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

JUANE T. KENNELL,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 4:09-CV-00407 AGF
	)	
DAVE DORMIRE,	)	
	)	
Respondent.	)	

RESPONDENT'S POST-HEARING BRIEF

In September 2015, this Court held an evidentiary hearing on Petitioner Juane Kennell's defaulted claim that the State violated his rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by withholding evidence that prosecution witnesses Jeffrey Shockley and/or Robert Stewart received favorable treatment, or promises thereof, in exchange for his/their testimony against Kennell. The record refutes these allegations. This Court should deny the claim and his petition for the reasons set forth in this brief and Respondent's original response (ECF No. 20).

BACKGROUND

The murder and assault

Early in the morning on June 21, 2002, Fred Chew, the murder victim, Jacqueline Daugherty, Chew's fiancée and mother of his child, Jacqueline

A-265

Daugherty, Jeffrey Shockley, and Robert Stewart were on the front porch of Chew's uncle's house. (Resp. Ex. A at 436–37, 440). Shockley's home was on the same street. (*Id.* at 571–72).

The group saw a vehicle travel slowly down the middle of the street. (*Id.* at 566). Kennell, Christopher White, and another unidentified man got out of the vehicle, with guns drawn, and went towards the door of Shockley's house. (*Id.* at 571–72, 573). The men then approached Chew's uncle's house. (*Id.* at 571–72).

After trying to get into the house through the front door, Daugherty jumped off the porch and ran to the back of the house. (*Id.* at 447, 450, 452, 503, 512, 555). Chew, Shockley, and Stewart left the porch and went into the gangway by Chew's uncle's house. (*Id.* at 514, 535, 555).

Chew asked the three men "what they doing around here." (*Id.* at 516). After one of the men asked him where "Jeffrey" and "Double R" were, Chew fired one shot into the street. (*Id.* at 454, 517–18). The men then fired at Chew and he fell to the ground. (*Id.* at 577). Stewart dropped to the ground near Chew's body. (*Id.*). Shockley then shot at the three men from the gangway. (*Id.* at 598, 519). Stewart and Shockley ran behind the house as the shooting continued. (*Id.* at 520). Kennell chased after Shockley and continued to fire at him. (*Id.* at 522, 541).

Shockley and Stewart recognized Kennell and White during the attack because they knew them from before, and later identified them during a photo line-up, a live line-up, and at trial. (*Id.* at 377, 384, 389, 503, 525–26, 542, 567–68, 587–88, 611, 746).

The trial

The State charged Kennell with acting in concert with others to commit first-degree murder, armed criminal action, first-degree assault, and armed criminal action for killing Chew and shooting at Shockley. (Resp. Ex. B. at 1, 13–14). Kennell went to trial on January 5, 2004. (*Id.* at 3–5, 34–38).

Shockley and Stewart testified against Kennell at trial. Both men identified Kennell and White as two of the three men who attacked them. (Resp. Ex. A. 503, 542, 567–68, 611, 746). Although no other witnesses could identify the three men, Shockley and Stewart's testimony regarding the attack was corroborated by other eyewitness accounts and physical evidence. A neighbor, Damon Stamers, saw Chew on the ground and watched two men approach his body. (*Id.* at 487–88). The men stood over Chew, shot him, and kicked him. (*Id.* at 488). One bullet was fired into the victim's head from a distance of about a foot or a foot and a half. (*Id.* at 408–10). The man that shot Chew then ran into the gangway. (*Id.* at 488). The autopsy revealed that the wound to Chew's head had "stippling," which is caused when a person is shot at an "intermediate range" of no more than one and a half feet. (*Id.* at

408–10). Kennell's fingerprints were also recovered from the outside of a car in front of Chew's uncle's house. (*Id.* at 311–14).

Kennell testified and claimed that he had been home with his family at the time of the shooting. (*Id.* at 790–820). Kennell's grandmother, Hattie Bolten, testified that she set a security alarm at her house and Kennell was home when she set the alarm on June 20 (the night before the murder and the assault). (*Id.* at 688). Bolten testified that the alarm did not "go off any time during the night," that she woke up the next morning "around six," that Kennell was there and making her coffee. (*Id.* at 688–89).

The defense challenged the veracity of Shockley and Stewart's identifications and called three law enforcement officers to demonstrate the inconsistencies in the testimony of Shockley and Stewart. (*Id.* at 529–30, 553–54, 558, 592–93, 597, 701–779). The focus of the defense was alibi and intentionally false identification by Stewart and Shockley for purposes of revenge. Kennell also attempted to explain the presence of his fingerprints on the car by presenting the testimony of Kennell's brother, Jesse Kennell, who testified that he had "rented" a car (he did not specifically identify any car) from someone he did not know and that Kennell had been in that car. (*Id.* at 652–79). After considering the testimony presented, the jury ultimately found Kennell guilty as charged. *State v. Kennell*, 159 S.W.3d at 480.

Analysis

In his *pro se* petition, Kennell argues that the State failed to disclose that Shockley and Stewart were arrested in July 2002, that the weapon recovered from this arrest matched the shell casing found at the murder, and speculates that Shockley and Stewart received deals on pending drug and weapons charges stemming from the July 2002 arrest in exchange for their testimony. (ECF No. 1 at 33–34). This same claim was advanced in his amended petition filed by Kennell's counsel in September 2009. (ECF No. 13 at 6, 10). Kennell also alleged that the State failed to disclose that Shockley had pending felony charges against him at the time of trial and speculates that Shockley must have received favorable treatment from the State in that proceeding in exchange for his testimony and that the State provided financial assistance to Shockley. (ECF No. 13 at 7–9). During the hearing, evidence adduced suggests that Kennell will also argue that the State failed to disclose that it paid for travel costs for Stewart, who was out-of-state at the time of trial, to return to Missouri to testify. As discussed below, these claims are both meritless and procedurally barred.

1. The State did not withhold material evidence.

In *Brady*, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or punishment, irrespective of good faith or bad faith

of the prosecution." *Brady*, 373 U.S. at 87. A successful *Brady* claim requires a three-part showing: (1) that the evidence is favorable to the accused, either because it is exculpatory or impeaching; (2) that the state suppressed the evidence; and (3) the state's action resulted in prejudice. *See Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). A defendant is prejudiced when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433–34 (1995) (quoting *United States v. Bagley*, 473 U.S. 677, 682 (1985)).

A. Shockley's February 2004 guilty plea and probation

The State has a duty to disclose agreements with witnesses for leniency in exchange for testimony. *Giglio v. United States*, 405 U.S. 154–55 (1972). This includes express agreements between the State and cooperating witnesses, as well as "less formal, unwritten or tacit agreement[s]." *Bell v. Bell*, 512 F.3d 223, 233 (6th Cir. 2008)(en banc)(citing *Giglio*, 405 U.S. at 154–55). *Giglio* does not require disclosure of rejected plea offers. *United States v. Rushing*, 388 F.3d 1153, 1158 (8th Cir. 2004). Kennell has not shown that any deal existed or that the State violated *Brady*.

There were no undisclosed deals between the State and Shockley

In February 2002, Shockley was arrested on drug and gun charges. The State charged Shockley with felony offenses of possession of a controlled

substance and carrying a concealed weapon in April 2002 as result of this arrest. (Pet. Ex. 5). Shockley was seventeen at the time of the offenses and had no prior convictions. (Pet. Ex. 5; Pet. Ex. 3 at 11). Shockley ultimately pled guilty to these offenses on February 9, 2004, after both Kennell's and White's trials. (Pet. Ex. 3).

At Shockley's plea, Robert Taaffe, Shockley's counsel, informed the court that Shockley's plea was "made open" because "[w]e have no agreement with the State of Missouri." (Pet. Ex. 3 at 2). The prosecutor recommended a two-year sentence in the Department of Corrections, but that execution of that sentence be suspended and Shockley be placed on supervised probation for two years, that he serve 60 days shock incarceration and pay the court costs and a drug analysis fee. (Pet. Ex. 3 at 5). The court was also advised that Shockley had no prior convictions and no other pending charges. (Pet. Ex. 3 at 6–7). After the plea court accepted Shockley's plea, Taaffe argued for a more lenient sentence:

> Mr. Shockley's nineteen years old. He used to live in the City of St. Louis. Now he lives in St. Louis County with his mother. For the past two years, Mr. Shockley has cooperated with the State of Missouri in the prosecution of two murder first cases. . . . 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. He's out of the neighborhood, Judge, he's out of that element, and he did what he ought to have or should have done as a citizen. . . .Your Honor, he did all of this without an

> agreement from the State of Missouri. There was no plea agreement for Mr. Shockley to cooperate with the State of Missouri. No agreement. No quid pro quo, your Honor. He did this because he thought it was the right thing to do.

(Pet. Ex. 3 at 11–12). Counsel asked the court to order a suspended imposition of sentence and to place Shockley only on six months' unsupervised probation. (*Id.*). The plea court did not follow either party's complete recommendation. Instead, the plea court suspended the imposition of Shockley's sentence on both counts and placed him on one-year supervised probation, with all costs waived. (*Id.* at 13).

Shockley was placed under the supervision of Missouri Board of Probation and Parole. (Pet. Ex. 5). Although it appears that field violation reports were filed by Shockley's probation officer, the plea court did not revoke Shockley's probation. (*Id.*). He completed his probation on February 9, 2005. (*Id.*).

Kennell disputes the veracity of Taaffe's statements to the plea court, speculating that a "secret deal" existed between Shockley and the State based on the timing of Shockley's guilty plea, the sentence Shockley received, and a conflict transfer memorandum from Kennell's Missouri State Public Defender File. (ECF No. 13 at 9–10); (ECF No. 28 at 6). But Kennell's conjecture is refuted by the record. Although plea negotiations occurred, no formal or tacit agreement was ever reached and Shockley did not receive any favorable

treatment from the State in exchange for his testimony. (Hearing Tr. Vol. 1 at 47, 68, 114–16, 138–41, 187–88, 222–25; Resp. Ex. ZZ; Pet. Exs. 2, 3, 4, 5, 9).

The State made two formal offers before Kennell and White's criminal trials – in July 2002 and before February 2003. (Resp. Ex ZZ; Pet. Ex. 9 at 1, 2; Hearing Tr. Vol. 1 at 107, 108, 113, 138–39, 140–41). In July 2002, the State offered Shockley an agreement of a two-year suspended sentence and placement on probation for a period of two-years, with the conditions that Shockley enter and complete the REACT program, perform eighty (80) hours of community service, serve sixty (60) days' shock incarceration, and pay court costs. (Resp. Ex. ZZ). At some time before February 2003, the State made a second offer. (Pet. Ex. 2; Pet. Ex. 9 at 2; Hearing Vol. 1 at 108, 140–41). This offer differed from the original offer in that the State agreed to recommend a suspended imposition of sentence with no requirement for shock incarceration, but added the requirement that Shockley would have to testify against Kennell and White and against Dwanye Shockley, Shockley's brother, who was charged with an unrelated crime in another case. (Pet. Ex 2). Shockley did not accept either plea agreement. (Pet. Ex. 9; Hearing Tr. Vol. 1 at 138–39, 141). Because Shockley rejected these deals, the State did not violate *Brady* by failing to disclose rejected offers. *See United States v. Rushing*, 388 F.3d at 1158.

Nor does the evidence support a finding that a tacit agreement existed between Shockley and the State that required disclosure. "The mere fact that a witness desires or expects favorable treatment in return for his testimony is insufficient; there must be some assurance or promise from the prosecution that gives rise to a *mutual* understanding or tacit *agreement*." *Akrawi v. Booker*, 572 F.3d 252 (6th Cir. 2009) (citing to *Bell*, 512 F.3d at 233). (emphasis in the original). The evidence from the record does not reflect that there was a mutual understanding between Shockley and the State that Shockley would receive some sort of benefit in exchange for his testimony.

At the evidentiary hearing, Shockley testified that he was not promised anything in exchange for his testimony against Kennell and White, he was not testifying for any benefit, and had no expectation that he was going to get any sort of probation or any other favor as a result of his testimony. (*Id.* at 47, 68, 188). Shockley testified that when he pleaded guilty to his felony charges he had no expectation of leniency and thought he could still go to jail as a result of guilty plea. (*Id.* at 187–88). Shockley planned to throw himself on the mercy of the plea court. (*Id.* at 188). Shockley testified that he had known Chew his whole life and Chew was like a brother to him. (Hearing Tr. Vol 1 at 67). He stated that he originally did not want to testify against Kennell and White, because he wanted revenge, implying he would seek retribution. (*Id.* at 68). When asked what changed his mind, he replied that

his family changed his mind and he realized that if he sought revenge "[i]t would never [have] stopped." (*Id.*). Shockley testified against Kennell and White because he "thought it was what was right" and they murdered Shockley's friend. (*Id.* at 47, 188).

Robert Taaffe, Shockley's plea counsel, testified that "[w]e didn't have a deal." (*Id.* at 116). Although Taaffe attempted to negotiate a plea deal, no formal or tacit agreement was reached. (Hearing Tr. Vol. 1 at 114–16, 134). In August 2002, Taaffe met with Shockley to discuss the State's July 2002 offer, but Shockley didn't want to serve any jail time so he did not accept the offer. (Pet. Ex. 9 at 1); (Hearing Tr. Vol. 1 at 138–39). Taaffe also testified that the plea court would likely have given a lesser sentence, than that offered by the State, given Shockley's age and that he had no prior conviction or arrest history. (Hearing Tr. Vol. 1 at 140–41). On February 6, 2003, Taaffe met with Shockley regarding the State's second offer, but Shockley was not interested in the second agreement because he originally didn't want to testify against his brother or "against anybody."[1] (Pet. Ex. 9 at 2; Hearing Tr. Vol. 1 at 141). Although Shockley later agreed sometime before November

[1] Shortly after receiving the second offer, Taaffe contacted Kennell's trial counsel, Scott Reynolds, to let him know about the plea offer. *Cf* (Pet. Ex. 9; Pet. Ex. 1). Although neither Taaffe nor Reynolds could recall the specifics of the conversation, Taaffe's notes refute any suggestions that a deal had been reached between Shockley and the State on or before February 7, 2003, the date of the memorandum. (Pet. Ex. 9; Hearing Vol. 1 at 22, 36, 39–40, 117, 146). Thus, the memorandum does not prove the existence of a plea agreement.

2003 to testify against Kennell and White, there is nothing to suggest that Shockley agreed to testify against his brother before Kennell and White's criminal trials. [2] (Pet. Ex. 9 at 2). Taaffe testified that once Shockley agreed to testify against Kennell and White, he tried to get the State to agree to dismiss the pending felony charges against Shockley, but did not believe the State ever agreed to this deal. (Hearing Tr. Vol. 1 at 108, 109, 114). Although Taaffe's notes of November 13, 2003 stated "the State hinted that there may be a nolle after this is over" (Pet. Ex. 9 at 2), Taaffe testified that he did not believe that there was an implicit agreement and explained:

> Ultimately, we ended up pleading open because there's only going to be one reason for us to plead open and that was because whatever it was that we wanted from the State, ultimately they weren't willing to give us. Whether that be a nolle or whether they wanted him to testify against his brother. But there would be only one reason to plead open and that would be whatever it was that we wanted, whatever it was that we were bargaining for at the time. And I don't recall, like I said it was 12, 13 years ago, but the only reason to go open in front of a court would have been because the negotiations had broken down. Whatever it we asked from them they were not interested in giving us.
>
> ***
>
> [Shockley] didn't testify against his brother, Devion Shockley. I think we were pushing for a dismissal. Like I said, I don't remember specifics back then, what they wanted and what they

[2] Although Shockley testified that he eventually agreed to testify against his brother in an unrelated matter, Shockley stated that he only did so at his brother's insistence, not because of any promise by the State, and the record does not identify whether Shockley agreed to testify against his brother before his February 9, 2004 guilty plea. (Pet. Ex. 9 at 2; Hearing Vol. 1 at 141, 75–76, 77–79).

> didn't want and why we didn't have a complete deal. But again, we didn't have it. Whatever it was, whether it was a 60-day shock or they wanted us to – wanted him to testify against Devion, whatever that was, we didn't have a deal when we pled, a commitment from them to stand on the record and tell the Judge that this is the sentence and we're in agreement to that. We didn't have a deal.

(*Id.* at 114–16). Taaffe testified that he did intentionally continue Shockley's guilty plea until after Shockley's testimony because he was hoping to get a better offer from State, which did not happen, and he wanted to be able to argue to the plea court the mitigating circumstances of Shockley's cooperation with the State. (*Id.* at 142). Taaffe believed that Shockley might receive more favorable treatment from plea court due to Shockley's cooperation, but it was not because the State made any agreement to aid him. (*Id.* at 116). Taaffe also acknowledged that he didn't know what sentence the court would ultimately impose against Shockley. (*Id.* at 135). Any expectation of leniency by the plea court is speculative and beyond the State's control. Nothing in *Brady* or its progeny suggest that the State is required to make a disclosure in these circumstances. Further, even if Shockley hoped that he would receive more favorable treatment from the State after his testimony, which is refuted by his own testimony, his expectation of a future benefit alone is not determinative of whether a tacit agreement exists. *Bell*, 512 F.3d at 233. The agreement could not exist because the State did not make any assurances or promises to Shockley.

Bob Craddick, prosecutor in Kennell and White's criminal trials, testified that there was no deal with Shockley to testify on behalf of the State. (*Id.* at 214, 224). Because he was the prosecutor handling Kennell and White's trials, Taaffe would have contacted him for any potential deals with Shockley. (*Id.* at 229–30). Craddick said that he did not offer Shockley any favors or money in exchange for his testimony and did not suggest that Shockley might receive favorable treatment after the trials if he would testify on behalf of the State. (*Id.* at 225).

Although Craddick said that he did not have a specific memory about plea negotiations with Taaffe regarding Shockley, he said that he was sure he would have spoken to Taaffe if Shockley had pending charges and was a witness in his case. (*Id.* at 229, 230–32). Craddick testified that he did not have a conversation with Taaffe where he "hinted" that he would nolle pros Shockley's case. (*Id.* at 233, 234, 237). On cross-examination, Craddick was asked "[w]ould Mr. Taaffe be wrong if he testified that you hinted at a nolle pros?" Craddick responded:

> Let me answer it this way. Because of the circumstances, I'm pretty sure that Bob Taaffe and I probably had a conversation. I don't have a specific memory of the contents of those conversations, but I can tell you definitely that I did not offer to nolle pros Jeffrey Shockley's case in exchange for his testimony. I can tell you it would be typical for Bob Taaffe or any other attorney doing their job would have suggested that I could do that and may have been persistent in trying to pursue that line.

> But what I'm telling you is I never offered to dismiss his case. I never hinted that I would dismiss his case because Jeff Shockley, under the circumstances, was going to get the deal that everybody else would get without a deal and Jeff Shockley had told me specifically that he was going to go forward because his best friend got killed. So I didn't have a concern, out of the ordinary concern, that Jeff Shockley was going to refuse to testify unless I gave him something in exchange.

(*Id.* at 234). Craddick explained, based on his recollection, that Shockley likely would have received supervised probation without an agreement in light of the charges, Shockley's age, and that Shockley did not have any prior convictions. (*Id.* at 232). Because of this, Craddick testified that he would not have had an incentive to make Shockley an offer or to intercede on Shockley's behalf, because Shockley would receive from the plea court what the State would have offered regardless of his testimony and a plea deal would negatively impact Shockley's credibility. (*Id.* at 232–33, 238).

Finally, the guilty plea proceedings refute Kennell's allegation that a tacit agreement existed. Presumably, if the State had in fact promised favorable treatment in exchange for Shockley's testimony, evidence of this agreement would have occurred at the plea so that the court could impose sentence accordingly, but it did not. Instead, the State went back to its original recommendation, offering no leniency in exchange for Shockley's testimony. (Pet. Ex. 2; Pet. Ex. 3 at 5; Resp. Ex. ZZ; Hearing Vol. 1 at 116, 136–37, 142, 143). The fact that the plea court may have taken into

consideration Shockley's cooperation with the State, in addition to other factors it had before it (Shockley's age, the fact that he had no prior convictions and no pending charges, that he was helping his girlfriend raise their eight-month-old child, the he was enrolled in high school at the time and wished to be on probation so he could provide for his family (Pet. Ex. 3 at 2–3, 10–12)), does not demonstrate that a deal existed between Shockley and the State.

Kennell may argue that Shockley received favorable treatment from the State because Shockley's probation was not revoked even though he incurred violations. This is not supported by the record. Probation and Parole filed the violation reports directly with the plea court, thus, it was the court, and not the State, that chose not to act on the violations. Only the plea court was authorized to receive the reports; the State would only have had access to the reports if the plea court permitted inspection. *See* Mo. Rev. Stat. § 559.125.2 (2000). Furthermore, only the plea court – not the prosecution – has the authority to grant, modify, extend, or revoke probation in Missouri. Mo. Rev. Stat. §§ 559.016, 559.036, 559.100 RSMo. (2000). The fact that the plea court did not revoke Shockley's probation is a matter of the court's discretion.

In short, on the record before this Court, Kennell has not shown that any agreement existed between Shockley and Kennell. If it didn't have an

73 at 13–14). This Court's reasoning equally applies to Kennell. Indeed, the testimony from the evidentiary hearing only serves to support this Court's prior finding.

Both Shockley and Stewart testified that they did not receive any promises or favorable treatment by the State regarding these arrests in exchange for their testimony against Kennell and White. (Hearing Vol. 1 at 68, 72–73; Hearing Vol. 2 at 7, 13–14, 43–44). Craddick testified that was not involved in the State's decision to file charges against Shockley and Stewart and no one contacted him regarding the arrests. (*Id.* at 219–20, 221). Taaffe testified that he was not even aware of the arrest. (*Id.* at 149). As such, Kennell has not shown that State declined to press charges against, or gave any other favorable treatment regarding this arrest to, Shockley and Stewart in exchange for their testimony. The State cannot be faulted for not disclosing evidence that they did *not* give any benefit to a witness.

To the extent that Kennell claims that the State failed to disclose the police report or the lab report in connection with this arrest, this allegation is refuted by the record. Kennell's counsel received these reports before trial. *See* (Resp. Ex. F at 30). Kennell was also aware of this arrest before trial and contacted counsel about the arrest. (Resp. Ex. OOO; Resp. Ex. at K; Resp. Ex. F at 30) Respondent also notes that the records provided by Kennell to this Court in support of his claim state that records were released from the police

to "CAO" or the "Circuit Attorney's Office" on August 4, 2003. (ECF No. 13–2). Finally, Craddick testified that the arrest and lab reports *were* disclosed to defense counsel, not because these reflected an arrest of witnesses, but because the gun recovered matched a bullet from the homicide. (Hearing Vol. 1 at 218–19); *Wise v. Bowersox*, 136 F.3d 1197, 1205 (8th Cir. 1998) ("A party has no right to impeach a witness's credibility with evidence of 'wanteds' or arrests."). Therefore, the evidence reflects that Kennell in fact received these reports from the prosecution *before* trial. No violation occurred.

C. Expenses related to Shockley's protection and Stewart's travel for trial

Kennell has not shown that the State's alleged failure to disclose expense records regarding Shockley's protective relocation and Stewart's travel expenses violated *Brady*.

Shockley's witness protection

Shockley testified that his life was threatened due to his cooperation with the State in Kennell and White's trials. (Hearing Vol. 1 at 69–71). The police accordingly took Shockley from his home and placed him in a hotel for a couple of weeks. (*Id.* at 71). Shockley testified that he did not know who paid for the hotel. (*Id.* at 71–72, 74–75). He also stated that he received food vouchers, but never received any cash or other things of value. (*Id.*). As directed by this Court at the conclusion of the hearing, Respondent provided

records he received from the Circuit Attorney's Victim Services Unit that corroborates Shockley's testimony. It appears that Shockley was briefly housed at a hotel from July 28, 2002, until August 5, 2002, and it appears given assistance to relocate in October 2002 as part of a witness protection program.

Kennell has not shown that Shockley's participation in a witness protection program constituted favorable impeachment evidence that the State was required to disclose under the facts present here. Kennell cites to *United States v. Librach*, 520 F.2d 550 (8th Cir. 1975) to support his argument. (ECF No. 8, n. 1). But that case is not helpful to Kennell. In *Librach*, the Eighth Circuit held that a promise of financial reward to a witness as an incentive to testify favorably for the government is a fact affecting the credibility of a witness that must be disclosed. *Librach*, 520 F.2d at 553–54. In that case, the State failed to disclose that a government witness was being held in protective custody, received immunity, and was paid nearly $10,000 in subsistence payments. There is nothing in the record to suggest that Shockley's housing expenses constitute cash payments from the State as an incentive to testify on behalf of the State. *See United States v. Sigillito*, 759 F.3d 913, 930 (8th Cir. 2014) ("We have determined that witness motivations, like the payment of money as an incentive to change testimony, fall within the *Brady* disclosure requirement.")

But even if Kennell could demonstrate that this evidence would have been favorable and was suppressed, he has not shown prejudice for the same reasons discussed in this Court's prior decision in *White v. Steele*, 4:08CV00288 AGF. (*White*, ECF No. 73 at 16). Further, this information, that Shockley's life was threatened due to his involvement in this case, would have had a detrimental impact on Kennell's defense. That testimony may have allowed a reasonable juror to infer that Kennell and/or White had urged individuals to harm Shockley to escape a conviction. This testimony may have also opened the door to testimony regarding additional bad acts or threats made by Kennell, White, and other individuals who testified on their behalf at trial. As such, the verdict is "worthy of confidence" and there is no "reasonable probability of a different result" if the evidence had been disclosed.

Stewart's travel expenses

Similarly, Kennell has not shown that the State's expenses incurred as a result of bringing Stewart back to the State of Missouri to testify were required to be disclosed.

At Kennell's criminal trial, Stewart testified that he had been in the Army for approximately a year and four months. (Resp. Ex. A at 560–61). During the evidentiary hearing, Stewart testified that he had enlisted in the Army sometime after Chew's murder and was stationed in Fort Benning,

Georgia at the time of trial. (Hearing Tr. Vol. II at 45–46). Stewart was flown back for the trials in Missouri, but testified that he did know who paid for his flight. (*Id.* at 46). His lodging was also paid for and he was given food vouchers. (*Id.*).

Evidence that Stewart resided outside of Missouri at the time of trial was equally available to both the State and defense. Missouri law also requires reimbursement for witnesses' travel costs and mileage. Mo. Rev. Stat. §§491.280, 491.420 (2000). It is reasonable to conclude that the defense was on notice that the State was required to reimburse Stewart for his travel and expenditures to return for the criminal trials.

Further, Kennell has not shown that he was prejudiced. The impeachment value of this information would have been insignificant. *See Clay v. Bowersox*, 367 F.3d. 993 (8th Cir. 2004) (no *Brady* violation because information was "relatively insignificant"). Even if Kennell chose to impeach Stewart by asking who paid for his travel costs to attend the trial, it is unlikely that this fact would have undermined Stewart's testimony or diminished his credibility. As such, Kennell has not shown that this information was material.

II. Kennell's claim is procedurally barred.

The cause-and-prejudice analysis required to overcome a defaulted claim mirrors the last two elements required by *Brady*: suppression and

prejudice. *See Banks v. Dretke*, 540 U.S. 668, 691, 702–30 (2004) ("prejudice within the compass of 'cause and prejudice' exists when the suppressed evidence is 'material' for *Brady* purposes"); *Strickler*, 527 U.S. at 282 (prejudice prong of *Brady* "parallel[s]" prejudice prong of cause-and-prejudice standard for excusing procedural default). Therefore, a decision on the merits of the *Brady* claim also resolves any issues of procedural default. Because Kennell has not shown that any of the information he claims was not disclosed was both suppressed by the State and material, he has not satisfied cause and prejudice to overcome his procedural default. His claims are procedurally barred as well as without merit.

Conclusion

The Court should deny the petition.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Caroline M. Coulter
CAROLINE M. COULTER
Assistant Attorney General
Missouri Bar No. 60044
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-1508
Facsimile: (573) 751-3825
caroline.coulter@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. Counsels for petitioner are also electronic filers and will receive a copy of the foregoing via the CM/ECF System, this 19th day of February 2016.

/s/ Caroline M. Coulter
CAROLINE M. COULTER
Assistant Attorney General

A-288