

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JUANE T. KENNEL,)

Petitioner,)

v.)

Case No. 4:09-CV-407 AGF

DAVE DORMIRE,)

Defendant.)

FIRST AMENDED PETITION FOR A WRIT OF HABEAS CORPUS

COMES NOW petitioner Juane Kennell, by and through counsel, and submits to this Court his first amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In support of this petition, Mr. Kennell states the following grounds:

INTRODUCTION AND PROCEDURAL HISTORY

On June 21, 2002, a shootout occurred on the streets in the City of St. Louis at 5342 Arlington between Freddie Chew, Jeffrey Shockley, and Robert Stewart and three other persons. After a hail of gunfire involving at least five nine millimeter weapons, Freddie Chew died from multiple gunshot wounds. (Trial Tr. 215). Miraculously, no one else involved in the shooting was hit, despite the fact the police recovered more than fifty-two bullets, fragments, and shell casings at the scene. (*Id.* 216, 263-291). None of the weapons involved were recovered by the police at the scene. (*Id.*).

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On June 21, 2002, a shootout occurred on the streets in the City of St. Louis at 5342 Arlington between Freddie Chew, Jeffrey Shockley, and Robert Stewart and three other persons. After a hail of gunfire involving at least five nine millimeter weapons, Freddie Chew died from multiple gunshot wounds. (Trial Tr. 215). Miraculously, no one else involved in the shooting was hit, despite the fact the police recovered more than fifty-two bullets, fragments, and shell casings at the scene. (*Id.* 216, 263-291). None of the weapons involved were recovered by the police at the scene. (*Id.*).

After being identified by Jeffrey Shockley as one of the three men involved in the shooting, petitioner Juane Kennell was charged and subsequently convicted in January of 2004 for the offenses of first degree murder involving Mr. Chew, assault in the first degree involving Mr. Shockley, and two counts of armed criminal action in the Circuit Court of St. Louis City. (L.F. 13-14, 71-74). Petitioner was subsequently sentenced to life without parole, life imprisonment, fifteen years, and life imprisonment on February 20, 2004 by the Honorable Robert Dierker. (*Id.* 86-89). Petitioner is currently serving these sentences at the Jefferson City Correctional Center in the custody of respondent.

During post-conviction proceedings, compelling facts have come to light indicating that petitioner was wrongfully convicted due to a combination of prosecutorial misconduct and incompetence of his appointed trial counsel. Material exculpatory evidence was concealed from petitioner at the time of trial and was not heard by the jury involving the fact that the prosecution's star witness Jeffrey Shockley, was offered a deal on pending drug and weapons charges in exchange for his testimony against petitioner. In fact, one month after petitioner was convicted, Mr. Shockley pleaded guilty to two felony charges, possession of cocaine base and unlawful use of a weapon, that arose from a 2002 incident in the same neighborhood where the Chew homicide occurred. (*See* Exh. 1).

Because of his cooperation in this case, Shockley received a suspended imposition of sentence (SIS), and one year of unsupervised probation. In addition to this extremely lenient deal, the sentencing court took the extraordinary step of waiving Shockley's court costs, drug testing and every other normal requirement of probation. (*Id.* at p. 13).

Shockley and prosecution witness Robert Stewart were also arrested on drug and gun charges on July 1, 2002, just ten days after the Chew homicide. (*See* Exh. 2). Counsel for petitioner has been unable to determine the disposition of those drug and weapons charges because they are closed records. However, there is strong reason to believe, as subsequent discovery will verify, that both Stewart and Shockley were also given favorable consideration on those charges in exchange for their cooperation and testimony against petitioner and his co-defendant Christopher White. Like the Shockley guilty plea deal, this evidence was also concealed by the state. The aforementioned facts present the Court with a textbook violation of the due process clause under the seminal case of *Brady v. Maryland*, 373 U.S. 83 (1963). Because petitioner's jury had no reason to doubt the credibility of Shockley and Stewart, there is a reasonable probability that the prosecution's concealment of these secret deals with their two key witnesses affected the outcome of the case. *See Strickler v. Greene*, 527 U.S. 263, 280 (1999).

This *Brady* violation is not the only Constitutional error that tainted petitioner's conviction. Petitioner's appointed counsel, Afocha Ibe, failed to investigate and effectively present petitioner's alibi defense, which petitioner had insisted would exonerate him since he was arrested on these charges. Trial counsel inexplicably failed to give the prosecutor notice, as required by Missouri's discovery rules, that petitioner intended to present an alibi defense. (29.15 Tr. 18; 29.15 L.F. 22). As a sanction for this oversight, the trial court would not allow petitioner's trial counsel to give an opening statement regarding the alibi. (Trial Tr. 631). The prosecution also objected to trial counsel's presentation of petitioner's grandmother, Hattie Bolton, as an alibi witness. However, the trial court overruled the state's objection and allowed Ms. Bolton to testify that petitioner was at home with her at the time of the shooting and could not have left because her alarm was set and petitioner did not know the code to disarm it. (*Id.* at 683-689). Petitioner also testified in his own defense and denied any role in the shooting and corroborated his grandmother's testimony that he was at her home at the time the shooting occurred. (*Id.* 794).

Despite being allowed to present this alibi testimony over the state's objection, Ibe inexplicably did not submit an alibi instruction for the jury's consideration. *Id.* at 826-831; 29.15 L.F. 47-68, 75-80. Astonishingly, Ibe subsequently testified that

it was her belief that since she failed to give notice of the alibi she was legally precluded from offering an alibi instruction. (29.15 Tr. 25).

During state post-conviction proceedings, petitioner raised an ineffectiveness claim regarding counsel's failures in investigating and presenting petitioner's alibi evidence. (29.15 L.F. 31-33). Petitioner presented evidence that trial counsel failed to interview and present the testimony of petitioner's little sister Hatta Holmes, who corroborated the testimony of her grandmother that petitioner was home at the time of the homicide and could not have left because the alarm was set and only her grandmother had the code. (*Id.* at 25, 55-57). Ms. Bolton also testified that she had difficulty in communicating with trial counsel, who only interviewed her once prior to trial. (*Id.* 35-38).

Because the jury was given no compelling reason to disbelieve Shockley and Stewart, coupled with the bungled alibi defense, it came as no surprise that petitioner was convicted as charged. On direct appeal, the Missouri Court of Appeals, Eastern District affirmed petitioner's convictions in an unpublished memorandum opinion issued on February 15, 2005. *State v. Kennell*, No. ED84222.

Thereafter, petitioner pursued a timely motion for post-conviction relief pursuant to Rule 29.15. After holding an evidentiary hearing on the issue regarding counsel's failure to effectively present petitioner's alibi defense, Judge Dierker

denied relief on September 26, 2006. (29.15 L.F. 36-43). On appeal, the Missouri Court of Appeals affirmed Judge Dierker's order in an unpublished decision. *Kennell v. State*, No. ED89097. After transfer was denied by the Missouri Supreme Court, the Court of Appeals issued its mandate on March 21, 2008.

Petitioner commenced the present federal habeas proceeding by filing a timely *pro se* motion for a writ of habeas corpus on March 11, 2009. Petitioner's first amended petition for a writ of habeas corpus is now before this Court for consideration.

PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner's conviction was secured in violation of the Sixth and Fourteenth Amendments in the following respects:

CLAIM NO. 1

PETITIONER'S CONVICTION WAS SECURED IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE THE STATE FAILED TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE REGARDING ARRESTS AND PROSECUTIONS OF STATE WITNESSES JEFFREY SHOCKLEY AND ROBERT STEWART ON FELONY DRUG AND WEAPONS CHARGES FOR WHICH THEY RECEIVED DEALS IN EXCHANGE FOR THEIR TESTIMONY AGAINST PETITIONER AND HIS CO-DEFENDANT WHICH WOULD HAVE ADVERSELY IMPACTED THEIR BELIEVABILITY IN THE EYES OF THE JURY AND AFFECTED THE OUTCOME OF PETITIONER'S TRIAL.

Petitioner's conviction was secured in violation of his due process rights guaranteed by *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, because the state concealed from petitioner's trial counsel evidence that Jeffrey Shockley and Robert Stewart had been arrested and charged in 2002 on felony drug and weapons charges and received deals on those charges in exchange for their testimony. As noted earlier, evidence recently came to light that Jeffrey Shockley had pending felony drug and weapons charges against him in St. Louis City for which he received probation, that was not disclosed to the defense. (See Exh. 1). As a result, this material impeaching information was not heard by petitioner's jury to allow them to fully and fairly assess Shockley's credibility or lack thereof. It is well settled that the prosecution's nondisclosure of impeachment evidence of this nature, adversely affecting the credibility of a prosecution witness, falls under the *Brady* rule. See e.g. *Giglio v. United States*, 405 U.S. 150, 154-155 (1972).

On February 9, 2004, a month after he provided testimony that was critical in securing petitioner's conviction, Shockley pleaded guilty to two felony charges in *State v. Shockley*, No. 021-00715, in the Circuit Court of St. Louis City. (See Exh. 1). As noted earlier, these two felony charges involved the possession of cocaine base and carrying a concealed weapon that occurred in 2002 at 4931 Arlington, near the scene of the homicide. (*Id.* at p. 6).

The transcript of this guilty plea makes for some interesting reading. Although Mr. Shockley's attorney Robert Taaffe insisted at the initiation of the plea colloquy that no agreement has been made with the State of Missouri, the subsequent proceedings reveal otherwise. When asked by the court for a sentencing recommendation, the State's attorney recommended a two year suspended sentence and two years of probation. (*Id.* at p. 5). After the Court accepted petitioner's guilty plea to both felony charges, Mr. Taaffe gave a lengthy argument in favor of an even more lenient disposition of the charges. In this regard Mr. Taaffe stated: "For the past few years, Mr. Shockley has cooperated with the State of Missouri in the prosecution of two murder first cases. He came to court on time for two years, cooperated with Mr. Craddick, showed up when the cases were to go to trial and for two years he hung in with the state... As a result of this testimony, Judge, the state secured two first degree murder convictions, and Mr. Shockley did this not just as a concerned citizen, which would be his normal duty, but did this when his life was threatened. And he cooperated with the state. They moved him.¹ He's out of the neighborhood, Judge,

¹ This statement indicates that the state provided financial assistance to Shockley. Because this fact was also concealed by the state, this "payment for testimony" also constitutes a *Brady/Giglio* violation. See *United States v. Librach*, 520 F.2d 550, 553-554 (8th Cir. 1975).

he's out of that element, and he did what he ought to or should have done as a citizen." *Id.* at pp. 11-12.

Although Mr. Taaffe stated that Shockley did not have a formal plea agreement with the state, Mr. Taaffe argued that, because petitioner's testimony was critical to the convictions of petitioner and his co-defendant, that Shockley should receive an SIS and six months of unsupervised probation. *Id.* at p. 12. Thereafter, Judge John Garvey sentenced Shockley to an SIS on both counts and one year of unsupervised probation and waived all court costs and other normal requirements of probation. (*Id.* at 13).

Despite Mr. Taaffe's astonishing assertion that no deal existed, the record clearly indicates otherwise and the state was required by *Brady* to disclose to the defense that Shockley was facing two felony charges and was testifying with an expectation of receiving leniency on those charges from the state. The existence of this secret deal is corroborated by the circumstances surrounding the disposition of Shockley's case, which is the only explanation why the case languished on a docket for nearly two years before petitioner received an extremely lenient plea bargain for probation just weeks after he testified against petitioner. Despite the fact that petitioner's appointed counsel filed the standard request for discovery requesting any material exculpatory evidence in the state's possession (L.F. 15), the state failed to

disclose that Mr. Shockley was facing these pending criminal charges and expected to and did receive leniency for his testimony in clear violation of the *Brady* rule. See e.g. *Reutter v. Solem*, 888 F.2d 578, 582 (8th Cir. 1989).

The state also failed to disclose that both Shockley and Stewart were arrested on drug and weapons charges on July 1, 2002, ten days after the homicide. (See Exh. 2). The state also failed to disclose that the nine millimeter weapon seized from the car in which these two states witnesses were arrested matched the shell casings at the scene of the homicide. (*Id.*). Undersigned counsel has attempted to obtain further information in addition to the attached police reports to reveal the disposition of these charges against Shockley and Stewart. Counsel has been unable to discover the disposition of these charges, undoubtedly due to the fact that either they were dismissed or resulted in a suspended imposition of sentence, which would make those dispositions closed records under Missouri's Sunshine Law. See § 610.105 R.S.Mo. (2000). In light of Stewart's trial testimony that he enlisted in the Army in 2002, (Trial Tr. 560), it is likely that his charges were dismissed by the state because Army regulations do not allow recruits who have pending felony charges to enlist. Army Regulation 601-210 § 1-9(a) (1995). Petitioner intends to seek further discovery on these issues, pursuant to Rule 6, in order to bring to light and develop further facts supporting this *Brady* claim regarding Shockley and Stewart.

Undisclosed evidence is material under *Brady* if there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome at trial would have been different. *Strickler v. Greene*, 527 U.S. 263, 289 St. 90 (1999). In other words, the withheld evidence must "undermine confidence in the conviction." *Kyles v. Whitley*, 543 U.S. 419, 434-437 (1995); *United States v. Bagley*, 473 U.S. 667, 682 (1985).

Petitioner can easily meet the *Brady* materiality test. These two witnesses provided the most important evidence, indeed the only direct evidence, implicating petitioner in the crimes. Had the jury been given a compelling reason to disbelieve their testimony, there is a reasonable probability that petitioner would have been acquitted. See *Benn v. Lambert*, 283 F.3d 1040, 1054-1059 (9th Cir. 2002). Habeas relief is warranted.

CLAIM NO. 2

TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO ADEQUATELY INVESTIGATE AND PRESENT PETITIONER'S ALIBI DEFENSE BY FAILING TO GIVE NOTICE OF AN INTENT TO RELY ON AN ALIBI DEFENSE, FAILING TO ADEQUATELY INTERVIEW ALL OF PETITIONER'S ALIBI WITNESSES, AND IN FAILING TO SUBMIT AN ALIBI INSTRUCTION TO THE JURY. HAD PETITIONER'S ALIBI DEFENSE BEEN THOROUGHLY INVESTIGATED AND EFFECTIVELY PRESENTED AND ARGUED TO THE JURY, THERE IS A REASONABLE LIKELIHOOD THAT THE OUTCOME AT PETITIONER'S TRIAL WOULD HAVE BEEN DIFFERENT.

Reviewing courts must analyze claims of ineffectiveness of trial counsel under the familiar test of *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show that trial counsel failed to exercise the customary skill and diligence of a reasonably competent attorney under similar circumstances and that counsel's deficient performance prejudiced him. *Id.* at 687-688. The necessary prejudice is shown where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Just days after his arrest, petitioner informed his first public defender that he had an alibi defense. (29.15 Tr. 4). Despite being given the names of several family members who could provide him an alibi, trial counsel interviewed only one witness, petitioner's grandmother Hattie Bolton. (*Id.* at 4-5). Counsel failed to interview other members of petitioner's family, including his sister Hattie Holmes.

On August 18, 2003, trial counsel endorsed Hattie Bolton as a witness. (L.F. 22). However, counsel never gave notice of an alibi defense as required by Missouri Supreme Court Rule 25.05(A)(5). (*Id.*; 29.15 Tr. 18). The trial court, in response to the state's objection, precluded counsel from mentioning the alibi defense during opening statements (Trial Tr. 631). The trial court subsequently overruled the state's

objections to Ms. Bolton's testimony, and allowed her to testify. (*Id.* 683-689). However, trial counsel inexplicably failed to request that an alibi instruction be submitted to the jury. (L.F. 47-86, 75-80). As a result, the jury was not properly instructed that they must acquit petitioner if they had a reasonable doubt that the defendant was present at the scene and that the state had the burden of proving beyond a reasonable doubt that petitioner was present at the scene of the crime. *See* MAI-CR.3d 308.04.

Counsel's handling of the alibi evidence was objectively deficient under *Strickland* in numerous respects. By failing to interview all of the alibi witnesses supplied by petitioner during interviews with appointed counsel, petitioner's failure was objectively deficient under *Strickland*. *See Lawrence v. Armontrout*, 900 F.2d 128-129 (8th Cir. 1990). As a result, petitioner's alibi evidence was not fully and effectively presented. Even more egregiously deficient were counsel's inexcusable failures to give the state notice of the alibi defense and request the pattern instruction to allow the jury to give meaning to that evidence. *See Clinkscale v. Carter*, 375 F.3d 430, 442-443 (6th Cir. 2004); *Reliford v. State*, 186 S.W.3d 301, 304-305 (Mo. App. E.D. 2005).

Petitioner was prejudiced because, had the alibi evidence been fully and fairly presented, the jury been properly instructed, and the evidence been fully and

effectively argued to the jury during opening and closing arguments by competent counsel, there is a reasonable likelihood petitioner would have been acquitted. See *Blackburn v. Foltz*, 828 F.2d 1177, 1186 (6th Cir. 1987) (finding *Strickland* prejudice in failing to present alibi where prosecution's eyewitness testimony had credibility problems). Habeas relief is warranted.

CONCLUSION

WHEREFORE, for all the foregoing reasons, petitioner, Juane T. Kennell, prays:

1. That a writ of habeas corpus be directed to respondent;
2. That the state of Missouri be required to appear and answer the allegations in this petition;
3. That Mr. Kennell be afforded reasonable discovery and a full and fair evidentiary hearing on the allegations of this petition;
4. That Mr. Kennell be discharged from his unconstitutional convictions and sentences; and
5. 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

KENT E. GIPSON, #34524

Law Office of Kent Gipson, LLC

301 East 63rd Street

Kansas City, Missouri 64113

Tel: 816-363-4400 • Fax: 816-363-4300

kent.gipson@kentgipsonlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of September, 2009, 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