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 POST-HEARING BRIEF

COMES NOW petitioner, Juane Kennell, by and through counsel, and pursuant to this Court's order, submits the following post-hearing brief in support of his petition for a writ of habeas corpus.

I.

INTRODUCTION

As the court noted during the recent hearing, this case has already been extensively briefed. Thus, in the interest of brevity, this post-hearing brief will focus on some of the pertinent evidence that was presented during the recent evidentiary hearing and the supplemental discovery provided thereafter that bolster petitioner's due process claims under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). This evidence removes any doubt that the state withheld material exculpatory evidence that could have been utilized to impeach the credibility of Jeffrey Shockley and Robert Stewart. The testimony

and evidence presented at the hearing, coupled with documents received in previous and subsequent discovery, also established that petitioner's conviction was secured through the perjured testimony of both Mr. Shockley and Mr. Stewart.[1]

Regarding Mr. Shockley, there can now be no doubt that Mr. Shockley, his public defender, and the prosecution had a tacit agreement that, in exchange for his testimony, Shockley would, at worst, get probation and, at best, would get his pending drug and weapon charges dismissed. The existence of this tacit understanding is established by the testimony of attorney Robert Taafe, prosecutor Robert Craddick, and petitioner's hearing exhibit 9.

The other most significant piece of evidence that has recently come to light are documents corroborating the allegation that Jeffrey Shockley was paid a significant amount of money for a hotel room, personal expenses, and a new apartment prior to his testimony at the trials of petitioner and his codefendant. After the hearing, on October 5, 2015, respondent filed under seal twenty-two pages of documents the state received from the St. Louis City Circuit Attorney's Office. (Doc. 124). These documents indicate that the Circuit Attorney's Office, through some sort of "slush fund" the police department runs for prosecution

[1] Pursuant to Fed. R. Civ. Pro. 15(b)(2), petitioner moves to amend his habeas petition, based upon evidence revealed in subsequent discovery and the hearing, to include a claim that his conviction was secured through the knowing use of perjured testimony from Shockley and Stewart.

witnesses, paid over seven hundred dollars to Mr. Shockley and three other persons to stay in the Drury Inn at Union Station between July 28 through August 5, 2002 and then paid over one thousand dollars to move Mr. Shockley and his mother to a new apartment in St. Louis County in October of 2002. These sealed documents were attached to Dist. Ct. Doc. 124, which was filed with this Court, after the hearing, on October 5, 2015. Petitioner will designate these documents as hearing exhibit 11.

Finally, the uncontradicted testimony of petitioner, Christopher White, and Darryl Smallwood corroborate and reinforce this Court's prior ruling in Mr. White's case that there is cause and prejudice to overcome any procedural default to petitioner's *Brady/Giglio* claim. This testimony, which the state did not and could not possibly rebut, was that neither petitioner nor Mr. White had any factual basis to raise this claim until Mr. White received the conflict form (Hrg. Exh. 1) from Mr. Smallwood in prison after it was too late for either of them to include such a claim in either their direct appeal or 29.15 motion.

This brief will first summarize the pertinent evidence that has come to light, and thereafter, provide supplemental legal arguments based upon this new evidence, that establishes that petitioner can easily meet the familiar three-part *Brady* test and the more lenient test to establish a due process violation involving the knowing use of perjured testimony. Petitioner is confident that this Court will

conclude, after a fair assessment of the evidence, the credibility or lack thereof of the witnesses who testified at the hearing, and the weakness of the prosecution's case presented at trial, that petitioner is entitled to a new trial.

II.

SUMMARY OF PERTINENT EVIDENCE FROM THE EVIDENTIARY HEARING AND POST-HEARING DISCOVERY

A. Steven Reynolds

Mr. Reynolds, who was an assistant public defender in St. Louis City from 1998 through 2004, testified that he was the author of the public defender conflict form introduced into evidence as Hearing Exhibit 1. (Tr. 18-26). Mr. Reynolds was also Mr. Kennell's first assigned public defender. (*Id.* 24-25). The language Mr. Reynolds put in this form regarding a deal with Jeffrey Shockley, which created the conflict, would have been based on what Mr. Taafe had told him at that time. (*Id.* 25-26).

B. Jeffrey Shockley

Mr. Shockley was originally called as a hostile witness by petitioner. (Tr. 41). He was later recalled twice by respondent to rebut other testimony in the case. (*Id.* 184, 207). Mr. Shockley clearly was not a credible witness. This conclusion is inescapable in light of his repeated insistence that he never had any informal deal or understanding with prosecutors and Mr. Taafe that he would avoid going to jail on his pending drug and weapons charges if he agreed to testify against

petitioner and Christopher White. This aspect of Mr. Shockley's testimony is clearly refuted by the subsequent testimony of Robert Taafe, Robert Craddick, Darryl Smallwood, and Jerome Johnson. This aspect of Shockley's testimony is also inconsistent with petitioner's hearing exhibit 9, which is a two page memorandum authored by Mr. Taafe in the public defender files indicating that Mr. Shockley had an understanding, that if he testified against Kennell and White, he would possibly get the charges dismissed and, at worst, would get probation.

Regarding the relocation/payment issue, Mr. Shockley admitted that the state put him up in a hotel near Union Station for approximately two weeks before the trial and gave him other money for meals and other incidental expenses. (Tr. 57-58, 71). Mr. Shockley, however, denied that the state paid him and his mother to move into an apartment out of the neighborhood where they resided. (*Id.* 58, 72). Mr. Shockley's testimony regarding the apartment is refuted by the aforementioned records that were attached to Doc. 124, designated as exhibit 11, that indicates that the prosecutor's office paid at least $1,060.00 to obtain an apartment for Mr. Shockley and his mother.[2] (Exh. 11, pp. 12-22). These sealed records also

[2] This payment appears to cover the first and last month's rent and the security deposit for this apartment. *Id.* at 19. There is another check written to the prosecutor's office from the police for $320.00. There are no other documents to explain where or to whom this money was directed. *Id.* at 13. However, there is a deposit slip containing a figure of $1,380.00, which is the sum total of both checks. *Id.* p. 14. This strongly suggests that this second check was for Mr. Shockley's moving expenses.

corroborate the fact that Mr. Shockley stayed at the Drury Inn at Union Station at the prosecution's expense for approximately eight days prior to trial. *Id.* at pp. 2-11. These documents noted that these payments were made because Shockley was a witness in the Christopher White homicide case that was being prosecuted by Mr. Craddick. *Id.* at p. 1, 7. It appears that the prosecutor's office after depositing $1,380.00 received from police in the Lindell Bank, wrote a check on the same account for $1,060.00 to Mr. Shockley's new landlord. *Id.* 14, 17. Where the other $320.00 went remains a mystery.

The final pertinent fact that Mr. Shockley admitted in his testimony involved his agreement to become a state witness against his brother in a vehicular homicide case that was pending trial around the same time as the trials of petitioner and Mr. White. (*Id.* 75, 187). Mr. Shockley insisted that the only reason he did this was because his brother told them it was okay to agree to do this because his brother wanted him to avoid going to jail or prison. (*Id.* 77-78). Finally, Mr. Shockley admitted he lied at petitioner's trial when he said he had disposed of the Glock that he had fired the night of the Freddie Chew shooting. (*Id.* 62-63). He also admitted that the Glock that was found in the car when he was arrested on July 1, 2002 with Jerome Johnson and Robert Stewart was the same weapon he fired the night of the Chew shooting.

C. Robert Taafe

Mr. Taafe was the assistant public defender who represented Jeffrey Shockley on his drug and weapons charges. (Tr. 105-106). Mr. Taafe testified that the Saint Louis Circuit Attorney's Office offered Jeffrey Shockley a plea bargain for probation in exchange for his testimony against petitioner and Christopher White. (Tr. 107-108). After Mr. Shockley had agreed to testify, Mr. Taafe continued the case for plea and sentencing until after Mr. Shockley testified at petitioner's and Mr. White's trials. (*Id.* 107).

After the noon recess on the first day of the evidentiary hearing after the court ordered disclosure to petitioner and Mr. White of the public defender records from Shockley's trial file, Mr. Taafe identified Exhibit 9 as his notes and emails regarding plea negotiations in Mr. Shockley's case. (Tr. 130-131). After refreshing his recollection with his notes from Exhibit 9, Mr. Taafe testified that, at a November 2003 meeting in which Mr. Shockley and prosecutor Robert Craddick were present, Mr. Craddick hinted that he might dismiss the charges if Mr. Shockley agreed to testify at the upcoming trials of petitioner and Mr. White. (*Id.* 131-132). During this meeting, Mr. Shockley agreed to become a state's witness. Based upon this meeting Mr. Taafe testified that it was clear that if Mr. Shockley testified, the state would, at best, dismiss his pending charges and, at worst, he would get probation. (Tr. 130-132).

D. Robert Craddick

Mr. Craddick was the assistant circuit attorney who prosecuted petitioner and Mr. White on murder charges and obtained convictions through the use of Mr. Shockley's testimony. Mr. Craddick testified he did not recall any conversations with Mr. Shockley or his counsel regarding the aforementioned meeting in which an agreement was reached for Mr. Shockley to testify. (*Id.* 222). He also testified he never saw any of the written plea agreements that were provided by another circuit attorney to Mr. Shockley's attorney. (Tr. 236-237; see also Exh. 2).

In response to the Attorney General's question regarding whether he was aware of Mr. Shockley receiving any money from the state for his testimony, Mr. Craddick answered: "Absolutely not." (Tr. 225). Mr. Craddick also testified he was unaware of whether the prosecutor's office moved Shockley to a new place of residence. (*Id.*). This testimony is contradicted by the documents contained in exhibit 11, which indicate, as noted earlier, that the Victims Services Unit in collaboration with the St. Louis Police Department gave Mr. Shockley and his mother more than two thousand dollars for a hotel stay and a new apartment in 2002 when Mr. Craddick was prosecuting the case against petitioner and Christopher White. (Exh. 11 at p. 1, 7).

Finally, Mr. Craddick testified that he had no incentive to offer Mr. Shockley a formal plea bargain agreement in exchange of his testimony. He took

this position because it was understood by himself and Mr. Taafe that Mr. Shockley would undoubtedly get probation given his age, lack of criminal record, and the pending charges. As a result, Mr. Craddick did not want to offer a definite plea bargain to Shockley because it would adversely affect his credibility before a jury. (Tr. 232-233).

E. Jerome Johnson and Darryl Smallwood

Mr. Johnson testified regarding the incident of July 1, 2002 in which he, Shockley, and Robert Stewart were arrested in a car and the Glock belonging to Mr. Shockley was seized by police. (Tr. 86-88). Mr. Johnson testified that, after he was formally charged with a weapons charge involving this Glock that was found in Mr. Shockley's mother's car, he learned that this weapon was linked to the Chew murder. (*Id.* 89). Mr. Johnson also testified that, after the murder of Freddie Chew, both Mr. Stewart and Mr. Shockley told him they could not identify who did it because the shooters had ski masks on. (*Id.* 85-86, 94, 99). However they thought, due to a prior incident, that the shooters were "Smurf" and "50C," which were the nicknames for Juane Kennell and Christopher White. (*Id.* 85-86, 94).

Darryl Smallwood provided testimony, that corroborated the testimony of petitioner and Christopher White, that he was the person who obtained the public defender conflict form while he was incarcerated with Jeffrey Shockley. (Tr. 198-

201). After Shockley gave him this document, Mr. Smallwood, thereafter, gave the form to Christopher White in 2007 or 2008 when they were in prison together. (*Id.* 195-198). Although Mr. Shockley was recalled by respondent to deny that he gave Mr. Smallwood this form, there is no other possible explanation how this form came into Mr. Smallwood's possession unless Mr. Shockley gave it to him. This fact is corroborated by Shockley's prior testimony that he knew Mr. Smallwood, a.k.a. "D-Blue," from meeting him in the city jail. (*Id.* 66-67). In addition, Mr. Smallwood's explanation regarding Mr. Shockley's motive for giving him this form, to avoid being labeled as a "snitch" when he went to prison, rings true. (*Id.* 201-202). Finally, Mr. Smallwood, like Mr. Johnson, stated that Mr. Shockley admitted to him that he lied when he identified petitioner and Mr. White as the shooters in order to get a favorable deal on his pending charges. (*Id.* 202-204).

F. Juane Kennell and Christopher White

Both Mr. Kennell and Mr. White, consistent with the subsequent testimony of Darryl Smallwood, testified that they did not obtain the conflict form (Hrg. Exh. 1) that put them on notice that they had a possible *Brady* claim until it was too late to raise that claim in either their direct appeal or 29.15 motion. (Tr. 152-183). Mr. Kennell also testified that neither he nor his trial attorney were provided any evidence or knew that either Mr. Stewart or Mr. Shockley had previously been

arrested or had any pending charges at the time they testified at trial. (*Id.* 154). Mr. Kennell's testimony in this regard was corroborated during respondent's cross-examination in which they referenced hearing exhibit YY, which is a letter Mr. Kennell wrote to his trial counsel in July of 2003 indicating he had heard a rumor regarding the July 1, 2002 incident where Shockley and Stewart were arrested with Jerome Johnson. (*Id.* 160-161). As with the conflict form, Mr. Kennell did not obtain the police reports regarding the Glock seized on July 1, 2002 until it was too late to utilize them in either his direct appeal or 29.15. (*Id.* 160). (*See also* Hrg. Exh.'s 5, 6, 7).

The testimony of Christopher White regarding the conflict form also corroborated the other evidence that this form did not come into his possession until it was given to him by Mr. Smallwood when they were incarcerated together at Bonne Terre in 2008 or 2009. (*Id.* 174-176). Once he obtained this form from Mr. Smallwood, he mailed it to Mr. Kennell at Jefferson City Correctional Center. (*Id.* 177-178).

G. Robert Stewart

The final witness who testified at the hearing was Robert Stewart. (Tr. Vol. II, p. 4). Mr. Stewart was flown into St. Louis at the expense of the Attorney General to testify regarding the allegations advanced by petitioner that, among other things, Stewart and Shockley perjured themselves at trial when they

positively identified Mr. White and petitioner as the shooters and that Mr. Shockley coached him at the pretrial identification procedure to pick out the photos of White and Kennell at the police department.

Although Mr. Stewart predictably denied that he told Jerome Johnson or investigator David Haubrich that he could not identify the shooters, this aspect of his testimony is clearly not credible. (*Id.* pp. 9-17). Unlike Mr. Stewart, neither Mr. Johnson nor Mr. Haubrich have any motive to lie. The most telling passage from Mr. Stewart's testimony that indicates he lied at the hearing when he denied telling Mr. Haubrich that he could not identify the shooters, that Mr. Shockley had a deal, and that there were irregularities in the lineup procedure, was his admission that he did in fact speak with Mr. Haubrich at the jail in Florida for approximately thirty to forty-five minutes. (*Id.* 19). Obviously, had Stewart provided no useful information to Mr. Haubrich, this visit and conversation between them would have undoubtedly been much shorter. Moreover, it is incredible to believe that a licensed private investigator would commit perjury in an affidavit, which provides further compelling evidence that Mr. Stewart's hearing testimony is unworthy of belief.

III.

ARGUMENT

The three-part test under *Brady* is well settled and has been briefed extensively in petitioner's amended petition, traverse, and supplemental traverse. (See Doc.'s 13, 27, 85). However, at the time these prior pleadings were filed, the facts were not fully developed to establish that the state suppressed exculpatory and material evidence that undermined any confidence the outcome of petitioner's trial.

As the prior pleadings of the parties and the focus of the questions at the evidentiary hearing demonstrate, the parties disputed whether the agreement between Shockley and the state to testify with the understanding that he would receive a favorable outcome on his pending drug and weapons charge violated *Brady*. Petitioner will address the issue of whether this arrangement violated *Brady* in greater detail below. However, there is absolutely no dispute that the state suppressed exculpatory impeaching information regarding the prosecution's payments to Mr. Shockley for a hotel room, personal expenses,[3] and a new apartment. (See Exh. 11). It is also clear that the state suppressed material

[3] As noted earlier, there is a $320.00 check in Exhibit 11 that is unaccounted for. One possible explanation is that these funds were used to provide, as Shockley admitted at the hearing, vouchers to Shockley's mother for his use. (Tr. 72, 74-75).

exculpatory evidence regarding the fact that Mr. Shockley had also agreed to become a state's witness against his brother in another case.

Regarding the prosecutor's payments for lodging and relocation of Mr. Shockley, there can be no dispute that payments made by the police or the prosecution's office to an informant is exculpatory evidence under *Brady*. *See Banks v. Dretke*, 540 U.S. 668 (2004). In *Banks*, the state failed to disclose that a key prosecution witness was paid $200.00 for his testimony. *Id.* at 685. In light of this fact, the Court in *Banks* held that it was beyond genuine debate that this witness's paid informant status qualified as evidence advantageous to *Banks*. *Id.* at 691. Other courts have found *Brady* violations in similar circumstances where government witnesses were paid prior to their trial testimony and this fact was not disclosed to the defense at trial. *United States v. Librach*, 520 F.2d 550, 553-554 (8th Cir. 1975) (finding that government's payment for relocation of a key prosecution witness violated *Brady*); *Benn v. Lambert*, 283 F.3d 1040 (9th Cir. 2002). In *Benn*, among the other undisclosed impeachment evidence that was considered by that court, a key prosecution witness was given $150.00 by the police in exchange for his promise to incriminate Benn. *Id.* at 1056-1057.[4]

[4] As petitioner noted in his supplemental traverse, this aspect of petitioner's *Brady* claim is virtually identical to the Gary Engel case, where the Missouri Supreme Court ordered a new trial under *Brady* because the police gave an informant's mother five hundred dollars. (See Doc. 85, pp. 10-11).

It is also clear that the state's failure to disclose Mr. Shockley's agreement to become a state's witness against his own brother was exculpatory. Mr. Shockley's admission at the hearing that he had agreed to become a state's witness against his brother Duane Shockley in order to stay out of jail involves similar facts to those recently confronted by the Supreme Court of Delaware. 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.

Regarding the issue of whether Mr. Shockley's agreement to become a state witness arranged by his public defender and his subsequent guilty plea where he received probation constituted a *Brady* violation, the evidence presented at the recent hearing, coupled with the legal arguments previously advanced in petitioner's supplemental traverse clearly indicate that a due process violation

occurred. (See Doc. 85, pp. 3, 5-13). There was clearly a tacit arrangement between Mr. Shockley, his attorney, and the state, that he would avoid jail on his pending charges if he agreed to testify against Mr. White and Mr. Kennell. A formal plea agreement or contract is not required to establish a *Brady* violation. *See Reutter v. Solem*, 888 F.2d 578, 582 (8th Cir. 1989) (finding *Brady* violation despite the lack of either "an express or implied agreement" between the witness and state). As the Supreme Court has noted, the key question is not whether there is an effective agreement, but whether the witness "might have believed that [the state] was in a position to implement...any promise of consideration." *LaCaze v. Warden*, 645 F.3d 728, 735 (5th Cir. 2011), quoting *Napue v. Illinois*, 360 U.S. 264, 270 (1959). As the testimony of Mr. Craddick noted above indicates, no formal plea bargain was reached because he was concerned that a formal plea bargain agreement would undermine Mr. Kennell's credibility with the jury.

Here, regardless of whether there was a formal enforceable contract, there was clearly an understanding as to the outcome of a future prosecution that would have adversely affected Mr. Shockley's credibility. *See Giglio*, 405 U.S. at 155. As the record clearly indicates, a formal agreement was strategically not offered by the prosecution to unfairly enhance Shockley's credibility in order to mislead the jury. *See Tassin v. Cain*, 517 F.3d 770, 778 (5th Cir. 2008).

Finally, this Court must determine whether the multiple *Brady* violations here are material. Suppressed evidence is material if it undermines confidence in the outcome of the trial. In determining materiality, reviewing courts must consider the cumulative prejudice resulting from numerous instances of the suppression of exculpatory or impeachment evidence in light of the entire record in the case. *United States v. Agurs*, 427 U.S. 97, 112 (1976). A reviewing court must evaluate the "tendency and force of the undisclosed evidence item by item" and then consider the cumulative effect of the suppressed evidence in light of the strength of the evidence of guilt presented at trial to determine whether these *Brady* violations, in the aggregate, undermine confidence in the outcome of the trial. *See Kyles v. Whitley*, 514 U.S. 419, 421, 434, 437, n.10 (1995).

As noted in earlier pleadings, materiality is not a close question. The state's entire case hinged on the credibility, or lack thereof, of Mr. Shockley and Mr. Stewart. Their credibility was already suspect, even without considering the multiple *Brady* violations, due to their drug use, prior inconsistent statements, and the fact that they had positively identified three other perpetrators of the murder who were subsequently cleared by police. (See Doc. 27, pp. 10-11). Since this was obviously a close case even without factoring in the suppressed evidence, the suppressed evidence of Shockley's tacit arrangement for leniency, monetary payments, and his agreement to testify against his brother, would have given the

jury additional compelling reasons to doubt the true motives of why Shockley and Stewart were testifying as the state's star witnesses.

In many respects, the constitutional violations here bear remarkable similarities to those addressed by Judge Jean Hamilton in the Ellen Reasonover case. *See Reasonover v. Washington*, 60 F.Supp.2d 937 (E.D. Mo. 1999). Similar to the facts presented here, Ellen Reasonover was wrongly convicted of murder based upon the testimony of two witnesses, who were convicted felons, who negotiated favorable deals with the prosecution to testify against her. *Id.* 943-944. One of the witnesses against Ms. Reasonover, Rose Jolliff, had a tacit understanding with the state that she would obtain a favorable disposition on pending charges if she testified against Ms. Reasonover. *Id.* at 957-959. As here, the precise circumstances of the deal Ms. Jolliff would receive on her pending charges was deliberately left vague because the prosecutor did not want Ms. Reasonover's trial counsel to bring up a deal that might have damaged this witness's credibility at trial. *Id.* As here, Ms. Jolliff, shortly after testifying at Ms. Reasonover's trial, went to court and received probation on her pending charges. *Id.* at 958.

The second witness against Ms. Reasonover, Mary Ellen Lyner, was a convicted felon who also reached an agreement with the state to testify at Ms. Reasonover's trial. Like this case, the state 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 aforementioned *Brady* violations in Reasonover were material. *Id.* at 976-981. With regard to Ms. 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.[5] *Id.* at 979-981.

It is also clear that the suppressed evidence regarding the July 1, 2002 arrest of Shockley and Stewart and the subsequent ballistics testing indicated that Mr. Shockley committed perjury at petitioner's trial when he stated he threw away his

[5] Like the prosecution in *Reasonover*, Mr. Craddick argued to the jury that there was "no fix in" or any other reason that Shockley and Stewart would frame petitioner. (Trial Tr. 873-877).

Glock. (See Trial Tr. 552). There is also compelling evidence of perjury based upon Shockley's and Stewart's statements to Jerome Johnson, Darryl Smallwood and David Haubrich that they could not identify the perpetrators and lied when they testified to the contrary at trial. The credibility of Haubrich, Johnson, and Smallwood, regarding Stewart and Shockley's post-trial statements that they could not identify the shooters, is undoubtedly enhanced and should be deemed credible because Stewart and Shockley mistakenly identified three other suspects shortly after the shootings. (See Doc. 27, pp. 10-11). The allegation that Shockley manipulated Stewart into identifying petitioner and White is also corroborated by Shockley's trial testimony that Stewart did not know Mr. Kennell and Mr. White and that Shockley told Stewart, after the shooting, that Chris and Smurf were involved. (Trial Tr. 551).

To prevail on a due process violation involving perjured testimony under *Napue* and *Giglio*, a petitioner must establish that the prosecution knew or should have known that false testimony was utilized and that prejudice ensued. *Jackson v. Brown*, 513 F.3d 1057, 1071-1072 (9th Cir. 2008). The test for prejudice resulting from the use of perjured testimony is more lenient than the *Brady* materiality test and a new trial is required where there is any reasonable likelihood that the perjured testimony could have "affected the judgment of the jury." *United States v. Bagley*, 473 U.S. 667, 678 (1985).

In *Napue*, the Supreme Court explicitly stated: "[I]t is established that a conviction obtained through the use of false evidence, known to be such by representatives of the state, must fall under the Fourteenth Amendment. The same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue*, 360 U.S. at 269. In *Giglio*, the court also found a *Napue* violation when the prosecutor lacked personal knowledge of the perjury. In that case, the court held that one prosecutor's unknowing failure to correct false testimony that disavowed promises made by another prosecutor violated due process. 405 U.S. at 155. In reaching this conclusion, the court in *Giglio* stated: "The prosecutor's office is an entity and as such it is the spokesman for the government. A promise made by one attorney must be attributed for these purposes, to the government." *Id.* at 154.

Thus, *Napue* and *Giglio* stand for the proposition that the element of the "knowing use" of perjured testimony is established when any of the state's representatives, including the police, would know that the testimony presented at trial was false. Based upon the police and ballistics reports from the July 1, 2002 arrest, there is no doubt that the state knew or should have known that Shockley's trial testimony regarding this gun was false. (See Hrg. Exh.'s 6, 7, 8).

CONCLUSION

One of the most cherished principles of our criminal justice system, "implicit in any concept of ordered liberty," is that the state may not use false evidence to obtain a criminal conviction. *Napue*, 360 U.S. at 269 (1959). Deliberate deception of a judge and a jury is "inconsistent with the rudimentary demands of justice." *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). The evidence here is clear that petitioner's jury was deliberately deceived into believing that neither Mr. Shockley nor Mr. Stewart had any ulterior motives to become prosecution witnesses, that could have adversely affected their credibility. The interests of justice clearly require that petitioner receive a new and fair trial in which a new jury can fairly and accurately assess whether Shockley and Stewart's accounts of the crime and identifications of petitioner and Mr. White as the murderers are worthy of belief beyond a reasonable doubt.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of February, 2016, this motion was filed via the CM/ECF system which sent notification to all counsel of record.

/s/ Kent E. Gipson
Counsel for Petitioner