UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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

/s/ Kent E. Gipson
Kent E. Gipson

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MEMORANDUM AND ORDER

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

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