

Case no. SC90314

IN THE MISSOURI SUPREME COURT

STATE EX REL. GARY ENGEL,

Petitioner,

v.

DAVE DORMIRE,

Respondent.

Original Proceeding in Habeas Corpus

RESPONDENT'S STATEMENT, BRIEF, AND ARGUMENT

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Statement of Facts

I. Gray Engel kidnapped Charles Ford and Mark Harris

Gary Engel, Steven Manning, and Thomas McKillip came to Kansas City from Chicago in order to kidnap a drug dealer. Tr. 312-14.¹ Anthony Mammolito, a competing drug dealer, formulated the plan to kidnap, hold for ransom, and rob Charles Ford and hired Engel and his accomplices. Tr. 309-10, 312-13. Mammolito bought Engel and Manning a police scanner and other electronic equipment to be used in the crimes. Tr. 318, 320, 321-22.

The four men prepared extensively for the kidnapping. Engel and Manning plotted out the location of Kansas City police divisions on a map. Tr. 320. McKillip drove from Chicago and brought pistols, fake police identification badges, fake federal Drug Enforcement Administration (“DEA”) badges, fake search warrants, and fake arrest warrants. Tr. 322. Mammolito and McKillip installed an electronic bug on Ford’s sister’s telephone. Tr. 331-34. Meanwhile, Engel and Manning stole a car and installed police radios, a police scanner, and flashing red lights. Tr. 335.

One evening in February 1984, Engel and Manning, masquerading as DEA agents, kidnapped Charles Ford and Mark Harris in front of Ford’s apartment. Tr.

¹ Respondent submitted the trial transcript as an exhibit to his response to the order to show cause.

171, 174, 311-12, 345-46. They took them to a “safe house,” tied them to a pole, threatened their lives, and coerced Ford into agreed to pay a ransom. Tr. 179-80, 348-49. They also took Ford’s ring. Tr. 190, 363-64, 471. After Ford arranged for payment of a \$50,000 ransom, Manning and Mammolito picked up the ransom money from Ford’s sister. Tr. 354-61. Engel, Manning, and Mammolito then released the victims in a Clay County cemetery. Tr. 194, 365.

In February of 1984, Engel told Sharon Duggan, his wife, that he went to Kansas City twice to “rip off drug dealers.” Tr. 467, 470. Engel told Duggan about “this big score that he made down in Kansas City, how they kidnapped two guys posed as D.E. [sic] agents, made the one guy [s---] in his pants, he was always laughing about that, how they released them in front of an open grave so that they knew they’d never talk.” Tr. 473. During that time, Engel also possessed a book entitled “How to Rip Off a Drug Dealer.” Tr. 478-83.

Engel gave Duggan a ring that he said he had taken off one of the kidnapping victims. Tr. 471. Charles Ford, one of the kidnap victims, identified the ring that Engel gave Duggan as the one that the kidnappers took from him. Tr. 190-91; 435, 456-58.

II. Procedural history

A Clay County jury convicted Engel of two counts of kidnapping and two counts of armed criminal action and the trial judge sentenced him to serve a total of

ninety years imprisonment. The Missouri Court of Appeals, Western District, upheld Engel's convictions and sentence as well as the denial of post-conviction relief. *State v. Engel*, 859 S.W.2d 822 (Mo.App. W.D. 1993).

Engel then attempted to challenge his convictions via state habeas corpus in this Court. *Engel v. Dormire*, no. SC85404 (Mo., writ denied Aug. 28, 2003).² Engel argued in that action that the prosecution failed to disclose the State's "deal" to pay Mammolito for his testimony, that FBI agents and Illinois police officers investigating Engel's case committed misconduct by paying Anthony Mammolito for false testimony and that the Clay County prosecutor committed misconduct by using perjured testimony at trial. Resp. App. A16-A29. This Court denied Engel's petition in a summary order. Resp. App. A33.

Engel then filed for a federal writ of habeas corpus. *Engel v. Dormire*, no. 03-0798-CV-W-GAF (W.D.Mo.). Resp. App. A34. Engel alleged that the prosecutor failed to disclose the "deal" with Anthony Mammolito and that Mammolito's testimony was false. Resp. App. A40-A50. The federal district court held that the statute was barred by the federal statute of limitations and that all of Engel's claims were procedurally defaulted and meritless. *Id.* at A53-A68. The Eighth Circuit denied a certificate of appealability. *Id.* at A70.

² Respondent asks this Court take judicial notice of its file in SC85404.

Co-defendant Steven Manning's Missouri convictions for kidnapping Ford and Harris were ultimately reversed on federal habeas corpus review based on improper testimony by a jailhouse informant. *Manning v. Bowersox*, 310 F.3d 571 (8th Cir. 2002). Manning then filed a lawsuit under the Federal Tort Claims Act (FTCA) and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) against the United States and two Federal Bureau of Investigation (F.B.I.) agents. *See Manning v. Miller*, 355 F.3d 1028, 1030-31 (7th Cir. 2004).

A federal jury found in favor of Manning on the *Bivens* claims, but the federal district court found in the government's favor on the FTCA claims. *Manning v. United States*, 546 F.3d 430, 432 (7th Cir. 2008). The federal district court then threw out the jury's verdict as barred by the court's determination of the FTCA claims. *Id.* The Seventh Circuit affirmed, *id.* at 433-438, and the United States Supreme Court denied certiorari, 2009 WL 1849812 (Nov. 9, 2009).

III. The "deal" between Mammolito and the Buffalo Grove police

Prior to Engel's trial, Mammolito wrote a letter to Rex Gabbert, then a Clay County assistant prosecutor. Resp. App. A70-A71. In that letter, Mammolito referenced a "deal" in which he would receive \$25 per week that he was in the

county jail. *Id.* He alleged that the “deal” was made in March 1990.³ *Id.*

Mammolito asked that the money be sent to his mother. *Id.*

On February 7, 1992, after Engel and Manning were both convicted, Mammolito wrote a letter to Sergeant Robert Quid of the Buffalo Grove, Illinois, Police Department. Resp. App. A73-A75. Mammolito again referenced the \$25 per week deal and asked for the money to be sent to his mother. *Id.* at A74.

Commander Gary Del Re sent Mammolito’s mother a \$500 check on November 9, 1992. *Id.* at A76-A77.

Engel argued that he was prejudiced by this “deal” in his previous habeas petition in this Court. Resp. App. A16-A29. Further, the existence and substance of this “deal” was actively litigated in Manning’s civil trial. When confronted with Mammolito’s February 1992 letter, Sergeant Quid testified he did not make any deals with Mammolito to reimburse him

Q. And let’s make it absolutely clear, sir. Was there ever any agreement at all, ever, that if he fulfilled his end, he would get reimbursed for his expenses?

A. None at all.

³ The federal district court found that there was no evidence the Mammolito met with police or prosecutors in March 1990: “Mammolito was either making it up or had a bad memory for dates.” Resp. App. a100.

A. [Mammolito] had no --no right writing me telling me that I made a bargain with him, because I never did.

[Q.] Was there an agreement that Mammolito was going to be paid money?

A. No.

Q. At any point, was there a deal that if he did what he was supposed to do and you did what you were supposed to do, you'd pay him?

A. No.

Resp. App. A150-A151, A156.⁴ Further, neither Quid nor Del Re made any deals with Mammolito during their meetings in 1990. *Id.* at A164-A165, A 215-A216.⁵

At some point during Manning's first criminal trial, Mammolito spoke to Gabbert and asked for \$25 per week for cigarettes and toiletries. *Id.* at A196-A197.⁶ Gabbert told Mammolito that Clay County did not have money for those types of requests. *Id.* at A197.⁷ Quid then spoke with Mammolito. *Id.* Quid told

⁴ Civil Tr., Vol. 14, at 183-184, 189.

⁵ Civil Tr., Vol. 14, at 268-269; Civil Tr., Vol. 16, at 194-195.

⁶ Civ. Tr., Vol. 15, at 3-4.

⁷ *Id.* at 4.

Mammolito that he had no authority to give him money, that he would not give him money, and that he would not make any deals to give him money in the future.

Id. at A199.⁸ The \$500 that Del Re sent to Mammolito's mother was a partial reimbursement for her expenses, not a payment for testimony:

I felt it was an appropriate amount based on ... the fact that he did incur expenses and the fact that he was not in a position to obtain some of the things that he was accustomed to in [federal prison in Oakdale, Louisiana.]

Id. at A219;⁹ *see id.* at A200 (the payment "was a partial reimbursement of the expenses that was incurred by Mammolito's mother").¹⁰ Del Re further explained that he had not "made any representations" to Mammolito that Buffalo Grove would pay him and he did not make any agreement to pay Mammolito. *Id.* at A218, A226.¹¹

Mammolito explicitly testified that his motive for testifying against Manning and by extension Engel was because he was angry with Manning and blamed Manning for sending him to prison: "Well, you know, Manning got me 25 years,

⁸ *Id.* at 9.

⁹ Civil Tr., Vol. 16, at 198.

¹⁰ Civil Tr, Vol. 15, at 7.

¹¹ Civil Tr., Vol. 16, at 197, 205.

you see, being an F.B.I. informant. So I live by a strict policy. You don't do nothing to hurt me; I don't do nothing to hurt you. You get on the stand and point the finger at me; if I knew anything against you, I'm going to defend myself.” Resp. App. A231-A232.¹² Later, Mammolito turned down the offer of a “time cut” and told Del Re and Quid that he would testify because Manning was an F.B.I. informant and Manning “got” Mammolito twenty-five years in federal prison.¹³ *Id.* at 214, 243, 249-250.¹⁴ Regarding the \$500, Mammolito stated that “this ain’t no paying for testifying” and was intended solely to reimburse his mother for her trips to bring him cigarettes. *Id.* at A264.¹⁵ Mammolito also stated that the reimbursement agreement “wasn’t an up-front agreement at all.” *Id.* at A264-A265.¹⁶ Mammolito was unsure about who, if anyone, approved the deal on behalf of the State of Missouri or Buffalo Grove. *Id.* at A265-266.¹⁷

¹² Civil Tr., Vol. 17, at 187-188.

¹³ Mammolito did not have any animosity toward Engel. Civil Tr., Vol. 17, at 206-207. He testified against Engel because of his desire to see Manning go to prison. *Id.* at 207.

¹⁴ Civil Tr., Vol. 17, at 197, 199, 205-206.

¹⁵ *Id.* at 220.

¹⁶ *Id.* at 220-221.

¹⁷ *Id.* at 221-222.

Argument

I. Engel already raised his claims in a previous action in this Court and cannot relitigate those claims in this habeas action

This Court has explicitly held that habeas corpus “was [not] designed for duplicative and unending challenges to the finality of a judgment.” *State ex rel. Simmons v. White*, 866 S.W.2d 443, 446 (Mo. 1993). Engel previously filed a state habeas petition in this Court alleging two grounds for relief:

1. The prosecution failed to disclose to the defense evidence impeachment evidence of Anthony Mammolito.
2. The FBI agents and Illinois police officers investigating Engel’s case committed misconduct by paying Anthony Mammolito for false testimony and the Clay County prosecutor committed misconduct by using perjured testimony at trial.

State ex rel. Engel v. Dormire, no. SC85404 (Mo., denied Aug. 26, 2003); Resp. App. A16-A29. This Court denied the petition. Resp. App. A33.

Engel’s claims in his prior petition are identical to the ones that he raises here. Under *Simmons*, he cannot use habeas corpus to relitigate those claims. This Court therefore should deny his petition.

II. Engel defaulted on his claims for relief

Engel raises three claims in his habeas petition:

1. The prosecution failed to disclose exculpatory and impeachment evidence.
2. The FBI agents and Illinois police officers investigating Engel's case committed misconduct by suborning perjury.
3. The armed criminal action counts were barred by the statute of limitations.

Engel procedurally defaulted on each of these claims because he did not raise them on direct appeal or in his Rule 29.15 motion. *Brown v. State*, 66 S.W.3d 721, 726 (Mo. 2002), quoting *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214 (Mo. 2001). Engel concedes in his brief that the claims are defaulted. Pet. Br. at 27, 51-54.

In order to overcome the procedural bar, Engel must show either (a) manifest injustice, or (b) cause and prejudice or (c) a jurisdictional defect. *Brown*, 66 S.W.3d at 731. "Manifest injustice" requires Engel to present newly-discovered evidence of his actual innocence. *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. 2000). He does not allege that he can satisfy this test. Engel does assert that he can show cause and prejudice to overcome his default of all of his claims and that his statute of limitations claim involves a jurisdictional defect. Engel's arguments lack support in law and fact.

III. Engel cannot overcome the procedural default of his *Brady* claim

Engel argues that the prosecution failed to disclose a “deal” between the State and Anthony Mammolito as well as the fact that the F.B.I. paid Sharon Duggan’s expenses when she came to Kansas City in order to testify against Engel and Manning. App. Br. 28-30.

“A constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.” *United States v. Bagley*, 473 U.S. 667, 678 (1985). Evidence is material “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Id.* at 682. Engel cannot demonstrate either cause or prejudice to overcome his default.

Further, other than Mammolito’s letter to the Clay County prosecutor, none of the documents he proffers to show the existence of this “deal” existed prior to his trial. *See* Tr. at i (trial began on June 24, 1991); Resp. App. A73-A75 (written on February 7, 1992); Resp. App. A76-A77 (written on November 9, 1992). The prosecutor could not have disclosed documents to Engel that did not exist at the time of trial. The post-trial letters therefore played no part in Engel’s trial.

A. There was no “deal” for Mammolito’s testimony

Engel implies that Mammolito was paid for his testimony. App. Br. 29. He presents no evidence to support that conclusion. That omission is understandable because no such evidence exists.

Sergeant Quid of the Buffalo Grove Police Department testified in no uncertain terms that he did not promise Mammolito anything:

Q. And let’s make it absolutely clear, sir. Was there ever any agreement at all, ever, that if he fulfilled his end, he would get reimbursed for his expenses?

A. None at all.

Resp. App. A150-151.¹⁸ Quid consistently denied making any deal with Mammolito. *Id.* at A151, A156.¹⁹ He told Mammolito that he “had no authority to make any promise like that.” *Id.* at A151, A199.²⁰ Quid further told Mammolito that he would not give him money and that he would not make any deals to give him money in the future. *Id.* at A199.²¹ Commander Del Re also did not “[make] any representations” to Mammolito that Buffalo Grove would pay him and did not

¹⁸ Civil Tr., Vol. 14, at 183-184.

¹⁹ *Id.* at 184, 189

²⁰ *Id.* at 184; Civil Tr., Vol. 15, at 6.

²¹ Civil Tr., Vol. 15, at 6.

make any agreement to pay Mammolito. *Id.* at A218, A226.²² Mammolito himself testified that “this ain’t no paying for testifying” and “wasn’t an up-front agreement at all.” *Id.* at A264-A265.²³

Thus, there was no deal to pay Mammolito in exchange for his testimony. Further, according to Quid, Del Re, and Mammolito, there was no deal at all. The prosecution cannot be faulted for failing to reveal a deal that did not exist.

B. Engel was not prejudiced

Even assuming that a deal existed to reimburse Mammolito’s mother, Engel cannot show prejudice: “a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” 473 U.S. at 682.

First, Engel challenged Mammolito’s credibility at trial. Mammolito admitted that he was serving a thirty-year federal sentence for possession of stolen property and that he had previous convictions and sentences for stealing a farm tractor and transporting stolen property across state lines. Tr. 307-08. Mammolito further testified at trial that he was a drug dealer and that he arranged for and was part of the conspiracy to kidnap, hold for ransom, and rob the victims. Tr. 308-365. Mammolito provided a detailed account of the kidnappings. *Id.* Mammolito also

²² Civil Tr., Vol. 16, at 197, 205.

²³ Civil Tr., Vol. 17, at 220-221.

testified that in return for his testimony, he had not been charged with kidnapping and armed criminal action and hoped not to be charged in the future. Tr. 366.

Further, Engel's trial counsel actively cross-examined Mammolito about the details of the crime and pointed out many inconsistencies in Mammolito's stories at trial and in previous testimony. Tr. 376-395.

The jury had ample opportunity to disbelieve Mammolito, who was testifying in exchange for no prosecution on the class A felony offenses for which Engel was on trial. Mammolito was a three-time convicted felon serving a thirty-year sentence in federal prison. Engel's counsel also demonstrated to the jury on cross-examination that Mammolito testified differently about the crime at various times before trial. The jury therefore had sufficient opportunity to disbelieve Mammolito if they chose to. Further impeachment evidence would have been overkill.

Second, the "deal" would have constituted weak impeachment evidence. The fact that Del Re sent Mammolito's mother \$500 does not mean that there was any kind of nefarious deal for Mammolito's testimony either. Del Re explicitly stated that he sent the money as a reimbursement because "he did incur expenses and the fact that he was not in a position to obtain some of the things that he was accustomed to in [federal prison in Oakdale, Louisiana]. Resp. App. A117.²⁴

²⁴ Civil Tr., Vol. 16, at 198.

Mammolito believed that the “deal” was solely to reimburse his mother. *Id.* at A264.²⁵

Further, Mammolito explicitly stated that his motive for testifying against Manning and by extension Engel was because he was angry with Manning and blamed Manning for sending him to prison. Resp. App. A231-A232.²⁶ In fact, Mammolito turned down the State’s offer of a “time cut” (apparently a deal to lessen the amount of time he would serve in a federal penitentiary) and told Del Re and Quid that he would testify because Manning was an F.B.I. informant and Manning “got” Mammolito twenty-five years in federal prison. *Id.* at A241, A243, A249-A250.²⁷ He decided to testify based on his disgust with Manning and because he received immunity from the State of Missouri. *Id.* at A146, A230, A245, A249-250.²⁸ The “deal” alleged here was not in exchange for testimony and pales in comparison to Mammolito’s past convictions and his loathing for Manning.

Third, even discounting Mammolito’s testimony, sufficient evidence existed at trial to convict Engel. Engel told his ex-wife that in February of 1984, he went to

²⁵ Civil Tr., Vol. 17, at 220.

²⁶ Civil Tr., Vol. 17, at 187-188.

²⁷ *Id.* at 197, 199, 205-206.

²⁸ *Id.* at 188, 201, 205-206; Civil Tr., Vol. 14, at 179.

Kansas City twice to “rip off drug dealers.” Tr. 467, 470. Engel further told her about “this big score that he made down in Kansas City, how they kidnapped two guys posed as D.E. [sic] agents, made the one guy [s---] in his pants, he was always laughing about that, how they released them in front of an open grave so that they knew they’d never talk.” Tr. 473. Engel brought his ex-wife a ring from Kansas City that he stole from one of the kidnapping victims. Tr.471. Charles Ford, one of the kidnap victims, identified the ring Engel gave his ex-wife as the ring that taken from him during the kidnapping. Tr. 190-91; *see also* Tr. 435, 456-58.

The kidnapping occurred in February 1984. Tr. 170, 249. The kidnapping involved two men masquerading as D.E.A. agents. Tr. 170-72, 249-51. Engel’s admissions to Duggan are identical to the victims’ testimony concerning the kidnappings, and in addition, Engel was in possession of the ring taken from victim Ford and bragged that he obtained it during the kidnapping. In light of his own admissions, Engel cannot show prejudice and cannot prevail on his *Brady* claim.

C. The F.B.I. reasonably paid for witness Sharon Dugan’s trial expenses

Engel contends that the State failed to disclose that the F.B.I. gave Sharon Dugan, Engel’s ex-wife, a spending allowance when she came to Missouri to testify at Engel’s trial and Manning’s trials.

The fact that the F.B.I. paid Dugan's trial expenses is unremarkable. Missouri prosecutors are required to pay fees to any person that it subpoenas. Mo.Rev.Stat. §§491.130 and 545.360 (2000). Federal law also requires that the government pay fees and costs of its witnesses, including travel costs and a subsistence allowance, including a *per diem*, for overnight stays. 28 U.S.C. §1821. Thus, if the F.B.I. had not paid for Dugan's expenses, the State would have. If Engel had challenged Dugan's testimony on this point, the prosecutor could have told the jury that payment of a witnesses' costs was standard practice in all cases. Such a statement would have negated Engel's attack on Dugan's credibility. Further, the jury could have seen such an attack as weak and unfounded. The jury could have viewed such an attack as demonstrating that Engel believed that his case was weak and that he was grasping at straws in order to avoid conviction. Such views from the jury could only have harmed Engel's case.

Therefore, the result of the trial would not have been different if the jury had known that the State was paying for its witnesses' expenses.

IV. Engel cannot overcome the procedural default of his claim that the prosecutor suborned perjury

In order to prevail on his perjury claim, Engel must show that: '(1) [the witnesses'] testimony was false; (2) the state knew it was false; and (3) [his] conviction was obtained as a result of the perjured testimony.'" *State v. Albanese*,

9 S.W.3d 39, 50 (Mo.App. W.D. 1999), *quoting State v. Cummings*, 838 S.W.2d 4, 7 (Mo.App. W.D. 1992). He cannot show that any testimony presented at trial was false and therefore cannot show prejudice.

A. Anthony Mammolito did not perjure himself

Engel alleges that Mammolito testified that he was not receiving any deals from the State. App. Br. 39-41.

Engel overstates the nature of Mammolito's trial testimony. He recites Mammolito's testimony from Steven Manning's criminal and civil trials. App. Br. 40-41. That testimony, however, is not at issue here. The issue in this case revolves solely around Mammolito's testimony in Engel's criminal trial. Analysis of that testimony does not reveal perjury.

On direct examination during Engel's trial, the prosecutor had the following colloquy with Mammolito:

Q. Now Mr. Mammolito, you actually participated in this kidnapping and armed criminal action of both Mr. Ford and Mr. Harris, is that correct?

A. That's correct.

Q. And you have not been charged by my office with that offense?

A. No, I haven't.

Q. And you understand that is something that my office is not going to charge you with, correct?

A. I hope not.

Q. That is your understanding?

A. Yes, it is.

Q. Other than, there has been no other plea agreements [sic] with you for your testimony here today, is that correct?

A. No, nothing whatsoever, no agreements.

Tr. 366.

The prosecutor's questions here referred explicitly to plea agreements and future criminal prosecution. A "plea agreement" is a deal where a defendant pleads guilty in exchange for leniency in sentence or other considerations. It is uncontested in this case that Anthony Mammolito did not have any plea deals with the State. He did not plead guilty to any Missouri charges in connection with the Ford and Harris kidnappings. His testimony that there were no plea agreements was true. Further, as discussed in the first point of this brief, there was no "deal" for money in exchange for testimony. Thus, there was no perjury.

B. Sharon Duggan did not perjure herself

Engel alleges that the F.B.I. helped Sharon Dugan to fabricate her testimony
App. Br. 41-44.

The federal judge in Manning's civil trial rejected Manning's claim that the F.B.I. induced Dugan to fabricate her testimony. Resp. App. A91. The judge found that Dugan, during her first interview with Sergeant Quid, stated that Engel had gone to Kansas City in 1984 to "pull[] a DEA scam" and extort money from a drug dealer. *Id.* at A90. During this first meeting, Quid described the ring that Engel took from Ford and Dugan promised to look for it. *Id.*

The judge also found that Dugan met with Quid and F.B.I. agent Robert Buchan a week after her initial interview. *Id.* She gave them a ring that was similar to the one Quid had described. *Id.* She first saw the ring after Engel returned from Kansas City and told her that he and his friends had kidnapped and robbed a drug dealer. *Id.* She also told Buchan and Quid that Engel, Manning and Thomas McKillip met and planned the Kansas City kidnapping. *Id.* at A91.

Engel does not provide any objective evidence to show that Dugan's testimony was false. He points to inconsistencies between Dugan's testimony at various times and the testimony of other witnesses. However, "inconsistencies between trial testimony and other testimony do not alone constitute perjury." *Albanese*, 9 S.W.3d at 50. Other than overheated rhetoric, Engel presents no other evidence contradicting Dugan. This claim lacks merit.

C. Carolyn Heldenbrand did not perjure herself

Engel alleges that Carolyn Heldenbrand present fabricated testimony at Engel's trial. App. Br. 44-45. Specifically, he alleges that her identification of Steven Manning was flawed. *Id.* Heldenbrand did not testify at Engel's trial about any identification of Manning. Trial Tr. 291-305. She therefore could not have perjured herself at Engel's trial.²⁹

D. The F.B.I. did not fabricate Charles Ford's testimony

Engel alleges that Agent Buchan induced false testimony from Charles Ford. App. Br. 45-47. The thrust of this argument is that the ring found by Sharon Dugan was not Ford's ring because it had seven diamonds instead of five. *Id.* Ford testified at trial that the ring appeared to be his. Tr. 190-91, 236. At trial, Ford identified the dents on the ring, explained how the dents happened, and told the jury where he bought the ring. Tr. 190, 236.

Engel cross-examined Ford about the inconsistency in the number of diamonds between the ring and Ford's description of the ring to Sergeant Quid. Tr. 237-238. Again, "inconsistencies between trial testimony and other testimony do

²⁹ Heldenbrand testified about her pre-trial identifications of Manning in Manning's Missouri state trials. *Manning v. Bowersox*, 310 F.3d 571, 574 (8th Cir. 2002).

not alone constitute perjury.” *Albanese*, 9 S.W.3d at 50. Engel has not proved that Ford presented false testimony.

V. Engel cannot overcome the procedural default of his claim that the statute of limitations barred his armed criminal action convictions.

Engel contends that his armed criminal action convictions violated the statute of limitations in §556.036, RSMo 1978. Engel alleges both a jurisdictional defect and cause in his attempt to overcome his default. He cannot satisfy either test.

A. Engel does not present a jurisdictional defect

This Court has held that the statute of limitations is an affirmative defense, not a jurisdictional bar. *Longhibler v. State*, 832 S.W.2d 908, 910-11 (Mo. 1992). Engel therefore cannot show that the trial court lacked jurisdiction over the armed criminal action charges.

Further, this Court recently clarified the definition of “jurisdiction” by holding that there are only two types of jurisdiction: subject-matter jurisdiction and personal jurisdiction. *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 252 (Mo. 2009). Here, the trial court had personal jurisdiction over Engel because Engel was present in the State of Missouri and the charged crimes occurred in the State of Missouri. *Id.* at 252-253. The circuit court had subject-matter jurisdiction over Engel’s felony case because circuit courts have the power to try felony cases.

Id. at 253-254; Mo. Const., Art. V, §14 (as amended 1976); Mo.Rev.Stat. §§565.110 and 571.015 (1978).

B. Engel cannot show sufficient cause

Engel argues that he could not have raised his statute of limitations claim on direct appeal because the legal basis for the claims did not exist at that time. App. Br. 52-54. He bases his argument on the fact that the Missouri Court of Appeals held in 1992 that armed criminal action charges were subject to the three-year statute of limitations. *Id.*; *State v. Hyman*, 37 S.W.3d 384 (Mo.App. W.D. 2001). He is wrong.

A defendant may demonstrate “cause” to overcome his default by showing that “some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.” *Coleman v. Thompson*, 501 U.S. 722, 753 (1991), quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *State ex rel. Taylor v. Moore*, 136 S.W.3d 799, 801 (Mo. 2004). In other words, the default must be “something that cannot fairly be attributed” to the defendant. *Coleman*, 501 U.S. at 753. The United States Supreme Court has held that “a showing that the factual or legal basis for a claim was not reasonably available to counsel ... would constitute cause” to overcome a procedural default. 501 U.S. at 753; *Murray*, 477 U.S. at 488.

Here, Engel fails to show that his attorney was unable to raise a claim similar to *Hyman* at the time of his direct appeal. In *Hyman*, the claim was based solely on a conflict between Mo.Rev.Stat. §556.036.1 (2000) and Mo.Rev.Stat. §556.036.2(1) (2000). 37 S.W.3d at 388-389. These statutes were identical to the 1978 statutes in force at the time of Engel's crime. Therefore, an argument based solely on the text of these statutes and the armed criminal action statute was available to him and to his attorney at the time of his trial, direct appeal, and post-conviction action.

Further, another defendant raised a similar claim in 1992, while Engel's appeals were pending. *State v. Cunningham*, 840 S.W.2d 252 (Mo.App. E.D. 1992). There, the defendant argued that rape, an unclassified felony, was subject to the three-year statute of limitations. *Id.* at 253. The Court of Appeals held that rape was a class A felony and therefore was not subject to the three-year statute of limitations. *Id.* The Western District of the Court of Appeals rejected *Cunningham's* reasoning in *Hyman*. 37 S.W.3d at 388-389.

Engel's claim that armed criminal action, an unclassified felony, is subject to the three-year statute of limitations is legally indistinguishable from the argument presented in *Cunningham*. He could have raised this claim just as the defendant in *Cunningham* did. His claim therefore was not novel because at least one other

defendant had raised an near-identical claim.³⁰ He therefore cannot show cause to overcome his default.

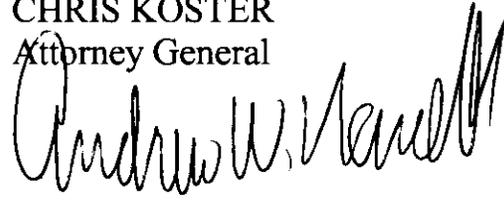
³⁰ Engel also cannot argue that he can show cause because the Missouri Court of Appeals would have rejected his claim. “Futility cannot constitute cause if it means simply that a claim was ‘unacceptable to that particular court at that particular time.’” *Bousley v. United States*, 523 U.S. 614, 623 (1998), *quoting Engle v. Isaac*, 456 U.S. 107, 130 n.35 (1982).

Conclusion

For these reasons, this Court should quash its preliminary writ of habeas corpus.

Respectfully submitted,

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Certificate of Compliance and Service

I hereby certify that the attached brief complies with the limitations contained in Rule 84.06(b) of the Supreme Court of Missouri and contains 5,666 words, excluding the cover and this certification, as determined by Microsoft Word 2003 software; that the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses, using Norton Anti-virus software, and is virus-free; and that a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, on December 21, 2009, to:

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