

Case no. SC91021

IN THE MISSOURI SUPREME COURT

MARK WOODWORTH,

Petitioner,

v.

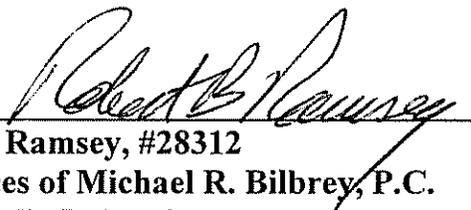
LARRY DENNEY, WARDEN
CROSSROADS CORRECTIONAL
CENTER,

Respondent.

PETITIONER'S REPLY BRIEF

Respectfully Submitted,

By: _____


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PETITIONER'S REPLY TO RESPONDENT'S
STATEMENT OF THE FACTS

Respondent's statement of facts is an obvious attempt to contradict the Master's finding that the trial evidence against Petitioner was "...thin, very thin." However, it contains numerous misleading or inaccurate representations of events and testimony, a common theme throughout Respondent's brief, including the following:

- 1.) Rochelle Robertson was 20 years old at the time of the crimes, not 18 as asserted in the brief. (See Reply Appendix p. 1)
- 2.) Brandon Hagan was 17 years old. (See Reply Appendix p. 2)
- 3.) The statement leaves the false impression that Lyndel Robertson identified a photograph of the work bench which showed a box of bullets on the bench. (See State's Brief p. 11, lines 11-14). However, the trial exhibit was a photograph which was produced, in 1995, from the video of the crime scene taken by investigators the morning after the shootings. There are no boxes of bullets in the photograph, suggesting either that investigators were sloppy or that they later contrived the scenario. (See Reply Appendix p. 3, 4) Second Trial Exhibit 13)
- 4.) At page 16, Respondent, in an attempt to establish Petitioner's motive to commit the crimes, asserts that Petitioner indicated during police interrogation that it was his father's idea to terminate the

partnership with Robertson. At page 23, Respondent asserted that Robertson learned that fall, from his hired man, that the partnership was splitting up. Respondent fails to mention the uncontradicted hearing testimony of John Williams, Robertson's hired hand at and before the time of the crimes, and present farming partner, that he and Robertson desired to remove him as Robertson's partner and proceed with their own partnership, and that this was not made known to Woodworth. (Master's Hearing p. 540-542)

- 5.) Respondent selectively referred to the trial testimony of ballistics experts in an order to attempt to establish there was substantial evidence connecting Claude Woodworth's .22 revolver to the shootings. Respondent failed to mention that none of the State's experts or their reports ever established a "conclusive" connection. (Trial 1 and Trial 2 – Cayton Trial 1 – pp. 717 - 770, Cayton Trial 2 – pp. 617 – 694 & 975 – 962; Garrison Trial 1 – pp. 623 - 705, Garrison Trial 2 – pp. 417 – 473; Nicklin Trial 1 pp. 847 – 919, Nicklin Trial 2 – pp. 694 – 723; and their reports – Cayton Report, Reply Appendix p. 5, 6; Garrison Report, Reply Appendix p. 7; Nicklin Reports, Reply Appendix pp. 8 - 18) With regard to Steve Nicklin, Respondent similarly fails to mention the substantial effort by private investigator Deister to improperly influence or coerce his opinions, (See Master's Hearing Exhibits 1 and 2) and the

characterization of such attempts as “untoward” and “improper” by Hulshof and Calvert, as well as the Special Master. (Master’s Hearing Exhibit 156, Gary Calvert Deposition pp. 48, 49 and 51-57; Master’s Hearing Exhibit 180, Kenny Hulshof Deposition p.38; Master’s Report p. 31)

Sheriff Cox testified to the following:

Q. Did you find anything significant in your review in terms of your opinion as to the credibility and integrity of the investigation in which Mr. Deister and Deputy Calvert were involved?

A. With regard to Exhibits 1 and 2, I believe it's unethical and unprofessional on their part.

Q. Can you explain for the Court why you -- what you base that opinion on?

A. It suggests attempting to coerce an answer from a firearms expert. The Highway Patrol, Mr. Cayton, had already basically ruled it as inconclusive. It's suggestive of the \$25,000 bullet.

(Master’s Hearing p. 72, Cox Testimony)

6.) Respondent referred to the trial testimony of John Quinn that no one ever asked Lyndel Robertson if he “saw” who shot him. Respondent fails to mention the following uncontradicted hearing testimony of

Mark Mellor who visited Lyndel Robertson at the hospital on a different occasion than Quinn:

Q. "...Did he (Lyndel Robertson) say that he saw who shot him?

A. Yes, he did. Brandon..."

(Master's Hearing p. 179)

Respondent's attempt to enhance the strength of the evidence against Petitioner is contrary to its own assessment of the case as being a "long-shot-to-win case." (See Master's Hearing Exhibit 21) That assessment is consistent with the Master's factual finding that:

"...At best though, the State's evidence of guilt is thin...very thin. This Court is skeptical that a jury of reasonable men and women, with a fair look, would find Woodworth guilty beyond a reasonable doubt." (Master's Report p. 35)

Petitioner's Reply to Respondent's Asserted Standard of Review

Respondent suggests that Petitioner asserted his claim of actual innocence solely as a means of overcoming procedural default, ostensibly to be able to raise claims which Respondent asserts were, in fact, procedurally defaulted. Procedural default may be overcome "...only if they present jurisdictional issues or circumstances so rare and exceptional that a manifest injustice 'will result if review is not taken...' The procedural bar to raising a habeas claim can be overcome by showing of manifest injustice, cause and prejudice, or a jurisdictional default." *State ex rel Engel v Dormire*, 304 S.W.3d 120, 125 (Mo Banc. 2010), citing *State ex rel Amrine v Roper*, 102 S.W.3d 541, 545, 546 (Mo.Banc 2003); *State ex rel Simmons v White*, 866 S.W.2d 443, 445 (Mo Banc. 1983).

The Special Master found that Petitioner had not clearly and convincingly established actual innocence because this was not a DNA case, nor had the key witnesses "recanted their stories." However, the Master found that Petitioner had clearly and convincingly established both "cause and prejudice" by numerous *Brady* violations and "manifest injustice" due to sufficiently "rare and exceptional circumstances, justifying review of all evidence developed since the first trial." (Master's Report, pp. 30, 35)

Petitioner's Reply to Respondent's Introduction

Respondent asserts that the Missouri Court of Appeals determined that the Lewis letters were not “new evidence”, *Woodworth v State*, WD 70685, p. 7 (Mo.App.W.D. 2010) The Lewis letters were not in evidence in that proceeding. The other *Brady* material found by the Master had not even been discovered yet. The footnote “determination” that the Lewis letters were not “new evidence” was of no precedential value and was erroneous. That Court did not have the benefit of the body of evidence presented to the Special Master.

Petitioner's Reply to Respondent's Summary of the Argument

That Petitioner's claim is based on the strength of evidence inculpatng Brandon Hagan is misleadingly asserted by Respondent. To the contrary, it is based, inter alia, on the failure of the State to fulfill its duties under *Brady v. Maryland*, 373 U.S. 83 (1963). This failure deprived Petitioner of evidence with which he would have been able to significantly undermine the credibility of the state's testimonial witnesses, the reliability of the state's "scientific" evidence and the credibility of the state's investigation and prosecution. The Master found clearly and convincingly that the investigation was not conducted with a "fair eye for ascertaining the facts, but was inexcusably led by an outside private investigator, who was "conflictually employed" by one of the victims." (Master's Report p. 31) This conflicted investigator was not only surreptitiously given unaccounted for possession of the sheriff's investigative file, but also was given unaccounted for possession of two of the key pieces of "scientific" evidence, the purported murder weapon and the connecting bullet purportedly removed from his employer, the victim.

Petitioner's claim was also based on the highly improper actions of a judge who assumed the role of prosecutor and about whose actions the Master found that, "...It is inconceivable that each of these actions was simply an isolated, unrelated event; they hold the trappings of a case-specific, professionally unacceptable, pattern and practice." (Master's Report p. 33) These actions include the permitting of an egregious conflict of interest of which he was specifically

aware to persist without disclosure to the record or to the defense. Petitioner was represented by an attorney who simultaneously represented a hired hand of the victim, who was acting as an informer against Petitioner and who was the recipient of undisclosed “deals” from the State in exchange for his providing evidence against Petitioner.

Petitioner’s claim is also based on circumstances so rare and exceptional as to clearly and convincingly prove to the Special Master that a manifest injustice occurred and the verdicts against Petitioner were not worthy of confidence.

REPLY ARGUMENT

I

A. Petitioner Proved Clearly and Convincingly That the Lewis Letters Were Not Disclosed to the Defense.

The Master's finding that the Lewis letters were not disclosed to the defense is supported by substantial evidence, including the following:

- 1.) Special Prosecutor Hulshof (to whom all the letters were sent), testified that "... this letter (Lewis' letter to Hulshof) was not disclosed..." (Master's Hearing p. 695, Line 20-21, Hulshof Testimony). He agreed with the Court that the letters should have been disclosed. (Master's Hearing p. 695, line 25, Hulshof Testimony)
- 2.) Hulshof also admitted that the letters did not contain the consecutive numbering which was placed on all materials provided to the defense. (Master's Report p. 16; Master's Hearing pp. 648 - 649)
- 3.) All defense attorneys, James Wyrsh, Jacqueline Cook and William Kutmus testified that the letters were not disclosed. (Master's Report pp. 16 - 17; Master's Hearing Exhibit 200, James Wyrsh 2011 Deposition p. 11; Master's Hearing Exhibit 174, Jacqueline Cook 2011 Deposition pp. 10 - 11; Master's Hearing Exhibit 183, William Kutmus 2011 Deposition pp. 6 - 7)

- 4.) Investigator Phil Thompson testified that he had never before seen the Lewis letters. In addition, he asked Hulshof before the first trial about letters regarding the grand jury. Hulshof told him that he could not provide the letters. (Master's Hearing Exhibit 196, Phil Thompson 2011 Deposition p. 10) This testimony was uncontradicted.
- 5.) The Lewis letters were not included in Ms. Smith's inventory of all discovery provided to the defense. (Master's Report p. 16; Master's Hearing pp. 618 - 621, R. Smith Testimony; Master's Hearing Exhibit 194, Rachel Smith Deposition pp. 16 - 18)

Respondent acknowledges that the Master's credibility determinations are unassailable. Thus, Respondent cannot complain now because the Master credited Petitioner's trial counsel, the testimony of Hulshof and the inventory letter. Notwithstanding its meritless claim that Petitioner somehow should have produced the entire defense file, Respondent passed up the opportunity to request the defense file in discovery.

Respondent's argument that Petitioner's Third Amended Petition alleges that "the Deister Letter" was concealed but that letter was used at trial in fallacious. There were, in fact, two Deister letters. Respondent is aware that on October 20, 2011, the issue of one of the letters was specifically withdrawn by Petitioner. (See Reply Appendix pp. 19 - 23, Petitioner's Withdrawal of Exhibit 1 as being *Brady* Suppressed Material) The other letter, was an additional letter from

Lyndel Robertson to Judge Lewis dated in 1992. It was not provided to the defense and was not used at trial. It was, however, discovered in the British expert's file. It is material to the issues of impermissible influence on an expert and also describes in detail the pre-arranged plan of obtaining disqualification of the County Prosecutor, who had refused to file charges against Petitioner.

Respondent refers to a letter from Lyndel Robertson to Judge Lewis used at the second trial. Review of the transcript reveals that this was a letter regarding Lyndel Robertson's request that Petitioner not be granted bond. (Trial II, 25 – 27, Reply Appendix pp. 24, 25) This Robertson letter was accompanied by a cover letter from Judge Lewis. The Master found it significant in discrediting Judge Lewis' testimony that there was no similar cover letter from Judge Lewis regarding the *Brady* letter.

Respondent's reliance on Rachel Smith's testimony that the Lewis letter would have been in the "open file" she made available to the defense is misplaced. The State offered no evidence that these letters were, in fact, in the file which Smith made available. She did not even remember the first time she saw the letters. (Master's Hearing pp. 613 – 624, Master's Hearing Exhibit 194, Rachel Smith Deposition p. 19)

B. The Lewis Letters Were Exculpatory, Material and Properly Found By the Special Master to be *Brady* Material.

Contrary to Respondent's assertions, the Master made explicit findings that the Lewis letters were exculpatory, including the following:

- 1.) The letters were all provided to Kenny Hulshof prior to Petitioner's indictment. Hulshof was thus specifically made aware that shortly after the crimes Lyndel Robertson had "fingered" a suspect other than Petitioner. Thus, the Lyndel Robertson's 1995 deposition testimony (at which Hulshof was present) suggests a pattern and practice by the prosecution to conceal from the defense and the jury that Lyndel Robertson had not only identified Brandon Hagan as the perpetrator, but was so sure of it that he demanded that Hagan be prosecuted. These letters would have substantially supported a defense that the prosecutor's motives were improper.
- 2.) The letters explicitly described, in Judge Lewis' own words, his improper role in the calling of a grand jury, which was found by the Master to have been "prompted" by and "based upon an ex parte letter that he got from one of the victims." (Master's Report pp. 15, 32)
- 3.) The Master found that "...In both trials, Woodworth's efforts to impeach prosecution witnesses such as Lyndel Robertson, Brandon

Hagan and Gary Calvert were deprived of substantial evidentiary force; correspondingly, prosecutors were able to claim much greater credibility than was warranted from the testimony of Robertson, Thomure and Calvert.” (Master’s Report pp. 17, 18)

- 4.) “Woodworth’s argument to the first trial court to allow him to prove that another person had the motive and opportunity to commit the crime would have been substantially augmented and with that augmentation the Griffin Court may have become convinced to allow Woodworth to adduce evidence that Thomure was the shooter.” (Master’s Report p. 18) At the first trial, Judge Griffin did not permit evidence that “some other person did it”, resulting in a reversal and remand of the first conviction. The Master noted that the appellate court stated that, even without such defense evidence, “the case against Woodworth was thin.” In light of the thinness of the state’s case, the Master found that “...the slightest bit of defense evidence eroding the force of the State’s witness or bolstering the weight of the defense witnesses may have tipped the scales in favor of Woodworth. The same analysis applies to the second trial.” (Master’s Report p. 18)
- 5.) Timely disclosure of the letters “...would have significantly impacted upon the ability of Woodworth’s counsel to provide a meaningful defense... not only at trials, but also, during the grand

jury process...” The letters “...may have formed a basis for a then non time-barred attack on the grand jury proceeding.” (Master’s Report p. 18)

- 6.) The letters not only were exculpatory per se, but “...would reasonably lead to the discovery of other important defense related evidence.”
- 7.) The letters would have formed the basis for a challenge for cause against Judge Lewis, thus allowing Petitioner to retain a peremptory change of judge.
- 8.) Hulshof admitted that the letters were *Brady* material in his testimony hearing before the Master.

THE COURT: All right. However if they were in your file, it would have been appropriate, in your opinion, to deliver those to the Defense, correct? There wouldn't be any excuse not for delivering them, would there?

THE WITNESS: No, sir. (Master’s Hearing p. 692)

THE COURT: And say, this was significant information. It may have been disclosed. They are saying it's not. I don't -- you're not -- you're saying you're without knowledge as to whether it was. But in retrospect, it should have been disclosed. It was significant at that point in time, correct?

THE WITNESS: It -- and it -- this letter wasn't disclosed, but the fact that Mr. Robertson --

THE COURT: Right. I got it.

THE WITNESS: -- had been disclosed, yes, sir. (Master's Hearing p. 695)

THE COURT: Okay. I'm granting to you -- I'm setting aside for a moment the fact that there may be evidence presented that, in fact, this was disclosed. Okay? Let's just go with that.

But in retrospect -- let's just assume for a moment it wasn't disclosed. It's clearly significant evidence. Could lead to significant evidence. The -- if the Defense didn't know somebody else got fingered initially for this, that's a big deal, right?

THE WITNESS: That's a big deal if that information had not been disclosed. (Master's Hearing p. 696)

Respondent's arguments are without merit. The Master's findings on this issue are primarily factual and are to be accorded great deference.

Respondent's reliance on *Harrington v Richter*, 131 S.Ct. 770, 792 (2011) is misplaced. *Richter* involved a federal habeas case considering whether defense counsel had been ineffective by not calling a serology expert at trial. The expert evidence would have "established nothing more than a theoretical possibility that another suspect's blood may also have been present at the crime scene." Defense

counsel at trial had already “extracted a concession along the lines from the prosecutions expert.” (*Richter*, at p. 792)

Respondent ignores the specific findings of the Master which took into account the context provided by totality of the circumstances and all the evidence developed since the trial. The Master found:

“...the circumstances of the prosecutions and convictions are sufficiently rare and exceptional so as to justify a review of the totality of the circumstances. Woodworth’s verdict is not worthy of confidence. In and of itself, the violation of *Brady* predicated on the Lewis letters would be sufficient to justify the granting of habeas relief. Aggregated with Judge Lewis’ inappropriateness, the un-ending conflicts, the investigative misconduct and the significant State nondisclosures, it is even clearer that a manifest injustice has occurred.” (Master’s Report p. 30)

C. The First Trial Is Not a Nullity Because the Violations of Petitioner’s Due Process and *Brady* Rights Have Pervaded the Entire Judicial Process.

Respondent’s reliance on *Lockhart v Nelson*, 488 U.S. 33, 42 (1988) to support its contentions that the first trial was a “nullity” is misplaced. *Lockhart* involved a Double Jeopardy claim where a habeas petitioner asserted he should not be retried after a reversal of his convictions as a habitual burglary offender, because one of the alleged prior convictions had been eliminated by a gubernatorial pardon prior to his trial. The effect was to reduce the number of prior convictions below the minimum number required under Arkansas law to be

convicted as a habitual offender. The only discussion of the concept of “nullity” is the following:

“...Had the defendant offered evidence at the sentencing hearing to prove the conviction had become a nullity by reason of the pardon, the trial judge would presumably have allowed the prosecutor to offer evidence of another prior conviction to support the habitual offender charge.” (at p. 42)

The holding was limited to the unique facts of that case and does not support Respondent’s assertion that the reversal and remand of Petitioner’s first conviction by the appellate court rendered the entire conviction a nullity. Respondent cannot magically wash away improper conduct which pervaded the entire process.

Respondent ignores the Master’s finding that “...if there had been a balanced investigation, had there been a fair judge ab initio, had the state not violated *Brady*, no jury would have convicted Woodworth of the crimes charged.” (Master’s Report p. 35)

Had he been acquitted by the first jury, as the Master found he would have, there would have been no second trial and Petitioner would have been spared the agony and expense of a second trial and spending fifteen more years in prison. He was prejudiced.

The State also ignores the law which prohibits retrial after sufficiently egregious prosecutorial misconduct. Because this was contained in Petitioner’s

original brief, further discussion is unwarranted. However, because of the *Brady* violations, Petitioner was effectively denied the opportunity to timely challenge his convictions on the basis of prosecutorial misconduct and the wholesale denial of his due process rights by the trial judges and at the grand jury.

The *Brady* violations continued throughout the second trial and beyond. Had it not been for the propitious discovery of the Lewis letters by a newspaper reporter given access to the Attorney General's files, none of the *Brady* material would have been discovered. Petitioner was denied the opportunity by the Griffin Court during his 29.15 proceedings to obtain discovery of grand jury records and take the deposition of Judge Lewis, especially in light of the fact that a copy of the Lewis letters had been in Judge Lewis' personal files from the outside. (See Master's Hearing Exhibit 185, Judge Lewis' Deposition Volume 2, pp. 25 – 26) (Reply Appendix pp. 26 - 28, Memo to Judge Griffin in 29.15 Motion) Tragically, Petitioner could have found the new evidence years before they were discovered by the news reporter.

Respondent's reliance on *State v Owens*, 740 S.W.2d 269 (Mo.App.W.D. 1987) is also misplaced. In *Owens*, the Court reversed a jury verdict for sodomy because the information was jurisdictionally defective by not including the statutorily required allegation that the defendant had deviate sexual intercourse with a person "...to whom he is not married." The Court merely found that the jury verdict and convictions were a "nullity" because the defective information

resulted in the trial court never acquiring jurisdiction. Thus, *Owens* holding provides no support for Respondent's argument.

Respondent's assertions regarding the importance of Brandon Hagan are without merit. The Master did not conclude that "the alibi evidence for Mr. Hagan was "shaky", he found that Hagan's alibi itself was "shaky." The assertion that the conclusion was "surprising" given the fact that the Master heard no evidence of Hagan's alibi since it was not an issue and Petitioner asserted that the State could not "relitigate" its case in chief in the habeas proceeding is false and misleading in the following respects:

- 1.) The Master reviewed the second trial transcript which contained the entirety of Hagan's alibi evidence;
- 2.) The Master was provided, and reviewed, the video-taped and transcribed law enforcement interview of Hagan in which Hagan insisted that he left Independence at 6:45 a.m. to go to Chillicothe the morning after the shootings;
- 3.) Bob Fairchild, principal at Chillicothe High School, testified that he saw Hagan at that school at approximately 7:45 a.m.;
- 4.) Sheriff Steve Cox testified that it is a minimum one and a half hour drive from Independence to Chillicothe;
- 5.) June Cairns and Matt Cairns testified that they observed Hagan in their Chillicothe home at 6:00 – 6:45 a.m. that morning. This information, although provided to investigators Calvert and Miller,

was not included in their reports, nor were they followed up on by anyone. The State chose not to contradict this evidence by calling Calvert or Miller as witnesses. (Master's Report p. 29; Petitioner's Brief Appendix (previously filed) pp.21 - 23, June Cairns Deposition pp. 4 - 7 and J. Cairns Deposition Exhibit 1; Petitioner's Brief Appendix (previously filed) pp.24 - 28, Matt Cairns Deposition pp. 7-8, M. Cairns' Deposition Exhibit 1 and 2)

- 6.) Mike Thistlethwaite, a witness never followed up on by law enforcement, testified that he observed Hagan in Chillicothe at approximately 11:00 p.m. on the night of the shootings, contrary to Hagan's "alibi" that he was asleep at home in Independence. (Master's Hearing pp. 35, 36, 53, 54, 108, Cox Testimony and 596, Thistlethwaite Testimony)
- 7.) Private investigator Deister's testimony that Hagan's alibi had been checked out thoroughly and eliminated him as a suspect was untruthful. It is consistent with Deister's documented agreement to "assume" that evidence implicating a suspect other than Petitioner did not exist.
- 8.) Hagan's incriminating admissions to Aaron Duncan and his Fifth Amendment refusal to answer questions about his alibi support the Master's finding. (Master's Hearing pp. 321-323; Master's Hearing pp. 507 - 511)

9.) The documented agreement between Deister and Deputy Calvert to proceed with the investigation by “assuming” that evidence implicating another suspect “did not exist”, clearly and convincingly supports the Master’s finding that “there is no indication that the investigation...was conducted...with a fair eye for ascertaining the facts...” (Exhibit H of Master’s Hearing Exhibit 176, Deister’s 2011 Deposition)

D. Respondent Mischaracterized the Significance of the Conduct of the Investigation.

Respondent mischaracterizes the issue of the conduct of the investigation. It does not address or acknowledge the effect of the *Brady* violations on Petitioner’s ability to present the trial defense that the investigation and prosecution were biased, lacked integrity and that the testifying investigators lacked credibility. See *Kyles v Whitley* 514 U.S. 419, 434, 435, 437, 442, 444, 445, 447 (1995). Because this issue was included in Petitioner’s original brief, no further discussion is necessary.

Respondent’s attempts to diminish the effect of the testimony of June and Matt Cairns regarding Hagan’s alibi are misleading. The state chose not to call any reporting investigator to dispute the testimony that Hagan was in the Cairns home at a time contrary to the State’s alibi evidence and that this information was not included in their reports. Similarly, the State chose not to dispute Connie Grell’s testimony that she reported explicit incriminating statements of intent by Rochelle

Robertson shortly before the crimes to Officer David Miller and that this information was either not reported or provided to the defense. The only testimony the State offered at the hearing was that of Hulshof and Smith on the narrow issue of whether the Lewis letters were provided to the defense.

Respondent mischaracterizes the significance of the “quality” of Private Investigator Terry Deister’s “investigation.” No one knew that Deputy Calvert had clandestinely given physical possession of the sheriff’s entire investigative file to Deister until Deister admitted it for the first time at the hearing. (Master Hearing pp. 385, 421, 428 and 429) Because the State has never provided any documentation or accounting for which items were removed and returned, there is a serious question as to the chain of possession and the integrity of all the evidence. This would clearly be one of the undesirable consequences underlying the prohibition of private influence at any stage of the judicial process. *State v Harrington*, 534 S.W.2d 44, 48, 50 (Mo. 1976).

E. The Master’s Finding That Petitioner Was Prejudiced by Judicial Conflicts Was Supported by Clear and Convincing Evidence

Respondent’s reliance on the holding in *Hickey v State*, 328 S.W.3d 225 (Mo.App.E.D. 2010) is misplaced. *Hickey* involved the dismissal without a hearing of a 29.15 motion in which the defendant alleged that his trial counsel previously represented a state’s witness in the case against him did not “thoroughly” impeach the witness, and wrongfully advised him not to testify in his

own behalf. The *Hickey* Court, in reversing and remanding for an evidentiary hearing, and emphasized that where there was an actual conflict of interest, prejudice is presumed. (citing *Ciarelli v State*, 441 S.W.2d 695, 697 (Mo. 1969); *Gordon v State*, 684 S.W.2d 888, 890 (Mo.App.W.D. 1985); *State v Risinger*, 546 S.W.2d 563, 565 (Mo.App.S.D. 1977); *State v Cox*, 539 S.W.2d 684, 687 (Mo.App.E.D. 1976) These cases involved "...related offenses or other facts, such as a favorable plea bargain for the witness... that was detrimental to the movant and advantageous to another." (*Hickey*, at p. 230, 231) This is precisely the situation here.

The circumstances are even more extreme in that Jim Johnson was represented by one of Petitioner's counsel, McFadin, who contemporaneously participated in dealing for a drastic reduction in Johnson's sentence in exchange for information and grand jury testimony against Petitioner and his father in related cases. The facts, and the conflict, get worse:

- 1.) Johnson also named victim Lyndel Robertson in farm theft along with Petitioner and his father, yet Lyndel Robertson was never charged or prosecuted even though he admitted that he had stolen farm products.
- 2.) Court documents reviewed by the Master reveal that Judge Griffin and Judge Lewis were specifically aware that McFadin was involved in the plea bargaining for Johnson and thus would have been aware of the actual conflict of interest. Judge Griffin granted Johnson's

29.15 motion with no evidentiary hearing and the record of that proceeding contains no specific findings of fact and conclusions of law. That file further reveals that Judge Lewis then acceded to Johnson's letter request, writted Johnson to Court, accepted a guilty plea from him and imposed a three year sentence instead of the fifteen year sentence imposed by a jury verdict. Judge Lewis was accepting Johnson's guilty plea and McFadin represented Johnson. (Petitioner's Brief Appendix (previously filed) pp.70 - 71, *Johnson v. State*, Davies County Circuit Court, Case No. CV394-76CC) Johnson sent letters to Judge Lewis and Hulshof indicating his intention to make deals.

- 3.) The most insidious aspect of this actual conflict of interest is the glaring violations of the Code of Judicial Conduct and the Canons of Ethics. It is difficult to imagine a set of circumstances more illustrative of the failure by judges and attorneys to avoid the "appearance of impropriety" or to be "fair and impartial." The State's prosecutors not only proceeded in the case despite specific awareness of the blatant ethical problems, but actually participated in the actions and circumstances magnifying the appearance of impropriety.
- 4.) The Master found that the "judicial conflicts" were "un-ending." The pervasiveness of the conflicts included the involvement of Judge

Lewis' personal private attorney, Brent Elliott as the primary prosecutorial consultant to private investigator Deister and Deputy Calvert throughout their investigation of Petitioner. They did not consult with the duly elected county prosecutor, probably because he refused to file charges against Petitioner. Elliott also represented Rochelle Robertson (originally suspected as being Hagan's accomplice) in her protective order proceedings against Hagan. He later served as a "private prosecutor" appointed by Judge Lewis to represent the juvenile officer in the certification proceedings presided over by Judge Lewis.

Part and parcel of these inextricably interwoven "judicial conflicts" was Deister's employment to assist Lyndel Robertson's defense of a civil lawsuit brought by Petitioner's father against him, while simultaneously leading the criminal investigation of Petitioner. It is simply inconceivable that the State and the trial courts were not aware of and placed their imprimatur upon these conflicts of interest.

In discussing these "unending" judicial conflicts and comparing them to the circumstances in *State v Chandler*, 698 S.W.2d 844, 846 (Mo. 1985), the Master stated that "...If the conflicts in *Chandler* were bizarre, this Court is hard-pressed to come up with a word or phrase in the English language that fairly describes the conflicts that existed with regard to Woodworth's judicial process: they could have been the lyrics to a country and western song..." The lyrics the Master must

have contemplated were from the great Loudon Wainwright – “Dead skunk in the middle of the road, stinkin’ to high heaven.”

F. Respondent’s Assertions That Petitioner Produced No Evidence That Rochelle Robertson’s Reporting of Protective Order Violations Were *Brady* Material is Erroneous and Misleading.

First, Exhibit 9 is a Court file which Petitioner requested the Master to take judicial notice of. Petitioner requests that this Court take judicial notice thereof. The importance of the evidence is that this Court file, the only one which was available to defense counsel in the Livingston County Circuit Clerk’s office, did not contain any reference to Hagan’s violations of the order, any reported violations, or even the fact that the file was transferred to Davies County, where the violations were in the file.

Further, Rochelle’s allegation that Petitioner produced no evidence that his attorneys were not aware of Rochelle’s reports of violations are false, misleading and are a clear attempt to divert the Court’s attention from their prejudicial significance, in the following respects:

- 1.) The reports of violations were only obtained subsequent to the depositions of defense counsel;
- 2.) Petitioner filed a motion on August 17, 2011 to supplement the record in order to obtain defense counsels’ testimony on this issue. Petitioner submitted an affidavit from Jacqueline Cook that she had never been provided these reports. The Master never ruled on that

motion, but made specific findings that they were never produced by the State based on the facts that there were no consecutive numbers on the documents (per Hulshof) and they were not included in Rachel Smith's inventory of discovery materials provided to the defense; (See Reply Appendix p. 29 - 35) Thus, Respondent's allegations that Petitioner never asked to do this is patently false.

- 3.) Their significance was in the prejudice suffered by Petitioner's inability to impeach the untruthful 1994 deposition testimony of Rochelle Robertson that she had never "reported" Hagan's violations. This would have augmented the available defense that Rochelle Robertson was protecting her boyfriend from prosecution by lying about him.
- 4.) The same situation exists regarding Petitioner's witness, Kevin Price, who testified that Rochelle Robertson gave a conflicting "alibi" for Brandon to him the morning after the shootings, which she later changed, probably after learning that investigators intended to examine telephone records. Rochelle Robertson first told Price that Hagan couldn't have committed the murders because she telephoned him in Independence on the night of the shootings after she got off work at 10:00 p.m., then changed her story when questioned by investigators. This discrepancy would have greatly augmented the defense evidence that Hagan's alibi was false and

that Rochelle Robertson was attempting to protect him. (Master’s Hearing Exhibit 190, Rochelle Robertson 1994 deposition p. 16; Master’s Hearing Exhibit 193, Rochelle Robertson’s 2011 Deposition pp. 22 - 25; Master’s Hearing Exhibit 47 and 48, Law Enforcement Interviews of Rochelle Robertson; Master’s Hearing pp. 256 – 258, Price Testimony, and 533 – 536, Rochelle (Robertson) Koehly Testimony)

Respondent misleadingly cites Rochelle Robertson’s 1994 testimony to support its assertion that the defense knew about the violations by providing an incomplete quotation from that deposition. (Respondent’s Brief p. 107) The State, as it has done previously, omitted the very next question and answer, which were:

Question: "Did you ever report that to anybody?"

Answer: "No, I didn't because it was getting a lot better. Like I said, he didn't keep calling back. He was getting the hint." (Master’s hearing Exhibit 190, p. 16)

It was the dishonesty in concealing the “reporting” of the violations which was of *Brady* significance, not the fact of the violations. The reason knowledge of the violations “was not worthy of use at trial” (as suggested by Respondent), was because the defense had no way of knowing at the time that Rochelle Robertson lied about her “reporting” of the violations.

Respondent’s assertion that Petitioner never offered to provide the depositions of Cook, Wyrsh and Phillip Thompson is false. Petitioner filed a

specific motion on August 17, 2011 containing an offer of proof that defense counsel and Phil Thompson would testify that they were never provided evidence of the reported protective order violations, as well as a specific request to be allowed to take their depositions. Petitioner also filed an affidavit from Jacqueline Cook. (Reply Appendix pp. 29 - 35)

Respondent's assertions are meritless.

G. Petitioner's Evidence Clearly Proved His Actual Innocence

Petitioner, despite this not being a case of elimination by DNA testing, produced clear and convincing proof that he is actually innocent; including the following:

- 1.) The uncontradicted testimony of Aaron Duncan that Hagan made incriminating admissions that he had committed the crimes;
- 2.) The improperly influenced "scientific" ballistics testimony by the British firearms expert, Steven Nicklin, whose reported opinions changed significantly after the influence and coercion of the "conflictually employed" Deister. (See Reply Appendix 8 - 18, Reports of Steven Nicklin)
- 3.) The shady at best circumstances regarding the alleged incriminating thumbprint of Petitioner connecting him to the scene of the crime. (Master's Report p. 24; Miller First Trial pp. 593, 594, 924, and 925; Miller Second Trial pp. 249 - 252; Master's Hearing pp. 352, 353, Eskew Testimony)

- 4.) The lack of integrity in the “scientific” evidence of the bullet allegedly connecting it to the gun owned by Petitioner’s father, by virtue of its unaccounted for possession by the “conflictually employed” private investigator, whom the Master found to lack any credibility.
- 5.) The inescapable conclusion that is drawn by review of the totality of the circumstances which show clearly that Petitioner was “framed.”
- 6.) The unaccounted for secret removal of the sheriff’s file by Deister and Calvert giving possession to the “conflictually employed” private investigator.

H. Petitioner Proved Clearly and Convincingly That the Concealed Lewis Letters Were *Brady* Material and That Lyndel Robertson Did Lie.

It is beyond argument that “...I never pointed my finger at anybody” is diametrically opposed to “...but recall that soon after this crime, Mr. Robertson was adamant that we charge another young man...” Even Hulshof admitted that this was a “big deal” that should have been disclosed to the defense.

That Robertson lied in an attempt to cover up this entire scheme was evidenced in his 2006 deposition, wherein he testified that no one had ever told him that prosecutor Roberts was not going to prosecute Mark Woodworth (Master’s Hearing Exhibit 188, p. 15) It is highly doubtful that Robertson would have given that testimony unless he was sure that the Lewis letters had not and

would not ever be produced to the defense. Once the Lewis letters were disclosed the State disregarded its duty to correct this false and inaccurate testimony.

Respondent's argument contains yet another unfounded assertion – that “For two years, the police followed a number of leads, including Brandon...and Jim Johnson as suspects.” The Master found that once Deister became involved on June 13, 1991 (a little over six months after the crimes) the investigation focused solely on Petitioner. Significantly, by Deister's own documented omission, that focus depended on the agreement, instigated by Deister and agreed to by Deputy Calvert, that they would “assume” that evidence which implicated another suspect did not exist and that they would keep Deister's involvement a secret from the Sheriff and the Highway Patrol.” (Exhibit H, N and O of Master's Hearing Exhibit 176, Deister's 2011 Deposition)

The State's assertion that there was no private prosecutor is meritless. Brent Elliott, Judge Lewis' personal private attorney, assisted in the first trial. (First Trial pp. 1331-1333) He also served as the Juvenile Prosecutor in the certification hearings against Petitioner. He regularly consulted with Deister, Calvert, Lyndel Robertson and John Williams regarding their “investigation” of Petitioner. In *State v Harrington*, 534 S.W.2d 44 (Mo.Banc. 1976) this Court condemned the private influence on all stages of the state's criminal proceedings specifically including the investigative stage.

REPLY ARGUMENT

II

Petitioner Is Entitled to Discharge For the Reason That Review of the Totality of the Circumstances Prove the Prosecutors' Deliberate Intent to Subvert Petitioner's Double Jeopardy and Due Process Protections

Due Process Protections

Several concrete circumstances clearly and conclusively prove the State's intent to subvert Petitioner's Double Jeopardy and Due Process Protections, including:

- 1.) The Special Master found that Petitioner's judicial process was "ignored"; (Master's Report p. 31)
- 2.) Prosecutor Hulshof untruthfully argued to the jury that the British ballistics expert was credible because he was objective and was not aware of the "facts" that the jury had been presented. He stated "...And something about the experts - - they are in their laboratories and do not have the facts that you have." (First Trial p. 1298) This false argument was directly contradicted by the fact that he was, or should have been aware of Master's Hearing Exhibits 1 & 2 (Deister's and Robertson's letters) which were contained in the expert's files. At least one of those letters, Deister's letter to Nicklin's supervisor, was in Deister's files. Revealingly, those letters contain, inter alia, the following:

- a. Detailed summaries of Deister's and Calvert's investigative "facts" about Petitioner;
- b. Their belief that they knew that Claude Woodworth's gun was the murder weapon;
- c. The prosecution theories of Petitioner's guilt;
- d. Alleged findings of other experts;
- e. Fingerprint "evidence" allegedly linking Petitioner to the murder weapon;
- f. Deister's assertions that the case against Petitioner is weak without ballistics evidence that Woodworth's gun was the murder weapon;
- g. That "we are willing to take whatever steps necessary, within reason, to identify this weapon.";
- h. Disparaging remarks about the county prosecutor, Roberts;
- i. "Facts" purporting to establish a motive to murder by the Woodworths;
- j. That the arrest of Mark Woodworth was "forthcoming.";
- k. The plan, expressed in 1992 (and executed in 1993) to have Roberts disqualified as the prosecutor in the case.

Hulshof's decision to proceed with an altered version of these facts, portraying Nicklin as objective and shielded from improper influence reveals an intent to deliberately deceive the jury and is misconduct of the highest order;

- 3.) Mr. Hulshof was questioned at the Master's Hearing about the Deister report which set forth the investigative plan to assume that a crucial fact implicating a suspect other than Petitioner did not exist. Hulshof denied that he had ever seen the report. (Master's Hearing Exhibit 180, pp. 51-53, Kenny Hulshof 2011 Deposition) However, a review of Deister's 1995 pre-trial deposition reveals that all of Deister's reports, including the above, were discussed in detail. One of two conclusions can be drawn from this scenario:
- a. Hulshof did not thoroughly review the prosecution file before the Master's evidentiary hearing and simply did not remember; or
 - b. Hulshof was untruthful and hoped that he would not be caught
- Given the context of the State's condonation of improper influence on the ballistics experts (as evidenced by the Attorney General's internal memorandum – Master's Hearing Exhibit 21), Hulshof's track record of association with serious *Brady* violations and the number of irregularities and *Brady* violations in this case, it is difficult not to draw the conclusion that the ignoring of Petitioner's judicial process was deliberate;
- 4.) Judge Lewis' letter to Hulshof contained Doug Roberts' letter that Lyndel Robertson was "adamant" that Hagan be prosecuted. Hulshof was present at the 1995 deposition when Lyndel Robertson testified that he had never "pointed my finger at anybody." Thus, Hulshof

(and Rachel Smith) knew that this was not true, yet peddled a substantially altered version of the fact to the jury, knowing that the defense was not in possession of this highly contradictory evidence;

- 5.) The sheer breadth of the *Brady* material concealed from the defense, along with the other circumstances gives rise to an irrefutable inference that the *Brady* violations were intentional and deliberate;
- 6.) Both prosecutors, Hulshof and Smith, despite their full knowledge of the improper and unethical actions of Judge Lewis, proceeded unquestioningly with the prosecution of Petitioner. Not only did they violate *Brady* repeatedly, but also they made no good faith, diligent effort to inquire of investigators whether there was exculpatory evidence. They blindly proceeded despite their explicit knowledge of the improper private prosecutorial influence at all stages of the proceedings, even attempting to characterize it as a positive by arguing that Lyndel Robertson had heroically used \$35,000.00 of his own money to “assist” the sheriff’s department in solving a crime. They had every reason to know that crucial State’s witnesses, including Lyndel Robertson, Gary Calvert and Rochelle Robertson were testifying untruthfully about material matters, yet they permitted it and never once corrected the record.

Not only did they ignore actual conflicts of interests, but they completely failed to honor their ethical obligations as attorneys and as State Prosecutors mindful of their duty to see that justice is done through honorable means.

Conclusion

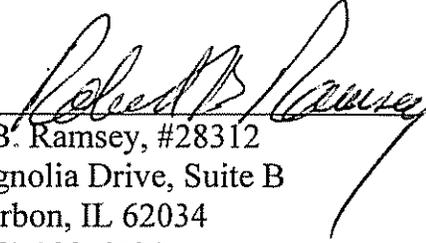
Referring to the improper actions of Judge Lewis, the Special Master found that "...It is inconceivable that each of these actions was simply an isolated, unrelated event; they hold the trappings of a case-specific, professionally unacceptable, pattern and practice." (Master's Report p. 33) The totality of the circumstances and the evidence clearly and convincingly support this finding.

Petitioner's convictions and the circumstances which brought them about, stand as a cancerous tumor on the body of our State's system of Criminal Justice. Unless this cancer is removed, the public can have no confidence that this system is fair and just.

For all the above reasons, Petitioner requests this Court to accept the Special Master's Findings and Recommendation by granting habeas corpus relief. Petitioner further requests that he be discharged, based on the pattern of professionally and constitutionally unacceptable practice engaged in by all involved in obtaining his convictions.

Discharge is warranted because Petitioner proved by clear and convincing evidence that he is actually innocent. The "scientific" evidence is all that connects Petitioner to those crimes. Petitioner proved clearly and convincingly that this evidence is unreliable and inadmissible. The secret removal of the investigative file and the unaccounted for and improper possession of the crucial evidence, by a "conflictually employed" private investigator, invalidate the evidence. Without this, there is no evidence of guilt.

Respectfully Submitted,
The Law Offices of Michael R. Bilbrey

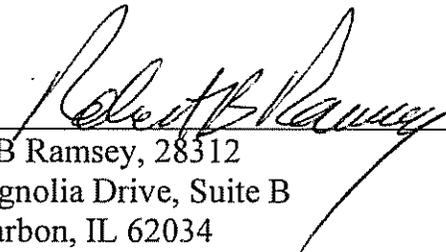
A handwritten signature in cursive script, appearing to read "Robert B. Ramsey", written over a horizontal line.

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CERTIFICATE OF COMPLIANCE AND SERVICE

Petitioner hereby states that a true copy of the Petitioner's Reply Brief complies with the limitations contained in Rule 84.06 (b), contains 7,436 words, excluding the cover page, table of authorities and this certificate of compliance and service; that a courtesy copy of Petitioner's Reply Brief, signed by Robert B. Ramsey, Attorney for Petitioner, was served on the 10th day of September, 2012 via U.S. Mail, postage pre-paid to Mark Woodworth, Petitioner, 4 House, Crossroads Correctional Center 1115 E. Pence Road, Cameron, MO 64429 and Larry Denney, 1115 E. Pence Road, Cameron, MO 64429, Warden, Crossroads Correctional Center, Respondent; and that a copy of the foregoing has been served on this 10th day of **September, 2012** via electronic filing to Mr. Theodore Bruce, Assistant State's Attorney and Mr. Stephen Hawke, Assistant State's Attorney at 207 W. High Street, Jefferson City, MO 65102, Attorney for Respondent and the Missouri Supreme Court, 1300 Oak Street, Kansas City, MO 64106-2970.

Respectfully Submitted,
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