

Metropolitan Police Department, and the Missouri Public Defender System to provide numerous files, including the criminal case files for Petitioners, and any files involving charges against Shockley and Stewart, affording these non-parties a chance to object. The Circuit Attorney objected based on work product and attorney-client privileges, and the Arrest Record Act, Mo. Rev. Stat. § 610.100. The Public Defender objected based on work product and attorney-client privileges, and also argued that compliance with the Court's order would require it to violate Missouri Supreme Court Rule 4-1.6. In light of these objections, the Court ordered that the files be submitted to the Court for *in camera* inspection.

The files were submitted to the Court and the Court held a hearing on the question of whether the *in camera* documents should be provided to counsel for Kennell and counsel for White. At the hearing, the Court directed the Circuit Attorney to provide Kennell and White with copies of an unsigned plea agreement related to February 18, 2002 charges against Shockley, and granted Kennell and White leave to depose Shockley if they wished to. In other regards, the Court took the matter under submission.

In its decision in *White*, the Court concluded, after review of the documents, that there was no evidence whatsoever in the record as a whole, including the *in camera* documents, of a violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), with respect to Stewart, and that any possible *Brady* violation with respect to Shockley based upon a notation in his attorney's files that the State "hinted" that it may drop certain charges against Shockley in exchange for his testimony was not material or prejudicial for several

reasons, including that Stewart had testified to essentially the same events as had Shockley.

The next day, counsel for Kennell filed the present motion, stating that he was "blindsided" by the Court's decision in *White*, and had assumed that once the Court finished its *in camera* review of the documents, the Court would release any documents that were relevant to counsels for Kennell and White so that they could file a supplemental traverse in support of their *Brady* claims and renew their request for an evidentiary hearing. Counsel for Kennell argues that even if this assumption was faulty, it would not be fair to issue a decision in Kennell's case now without releasing relevant *in camera* documents to him, and affording him an evidentiary hearing and an opportunity to file a supplemental traverse on his *Brady* claim.

In support of his motion, counsel for Kennell submits three exhibits. The first exhibit is a statement by an investigator hired by counsel to interview Stewart. The investigator states that he interviewed Stewart on August 2, 2012, and that Stewart told him that he (Stewart) was not offered any deal to testify against Kennell and White. Rather the judge in his case, offered to drop the charges if he would enlist in the army, which Stewart did. This undermines any claim that Stewart testified against Kennell and White in return for a deal with the state. The investigator further states that Stewart said he really could not identify Kennell and White, which has no bearing on Kennell's *Brady* claim. And the investigator states that Stewart told him that he never heard Shockley say he was offered "some kind of a deal, but it was obvious, because he never went to prison

on his serious [gun and drugs] charges." (Doc. No. 77 at 7.) This (hearsay) conclusion by Stewart is rank speculation. Petitioner did not depose Stewart.

The second exhibit submitted by Kennell's counsel is the above-mentioned unsigned plea agreement with Shockley. The unsigned agreement states that if Shockley pleaded guilty, the state would recommend a suspended imposition of sentence plus two years supervised probation, 80 hours community service, and payment of court costs, in exchange for his full cooperation, including truthful testimony in the prosecution of Kennell and White for Chew's murder, and Shockley's brother for a different murder. This plea proposal was never accepted.

The third exhibit is a declaration by Jerome Johnson dated Oct. 24, 2012, in which Johnson states that Shockley and Stewart told him they could not recognize the shooters in the Chew murder case because the shooters were wearing ski masks, and that they just guessed as to who the shooters were. Johnson also states that a gun found by the police in a car he was driving on July 1, 2002, was not his, but belonged to Stewart, who along with Shockley, was in the car too. This gun later was identified as one involved in the shooting incident that left Chew dead.

The Court regrets the misunderstanding between the Court and Kennell's counsel as to how matters would proceed with regard to the *Brady* claim. The Court does not believe that Petitioner or his counsel has a right to the release of any of the *in camera* documents from the Public Defender's Office. There is no basis for finding that Shockley waived his attorney-client privilege with respect to his attorney's case file. And

as noted above, the only possible basis for a *Brady* claim contained in those files has already been disclosed and analyzed by the Court.

With respect to the Circuit Attorney's files, the Court is inclined to provide counsel for Kennell with a copy of the record showing the disposition of charges against Shockley and Stewart filed when they were arrested on July 1, 2002. As noted in *White*, the record shows that within days of the arrest the charges were refused for lack of "sufficient value" with respect to Shockley and for "insufficient connection" with respect to Stewart. A copy of this Order will be provided to the Circuit Attorney's Office and the Court will allow the Circuit Attorney's Office seven days to object to the Court making this limited release of this document to counsel for Kennell.

The Court will also allow Kennell 30 days within which to file a supplemental traverse based on any new evidence and arguments he wishes to submit to the Court. Kennell's request for additional time for discovery shall be denied without prejudice. He has not set forth with specificity the additional discovery he seeks nor has he shown that any additional discovery will enable him to demonstrate that he is entitled to relief. Similarly, Kennell's request for an evidentiary hearing is denied at this point in the proceedings, as he has not shown that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *See* 28 U.S.C. § 2254(e)(2)(B).

Accordingly,

IT IS HEREBY ORDERED that Petitioner Juane Kennell's "Renewed Motion for Discovery, Release of Documents, and for Evidentiary Hearing" is GRANTED in part and DENIED in part as set forth above. (Doc. No. 77.)

IT IS FURTHER ORDERED that the Clerk's Office shall provide the Circuit Attorney's Office of the City of St. Louis (a Movant in this case) with a copy of this Memorandum and Order, together with a copy of the document separately marked as Order Exhibit 1. The Circuit Attorney's Office shall have seven days to object to the Court making the above-noted release of the document to counsel for Kennell. If no objection is filed, the Court will thereafter file Order Exhibit 1 under seal, with a copy to Petitioner and Respondent.

IT IS FURTHER ORDERED that Petitioner shall have 30 days, to and including January 14, 2015, to file a supplemental traverse. Respondent shall have 10 days thereafter to respond.


AUDREY G. FLEISSIG
UNITED STATES DISTRICT JUDGE

Dated this 15th day of December, 2014