UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

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

PETITIONER'S MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59(e)

COMES now petitioner, Juane Kennell, and hereby moves this Court, pursuant to Fed. R. Civ. P. 59(e), to alter or amend its order and judgment issued March 31, 2016 denying petitioner's habeas corpus petition pursuant to 28 U.S.C. § 2254. In support of this motion, petitioner respectfully states the following grounds:

I.

INTRODUCTION AND STANDARD OF REVIEW

A material mistake of law or fact allows the district court, in its discretion, to alter or amend its judgment. *See, e.g., Deutsch v. Burlington Northern Railway Co.*, 983 F.2d 741, 744 (7th Cir. 1992), *Bannister v. Armontrout*, 807 F. Supp. 516, 556 (W.D. Mo. 1991). A district court's failure to notice or consider arguments or authorities that justify relief also constitutes an appropriate ground to grant a Rule

59(e) motion, if these failures affected the correctness of the court's decision, *Hicks v. Town of Hudson*, 390 F.2d 84, 87-88 (10th Cir. 1967). Finally, 59(e) relief is appropriate to consider evidence or information that was not available to the court when it issued its decision, or in order to prevent manifest injustice. *See, e.g.*, *Max's Seafood Café v. Quinteros*, 176 F.3d 669, 677 (3rd Cir. 1999). Most of the settled grounds for granting a Rule 59(e) motion are present here.

II.

REASONS THE MOTION SHOULD BE GRANTED

THE *BRADY/GIGLIO* CLAIM

A. The Court's Order And Judgment Overlooked Material Issues Of Law And Fact That Clearly Indicates That Petitioner Is Entitled To Relief On His *Brady/Giglio* Claim.

Petitioner's and codefendant Christopher White's multifaceted due process claim under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) has spawned extensive discovery and culminated in a two-day evidentiary hearing before this Court in September of 2015. Despite evidence that clearly indicates that material exculpatory impeachment evidence was suppressed by the state that would have adversely impacted the credibility of the prosecution's star witnesses Jeffrey Shockley and Robert Stewart, this Court's order and judgment of March 31, 2016 denied petitioner habeas relief on this claim and further denied petitioner a certificate of appealability (COA) to allow him to

challenge this Court's decision on appeal. For the following reasons, this Court should reconsider this order and judgment and issue a new and superseding order granting habeas relief because the court's order was based on several material mistakes of law and fact.[1] At a minimum, a COA should issue because a different court could reach the opposite conclusion based on the facts presented here and prevailing law.

Petitioner's *Brady* claim had three primary components, two of which cannot possibly be disputed. First, there can be no dispute that the state suppressed exculpatory impeaching information regarding the prosecutor's payments of more than $2,000.00, through some sort of police witness fund, to Mr. Shockley and his mother for two weeks in a hotel, personal expenses, and a new apartment. (See Exh. 11). Second, there is also no dispute that the state suppressed material exculpatory evidence regarding the fact that Mr. Shockley had also agreed to become a prosecution witness against his own brother in a vehicular manslaughter case that occurred around the same time as the homicide in this matter. There was a dispute regarding whether the understanding between Shockley, his attorney, and the prosecutor regarding the disposition of his pending drug and weapons charges

[1] There is also a clerical error on page 10 of the order regarding the date petitioner's amended 29.15 was filed. This motion was filed on January 6, 2006. (29.15 L.F. 2, 28-34). This error could be significant to the cause/prejudice issue in light of other testimony that the facts supporting this claim did not come to light until 2007 or 2008.

constituted a *Brady* violation. However, the two other admitted *Brady* violations by themselves were sufficiently material to warrant habeas relief regardless of whether any understanding regarding the disposition of Mr. Shockley's charges violated *Brady*.

In addressing whether these two undisputed *Brady* violations regarding the payments and Shockley's agreement to testify against his brother warranted relief, this Court found, in a single paragraph, that neither of these nondisclosures were material. (Doc. 155, p. 37). Reconsideration of the issue of *Brady* materiality on these two nondisclosures is necessary for a number of reasons. First, it appears that the court, in assessing materiality, considered the prejudice from these two nondisclosures in isolation rather than cumulatively as the established caselaw from the United States Supreme Court requires. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 434-435 (1995).

This error of law is underscored by the court's finding regarding the monetary payments that "this nondisclosure does not undermine confidence in the verdict." (Doc. 155, p. 37). This passage is supported by a footnote where the court speculates that this evidence could have invited further speculation by the jury that these payments were necessary because Shockley had been threatened. (*Id.* at 37, n.10). However, Shockley never testified that petitioner or anyone else threatened his life. With regard to Shockley's agreement to testify against his

brother, the court found that this evidence did not have any impeachment value. *Id.* at 37.

Reconsideration of the *Brady* issue regarding Shockley's agreement to testify against his brother is necessary because the court overlooked the uncontradicted testimony of Mr. Shockley where he indicated that he agreed to testify, after having conversations with his brother, who advised him that it would be in Mr. Shockley's interest to testify against him to avoid going to jail on his pending charges. (Hrg. Tr. 75-79). Reconsideration is also warranted because other courts have found that similar impeachment material warranted relief under *Brady* based on similar facts.

In *State v. Wright*, 91 A.3d 972 (Del. 2014), the state suppressed evidence that one of the informants against Mr. Wright had entered into a contemporaneous agreement with the prosecutor to inform on a codefendant in another criminal case. *Id.* at 989. In finding that the failure of the state to disclose this other arrangement with this witness violated *Brady*, the court in *Wright* held: "[This] prior agreement to cooperate with the prosecution would have been useful impeachment evidence for Wright at his trial. Even though [this witness] ultimately did not testify against his codefendant in a different trial, his repeated willingness to testify in order to advance his own legal interests, given his criminal record, would have been helpful to the jury in weighing the credibility of [his] testimony." *Id.* at 989-990.

As noted in prior pleadings, Judge Hamilton also found a *Brady* violation under similar circumstances in *Reasonover v. Washington*, 60 F.Supp.2d 937 (E.D. Mo. 1999). One of the two key prosecution witnesses against Mrs. Reasonover, Mary Ellen Lyner, was a convicted felon who reached an agreement with the state to testify at Ms. Reasonover's trial.

Like this case, the state in *Reasonover* failed to disclose that Ms. Lyner had made a plea bargain to become a state's witness in another case. *Id.* at 961-963. Ms. Lyner had also lied to the grand jury about being an informant in this second case for the state. Judge Hamilton had little difficulty in finding that this evidence of this witness's informant status was *Brady* material that should have been disclosed. *Id.* at 975.

In assessing prejudice, Judge Hamilton also had little difficulty in finding the *Brady* violations in *Reasonover* were material. *Id.* at 976-981. With regard to another witness, Rose Jolliff, Judge Hamilton found that a *Brady* violation occurred and that Ms. Reasonover was prejudiced because, despite the absence of a formal plea agreement, this witness's expectation of a favorable deal adversely impacted her credibility. *Id.* at 979. With regard to both witnesses, as here, prejudice was also established because, due to the suppression of evidence that would have affected these witnesses' credibility, the jury did not hear any evidence

to suggest that these witnesses might have an ulterior motive of advancing their self-interest for testifying. *Id.* at 979-981.

Regarding the materiality of the payments, this Court's reliance upon the speculative view that the jury might have inferred that the monetary payments were necessary because of threats against Shockley by petitioner ignores the fact that petitioner had already been jailed for several months before the state paid Shockley and his mother over $1,380.00 for a new apartment and moving expenses. The court's materiality analysis also ignores the indisputable fact that the jury had no reason to question Mr. Shockley's motives for testifying. In this regard, this Court noted that Shockley was motivated to testify because the victim of the homicide was his best friend. Had the jury heard of the monetary payments, coupled with the other *Brady* material, they would have had more than ample reasons to believe that Mr. Shockley was testifying in his self-interest rather than friendship.

This aspect of the court's *Brady* materiality analysis should also be reexamined in light of the striking similarities between the facts here and those confronted by the Missouri Supreme Court in *State ex rel. Engel v. Dormire*, 304 S.W.3d 120 (Mo. banc 2010). In *Engel*, as here, the prosecution failed to disclose to Engel's trial counsel that its star witness had received informal promises of

leniency and monetary payments in exchange for his cooperation and testimony at Engel's trial.

In light of these facts, the Missouri Supreme Court had little difficulty in finding a *Brady* violation occurred and, in light of the weakness of the prosecution's case, that the excluded impeachment information was material. The court in *Engel* found that the excluded evidence was material under *Brady* despite the fact that a second witness also implicated Engel in the crimes for which he was convicted. *Id.* at 128-129, n.5. Unlike *Engel*, however, the second eyewitness in this case, Robert Stewart, since admitted that both he and Mr. Shockley lied when they identified White and Kennell as being involved in the shooting of Freddie Chew. Thus, under any objective measure, the facts in this case are even stronger than the facts the Missouri Supreme Court confronted in *Engel*.

Reconsideration of the issue of *Brady* materiality is also necessary because this Court unreasonably disregarded the recent hearing testimony of Jerome Johnson and Darryl Smallwood and the affidavit of investigator David Haubrich regarding Shockley's and Stewart's statements that they could not identify Kennell and White as the killers and Stewart's admissions regarding the irregularities in the lineup process in which he was manipulated by Shockley into identifying these two men. Stewart's subsequent admissions that neither he nor Shockley could positively identify the shooters are relevant to the *Brady* materiality calculus in

determining whether the jury's guilty verdict was worthy of confidence. Other Missouri courts have held that similar newly discovered evidence, such as a recantation of a key witness, must be considered in conjunction with the *Brady* evidence in determining whether a new trial is warranted. *See State ex rel. Griffin v. Denney*, 347 S.W.3d 73, 77 (Mo. banc 2011); *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 345 (Mo. banc 2013).

Another significant flaw in the court's materiality analysis is the court's erroneous factual finding that the evidence presented by the prosecution at trial was "strong." (Doc. 155, p. 34). As noted earlier, the evidence of petitioner's guilt is no stronger and arguably weaker than the evidence utilized to convict Gary Engel. In addition, the evidence of petitioner's guilt was similar in substance to the evidence the prosecution presented in the *Wearry* case. *Wearry v. Cain*, 577 U.S. __ (2016), *slip op.* at 2-3.

The only authority this Court cited to support this finding was the Eighth Circuit decision in *Sullivan v. Lockhart*, 958 F.2d 823 (8th Cir. 1992). *Sullivan* is clearly distinguishable because, in that case, there were two additional witnesses who corroborated the witness whose deal on a pending charge was not disclosed. *Id.* at 825. In addition, there was an additional eyewitness to the crime in *Sullivan*, whose credibility was unaffected by the *Brady* violation that was found to be immaterial. *Id.*

There are numerous published cases where relief has been granted on Brady claims, where reviewing courts have described evidence that was much stronger than the proof utilized here to convict petitioner as weak or questionable. In *Trammell v. McKune*, 485 F.3d 546 (10th Cir. 2007), the court granted habeas relief to a Kansas prisoner on a *Brady* claim where the evidence utilized to convict the defendant consisted of three eyewitnesses whose accounts of the crime were consistent with each other. *Id.* at 549, 552. The *Brady* violation before the court in *Trammell* would have undermined the accuracy of the eyewitness identifications by pointing to a possible different suspect who committed the crime. *Id.* In finding that Trammell was prejudiced, the court also rejected an argument that the eyewitness identification evidence was "ironclad," noting that the circumstances surrounding pretrial identification procedures indicated that the identification of the defendant by the eyewitnesses might have occurred under "suggestive circumstances [that undermined] the reliability of the in-court identification[s]." *Id.* at 552.

In *Spicer v. Roxbury Corr. Inst.*, 194 F.3d 547 (4th Cir. 1999), the court granted a Maryland prisoner a new trial on a *Brady* claim where the defendant was convicted by the testimony of three eyewitnesses. *Id.* at 552, 560. The court found prejudice despite the fact that the *Brady* issue before the court undermined the credibility of only one of the three eyewitnesses. *Id.*

The final significant flaw in the court's materiality analysis is the failure to properly apply the test for materiality recently articulated in *Wearry*. In that case, the court noted: "Evidence qualifies as material when there is 'any reasonable likelihood' it could have 'affected the judgment of the jury.'" *Wearry, slip op.* at 7. When the evidence presented at trial is considered in conjunction with the excluded evidence involving the understanding between the prosecutor, Mr. Shockley, and his attorney regarding leniency, the monetary payments, and Shockley's agreement to snitch on his brother, it is clear there is a reasonable likelihood that the judgment of the jury on the critical issue of Shockley's and Stewart's credibility could have reasonably been affected.

The next issue that warrants reconsideration is this Court's analysis of whether the circumstances surrounding the disposition of Shockley's pending charges, in which he received probation shortly after he testified as a prosecution witness, violated *Brady*. The Court's analysis of this claim is tainted by its erroneous view that there must be some sort of implied or tacit agreement regarding the disposition of pending charges involving a prosecution witness for a *Brady* violation to occur. As petitioner has repeatedly noted in prior pleadings, the Supreme Court has never limited *Brady* violations to cases where there is either a formal or tacit agreement for leniency on a witness's pending charges.

In *Napue v. Illinois*, 360 U.S. 264 (1959), the Supreme Court explained that the key question is not whether the prosecutor and the witness entered into an effective and binding agreement, but whether the witness might have believed that the state was in a position to implement any promise of consideration. *Id.* at 270. *See also Giglio v. United States*, 405 U.S. 150, 154-155 (1972). It is clear under Supreme Court precedent that "evidence of any understanding or agreement as to a future prosecution would be relevant to the witness's credibility." *Id.* at 155. As the Fifth Circuit noted in a similar case, the key issue is not whether "the promise was indeed a promise." The key question is "the extent to which the testimony misled the jury." *Tassin v. Cain*, 517 F.3d 770, 778 (5th Cir. 2008). The Eighth Circuit has also reached the same conclusion in finding a *Brady* violation despite the lack of either "an express or implied agreement" between the witness and the state. *Reutter v. Solem*, 888 F.2d 578, 582 (8th Cir. 1989).

The evidence adduced at the evidentiary hearing, particularly from Mr. Taafe and Mr. Craddick, whom the court found to be credible in other respects, removes any doubt that these two attorneys and Mr. Shockley had an understanding that if Mr. Shockley testified for the prosecution he would certainly get probation and possibly get his charges dismissed. The following exchange between the undersigned counsel and Mr. Taafe at the recent hearing removes any doubt that this understanding existed:

"Q: And it was clear, is it not, that [Shockley] was not going to get anything worse than probation and you had hoped you could talk the state into dismissing the charges after he testified; is that a fair statement?

A: Well, yeah. I think the recommendation before he testified was for probation. But in answer to your question, yes."

(Hrg. Tr. 132). This understanding's existence was corroborated by Mr. Craddick's testimony where he indicated, because it was a certainty Mr. Shockley would get probation because of his age and lack of a criminal record, he chose for strategic reasons not to offer him a formal plea bargain to testify in order to unfairly enhance his credibility in the eyes of the jury. (*Id.* 232-233). Such tactics that are calculated to mislead the jury are prohibited by *Brady*. *See Tassin*, *supra*, 517 F.3d at 778.

The final issue that warrants consideration is this Court's repeated findings that Shockley's, Stewart's, Craddick's, and Taafe's testimony was credible and the testimony of petitioner, Mr. White, Mr. Smallwood, Mr. Johnson, and Mr. Haubrich was not, to support its finding that the excluded evidence did not warrant a new trial. In particular, the court found Shockley credible when he testified at the recent hearing that he was motivated to testify solely because his best friend was murdered and not for his own benefit. (Doc. 155, p. 34). This Court's assessment of Shockley's credibility and motives are irrelevant. The key issue is whether the excluded evidence could have reasonably impacted the jury's decision.

See Antwine v. Delo, 54 F.3d 1357, 1365 (1995). Where a conviction is secured through the testimony of prosecution witnesses who are admitted liars, such as Shockley, it is appropriate and just for a new jury, not a reviewing court, to determine credibility. *See State ex rel., Amrine v. Roper*, 102 S.W.3d 541, 550 (Mo. banc 2003) (Wolff, J., concurring). Had the jury heard the evidence now available regarding the monetary payments, the understanding that Shockley would receive probation on his pending charges, and his agreement to snitch on his brother, there is clearly a reasonable probability that the jury's assessment of his motives and credibility would have been affected under the *Wearry* test.

B. At A Minimum, This Court Should Alter Or Amend Its Order And Judgment To Grant Petitioner A COA On His *Brady/Giglio* Claim.

Even if this Court ultimately decides not to change the result of its order and judgment, it should reconsider whether to grant a COA on the *Brady/Giglio* claim raised here. Based upon the foregoing analysis and prior pleadings, a different court could decide that habeas relief is warranted on this claim. *See Engel, supra*. This conclusion is also underscored by the course of the litigation in this case. The court's failure to grant a COA is, in essence, a finding that this claim is frivolous. This conclusion cannot be reconciled with the court's previous rulings that this claim had sufficient merit to warrant extensive discovery and an evidentiary hearing. Because the standard for receiving a COA on a constitutional claim is modest and any doubts should be resolved in favor of the habeas petitioner, this

Court should reevaluate this aspect of its order and issue a COA on petitioner's *Brady* claim.

CONCLUSION

WHEREFORE, for all the foregoing reasons, petitioner respectfully requests that this Court alter and amend its judgment and address the issues of law and fact raised herein and issue a new order and judgment granting petitioner a new trial. In the alternative, this Court should alter or amend its order to grant petitioner a COA on his *Brady/Giglio* claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 2016, the foregoing was filed via the CM/ECF system which sent notification to all counsel of record.

/s/ Kent E. Gipson
Counsel for Petitioner