IN THE SUPREME COURT OF MISSOURI

CASE NO. 90314

STATE EX REL. GARY W. ENGEL,

Petitioner,

v.

DAVE DORMIRE, Superintendent,

Respondent.

PETITIONER'S REPLY BRIEF

Respectfully submitted,

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STATEMENT OF FACTS

In a desperate attempt to salvage Gary Engel's tainted convictions, respondent has submitted to this Court a copy of a nearly five thousand page transcript of Steven Manning's civil trial. Respondent, thereafter, "cherry-picks" a few portions of the civil trial testimony of Anthony Mammolito, Robert Quid, and other witnesses in support of an argument explicitly and emphatically rejected both by Manning's civil jury and District Judge Matthew Kennelly, that Mammolito did not have a deal in place to be paid for his testimony against Manning and Engel. Although this issue will be addressed more extensively in the argument section of this brief, petitioner feels that it is necessary to correct a misleading reference to Judge Kennelly's findings by respondent in his statement of facts.

Respondent appears to suggest that Judge Kennelly found that no deal had been made with Mammolito prior to his testimony against Manning and Engel, citing a passage from Judge Kennelly's order of 9/28/06 that states there was no evidence to corroborate the assertion in Mammolito's letter to Gabbert that a deal was reached for payment in March of 1990. (Resp. Br. at p. 9, n. 3). Based upon this snippet from Judge Kennelly's opinion, coupled with Mammolito and Quid's denials of the existence of a deal during their testimony at the civil trial, respondent argues that "no evidence exists" that Mammolito was paid for his testimony. (*Id*. p. 16).

Respondent's argument in this vein, apart from ignoring the civil jury's verdict, also conveniently ignores the explicit findings of Judge Kennelly on the same page of his order as the aforementioned language cited by respondent in his brief. In this regard, Judge Kennelly states: "There is no question that a deal was made at some point before Mammolito testified at Manning's Kansas City trial to pay him some amount of money. Though the jury was entitled to find otherwise, the Court finds that the agreement to pay Mammolito, as Mammolito himself testified, was not made until sometime after he had changed his story and agreed to testify. The deal to pay Mammolito was not disclosed to Manning's attorney in the Missouri case." (Resp. App. 100).

An earlier passage from Judge Kennelly's order also explicitly refutes respondent's suggestion that Judge Kennelly did not find the evidence credible that a pretrial deal existed with Mammolito: "The jury found that Buchan, via Quid, knowingly induced Mammolito to fabricate claims about the Kansas City kidnapping. This determination was, presumably, based on Mammolito's change of his story regarding who had picked up the ransom. The jury likely concluded that Quid importuned Mammolito to conform his story to Hildebrand's identification of Manning using his dislike of Manning and a offer of payment as a prod to get Mammolito to change his story. Such a finding was, as the court previously found,

supported by the evidence - - including the unexplained absence from Buffalo Grove's files of Quid's report about the interview." *Id*. at 98. Judge Kennelly's prior order upholding the jury verdict also found that there was ample evidence, despite Quid's denial of a deal, that "[Quid] and Mammolito reached an understanding for Mammolito to be paid at Manning's [and Engel's] trial[s]." (Pet. Exh. G p. 18).

Further facts will be developed in the argument portion of this brief.

REPLY ARGUMENT

I.

THERE IS NO SUCCESSIVE WRIT BAR TO THIS COURT'S CONSIDERATION OF PETITIONER'S CONSTITUTIONAL CLAIMS.

Respondent argues that this Court is precluded from considering petitioner's *Brady*/*Giglio*[1] claims because petitioner filed a *pro se* Rule 91 in this Court in 2003 raising due process claims based upon the Bascom affidavit and the Gabbert letter (Pet. Exh's A, B), which was summarily denied. (Resp. Br. 13). Citing *State ex rel. Simmons v. White*, 866 S.W.2d 443, 446 (Mo. banc 1993), respondent contends that Rule 91 does not allow successive claims. This argument is meritless for a number of reasons.

First and foremost, there is nothing in the *Simmons* decision or the text of Rule 91 to bar a court, in appropriate circumstances, from reviewing a successive claim. The discussion in *Simmons* cited by respondent merely reiterates the well-settled rule that a state habeas action should not be a substitute for a direct appeal or 29.15 unless the petitioner can show cause and prejudice or a manifest injustice. *Id.* This Court has also explicitly held that there is no absolute bar to successive habeas corpus

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[1] *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

petitions. *State ex rel. Nixon v. Jaynes*, 63 S.W. 3d 210, 217 (Mo. banc 2001). Since Mr. Engel can show cause, which the state has not disputed, coupled with the fact that the additional impeaching information came to light during Manning's *Bivens* action undermines confidence in the verdict, there is no procedural impediment to consideration of all aspects of petitioner's *Brady*/*Giglio* claims.

Second, respondent has waived his right to assert any absolute successive writ bar to petitioner's *Brady*/*Giglio* claims by failing to raise this issue in either his suggestions in opposition to the petition or his return. In both of these prior pleadings, respondent did not assert that there was a successive writ bar to the entirety of petitioner's *Brady* and *Giglio* claims. Instead, respondent's argument in opposition to the petition and in his return merely asserted that the court could not consider Mammolito's letter to Mr. Gabbert because this letter was presented to this Court in petitioner's *pro se* 2003 Rule 91 petition. (Resp. Sugg. in Op. at pp. 5-6; Return at pp. 5-6). Rather than asserting a successive writ bar to the entirety of petitioner's claims, respondent explicitly argued that the successive writ bar only barred the portion of the claim involving the aforementioned letter. (*Id*.)

Since this Court has generally followed the federal court rules on habeas corpus procedures in 28 U.S.C. § 2254 cases, petitioner suggests that this Court should follow federal court precedent and hold that the state waives an abusive/successive writ

defense by failing to assert it in a procedurally correct and timely manner. Several federal courts have held that the state waives any successive or abuse of the writ defense if they fail to raise this affirmative defense in a timely and procedurally correct manner before the district court.[2] *See, e.g., Aldridge v. Dugger*, 925 F.2d 1320, 1325 (11th Cir. 1991); *Lewandowski v. Makel*, 949 F.2d 884, 889-890 (6th Cir. 1991); *Hannon v. Maschner*, 981 F.2d 1142, 1146 (10th Cir. 1992). Missouri Courts have also applied similar waiver rules in original habeas corpus actions. *Curtis v. Tozer*, 374 S.W.2d 557, 567 (Mo. App. E.D. 1964); *Label v. Sullivan*, 165 S.W.2d 639, 641 (Mo. banc 1942).

Third, Engel's 2003 petition based upon the Mammolito letters is merely part and parcel of a broader *Brady*/*Giglio* claim involving several pieces of impeaching information that came to light both before and after 2003 that were never heard by petitioner's jury. Under well-settled caselaw from both this Court and the United States Supreme Court, in assessing claims of this nature, reviewing courts must consider all available evidence uncovered following trial in determining whether a

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[2] It is indeed ironic that the Missouri Attorney General, who has championed the procedural bar doctrine in this case and in numerous other post-conviction actions, has been caught in his own web by untimely raising this affirmative defense for the first time in his brief.

petitioner is entitled to habeas relief. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 545 (Mo. banc 2003) (reviewing court under Rule 91 must assess the totality of all of the evidence uncovered over the years between various judicial reviews to determine whether a claim of innocence can be established); *Kyles v. Whitley*, 514 U.S. 419, 436-437 (1995) (reviewing court must consider the cumulative effect of excluded evidence in assessing whether *Brady* violation occurred).

Since petitioner filed his *pro se* Rule 91 petition in 2003, additional evidence supporting his claims was uncovered during the course of Steven Manning's civil trial. Most notably, the evidence that the Buffalo Grove Police paid Mammolito $500.00 did not come to light until 2004 after Manning's civil lawyers uncovered the Del Re letter and the cancelled check during the discovery process. (*See* Pet. App. 17-18). Only after this evidence emerged, did Manning and Engel have an airtight case that Mammolito both expected to be and was, in fact, paid for his testimony. Under prevailing law, this Court must consider the cumulative effect of all of this excluded evidence in assessing whether a *Brady*/*Giglio* violation occurred.

II.

THERE IS CAUSE AND PREJUDICE TO OVERCOME ANY PROCEDURAL DEFAULT TO THIS COURT'S CONSIDERATION OF PETITIONER'S *BRADY*/PERJURED TESTIMONY CLAIMS AND, BECAUSE THE

EXCLUSION OF THIS EVIDENCE MEETS BOTH THE *BRADY* MATERIALITY AND *GIGLIO* PREJUDICE TESTS, PETITIONER IS ENTITLED TO RELIEF.

The state's brief does not dispute petitioner's contention that there is cause to overcome any procedural default arising from the fact that the *Brady*/perjured testimony claim was not raised on direct appeal or during 29.15 proceedings. As the chronology of events set forth in the petition and briefs demonstrates, cause exists under prevailing caselaw because the factual basis for this claim was not available to petitioner during his direct appeal and 29.15 and because the government "hid the ball" until it was forced to reveal this impeaching information during the Steven Manning litigation. *See, e.g., Williams v. Taylor*, 529 U.S. 420, 443-444 (2000); *Banks v. Dretke*, 540 U.S. 668, 696 (2004).

In responding to petitioner's *Brady* claim, respondent makes two arguments against the grant of habeas relief. First, on the Mammolito payment issue, respondent astonishingly argues that there was "no evidence" to support the conclusion that Mammolito was paid for his testimony. (Resp. Br. at 16). Second, respondent argues

that petitioner cannot meet the *Brady* materiality test.[3] (*Id*. at 17-20). Petitioner will reply to both of these arguments in turn.

In making the argument that petitioner presented no evidence to support his contention that Mammolito was paid for his testimony, respondent, as noted earlier, merely cites the testimony of Mammolito, Quid and Del Re at Manning's civil trial, in which they all denied that there was an agreement between the police and Mammolito to pay him prior to trial. This argument ignores the fact that both Manning's civil jury and Judge Kennelly in his post-trial orders obviously did not believe their testimony. As Judge Kennelly noted, "the jury was entitled to reject, as lacking in credibility, the testimony of Buchan and Quid regarding (among other things) the Hildebrand identification. (Pet. Exh. G p. 16). Judge Kennelly also noted that Buchan's demeanor was among the worst he had observed in his career as an attorney and judge. (*Id*.) The letters from Mammolito to Mr. Gabbert and Sgt. Quid, coupled with the irrefutable fact that Del Re sent Mammolito's mother a $500.00 check shortly after the trials of Manning and Engel concluded, presented

[3] Since respondent has declined to address whether petitioner can meet the more lenient prejudice test for due process claims involving perjured testimony, (*See* Pet. Br. at 47-51), petitioner will not rehash these arguments here.

overwhelming evidence that there was a deal to pay Mammolito for his testimony prior to trial. (*See* Resp. App. 100).

Taken to its logical extreme, if respondent's argument [that there is insufficient evidence to support the unanimous jury verdict and Judge Kennelly's findings merely because Mammolito, Buchan, Quid, and Del Re took the stand and denied that any such deal existed] is sound, counsel for respondent would have to concede that all criminal defendants in this state who are convicted by a jury after taking the witness stand and denying guilt would have to be released because there was insufficient evidence to support their convictions. Respondent's argument is ridiculous.

There are several published cases where reviewing courts have found due process violations involving similar facts where secret inducements were given to government witnesses for their testimony. In *United States v. Foster*, 874 F.2d 491 (8th Cir. 1988), the Eighth Circuit found a due process violation under *Napue v. Illinois*, 360 U.S. 264 (1959) and *Giglio* based upon letters in the prosecutor's file indicating that prosecution witnesses lied when they testified at trial they did not expect leniency in exchange for their testimony. *Foster*, 874 F.2d at 494-495. In light of the undisputed fact that the letter from Mammolito to Rex Gabbert was found in the prosecutor's file, the following language from *Foster* is instructive: "These promises

were all reflected by letters in the prosecutor's file, and she is charged with awareness of them." *Id*. at 495.

This case is also remarkably similar to *United States v. Librach*, 520 F.2d 550 (8th Cir 1975). In *Librach*, the court found a due process violation under *Giglio* because the prosecution failed to disclose to the defense that a key prosecution witness had been paid a monthly subsidy for living expenses[4] by the government in exchange for his testimony. *Id*. at 553-554. The court in *Librach* had no difficulty finding that the government's failure to disclose that it had paid one of its key witnesses was favorable to the accused and would have provided powerful impeachment material for the defense. *Id*. at 554. Undoubtedly, the same circumstances are presented here where the prosecution failed to disclose or correct Mammolito's false testimony that he had an expectation he would be paid by the government in exchange for his testimony against Manning and Engel.

Respondent's last line of defense against granting Gary Engel the new trial that due process requires is its argument that petitioner was not prejudiced because Mammolito was impeached and cross-examined on other matters that may have

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[4] The holding in *Librach* also undermines respondent's argument that the non-disclosure of payments to Mammolito was not material because it was merely a reimbursement for expenses. (Resp. Br. at 18-19).

adversely affected his credibility in the eyes of the jury. (Resp. Br. 17-20). The Supreme Court in *Napue* and *Banks* and the Eighth Circuit in *Foster* explicitly and emphatically rejected similar government arguments that the exculpatory evidence in those cases was immaterial because the jury heard other reasons that would give the witness an interest in testifying against the defendant. *Napue*, 360 U.S. at 269; *Banks*, 540 U.S. at 1278-1279; *Foster*, 874 F.2d at 494. As the Supreme Court stated in *Napue*, the fact that the witness who testified falsely was effectively cross-examined on other issues relating to credibility did not "turn [ ] what was otherwise a tainted trial into a fair one." 360 U.S. at 270.

In *Benn v. Lambert*, 283 F.3d 1040 (9th Cir. 2002), the Ninth Circuit found a due process violation due to, among other things, the fact that a key prosecution witness lied regarding material matters affecting his credibility and the state withheld evidence that could have been used to effectively impeach that witness, including the fact that the witness was given $150.00 by the police in exchange for his promise to incriminate *Benn* on an unrelated murder. *Id*. at 1054-1059. The court in *Benn* also emphatically rejected the argument that no prejudice could be shown because the witness was effectively cross-examined in other areas: "The fact that other impeachment evidence was introduced by the defense does not affect our conclusion. Where, as here, there is reason to believe that the jury relied on a witness's testimony

to reach its verdict despite the introduction of impeachment evidence at trial, and there is a reasonable probability the suppressed impeachment evidence, when considered together with the disclosed impeachment evidence, would have affected the jury's assessment of the witness's credibility, the suppressed impeachment evidence is prejudicial." *Id*. at 1056.

In considering the issue of *Brady* materiality, this Court's recent decision in *Merriweather v. State*, 294 S.W.3d 52 (Mo. banc 2009) is also instructive. As in *Merriweather*, the prosecution's case depended almost entirely on the credibility of Anthony Mammolito. *Id*. at 57. Like Mr. Merriweather, petitioner took the stand at trial to deny that he committed the offense. (Trial Tr. 538-576). Thus, the case hinged on whether the jury chose to believe Mammolito or petitioner. *Id*. In *Merriweather*, this Court had little difficulty in concluding that additional impeaching information in that case, involving an undisclosed prior conviction of the key prosecution witness, was prejudicial. The same conclusion can also be reached here "because [Mammolito's] credibility was pivotal and the [undisclosed impeachment evidence] would have affected the jury's assessment of [Mammolito's] credibility." *Merriweather*, 294 S.W.3d at 57.

There are a few other aspects of respondent's arguments on the *Brady* materiality issue that merit a brief reply. First, respondent argues that the impeaching

value of the undisclosed evidence would have been minimal because Mammolito indicated at Manning's civil trial that his motive for testifying against petitioner was his anger with Manning for sending him to prison. (Resp. Br. at 19). This argument ignores the fact that Mammolito's hatred of Manning was not an issue at petitioner's trial. This motivation was not brought up during Mammolito's testimony or in closing argument by either party in an effort to either enhance or diminish Mammolito's credibility in the eyes of petitioner's jury. (Trial Tr. 307-395; 593-629).

Second, respondent argues that, even if the jury had disbelieved Mammolito, there was "sufficient evidence" to convict petitioner based upon the testimony of his ex-wife, Sharon Dugan. (Resp. Br. 19-20). This argument reveals respondent's fundamental misunderstanding of the *Brady* materiality test. The Supreme Court has repeatedly rejected the view that the *Brady* materiality test is equivalent to a sufficiency of the evidence standard. In this regard, the Supreme Court explicitly held: "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Kyles v. Whitley*, 514 U.S. 419, 434-435 (1995). Instead, the Court in *Kyles* held that the materiality standard for *Brady* claims is met when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id*. at 435.

Respondent also attempts to minimize the impact of the government's nondisclosure of the fact that Sharon Dugan was paid and given a spending allowance in exchange for her testimony. (Resp. Br. 19-20). According to respondent, because witnesses under subpoena are entitled to statutory witness fees, the nondisclosure of Dugan's payment by the FBI was not important. (*Id*. at 20). This argument lacks merit because there is no evidence from the trial record indicating that Dugan was subpoenaed or paid statutory witness fees by the Clay County Prosecutor's Office. (*See* Exh. Q, pp. 207-245). To the contrary, the evidence from Manning's civil trial indicates that Dugan was paid directly by the FBI. (*See* Exh. O, p. 191).

In sum, respondent's brief is more remarkable for its omissions than its substance. For instance, respondent makes no effort to attempt to distinguish this case from *Banks*, *Merriweather*, and the other cases cited by petitioner in his opening brief.

The most conspicuous omission from the attorney general's brief is the failure to address the most powerful evidence that establishes a due process violation: the verdict in the Manning civil trial. After hearing extensive testimony from Mammolito, Dugan, and all of the law enforcement personnel involved in the Manning and Engel trials, the jury's verdict form in *Manning* asked the following question: "Has Mr. Manning proved that Mr. Buchan and Mr. Miller knowingly induced or caused other law enforcement officers to induce the following witnesses

to make false statements and/or fabricate claims about the Missouri kidnapping and conceal that information from prosecutors?" (*See* Pet. App. p. 4). The jury's verdict indicates that they answered "yes" to this question, finding that Agent Buchan induced Mammolito, Caroline Hildenbrand, and Sharon Dugan, to give false testimony and concealed information from prosecutors. (*Id*.). On the same verdict form, the same jury found that Buchan had promised to pay Anthony Mammolito for his testimony. (*Id*.). Respondent's failure to address this issue speaks volumes.

III.

THERE IS CAUSE AND PREJUDICE TO OVERCOME ANY PROCEDURAL BAR TO PETITIONER'S CLAIM INVOLVING THE STATUTE OF LIMITATION ON THE ARMED CRIMINAL ACTION CHARGES.

In responding to the claim involving the statute of limitations issue relating to petitioner's armed criminal action (ACA) convictions, respondent argues the claim is procedurally barred because the statute of limitations defense was not raised at trial or on direct appeal. (Resp. Br. 27-29) Cause is established because the legal basis for the claim did not exist until the decision was issued in *State v. Hyman*, 37 S.W.3d 384 (Mo. App. W.D. 2001). Since the *Hyman* case was decided ten years after petitioner's trial and long after his direct appeal had been concluded, there is cause and prejudice

to overcome any default because the legal basis for such a challenge to the ACA charges was unavailable to him. *See Reed v. Ross*, 468 U.S. 1, 12-15 (1984).

The use of novelty as cause in federal habeas corpus proceedings has been effectively eliminated by the Supreme Court's decision in *Teague v. Lane*, 489 U.S. 288, 301 (1989). However, since *Teague* does not apply to state habeas petitions, the novelty of a legal claim remains a viable external factor to excuse a procedural defect in state habeas actions under Rule 91. *State v. Whitfield*, 107 S.W.3d 253, 272, n. 19 (Mo. banc 2003).

Respondent argues that petitioner cannot establish cause because the Missouri Court of Appeals, Eastern District rejected a similar statute of limitation argument in 1992 involving the unclassified felony of forcible rape in *State v. Cunningham*, 840 S.W.2d 252 (Mo. App. E.D. 1992). Respondent's argument cannot be reconciled with this Court's decision in *Whitfield*. This Court held in *Whitfield* that novelty could constitute cause where a new decision explicitly overruled a prior decision. The *Hyman* decision, at least for those defendants who were convicted in the Western District of Missouri, explicitly rejected the reasoning of *Cunningham*. Prior to that time, defendants who were charged with ACA for crimes committed more than three years before charges were filed had no legal basis to raise such a claim before *Hyman*. In addition, there can be no doubt that Joseph Whitfield's attorneys could have raised

the same *Ring* issue years earlier in his case but it would have been doomed to failure based upon the legal landscape existing at the time his direct appeal was litigated. 107 S.W.3d at 257-258. The same is true in petitioner's case.

Prejudice is established because of the underlying merit of the claim for relief. *See Ivy v. Caspari*, 173 F.3d 1136, 1141-43 (8th Cir. 1999). There is no dispute that petitioner's ACA charges were filed outside the three year statute of limitation period and must be vacated under *Hyman*.

The balance of the issues in this case were adequately addressed in petitioner's opening brief.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, petitioner Gary Engel prays that this Court, after examining the evidence and the applicable law, issue a writ of habeas corpus vacating his convictions for the crimes of kidnapping and armed criminal action and remand the case to the Circuit Court of Clay County for further proceedings and grant such other and further relief as the Court deems just and equitable.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 3,903 words, excluding the cover, table of contents, table of authorities, this certification and [the appendix], as determined by WordPerfect X4 software; and,

2. That the a computer disk submitted with this brief, containing a copy of this brief, has been scanned for viruses and that the disk is virus free; and

3. That two true and correct copies of the attached brief, a computer disk containing a copy of this brief, were mail, postage prepaid, this 6th day of January 2010, to:

Andrew Hassell
Office of the Attorney General
P.O. Box 899
Jefferson City, MO 65102

_____
KENT E. GIPSON