

IN THE SUPREME COURT OF MISSOURI

CASE NO. 91112

STATE EX REL. REGINALD GRIFFIN,

Petitioner,

v.

**LARRY DENNEY, Superintendent,
Crossroads Correctional Center,**

Respondent.

PETITIONER'S REPLY BRIEF AND APPENDIX

Respectfully submitted,

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REPLY ARGUMENT

I.

RESPONDENT’S BRIEF CONCEDES THAT THERE IS NO PROCEDURAL IMPEDIMENT TO THIS COURT’S REVIEW OF PETITIONER’S *BRADY* CLAIM.

Respondent’s brief scarcely mentions petitioner’s arguments that there is no procedural bar merits review of petitioner’s *Brady*¹ claim because he can establish cause and prejudice to overcome any procedural bar due to the fact that the Jeffrey Smith evidence was unknown to the petitioner because it was suppressed by the state until 1993, which was well past the deadline for raising this claim on direct appeal or in the consolidated 29.15 proceeding. Although the state notes that the circuit court found, with no analysis, that petitioner’s *Brady* claim was procedurally barred, (Resp. Br. 9-10), respondent completely failed to address petitioner’s argument that there was uncontradicted and overwhelming evidence presented at the 2007 evidentiary hearing that there is “cause” to overcome any procedural bar because the evidence supporting the *Brady* claim did not come to light because it was concealed by the government until it was too late to raise this claim in petitioner’s direct appeal or original 29.15 motion. *See State ex rel. Engel*

¹ *Brady v. Maryland*, 373 U.S. 83 (1963).

v. Dormire, 304 S.W.3d 120, 125-126 (Mo. banc 2010). Respondent’s complete failure to address the issue of cause to overcome the procedural bar must, therefore, be viewed as a tacit concession that petitioner can meet this burden to overcome any procedural bar to the review of the merits of his *Brady* claim.

Likewise, under Argument II, respondent fails to address petitioner’s arguments that he can meet the gateway innocence test of *Schlup v. Delo*, 513 U.S. 298, 327 (1995). Instead, respondent focuses entirely on petitioner’s “free-standing” claim of innocence under *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003). (Resp. Br. 17-23). The state’s complete failure to address this gateway innocence issue also suggests that respondent had no viable argument to refute petitioner’s contention that his claim of gateway innocence is stronger than Lloyd Schlup’s. (*See* Pet. Br. at 37-39).

II.

PETITIONER IS ENTITLED TO HABEAS RELIEF ON HIS *BRADY* CLAIM.

In addressing the merits of petitioner’s *Brady* claim, respondent takes a “shotgun” approach, advancing an array of misleading and legally untenable arguments in a desperate attempt to salvage an obviously tainted conviction. Some of respondent’s arguments are so absurd that they do not merit a reply. However, a

few more words are necessary to address some of the issues respondent has brought up in his brief.

First, respondent advances various arguments that petitioner did not establish, through the 2007 hearing testimony of petitioner and Nancy McKerrow, that agents of the state suppressed exculpatory evidence. (Resp. Br. 10-12). In this regard, respondent suggests that because the trial court granted a pre-trial motion filed by trial counsel for production of the names of inmates held in administrative segregation, this somehow shows that the evidence regarding Jeffrey Smith being caught with a knife was actually disclosed to trial counsel. (*Id.*). Second, in a slight permutation of a previous argument he advanced in prior pleadings in this matter, respondent argues that there was no *Brady* violation because Raymond Newberry's post-trial testimony indicates that certain prison records were made available to trial counsel on July 10, 1987 and were copied during pre-trial discovery. (*Id.* 11).

Respondent also suggests, without citing any authority, that petitioner cannot establish a failure to disclose exculpatory evidence because he did not call trial counsel and the prosecutor as witnesses at the 2007 hearing. (*Id.*). Counsel for the state also suggests there was no failure to disclose because public defender Tom Marshall of Moberly represented Jeffrey Smith at his 1983 guilty plea on this

weapons charge before representing petitioner at his preliminary hearing after he was initially charged in 1987 with the Bausley murder. On the issue of *Brady* materiality, respondent argues, for the first time in this brief, that the Smith evidence would have been inadmissible at trial. (*Id.* 14-16). Petitioner will address each of these issues in turn.

As a threshold matter, respondent has waived his right to assert any defenses to relief based upon the September 8, 1987 discovery motion filed by trial counsel and the contention that the Smith evidence is inadmissible under Missouri law because neither of these affirmative defenses were advanced by respondent in either his suggestions in opposition to the petition or his return. In neither of these prior pleadings did respondent assert that the evidence regarding Smith being caught with a knife was inadmissible, nor did respondent assert that disclosure of the Jeffrey Smith evidence was made in light of the September 8, 1997 discovery motion.

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 affirmative defenses by failing to assert them in a procedurally correct and timely manner. Several federal courts have held that the state waives an affirmative defense if they

fail to raise the issue in a timely and procedurally correct manner before the district court. *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); *Ex parte Label v. Sullivan*, 165 S.W.2d 639, 641 (Mo. banc 1942).

Regarding the substance of the discovery motion filed by counsel on September 8, 1997, the motion actually requested disclosure of the classification files of petitioner and his co-defendants and Curtis and Mozee and a list of the inmates in administrative segregation in July of 1983. (L.F. 263). Although the trial court sustained the motion, even if it is assumed that trial counsel was given the name of Jeffrey Smith,² the uncontradicted testimony of Nancy McKerrow and

² To address this new argument by respondent, undersigned counsel located a five page list of Moberly's ad seg inmates from July of 1983 in the files he obtained from petitioner's prior counsel. This list contains the names of approximately 125 convicts, identified only by last name and inmate number. There were four inmates named Smith who were placed in ad seg during July of 1983. This list is appended to this brief. (App. 6-10).

petitioner indicates that none of the investigative reports involving Jeffrey Smith being caught with a knife resembling the murder weapon were contained in the pre-trial discovery or in the boxes of files that Ms. McKerrow obtained from trial counsel Jeanne Moenckmeier in 1993. (Pet. Exh. 56-65, 66-80).

In *Strickler v. Greene*, 527 U.S. 263 (1999), the state of Virginia raised a similar argument, contending that there was no failure to disclose *Brady* material regarding a prosecution witness because that evidence could have been discovered by counsel through the exercise of due diligence because, among other things, state court counsel was aware that this witness had given several interviews to the police. *Id.* at 279, 284. The Supreme Court in *Strickler* rejected this argument, finding that despite the fact that counsel knew that this witness had conducted multiple interviews with the police, “it by no means follows that they would have known that records pertaining to those interviews or that the notes [the witness] sent to the detective, existed and had been suppressed.” *Id.* at 285. Thus, under *Strickler*, the uncontradicted evidence shows that the investigative reports regarding Smith being caught with the knife were suppressed, which establishes cause for any procedural default as well as establishing one of the elements of the

underlying *Brady* violation, because the evidence was in the hands of the state and was deliberately suppressed by prison investigator Raymond Newberry.³

Respondent's suggestion that it was also necessary to present testimony from the prosecutor or trial counsel⁴ is ludicrous because it is irrelevant under *Strickler* and this Court's more recent decisions in *Engel* and *Merriweather v. State*, 294 S.W.3d 52 (Mo. banc 2009) whether or not the prosecutor knowingly failed to disclose the exculpatory evidence regarding Smith being caught with a

³ Raymond Newberry's post-trial testimony cited by respondent involved a distinct discovery dispute regarding statements made to prison investigators by Paul Curtis. (Tr. 1067-1073). The fact that trial counsel copied "certain documents" on July 10, 1987 proves nothing regarding the non-disclosure involving Jeffrey Smith. There was, however, evidence presented at the 2007 hearing that Newberry told Nancy McKerrow's investigator in 1993 that he suppressed the Smith reports because he did not believe he had any legal duty to disclose the Jeffrey Smith evidence to petitioner's trial counsel. (Pet. Exh. 2, pp. 63-65, 79).

⁴ Trial counsel did not testify at the 2007 hearing because she is no longer an active member of the Missouri bar and currently lives and practices in California.

knife. As this Court held in *Merriweather* and *Engel*, both *Brady* and Rule 25.03(c) impose an affirmative duty upon the state to find and disclose exculpatory evidence in the possession of other government agencies and personnel. 294 S.W.3d at 54-57; 304 S.W.3d at 127. Based upon the uncontradicted testimony of Nancy McKerrow and other evidence in the record, it is clear that the Smith evidence was not disclosed to trial counsel because it was suppressed by prison investigators. (*See* Exh. 2, pp. 63-81).

Similar arguments advanced by the state in opposition to a similar *Brady* claim were rejected by the Iowa Supreme Court in *Harrington v. State*, 659 N.W.2d 509 (Iowa 2003). In that case, Harrington's trial counsel had died before the *Brady* claim that was advanced in his successive post-conviction action came to light. *Id.* at 517-518. Like Nancy McKerrow's testimony in this case, Harrington presented evidence through the testimony of his first post-conviction counsel that police reports referring to the alternative suspect were not in the materials provided to him when he took over the case. *Id.* Despite the fact that the trial record proved that trial counsel knew some general information about a possible alternative suspect, the Iowa Supreme Court had little difficulty in finding

that exculpatory police reports were suppressed within the meaning of the *Brady* rule despite the fact that trial counsel was not available to testify.⁵ *Id.* at 522-523.

The state's argument regarding Mr. Marshall's involvement in the *Smith* case is also a "red herring." Petitioner retained private counsel, Jeanne Moenckmeier, to represent him at trial and Mr. Marshall withdrew at the circuit court arraignment. (Pet. Exh. 13, p. 1). Mr. Marshall had no involvement in petitioner's case other than representing petitioner at the preliminary hearing stage in 1987, more than three years after he was the public defender during Smith's 1983 guilty plea. (*See* Pet. Exh. 1, pp. 3-4; Pet. Exh. 13, p. 1). Given the volume of prison weapons charges undoubtedly handled by the Moberly public defender's office between 1983 and 1987, it defies logic to impute knowledge of a connection between Smith's charges and a murder charge filed over 3 years later to Mr. Marshall. A similar argument by the government was rejected by the Third Circuit in *United States v. Perdomo*, 929 F.2d 967, 968, 973 (3rd Cir. 1991) (rejecting argument that government did not suppress evidence of a prosecution witness'

⁵ This Court in *Engel* also had no difficulty in finding that exculpatory evidence was suppressed by investigators based upon evidence that did not include any testimony from Engel's trial counsel. 304 S.W.3d at 127-128.

criminal record because Perdomo's public defender represented this witness on the charges that produced the conviction years earlier).

On the issue of *Brady* materiality, respondent distorts the trial record by suggesting the homemade knife seized from Mr. Smith could not have been used by Bausley's murderer. (Resp. 14). Respondent's argument mischaracterizes the actual testimony of the late Boone County Coroner, Dr. Jay Dix, by suggesting that the "size of the wound was about three quarters of an inch." (*Id.*). Dr. Dix actually testified at trial that the stab wound was approximately three quarters of an inch in diameter. (Tr. 542). Dr. Dix also testified that the depth of the wound was between five and six inches. (*Id.* 544). The depth of the fatal knife wound indicates that Bausley could have been stabbed with the weapon seized from Smith minutes after the murder, which was described by Officer O'Brian and the prosecutor in court documents as being eight and seven eighths inches long with a blade of over five inches that was sharpened to a point. (*See* Pet. Exh. 1). Respondent's argument also ignores the fact that Mr. Bausley also had a smaller wound caused by "a sharp instrument" on his left upper leg that the state argued at trial was inflicted by petitioner. (Tr. 416, 543).

In the same vein, respondent also suggests that the shank seized from Smith could not have been used to stab Bausley because no blood was found on it.

(Resp. 14). Respondent also states that State's Exhibit 2, a knife found near the scene of the stabbing, tested positive for blood and human proteins. (*Id.*). This argument also distorts the record. Although preliminary tests for blood on State's Exhibit 2 were positive and human protein was found on the knife, the confirmatory test for blood on the knife was negative. (Tr. 555). Similarly, respondent's contention that the knife seized from Smith was "clean" is speculative because there is no evidence that the knife seized from Smith was ever tested for the presence of blood.

For the first time in this brief, respondent contends that the evidence connecting Smith to the stabbing would not have been admissible at trial, by citing a line of Missouri cases that evidence that casts a bare suspicion on another is inadmissible.⁶ (Resp. Br. 14-16). The mere fact that, in the context of a prison stabbing, an inmate is caught with a knife near the scene of the crime that other witness testimony indicates matches the description of the murder weapon is, by itself, enough to directly connect Smith to the murder. *See State v. Schaal*, 806 S.W.2d 659, 669 (Mo. banc 1991). Coupled with the fact that Smith physically resembles petitioner, who was later identified as the killer by Mozee and Curtis,

⁶ This affirmative defense, as noted earlier, has been waived because it was not advanced by respondent in prior pleadings. (*See pp. 4-5, infra.*)

these corroborating facts directly connect Smith to the crime. *State v. Butler*, 951 S.W.2d 600, 607-608 (Mo. banc 1997).

Ironically, the *Butler* case cited by respondent in his brief removes any doubt that the suppressed Jeffrey Smith evidence is admissible because it directly connected Smith to the Bausley stabbing. In *Butler*, this Court, in the context of an ineffective assistance of counsel claim, granted James Butler a new trial because trial counsel failed to investigate and present third party perpetrator evidence that would have been admissible to directly connect another man named Sean Malloy to the murder for which Butler was convicted. The excluded evidence in *Butler* is similar to the Jeffrey Smith evidence in several respects.

In *Butler*, a prosecution witness who found the body of Butler's wife on a remote road observed a vehicle similar to a car owned by Malloy driven by a person matching Malloy's description near the scene of the crime. *Id.* at 607. Malloy also attempted to sell a ring, similar to a ring that was purportedly worn by the victim when she was killed, a few days after the homicide. *Id.*

In finding *Strickland*⁷ prejudice, this Court concluded that the aforementioned evidence directly connected Malloy to the murder and granted Butler a new trial. *Id.* at 610. The evidence here directly connecting Smith to the murder of Bausley is of a similar character to the evidence linking Malloy to the

⁷ *Strickland v. Washington*, 466 U.S. 668 (1984).

murder in *Butler*. The fact that Smith was caught with a knife by a prison guard minutes after the victim was stabbed in the yard that could have caused either of the victim's wounds, coupled with other testimony indicating that the weapon seized from Smith and the weapon possessed by one of the murderers had a yellow handle, and the fact that Smith resembled petitioner, directly connects Smith to the crime. *Id.*

In addressing prejudice, respondent also suggests that this Court should reach the same result as the federal courts in petitioner's prior federal habeas proceedings. (Resp. 13). This Court implicitly rejected the same arguments in *Amrine* and similar arguments have been rejected in several other cases because the doctrines of law of the case/*res judicata* do not apply in habeas proceedings and state courts are not bound to follow decisions issued by intermediate federal courts. *See, e.g., Middleton v. State*, 200 S.W.3d 140, 144 (Mo. App. W.D. 2006); *Lockhart v. Fretwell*, 506 U.S. 364, 375-376 (1990) (Thomas, J. concurring). In addition, this Court rejected a similar argument advanced by the attorney general in *Engel*. 304 S.W.3d at 126. Like *Engel*, petitioner's *Brady* claim was not fully developed when it was presented to the state and federal courts in the 1990's because he never received an evidentiary hearing in either state or federal court to present all of the relevant facts until 2007 during the present Rule 91 action.

In addition, because this Court has original jurisdiction to issue writs of habeas corpus under the Missouri Constitution, Mo. Const., Art. V, § 4, this Court also owes no duty of deference to any of the prior Rule 91 decisions in the courts below. Finally, any implicit suggestion by respondent that this Court should deny relief because petitioner, acting *pro se*, previously unsuccessfully sought state habeas relief under Rule 91 during the 1990s should be rejected for two reasons.

First, this Court did not allow habeas relief to be granted to a prisoner upon a showing of cause and prejudice until this Court issued its decision in *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 215 (Mo. banc 2001). Prior to that time, habeas relief was available to prisoners on procedurally defaulted claims only “to raise jurisdictional issues or in circumstances so rare and exceptional that a manifest injustice results.” See *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc 2000). In *Clay* in 2000, this Court also equated the term manifest injustice with a showing of gateway innocence as defined in prior federal habeas cases. 37 S.W.3d at 217.

A second reason no deference to any prior state or federal litigation in this case is warranted is because most of the compelling evidence of petitioner’s innocence did not exist in the 1990s. Paul Curtis did not recant his trial testimony until he executed an affidavit in 2001. The other most significant evidence of actual innocence that discredited Yvonne Mozee’s trial testimony did not come to

light until Michael Garrett testified at the 2007 evidentiary hearing in DeKalb County.

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 at various stages of the post-conviction process in determining whether a petitioner is entitled to habeas relief. *Engel*, 304 S.W.3d at 126; *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).

Finally, petitioner would like to point out a notable omission from respondent's brief. Respondent makes no attempt whatsoever to distinguish the facts surrounding petitioner's *Brady* claim from this Court's recent decision in *State v. Stewart*, 313 S.W.3d 661 (Mo. banc 2010); the Tenth Circuit's decision in *Bowen v. Maynard*, 799 F.2d 593 (10th Cir. 1986); and the Iowa Supreme Court's decision in *Harrington v. State*, 659 N.W.2d 509 (Iowa 2003). Respondent's failure to attempt to distinguish, or even mention these analogous cases that were

prominently cited in petitioner's brief speaks volumes. (*See* Pet. Br. 31-35). Because the other arguments advanced by respondent in his brief clearly lack merit, habeas relief is warranted.

III.

PETITIONER IS ENTITLED TO HABEAS RELIEF BECAUSE NO CREDIBLE EVIDENCE EXISTS THAT HE MURDERED JAMES BAUSLEY.

Respondent devotes the bulk of his argument against petitioner's free-standing claim of innocence to attacking the credibility of the evidence petitioner presented in support of this claim. (*Id.* 19-23). First, with regard to Paul Curtis, respondent notes that the circuit court below found that Curtis's recantation in his deposition was not credible. (*Id.* 20). Apart from the fact that this Court owes no deference to that finding because it has original jurisdiction in this matter, it is difficult to understand how the trial court could make this credibility finding because it did not observe Mr. Curtis's demeanor because he testified by deposition and did not appear in person at the 2007 hearing. (*See* Exh's. 2, 3). Thus, this Court has the same ability to assess the credibility of Curtis's deposition testimony as the trial court did.

In attacking the credibility of Mr. Curtis's recantation during his deposition, respondent conveniently ignores one inescapable fact that petitioner pointed out in his opening brief. Petitioner's trial testimony was not corroborated by any independent evidence in the record. (*See* Pet. Exh. 4). In contrast, the substance of Curtis's 2007 deposition in which he recanted his trial testimony is corroborated by several unassailable facts from the record, including the fact that he was placed in "ad seg" because he feared for his safety from inmate sexual predators which was one of his motivations for giving false testimony at trial and that he learned details of the murder because he was in an adjoining cell in ad seg with petitioner's co-defendant Doyle Franks. (*See* Pet. Br. 10-11). Thus, by any objective measure, Curtis's recantation is more credible than his trial testimony because of these independent facts that corroborate the substance of his recantation.

Regarding Michael Garrett's 2007 hearing testimony, respondent asserts that the circuit court found that Mr. Garrett's 2007 testimony was not credible. (Resp. Br. 21). This assertion is misleading because the circuit court's order does not even mention Michael Garrett. (*See* Pet. Exh. 9). In any event, there is no objective evidence in the record to indicate any reason for Mr. Garrett to fabricate his testimony since he is no longer a prisoner and had nothing to lose or gain from testifying.

Respondent also contends that Garrett's testimony was cumulative to testimony presented at petitioner's trial. (Resp. Br. at 21). This argument also clearly distorts the record. As petitioner pointed out in his brief, the primary defense evidence presented at trial to attack Mozee's credibility came from inmate David Steele who provided testimony that Mozee told him that he had a deal to testify against petitioner and his co-defendants to get an early release. (Tr. 724-725). Another inmate named Eddie Johnson also testified that Mozee had told him he did not actually see the stabbing. (*Id.* 741-743). The testimony provided by Mr. Garrett was of a totally different character because he was with Mozee at the time the stabbing occurred and his testimony clearly indicates that Mozee was not present at the scene of the crime and could not have possibly seen what transpired. (Pet. Exh. 2, p. 5-28).

Respondent also attacks the credibility of co-defendants Arbary Jackson and Doyle Franks, noting among other things, that the 29.15 motion court found that the prior testimony of these witnesses was not credible because of their extensive criminal records. (Resp. Br. 22-23). However, the same can be said of Mr. Mozee and Mr. Curtis. Even if the testimony of Mr. Franks and Mr. Jackson is totally ignored or discounted, the fact remains that Paul Curtis has recanted and Wyvonne Mozee's trial testimony has been totally discredited.

The arguments advanced by respondent in opposition to petitioner's claim of innocence are remarkably similar to the arguments that the same attorney general's office advanced to attack similar evidence of Joseph Amrine's innocence. Like *Amrine*, there is no credible evidence remaining from petitioner's trial to support his conviction. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. banc 2003). As in *Amrine*, the only witnesses who implicated petitioner in the crime are proven liars. *Id.* at 550 (Wolff, J., concurring). Because there is no physical evidence to support the conviction, the interests of justice require the state, if they truly believe that they still have a case against petitioner, to retry him and let a new jury decide with the benefit of all the evidence that is now before the court, whether petitioner committed this crime. *Id.*

CONCLUSION

Wherefore, for all the forgoing reasons, as well as the reasons advanced in his habeas petition and opening brief, petitioner respectfully requests that this Court issue a writ of habeas corpus discharging petitioner from his capital murder conviction, or grant such other relief that this court deems just and proper under the circumstances.

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 4,225 words, excluding the cover, table of contents, table of authorities, jurisdictional statement, this certification and the appendix, as determined by Microsoft Word 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 a true and correct copy of the attached brief, a computer disk containing a copy of this brief, were mail, postage prepaid, this 8th day of April, 2011, to:

Steven Hawke
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P.O. Box 899
Jefferson City, MO 65102

KENT E. GIPSON

APPENDIX TO REPLY BRIEF

1. List of Moberly Administrative Segregation Inmates
(July 12 – July 31, 1983)A-6