi, petitioner believes it would be beneficial to set out the general parameters of the statute and the appropriate analysis that the Court should employ in determining whether habeas relief is warranted on this claim.

Under 28 U.S.C. § 2254(d)(1), a federal court may grant an application for a writ of habeas corpus on a claim adjudicated in state court if that adjudication "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." The Supreme Court has held that the clauses "contrary to" and "unreasonable application of" have independent meaning. *Penry v. Johnson*, 532 U.S. 782, 792 (2001); *Williams v. Taylor*, 529 U.S. 362, 385 (2000). The "contrary to" clause

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[1] The Missouri Court of Appeals summarily affirmed the motion court's ruling without issuing a formal opinion. *Kennell v. State*, 245 S.W.3d 829 (Mo. App. E.D. 2007).

applies, *inter alia*, when a state "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases;" the "unreasonable application of" clause applies when the state applies the correct legal standard but applies it unreasonably. *Williams*, 529 U.S. at 405.

Where the Missouri courts did not apply the proper legal test or pertinent legal rules established by the Supreme Court, petitioner is entitled to relief under the "contrary to" clause if this court independently determines that a non-harmless constitutional violation occurred. *See, e.g.*, *Williams v. Anderson*, 460 F.3d 789, 801-805 (6th Cir. 2006). In other words, if this court finds that the "contrary to" clause applies to a claim for relief, it is free to review the claim *de novo* and grant relief if a non-harmless constitutional violation occurred. *Id.*

In *Williams v. Taylor*, Justice O'Connor noted two possible ways that a state court decision might violate the "unreasonable application" clause of § 2254(d)(1):

> First, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of a particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

529 U.S. at 407.

In the aftermath of the decision in *Williams*, lower federal courts have grappled with the proper definition and scope of the unreasonable application clause. Because the Supreme Court did not give specific guidance as to what the term "objectively unreasonable" means, lower federal courts have had difficulty applying this standard. *See, e.g., Maynard v. Boone*, 468 F.3d 665, 670-671 (10th Cir. 2006). (describing difficulty in defining and applying the unreasonable application clause).

Although the Eighth Circuit has granted relief under the unreasonable application clause, it has not given any precise meaning to the term "objectively unreasonable." *Carter v. Bowersox*, 265 F.3d 705 (8th Cir. 2001). The Tenth Circuit, however, in *Maynard* described the appropriate definition of "objectively unreasonable" as being more onerous than the "clearly erroneous" standard, but more lenient than the "unreasonable to any jurist" standard. 468 F.3d at 670-671.

However, the most precise interpretation of the "objectively unreasonable" standard comes from the Second Circuit. In making the objectively unreasonable determination, reviewing courts should focus on "whether the state court decision reveals an increment of wrongness beyond error." *Francis S. v. Stone*, 221 F.3d 100, 110 (2nd Cir. 2000); *Henry v. Poole*, 409 F.3d 48, 68 (2d Cir. 2005); *Monroe v. Kuhlmann*, 433 F.3d 236, 246 (2d Cir. 2006).

For a habeas petitioner to prevail under this standard, he must meet the following test:

> Some increment of incorrectness beyond error is required. We caution, however, that the increment need not be great; otherwise, habeas relief would be limited to state court decisions 'so far off the mark as to suggest judicial incompetence.' We do not believe AEDPA restricted federal habeas corpus to that extent.

Francis S., 221 F.3d at 111. This interpretation of § 2254(d)(1) has also been adopted by the First Circuit. *Santiago v. Spencer*, 346 F.3d 206, 211 (1st Cir. 2003).

It is also clear under the law of this circuit that it is necessary for reviewing courts to review case law from lower courts because such an inquiry is relevant to whether the state court unreasonably applied existing Supreme Court precedent. *See, e.g., Atley v. Ault*, 191 F.3d 865, 871 (8th Cir. 1999). In petitioner's view, the "unreasonable application" standard must be interpreted in such a manner that allows meaningful review of state court decisions. To hold to the contrary would render this proceeding a futile and empty formality.

In deciding this case, this court must also address whether the Missouri decision "was based on an unreasonable determination of the facts . . ." under § 2254(d)(2). If the court determines that the Missouri decision rests upon a significant factual flaw, this court is free to review the claim *de novo* and grant relief if a nonharmless constitutional violation has occurred. *See, e.g., Simmons v. Luebbers*,

299 F.3d 929, 937-938 (8th Cir. 2002); *Ward v. Sternes*, 334 F.3d 696, 703-704 (7th Cir. 2003); *Carlson v. Jess*, 526 F.3d 1018, 1024 (7th Cir. 2008). As the Seventh Circuit noted in *Ward*: "A state court decision that rests upon a determination of fact that lies against the clear weight of the evidence is, by definition, a decision 'so inadequately supported by the record' as to be arbitrary and therefore objectively unreasonable." 334 F.3d at 704. Relief is also available to petitioner under § 2254(d)(2) if the state court misapprehends, misstates, or ignores a material factual issue that is central to a claim for relief. *Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003); *Wiggins v. Smith*, 539 U.S. 510, 528 (2003).

This ineffectiveness claim involving counsel's investigation of and presentation of petitioner's alibi defense at trial has three interrelated components. The first component involves counsel's failure to interview and present the testimony of Hatta Holmes. The second and third components involve counsel's inexplicable failure to give notice of petitioner's alibi defense and her failure at the close of the evidence to request that an alibi instruction be submitted to the jury.

In addressing the issue of *Strickland* performance, the 29.15 motion court found that trial counsel was "negligent" in failing to give notice of petitioner's intent to rely on an alibi defense. (29.15 L.F. 41). However, with regard to counsel's failure to interview Holmes and her failure to request a jury instruction, the motion

court found that trial counsel's performance was not deficient because both of these omissions by trial counsel were based upon trial strategy considerations. (*Id.* 42). The motion court's trial strategy findings regarding these latter two aspects of counsel's handling of the alibi were objectively unreasonable under both 2254(d)(1) and (2) for the following reasons.

With regard to the failure to interview and call Miss Holmes, the motion court stated: "Although counsel testified to no specific reason for omitting Hatta, it is inferrable that she preferred to concentrate on adult witnesses." (29.15 L.F. 42). With regard to the failure to ask for an alibi instruction, the motion court stated: "The decision not to seek an alibi instruction was a matter of trial strategy." (*Id.*). These trial strategy findings are based upon an unreasonable determination of the facts under 2254(d)(2) because trial counsel's testimony at the 29.15 hearing did not provide a factual basis to support a strategic justification for either of these decisions. *See Harris v. Reed*, 894 F.2d 871, 878, (7th Cir. 1990) ("Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should not construct strategic defenses which counsel does not offer.").

Regarding her failure to request the jury instruction, trial counsel testified that the reason she did not request the instruction was that she did not think she was entitled to it because she failed to give notice of the alibi. Counsel testified she

would have asked for an instruction otherwise. (29.15 Tr. 11). Thus, it is abundantly clear that trial counsel had no valid tactical reason whatsoever for not requesting the alibi instruction. Her failure to seek an alibi instruction instead resulted from ignorance of the law because the failure to give notice had no impact whatsoever on requesting an instruction that would have been required in light of the evidence presented at trial.[2] *See Gardner v. State*, 96 S.W.3d 120, 126-127 (Mo. App. W.D. 2003); *Butler v. State*, 108 S.W.3d 18, 26 (Mo. App. W.D. 2003) (trial strategy cannot be reasonable if it rests upon an erroneous interpretation or ignorance of the law). Thus, the motion court's resolution of the *Strickland* performance issue regarding the jury instruction was not only based upon an unreasonable determination of the facts, but was "contrary to" and involved an unreasonable application of the *Strickland* performance test as well. *See Williams v. Taylor*, 529 U.S. 362, 416 (2000).

Likewise, in considering counsel's failure to interview and present the testimony of Hatta Holmes, the record is clear that trial counsel failed to interview Miss Holmes, despite the fact that her name had been provided by petitioner to his prior public defender, who later turned over his files to trial counsel far in advance

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[2] Even if the trial court had struck Hattie Bolton's alibi testimony, petitioner's trial testimony that he was home asleep when the shooting occurred would have required the court to submit an alibi instruction if requested by defense counsel. *State v. Franklin*, 591 S.W.2d 12, 14 (Mo. App. E.D. 1979).

of trial. (29.15 Tr. 4; 29.15 Exh. 2). In light of these facts, any suggestion by the motion court that counsel's failures regarding Miss Holmes were trial strategy is both contrary to and involves an unreasonable application of *Strickland's* performance test. Under *Strickland*, counsel has a duty to make reasonable investigations or make a reasonable decision that makes particular investigations unnecessary. *Strickland v. Washington*, 466 U.S. 668, 691 (1984). Thus, the motion court's suggestion that there was a trial strategy justification, in light of the uncontradicted record that trial counsel failed to interview Miss Holmes, is contrary to and an unreasonable application of *Strickland*. *See White v. Roper*, 416 F.3d 728, 730-832 (8th Cir. 2005).

The 29.15 motion court also denied relief by finding that petitioner could not meet the *Strickland* prejudice test. (29.15 L.F. 41-42). Regarding Hatta Holmes, the motion court found that her testimony at the post-conviction hearing was not credible. (*Id.*). A state court's finding of a lack of *Strickland* prejudice based upon a subjective credibility determination involves an unreasonable application of the *Strickland* prejudice test. To properly assess *Strickland* prejudice, a reviewing court must decide whether the excluded testimony might have affected the jury's verdict. Thus, it is inappropriate for a reviewing court to deny relief by finding a post-conviction witness' testimony lacked credibility. *See Antwine v. Delo*, 54 F.3d 1357, 1365 (8th Cir. 1995). The Supreme Court has also held that a state post-conviction judge's

finding that a witness lacked credibility is no impediment to a subsequent finding of prejudice in a 2254 action because the appropriate prejudice determination must factor in how the excluded evidence might have affected the jury's verdict. *Kyles v. Whitley*, 514 U.S. 419, 449, n.19 (1995).

Regarding counsel's failure to give notice and request an alibi instruction, the motion court's *Strickland* prejudice analysis rested upon an unreasonable determination of the facts under 2254(d)(2). In particular, the trial court mistakenly noted that the only sanction it imposed for trial counsel's failure to give adequate notice was to limit the scope of the opening statement to preclude counsel from mentioning the alibi evidence. *See Taylor v. Maddox*, 366 F.3d 992, 1006-1008 (9th Cir. 2004).

The record clearly indicates that this was not the only sanction imposed. In addition to the opening statement restriction, the trial court limited the scope of Hattie Bolton's alibi testimony, precluding her from mentioning that she had set her alarm that evening when she went to bed and that petitioner could not have left because he did not know the alarm code. (Trial Tr. 682-683; 29.15 Tr. 46-47). Second, in finding that there is no prejudice from the failure to give the alibi instruction, the court failed to consider that trial counsel barely mentioned the alibi testimony in her

closing argument, only making a passing reference to this evidence in her summation. (Trial Tr. 861-862).

The final flaw in the motion court's *Strickland* prejudice analysis involves its conclusion that the sanction of limiting counsel's opening statement was not prejudicial because this sanction did not render counsel's error one of Constitutional magnitude because petitioner's alibi evidence was presented and argued. (29.15 L.F. 41-42). Apart from the aforementioned flaws indicating that the alibi was not fully presented or effectively argued, the motion court's suggestion that the sanction of precluding counsel from telling the jury about the alibi during opening statements was not prejudicial ignores decades of scientific and legal studies of jury dynamics indicating that an effective opening statement is critical to a litigant's success at trial. Empirical studies have consistently concluded that after hearing opening statements, the vast majority of jurors make up their minds about how they will decide a case and usually do not change their minds after hearing evidence thereafter. *See, e.g.*, Charles Becton & Terri Stein, *Opening Statement*, 20 Trial Law. Q. 10 (1990). In fact, one such study indicated that 80-90% of jurors come to a decision either during or immediately after opening statements are delivered. Donald E. Vinson, *Jury Psychology and Antitrust Trial Strategy*, 55 Antitrust L.J. 591 (1987).

By ignoring this settled rule of trial practice that a thorough effective opening statement is critical to a litigant's success, the motion court's *Strickland* prejudice analysis was unreasonable under 2254(d)(1) and (2). Thus, it is abundantly clear that the motion court's decision suffers from factual and legal flaws of a sufficient magnitude to allow this Court, after *de novo* review, to grant habeas relief under 2254(d).

CONCLUSION

WHEREFORE, for all the foregoing reasons, as well as the reasons advanced in the first amended petition, petitioner, Juane T. Kennell, prays:

1. That Mr. Kennell be afforded reasonable discovery and a full and fair evidentiary hearing on the allegations of this petition;
2. That Mr. Kennell be discharged from his unconstitutional convictions and sentences; and
3. That petitioner be allowed such other and further relief as may seem just, equitable and proper under the circumstances.

Respectfully Submitted,

/s/ Kent E. Gipson
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel of record.

/s/ Kent E. Gipson
Kent E. Gipson

EXHIBIT 3

SWORN AFFIDAVIT OF JUANE KENNELL

I, Ju'ane Kennell, after being duly sworn on my oath state as follows:

1. My name is Ju'ane Kennell, I am currently a prisoner at Jefferson City Correctional Center serving a sentence of life without parole from the City of St. Louis. The two (2) main witnesses against me were Jeffrey Shockley and Robert Stewart.

2. I am currently challenging my conviction in a federal habeas action pending before the United States District Court, Eastern District of Missouri. Attorney Kent Gipson of Kansas City is representing me.

3. During my trial, and state court direct appeal and 29.15 appeals, I had no evidence that either Mr. Shockley or Mr. Steward had been arrested for any crimes or had been charge with any crimes before I went to trial. I did not learn of any of information until I received additional police reports and other documents mailed to me January 2009, from my co-defendant, Christopher White, who also is incarcerated. I gave these documents to Mr. Gipson when I first met with him in January of 2009.

4. If I had known that either of these witnesses (Mr. Shockley and Mr. Steward) had been arrested and charged with crimes and received deals from the State, I would have raised these meritorious issues during my trial and state appeals.

AFFIANT FURTHER SAITH NAUGHT.

Dated: 2/22/10

Juane Kennell
JUANE KENNELL

STATE OF MISSOURI)
)ss.
COUNTY OF Cole)

On this 22 day February, 2010, before me, the undersigned notary public, personally appeared Juane Kennell, known to me to be the person whose name is subscribed to within the instrument and acknowledged that he executed the same for the purposes therein contained. In witness whereof, I hereunto set my hand and official seal.

Dated: 2-22-10

Robyn Combs
Notary Public

Robyn Combs - Notary Public
Notary Seal, State of
Missouri - Moniteau County
Commission #07423334
My Commission Expires 3/28/2011

EXHIBIT 4

DECLARATION OF KENT E. GIPSON

1. My name is Kent E. Gipson. I have been a licensed attorney in the state of Missouri since 1984, specializing in criminal defense and post-conviction litigation.

2. In December of 2008, I was retained by the family of Juane Kennell to represent him in an upcoming federal habeas corpus action challenging his 2004 conviction for first degree murder, assault in the first degree, and two counts of armed criminal action from the Circuit Court of St. Louis City.

3. On January 22, 2009, I visited Mr. Kennell in the Missouri State Penitentiary in Jefferson City. At that time, Mr. Kennell provided me with copies of various police reports and other documents pertaining to the arrest of Jeffrey Shockley and Robert Stewart on various weapons and drug charges. He told me he had just recently received these reports and documents in the mail from his co-defendant, Christopher White. These police reports were attached to Mr. Kennell's amended habeas petition in this case as Exhibit 2.

4. After reviewing these reports, I contacted the St. Louis City Public Defender's Office and provided them with a case number from a conflict transfer document I received from Mr. Kennell involving Jeffrey Shockley. This document is attached hereto. I was told that Shockley was represented by attorney Bob Taaffe and that the case culminated in a guilty plea on February 9, 2004. However, the public defender would not give me access to any further information or to their files without a court order.

5. On March 2, 2009, I called the Circuit Clerk's office in St. Louis, Missouri. I spoke to a man in that office and provided him the name and case number for Jeffrey Shockley's criminal case. At that time, the deputy clerk informed me that they did in fact have this file but that he could not provide it to me or give me any information about it because it was a closed record under Missouri law, which indicated to me, based upon information I had previously received from the public defender, that Mr. Shockley had received a suspended imposition of sentence at his 2004 guilty plea proceeding.

6. I thereafter contacted the court reporter for the presiding judge in St. Louis City and provided her the name of Mr. Shockley, the case number, and the date of the guilty plea. She informed me that the court reporter at Mr. Shockley's guilty plea hearing was Cynthia Tanner. I contacted Ms. Tanner by phone and arranged to have her prepare a transcript of Mr. Shockley's guilty plea, which had not been previously done, because he was not incarcerated for that offense. I received a copy of this guilty plea transcript from Ms. Tanner in July of 2009 and attached it to Mr. Kennell's first amended petition for a writ of habeas corpus as Exhibit 1.

7. Based upon my review of the state court record in Mr. Kennell's case, there was never any indication in any of the transcripts, reports, or other documents that either Mr. Stewart or Mr. Shockley had been arrested or charged with any crimes prior to their testimony against Mr. Kennell at his murder trial. I also spoke to Scott Thompson and Melinda Pendergraph, public defenders who represented Mr. Kennell on his direct appeal and state post-conviction appeal. These public defenders indicated that they had no idea that either Shockley or Stewart had been arrested or charged with any offense prior to their testimony at Kennell's trial. If they had known of this fact, they indicated to me that they would have pursued a due process claim under *Brady v. Maryland* on Mr. Kennell's behalf.

Dated: _____

_____
KENT E. GIPSON

MISSOURI STATE PUBLIC DEFENDER SYSTEM
CONFLICT TRANSFER REQUEST FORM
TRIAL LEVEL

Date	2/7/03
From	KK and SR
District Number	22
Defendant's Name	Juane Kennell
SSN	496-86-5381
Case Number	021-2340
Main Charge	565.020 - Murder 1st FA
Section Code	
Case Type Code	15
Pending County	St. Louis City
Division or Courtroom	16
Judge	Cohen
Prosecutor	Craddick
Next Court Date	3/31/03
Is Client on Bond or Confined?	C
If confined, where?	SLCJail
If bond, address:	
Statement of conflict*	Bob Taaffe represents Jeff Shockley in 021-0715. SR has just learned that Bob has negotiated a deal for Jeff Shockley to testify against this defendant, who was just arraigned on 1/13/03, as well as possibly another defendant, Christopher White (who may also be coming down the pike, as I think we just interviewed that guy today)

**please include victim names and witness names, and case numbers, so that we can be thorough in our conflict checks)*

EXHIBIT 5

DECLARATION OF SCOTT THOMPSON

1. My name is Scott Thompson. I have been a licensed attorney in the state of Missouri since 1995, specializing in criminal defense, appellate and post-conviction litigation.

2. In 2004, I represented Mr. Juane Kennell on appeal from his conviction for first degree murder, assault in the first degree, and two counts of armed criminal action in the Circuit Court of St. Louis City.

3 On appeal to the Missouri Court of Appeal, I raised four issues: (1) The trial court erred in including "initial aggressor" language in Instruction Number 11, the Use of Force in Self-Defense instruction, (2) The trial court clearly erred and abused its discretion in overruling defense counsel's objection to the state's question of its witness, the medical examiner, whether gravel found on the deceased was consistent with, "an arm being on the ground and being stepped on when the question improperly suggested Freddie Chew was stood on by his assailant, a fact not suggested by the evidence and the question was aimed solely at inciting the jurors' passions, (3) The trial court clearly erred in overruling Appellant's objections to the state's use of a peremptory strike to remove venirepersons Mr. Page and Mr. Banks, African Americans, from the venire panel, and (4) The trial court plainly erred in pronouncing sentences for Armed Criminal Action of "natural life" because "natural life," implying as it did no eligibility for parole, not an authorized punishment for Armed Criminal Action.

4. In preparing Mr. Kennell's brief, I reviewed the record on appeal I had compiled from certified copies of the trial court's file and the transcripts of the trial and sentencing. Nothing in the record indicated that Jeffrey Shockley and Robert Stewart had been arrested or charged with any crimes prior to their testimony against Mr. Kennell at his murder trial. I had no idea that either Shockley or Stewart had been arrested or charged with any offense prior to their testimony at Kennell's trial.

5. I have recently reviewed documents I received from Mr. Kennell's current attorney, Kent Gipson, indicating that both Shockley and Stewart received favorable treatment on pending criminal charges in exchange for their testimony against Mr. Kennell. If I had known of this fact while the direct appeal was pending in State court, I would have pursued a due process claim under *Brady v. Maryland* on Mr. Kennell's behalf. Had I known of Shockley and Stewart's deals in exchange for testimony, I would have raised the matter, to the extent possible, on direct appeal of Mr. Kennell's convictions and sentences.

Dated: 4/2/2010

Scott Thompson

EXHIBIT 6

DECLARATION OF MELINDA K. PENDERGRAPH

1. My name is Melinda K. Pendergraph. I have been a licensed attorney in the state of Missouri since 1986, specializing in criminal defense, appellate and post-conviction litigation.

2. In 2007, I represented Mr. Juane Kennell on appeal from the denial of his postconviction action in the Circuit Court of the City of St. Louis. That action was challenging his 2004 conviction for first degree murder, assault in the first degree, and two counts of armed criminal action in the Circuit Court of St. Louis City.

3. On appeal I raised three issues on appeal: trial counsel's ineffectiveness for failing to investigate, provide notice and present an alibi defense; trial counsel's ineffectiveness for failing to submit an alibi instruction; and the motion court's error in failing to grant an evidentiary hearing on trial counsel's ineffectiveness in failing to impeach state witnesses to show they could not identify Kennell as the shooter.

4. In preparing Mr. Kennell's brief, I reviewed the record on appeal from Mr. Kennell's direct appeal and the record on appeal in the postconviction action. Nothing in the file indicated that Jeffrey Shockley and Robert Stewart had been arrested or charged with any crimes prior to their testimony against Mr. Kennell at his murder trial. I had no idea that either Shockley or Stewart had been arrested or charged with any offense prior to their testimony at Kennell's trial.

5. I have recently reviewed documents that I received from Mr. Kennell's current attorney, Kent Gipson, that indicate that both Shockley and Stewart received favorable treatment on pending criminal charges in exchange for their testimony against Mr. Kennell. If I had known of this fact, I would have pursued a due process claim under *Brady v. Maryland* on Mr. Kennell's behalf. I would have raised this issue on appeal had it been presented to the postconviction court.

Dated: March 19, 2010

Melinda K. Pendergraph

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

JUANE T. KENNELL,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 4:09-CV-407 AGF**
	)	
DAVE DORMIRE,	)	
	)	
Defendant.	)	

EXHIBIT TO PETITIONER'S SUPPLEMENTAL TRAVERSE

Exhibit 10 - Missouri State Public Defender System Conflict Transfer Request Form

MISSOURI STATE PUBLIC DEFENDER SYSTEM
CONFLICT TRANSFER REQUEST FORM
TRIAL LEVEL

Date	2/7/03
From	KK and SR
District Number	22
Defendant's Name	Juane Kennell
SSN	496-86-5381
Case Number	021-2340
Main Charge	565.020 - Murder 1st FA
Section Code	
Case Type Code	15
Pending County	St. Louis City
Division or Courtroom	16
Judge	Cohen
Prosecutor	Craddick
Next Court Date	3/31/03
Is Client on Bond or Confined?	C
If confined, where?	SLCJail
If bond, address:	
Statement of conflict*	Bob Taaffe represents Jeff Shockley in 021-0715. SR has just learned that Bob has negotiated a deal for Jeff Shockley to testify against this defendant, who was just arraigned on 1/13/03, as well as possibly another defendant, Christopher White (who may also be coming down the pike, as I think we just interviewed that guy today)

**please include victim names and witness names, and case numbers, so that we can be thorough in our conflict checks)*

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JUANE T. KENNELL,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 4:09-CV-407 AGF
	)	
DAVE DORMIRE,	)	
	)	
Defendant.	)	

PETITIONER'S MOTION TO AUTHORIZE DISCOVERY

COMES NOW petitioner, Juane T. Kennell, by and through counsel, and moves the Court, pursuant to Rule 6 pertaining to cases filed under 28 U.S.C. § 2254 and *Bracy v. Gramley*, 520 U.S. 899 (1997), to authorize petitioner to conduct discovery in this habeas corpus case. For his motion, petitioner states the following grounds:

1. Petitioner has submitted herein a factually detailed petition for relief under 28 U.S.C. § 2254. Petitioner has set forth therein a prima facie case for relief from his conviction and sentence.

2. Under Claim 1 of his habeas petition, petitioner has made allegations, supported by independent sources which, if true, establish that his due process rights guaranteed by the Fourteenth Amendment were violated by the state's nondisclosure of material impeachment evidence regarding the credibility of prosecution witnesses

Jeffrey Shockley and Robert Stewart. In particular, as set forth in the petition, traverse, and supporting exhibits, both Shockley and Stewart were arrested on drug and weapons charges in the time period surrounding the homicide for which petitioner was convicted and before they gave subsequent testimony against petitioner. (*See* Exh's 1, 2). Based upon information currently before the Court, Shockley was arrested twice on drug and weapons charges and Stewart once. (*Id.*). Furthermore, evidence is currently before the Court that Shockley was formally charged with two felonies in the City of St. Louis in Cause No. 021-00715 and received a suspended imposition of sentence on those charges just a week after petitioner was convicted. (*See* Exh. 1). Internal public defender documents show that a "deal" was worked out between Shockley and the state in exchange for his testimony against petitioner and his co-defendant Christopher White. (*See* Exh. 4, p.3). Counsel for petitioner, therefore, has a good faith basis to believe that there is additional relevant evidence to support petitioner's claim for relief under *Brady v. Maryland*, 373 U.S. 83 (1963), in prosecution files, police files, court files, and public defender files to which petitioner does not have access without court-ordered discovery. (*See* Exh. 4).

3. In order to fully and fairly litigate this constitutional claim, it is necessary that petitioner be permitted to conduct discovery. Petitioner has clearly

presented sufficient factual and legal allegations to establish "good cause" to authorize discovery in this case. As the Supreme Court has pointed out: "Where specific allegations before the Court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief, it is the duty of the courts to provide the necessary facilities and procedures for an adequate inquiry." *Bracy v. Gramley*, 520 U.S. at 909, quoting *Harris v. Nelson*, 394 U.S. 286, 299 (1969). In *Banks v. Dretke*, 540 U.S. 668 (2004), the petitioner was granted discovery by the district court to obtain the prosecution's files, which revealed impeaching information regarding a state's witness that later resulted in relief being granted to petitioner in that case. *Id.* at 683-687. The same situation is presented here. Court-ordered discovery is the only avenue by which petitioner can obtain access to closed court files, police files, the prosecutor's files, and public defender files that undoubtedly contain additional evidence supporting petitioner's claim for relief under *Brady*. The disclosure of this information is, therefore, essential to the fair and accurate resolution of petitioner's *Brady* claim that is currently pending before this Court.

4. Specifically, petitioner requests leave to discover, by way of court order, subpoena, production of documents, depositions, and requests for admissions and/or interrogatories the following information:

(a) Any and all existing reports or other documentation contained in the city of St. Louis police files regarding the February 18, 2002 arrest of Jeffrey Shockley at 4931 Arlington in St. Louis City on gun and drug charges.

(b) Any and all reports and other documents in the possession of the St. Louis City Police Department regarding the January 1, 2002 arrest of Shockley and Stewart at 4709 North 20th Street, St. Louis, Missouri.

(c) Any and all files in the possession of the St. Louis City Prosecutor's Office in the underlying criminal case against petitioner and co-defendant Christopher White in No.'s 021-2340 and 021-2368, and in the case of *State of Missouri v. Jeffrey Shockley*, No. 021-00715.[1]

(d) Any other prosecution files or documents pertaining to any other criminal prosecutions or decisions to decline or drop charges in any other criminal case involving the arrest of Shockley or Stewart between 2002 and 2004.

(e) Any and all files and documents in the possession of the St. Louis City Public Defender's Office pertaining to *State v. Shockley*, No. 021-00715 and any

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[1] Since Shockley's case number is significantly lower than petitioner's, it must have been filed before the Freddie Chew homicide. This fact effectively rebuts respondent's argument that Shockley had no incentive to wrongly identify Kennell. (Resp. 5).

or all files and documents in their possession regarding any other prosecutions brought against Shockley or Stewart between 2002 and 2004.

(f) Petitioner also seeks a court order requiring the Clerk of the St. Louis City Circuit Court to turn over all documents contained in the criminal case file of *State v. Shockley*, No. 021-00715. Petitioner further requests a court order requiring the Clerk to produce any other closed criminal case files on any charges filed against Shockley or Stewart between 2002 and 2004.

(g) After these files and/or documents are produced, petitioner further requests leave of the Court to take necessary depositions of material witnesses in this case and, in the event an evidentiary hearing is granted, to issue subpoenas to all material witnesses necessary to present the documentary evidence produced during discovery.

5. Counsel for petitioner expresses to the Court a good faith belief that the discovery requested by petitioner is likely to produce relevant evidence or will lead to the discovery of relevant and admissible evidence. Further, counsel firmly believes that granting leave to conduct the requested discovery will assist the Court in arriving at a just and reliable resolution of the constitutional claims presently before it. In such circumstances, a district court is authorized to permit a prisoner to use suitable discovery procedures to help the Court "to dispose of the matter as law and justice

require." *Harris v. Nelson*, 394 U.S. at 290. *See also Toney v. Gammon*, 79 F.3d 693, 700 (8th Cir. 1996).

WHEREFORE, petitioner moves this Court to grant him leave to conduct the discovery requested herein, and order the Clerk of the Court to provide petitioner's counsel with a sufficient number of subpoenas duces tecum necessary to obtain the necessary records and reports, or issue orders directing the agencies and individuals in possession of these records and reports to promptly provide these records to counsel for petitioner, or grant such other and further relief that the Court deems fair and just.

Respectfully Submitted,

/s/ Kent E. Gipson
Kent E. Gipson, Mo. Bar No. 34524
Law Offices of Kent Gipson, LLC
301 East 63rd Street
Kansas City, Missouri 64113
Tel: 816-363-4400 • Fax: 816-363-4300
Email: kent.gipson@kentgipsonlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel of record.

/s/ Kent E. Gipson
Kent E. Gipson

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

JUANE T. KENNELL,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 4:09-CV-407 AGF
	)	**ECF**
DAVE DORMIRE,	)	
	)	
Respondent.	)	

SUGGESTIONS IN OPPOSITION TO PETITIONER'S MOTION TO AUTHORIZE DISCOVERY

Comes now respondent, by and through counsel, and states as follows as his suggestions in opposition to petitioner's April 22, 2010 motion to authorize discovery.

Petitioner requests authorization for discovery concerning two witnesses who testified for the state during petitioner's criminal trial. But for each witness, petitioner merely speculates about the existence of information to support a claim under Brady v. Maryland, 373 U.S. 83 (1963), and such speculation is insufficient cause for discovery under Rule 6 following 28 U.S.C. §2254.

As to witness Robert Stewart (Tr. 560), petitioner suggests that Stewart was arrested on July 1, 2002 but the charge was dismissed before Stewart's enlistment in the Army in 2002 (First Amended Petition, page 10). Assuming the suggestion were true, and assuming that the suggestion was not disclosed, petitioner cannot show prejudice under Brady. To state a Brady claim, the alleged information that was not disclosed must

be "material." Phrased another way, the undisclosed information must create a reasonable probability that the outcome of the trial would have been different. Strickler v. Greene, 527 U.S. 263 (1999); Strickland v. Washington, 466 U.S. 668 (1984).

The record reflects that petitioner's murder of Mr. Chew occurred on June 21, 2002 (Tr. 562-63). Later that day, Stewart had informed the police of petitioner's involvement (Tr. 585). On June 21, 2002, Stewart picked out petitioner's photograph (Tr. 586-88). Shortly thereafter, Stewart picked out petitioner from a line-up (Tr. 588-89). The witness's identification of petitioner occurred before the alleged arrest on July 1, 2002. Because the inculpatory information came in to existence before the alleged arrest, petitioner cannot show a reasonable probability that the outcome of the proceeding would have been different.[1]

As to witness Shockley, petitioner again complains that Shockley was arrested on July 1, 2002 (Motion, page 2). Similarly, Shockley identified petitioner before that alleged arrest. Shockley spoke with the police on June 21, 2002 (Tr. 522-23). Shockley identified petitioner's photograph that day (Tr. 523-26). Shockley identified petitioner from a live line-up on June 26, 2002 (Tr. 526-28). Again, Shockley identified petitioner before the alleged July 1, 2002 arrest.

Finally, petitioner contends that the state did not disclose a "deal" between Shockley and the state concerning the disposition of charges in State v. Shockley, No.

[1] Petitioner also suggests that a weapon used at the Arlington shootout was confiscated during the July 1, 2002 arrest (Motion, page 2). But the record was clear that the murder victim fired his weapon many times into the street (Tr. 454, 517-18, 576). It was also clear that Jeffry Shockley fired his weapon (Tr. 519, 578-79). Again, petitioner can show no Brady prejudice.

021-00715. The pending charge was discussed at Christopher White's, the co-defendant's, trial (Suggestions Exhibit A). Additionally, the fact that there was no deal made was also discussed during that proceeding (Tr. 555-56). That testimony under oath is confirmed at the February 9, 2004 guilty plea by Mr. Shockley (Petitioner's Exhibit 1), when Mr. Shockley's counsel announced, "this plea is made open. We have no agreement with the State of Missouri" (Petitioner's Exhibit 1, page 2). This understanding is confirmed later during the proceeding (Petitioner's Exhibit 1, page 12). Interestingly, in his motion, petitioner does not attach an affidavit from petitioner's counsel, Ms. Ibe, indicating the Shockley information was not disclosed, only affidavits from appellate attorneys.

To support his case, petitioner attaches petitioner's Exhibit 4, a computer generated unsigned and unsworn document containing multiple layers of hearsay. And in contrast, Shockley's lawyer, as an officer of the court, represented to the court, that Shockley was pleading guilty without a deal. Petitioner presents no recantation by the officer of the court. The in-court testimony should trump the hearsay proffered by petitioner.

WHEREFORE, for the reasons herein stated, respondent prays that the Court deny petitioner's motion to authorize discovery.

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Respectfully submitted,

CHRIS KOSTER
Attorney General

\s\ Stephen D. Hawke
STEPHEN D. HAWKE
Assistant Attorney General
Missouri Bar No. 35242

P. O. Box 899
Jefferson City, MO 65102
(573) 751-3321
(573) 751-3825 fax
stephen.hawke@ago.mo.gov
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed by using the CM/ECF system; thus, undersigned counsel should receive notice of the filing and the document through the CM/ECF service:

Kent E. Gipson
Attorney at Law
301 East 63rd Street
Kansas City, MO 64113

/s/ Stephen D. Hawke
Stephen D. Hawke
Assistant Attorney General

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

CHRISTOPHER WHITE, Appellant, vs. STATE OF MISSOURI, Respondent.	Appeal No. ED-84232

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI
Honorable Robert H. Dierker, Jr., Judge

STATE OF MISSOURI, Plaintiff, vs. CHRISTOPHER WHITE, Defendant.	Cause No. 021-02368

TRANSCRIPT ON APPEAL
JANUARY 12 - 16, 2004
VOLUME II

MR. ROBERT CRADDICK
MS. MARY PAT BENNINGER
Assistant Circuit Attorneys,
on behalf of the State of Missouri;

MS. TARA CRANE
MS. MICHELLE MONAHAN
Assistant Public Defenders,
on behalf of the Defendant.

MARGARET E. WALSH, CCR, RPR, CRR
OFFICIAL COURT REPORTER
CITY OF ST. LOUIS CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT

Juane Kennell v. Dave Dormire
No. 4:09-CV-407 AGF
Suggestions Exhibit A

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A Right.
Q And you look at the lineup, correct?
A Right.
Q With the detectives.
A Right.
Q And he's on the other side of the window.
A Right.
Q And you pick Smurf, who you believe is Smurf, out of that lineup.
A Right.
Q You're looking for Smurf.
A Right.
Q And then a few days after that, you have to come back down to the police station again.
A Right.
Q And at that point, you're looking for Christopher White at that point.
A Right.
Q And you do the same thing with the physical lineup
A Um-hum.
Q You're there with the detectives.
A Right.
Q You're on one side of a window, correct?
A Right.
Q Five ...en are on the other side of the window.
A Right.
Q And you pick Christopher White out of those five men.
A Right.
Q Because that's who you believe the shooter is.
A Right.
Q You weren't cooperating with the police at first.
A Right.
Q But you're cooperating now.
A Right.
Q And isn't it true that you have a pending felony here in the City of St. Louis?
A Right.
Q Charged by the prosecutor's office.
A Right.
Q Now, I would like to show you what is Defendant's Exhibit N. And you had talked before about what type of guns you and Fred and Robert had.
A Right.
Q Okay. And you indicated that you had a Glock 9 millimeter pistol.
A Right.
Q I'm showing you Defendant's Exhibit N. Do

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you recognize it?
A Yes.
Q What is it?
A A Glock 9 millimeter.
Q Is that similar to the gun that you had on the night of June 21st?
A Yeah.
Q Now, I'd like to show you what's been marked as Defendant's Exhibit N –
MR. CRADDICK: I'm sorry. I thought the first was M, as in Nancy.
MS. CRANE: N, as in Nancy. This is M, as in Mike.
MR. CRADDICK: Okay. Thank you.
Q [illegible] Do you recognize that?
A Yes.
Q What is that?
A A 9 millimeter Ruger.
Q I'm sorry, could you speak –
A A 9 millimeter Ruger.
Q Okay. And is that the type of gun, similar to what Fred had that night on the porch?
A Yes, sir.
Q And these are the guns that you describe as being automatic.

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A Right.
Q Thank you.
Now I'd like to show you what's been marked as Defendant's Exhibit D. Do you recognize it?
A Yes.
Q And what is it?
A Fred's house.
Q Fred's house?
A Right.
Q And is that a fair and accurate reflection of Fred's house?
A Yes.
Q And can you describe – show it to the jury and describe – point to where it is that you pointed off – jumped off on the porch at?
A (Indicating).
Q Okay. And you fell down and into the gangway right there.
A Yes, ma'am.
Q Next to that water spout.
A Yes, ma'am.
Q Okay. I'd like to show you now what's been marked as Defendant's Exhibit C. Do you recognize it?
A Yes.
Q And what is it?

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A Right.
Q Okay. Whatever you did with the police and whatever you told the police and whatever you did in common, did you do that independent of Robert Stewart?
A No.
Q Were you with Robert Stewart in the police station when that happened?
A No.
Q So you did it independent of him?
A Right.
Q You weren't with him then.
A I wasn't with him
MR. CRADDICK: Your Honor, I have no further -- I do have one more question.
Q You were asked about a pending case you have.
A Right.
Q Have I given you any deal to testify here today?
A No.
Q Have I made you any promises?
A No.
Q Has anyone in my office made you any promises in exchange for your testimony?
A No.
Q Do you have a lawyer on that case?
A Right.

Q Is t[illegible]ase still pending here?
A Yeah.
Q Do you expect to get anything from your testimony here today?
A No.
MR. CRADDICK: I have nothing further of the witness, Judge.
THE COURT: Ms. Crane?
MS. CRANE: I have no further questions at this time, but I would like to reserve the right to recall this witness.
THE COURT: All right. Mr. Shockley, you may step down, but you're not excused. You'll have to stay in touch with us, okay?
THE WITNESS: All right.
THE COURT: Ladies and gentlemen, we'll take a recess at this time.
Please don't discuss the case among yourselves or with others or form or express any opinions about it, and we'll be in recess for 20 minutes. Leave your notebooks in your chairs.
(At this time, the Court declared a recess and the jury was duly admonished.

The following proceedings were held in open Court within the presence and hearing of the jury).
THE COURT: You may call your next witness, Mr. Craddick.
MR. CRADDICK: The State calls Damon Stowers.
(Oa
DAMON STOWERS,
having been first duly sworn by the Deputy Clerk, testified:
DIRECT EXAMINATION
BY MR. CRADDICK:
THE COURT: You may proceed.
Q (By Mr. Craddick) Would you state your name for the Court and jury please?
A Damon Stowers.
Q Mr. Stowers, how old are you?
A Twenty nine.
Q And on June the 21st of the year 2002, where did you live?
A The 5300 block of Arlington.
Q Specifically, what address?
A 5351.
Q Now, I want to direct your attention to your direct left there. Do you see that diagram?
A Yes, sir.
Q Do you recognize those -- the lay-out of houses as being the houses laid out in part of the block of the 5300 block of Arlington?
A Yes, sir.
Q Would you agree with the houses as they're laid out and the numbers attached to them, as being part of that block?
A Yes, sir.
Q Would you step down and point to your house on that diagram, if it's on the diagram?
A (Indicating).
Q And for the record, you pointed at 5351, is that correct?
A Yes, sir.
Q Please take your seat.
At that time of June of the year 2002, did you know a person named Freddie Chew?
A Yes, sir.
Q And did you know him to either stay or have a relative who lived across the street from your house?
A Yes, sir.
Q What was the number of that house, if you know?
A I believe it was 5342.
Q Okay. That's also on the diagram?
A Yes, sir.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JUANE T. KENNELL,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 4:09-CV-407 AGF**
	)	
DAVE DORMIRE,	)	
	)	
Defendant.	)	

PETITIONER'S REPLY MEMORANDUM IN SUPPORT OF HIS MOTION TO AUTHORIZE DISCOVERY

COMES NOW petitioner, Juane T. Kennell, by and through counsel, and states as follows in reply to the Attorney General's Suggestions in Opposition to Petitioner's Motion to Authorize Discovery.

Before delving into the specific arguments that respondent advances in opposition to the discovery motion, petitioner would like to point out a clerical error contained in his discovery motion. (*See* Doc. 29). On page 4, paragraph (b): Petitioner requested reports from the police regarding the "January, 2002" arrest of Shockley and Stewart. The arrest in question actually occurred on July 1, 2002, not January 1, 2002. (*See* Pet. Exh. 2). Petitioner apologizes for this mistake.

In opposing this motion, respondent essentially advances two arguments. First, respondent contends that petitioner cannot meet the *Brady* materiality test. (Doc. 39,

pp.1-2). Second, respondent contends that the record conclusively shows that no deal existed between Shockley and the government. (*Id.* pp.2-3). Petitioner will address both of these arguments in turn.

On the issue of *Brady* materiality, respondent's argument places the "cart before the horse." The obvious reason that petitioner is seeking discovery on this *Brady* issue is precisely because the full extent of the deals that were made with Shockley and Stewart cannot be ascertained by petitioner and this Court unless discovery is granted. *See Toney v. Gammon*, 79 F.3d 693, 700 (8th Cir. 1996). For instance, it is still a mystery as to whether any charges were ever filed against Stewart or Shockley arising from their July 1, 2002 arrest.[1] Discovery is, therefore, necessary to determine whether the police declined to present the July 2002 case to the state for prosecution, or whether the prosecution declined to file charges. Most importantly, in light of the timing of the arrest, discovery is warranted to determine whether any decision not to file charges was related to their cooperation in the Freddie Chew homicide investigation.

Respondent's *Brady* materiality argument also conveniently omits several significant facts that should be taken into consideration in assessing the materiality

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[1]If formal charges were filed and later dismissed or, if either witness received an "SIS," the criminal files are closed records under Missouri law.

of the suppressed evidence in this case under *Brady*. First, in making the argument that this evidence would not have significantly affected Shockley's and Stewart's testimony, respondent fails to mention that petitioner's conviction rested solely on their credibility, which was already questionable in light of the fact that they wrongly identified other suspects in the murder before settling on petitioner and Christopher White as the assailants. (*See* Trav., Doc. 27, pp.10-11). There was also no physical evidence to tie petitioner to the crime. (*Id.*). Respondent's argument also ignores the fact that the known charges against Shockley arose from an incident that occurred in February of 2002 and, in light of the case number, this charge was obviously filed *before* the Chew homicide. (*See* Doc. 29, p.4, n.1).

Respondent's second argument, that no deal existed, is also premature because the facts have not been fully developed regarding all of the inducements that Shockley and Stewart obtained in exchange for their cooperation with police and prosecutors. Respondent also argues that because co-defendant Christopher White's attorney knew of Shockley's pending charge, this somehow suggests that this information was disclosed to Mr. Kennell. This argument ignores the fact that White's trial occurred the week *after* Kennell had already been convicted. This argument also ignores the fact that petitioner's *Brady* claim involves undisclosed

deals regarding Shockley's arrests and charges, not just the existence of the charge by itself. *See e.g. Killian v. Poole*, 282 F.3d 1204, 1208-1210 (9th Cir. 2002).

Respondent's final line of defense to court-ordered discovery on this issue is the argument that, based upon the testimony of Shockley at White's trial and Shockley's guilty plea transcript, there is conclusive evidence that no deal existed. Contrary to respondent's position, Shockley's testimony at Mr. White's trial actually adds further weight to petitioner's *Brady* claim. During his re-direct examination in White's trial, Shockley denied he received any promises or favorable considerations from the state in exchange for his testimony. (Resp. Exh. A, p. 3). This testimony is now known to be false based upon words that came from the mouth of Shockley's attorney at his subsequent guilty plea hearing, where Shockley's counsel indicated that the state paid for Shockley's moving expenses prior to petitioner's trial. (*See* Exh. 1, pp.11-12). This "slip of the tongue" shows the existence of a secret deal with Shockley to provide him a monetary reward for his testimony. *See State ex. rel Engel v. Dormire*, 304 S.W.3d 120, 127 (Mo. banc 2010).

Respondent also argues that Shockley's plea was "open," that is, there was no plea agreement between Shockley and the state. However, this assertion is belied by the fact that the prosecutor recommended a two year suspended sentence and two years of probation for Shockley before the plea colloquy began. (*See* Exh. 1, p.5).

Other strong circumstantial evidence of the existence of a secret deal is the obvious fact that it would have been unprecedented for a minor felony prosecution to await disposition for two years unless the trial court held the case by agreement until after White and Kennell had been convicted.

Petitioner's reasonable and factually specific requests for discovery should be granted in the interest of justice so that the truth will come to light.

Respectfully Submitted,

/s/ Kent E. Gipson
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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel of record.

/s/ Kent E. Gipson
Kent E. Gipson

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JUANE T. KENNELL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 4:09CV00407 AGF
	)	
DAVE DORMIRE,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

This matter is before the Court on Petitioner's Motion to Authorize Discovery (Doc. #29). Petitioner seeks to investigate whether either or both of two witnesses for the prosecution (Jeffrey Shockley and Robert Stewart) had an agreement with the State in exchange for their testimony against Petitioner, who was convicted of first degree murder, first degree assault, and two counts of related armed criminal action, and is serving a life sentence without the possibility of parole. The existence of any such agreement was not disclosed to Petitioner by the State in response to discovery requests, and on redirect examination at the trial of Petitioner's co-defendant, Christopher White, Shockley denied any such agreement. (Resp. Ex. A, p. 3). But new evidence suggests that agreements may have existed, especially with respect to Shockley.

Petitioner argues that if in fact such deals existed, he would be entitled to habeas relief under Brady v. Maryland, 373 U.S. 83 (1963). In Brady, the Supreme Court held that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment,

EXHIBIT 5

DECLARATION OF SCOTT THOMPSON

1. My name is Scott Thompson. I have been a licensed attorney in the state of Missouri since 1995, specializing in criminal defense, appellate and post-conviction litigation.

2. In 2004, I represented Mr. Juane Kennell on appeal from his conviction for first degree murder, assault in the first degree, and two counts of armed criminal action in the Circuit Court of St. Louis City.

3 On appeal to the Missouri Court of Appeal, I raised four issues: (1) The trial court erred in including "initial aggressor" language in Instruction Number 11, the Use of Force in Self-Defense instruction, (2) The trial court clearly erred and abused its discretion in overruling defense counsel's objection to the state's question of its witness, the medical examiner, whether gravel found on the deceased was consistent with, "an arm being on the ground and being stepped on when the question improperly suggested Freddie Chew was stood on by his assailant, a fact not suggested by the evidence and the question was aimed solely at inciting the jurors' passions, (3) The trial court clearly erred in overruling Appellant's objections to the state's use of a peremptory strike to remove venirepersons Mr. Page and Mr. Banks, African Americans, from the venire panel, and (4) The trial court plainly erred in pronouncing sentences for Armed Criminal Action of "natural life" because "natural life," implying as it did no eligibility for parole, not an authorized punishment for Armed Criminal Action.

4. In preparing Mr. Kennell's brief, I reviewed the record on appeal I had compiled from certified copies of the trial court's file and the transcripts of the trial and sentencing. Nothing in the record indicated that Jeffrey Shockley and Robert Stewart had been arrested or charged with any crimes prior to their testimony against Mr. Kennell at his murder trial. I had no idea that either Shockley or Stewart had been arrested or charged with any offense prior to their testimony at Kennell's trial.

5. I have recently reviewed documents I received from Mr. Kennell's current attorney, Kent Gipson, indicating that both Shockley and Stewart received favorable treatment on pending criminal charges in exchange for their testimony against Mr. Kennell. If I had known of this fact while the direct appeal was pending in State court, I would have pursued a due process claim under *Brady v. Maryland* on Mr. Kennell's behalf. Had I known of Shockley and Stewart's deals in exchange for testimony, I would have raised the matter, to the extent possible, on direct appeal of Mr. Kennell's convictions and sentences.

Dated: 4/2/2010

Scott Thompson

EXHIBIT 6

DECLARATION OF MELINDA K. PENDERGRAPH

1. My name is Melinda K. Pendergraph. I have been a licensed attorney in the state of Missouri since 1986, specializing in criminal defense, appellate and post-conviction litigation.

2. In 2007, I represented Mr. Juane Kennell on appeal from the denial of his postconviction action in the Circuit Court of the City of St. Louis. That action was challenging his 2004 conviction for first degree murder, assault in the first degree, and two counts of armed criminal action in the Circuit Court of St. Louis City.

3. On appeal I raised three issues on appeal: trial counsel's ineffectiveness for failing to investigate, provide notice and present an alibi defense; trial counsel's ineffectiveness for failing to submit an alibi instruction; and the motion court's error in failing to grant an evidentiary hearing on trial counsel's ineffectiveness in failing to impeach state witnesses to show they could not identify Kennell as the shooter.

4. In preparing Mr. Kennell's brief, I reviewed the record on appeal from Mr. Kennell's direct appeal and the record on appeal in the postconviction action. Nothing in the file indicated that Jeffrey Shockley and Robert Stewart had been arrested or charged with any crimes prior to their testimony against Mr. Kennell at his murder trial. I had no idea that either Shockley or Stewart had been arrested or charged with any offense prior to their testimony at Kennell's trial.

5. I have recently reviewed documents that I received from Mr. Kennell's current attorney, Kent Gipson, that indicate that both Shockley and Stewart received favorable treatment on pending criminal charges in exchange for their testimony against Mr. Kennell. If I had known of this fact, I would have pursued a due process claim under *Brady v. Maryland* on Mr. Kennell's behalf. I would have raised this issue on appeal had it been presented to the postconviction court.

Dated: March 19, 2010

Melinda K. Pendergraph

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

JUANE T. KENNELL,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 4:09-CV-407 AGF**
	)	
DAVE DORMIRE,	)	
	)	
Defendant.	)	

EXHIBIT TO PETITIONER'S SUPPLEMENTAL TRAVERSE

Exhibit 10 - Missouri State Public Defender System Conflict Transfer Request Form

MISSOURI STATE PUBLIC DEFENDER SYSTEM
CONFLICT TRANSFER REQUEST FORM
TRIAL LEVEL

Date	2/7/03
From	KK and SR
District Number	22
Defendant's Name	Juane Kennell
SSN	496-86-5381
Case Number	021-2340
Main Charge	565.020 - Murder 1st FA
Section Code	
Case Type Code	15
Pending County	St. Louis City
Division or Courtroom	16
Judge	Cohen
Prosecutor	Craddick
Next Court Date	3/31/03
Is Client on Bond or Confined?	C
If confined, where?	SLCJail
If bond, address:	
Statement of conflict*	Bob Taaffe represents Jeff Shockley in 021-0715. SR has just learned that Bob has negotiated a deal for Jeff Shockley to testify against this defendant, who was just arraigned on 1/13/03, as well as possibly another defendant, Christopher White (who may also be coming down the pike, as I think we just interviewed that guy today)

**please include victim names and witness names, and case numbers, so that we can be thorough in our conflict checks)*

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