

IN THE SUPREME COURT OF MISSOURI

CASE NO. 90314

STATE EX REL. GARY W. ENGEL,

Petitioner,

v.

DAVE DORMIRE, Superintendent,

Respondent.

PETITIONER'S STATEMENT, BRIEF AND ARGUMENT

Respectfully submitted,

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JURISDICTIONAL STATEMENT

This Court has jurisdiction to issue original writs of habeas corpus pursuant to Article I, Section 12 and Article V, Section 4 of the Constitution of the State of Missouri, Missouri Rule 91.01(b), and § 532.020 *et seq.* R.S.Mo. (2000). This petition is also properly before this Court pursuant to Rule 91.02(a) and 84.22(a) because petitioner previously filed the same habeas petition in the Circuit Court of Cole County and later in the Missouri Court of Appeals, Western District.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Petitioner was charged by way of complaint in the Circuit Court of Clay County, Missouri, on July 20, 1990, with two counts of kidnapping and two counts of armed criminal action. The complaint alleged that petitioner kidnapped Charles Ford and Mark Harris at gunpoint on an unspecified day in February, 1984. Petitioner was arrested on July 26, 1990, on a Clay County warrant and was placed in the Cook County Jail in Chicago, Illinois, to await extradition.

Petitioner retained Kansas City attorney F.A. White to represent him. Petitioner proceeded to trial on a subsequent information (case # CR190-1698FX) on June 24, 1991 in Clay County before the Honorable John R. Hutcherson, which resulted in a jury verdict of conviction on all counts. (Tr. 630-31; L.F. 46-49).¹ On October 4, 1991, Judge Hutcherson, pursuant to the jury's sentencing recommendation, sentenced petitioner to consecutive thirty-year terms for each count

¹ Citations to the State Court record will be designated as follows: trial transcripts will be "Tr.; legal file, "L.F.". A partial trial transcript, containing the testimony of the key prosecution witnesses, was attached to the habeas petition as Exhibit Q.

of kidnapping and consecutive fifteen year sentences on the counts of armed criminal action, for a total of ninety years imprisonment. (L.F. 58-59).

Thereafter, petitioner filed a notice of appeal and a motion for state post-conviction relief, pursuant to Rule 29.15. (L.F. 61). On May 26, 1992, after holding a hearing, Judge Hutcherson denied petitioner's 29.15 motion in all respects. On consolidated appeal, the Court of Appeals affirmed petitioner's convictions and the denial of post-conviction relief. *State v. Engel*, 859 S.W. 2d 822 (Mo. App. W.D. 1993).

On February 24, 2003, petitioner filed a *pro se* Petition for Writ of Habeas Corpus, in the Nineteenth Judicial Circuit Court, Cole County, Missouri (case # 03-CV-323479). This case was assigned to the Honorable Richard G. Callahan. On April 28, 2003, Judge Callahan denied the petition. On May 9, 2003, petitioner filed a timely Motion for Reconsideration with the Circuit Court. On May 16, 2003, the Circuit Court Judge denied Petitioner's Motion for Reconsideration.

On May 29, 2003, petitioner filed an appeal with the Missouri Court of Appeals, Western District (case # WD62850). On June 30, 2003, the Court of Appeals dismissed this appeal. On July 7, 2003, petitioner timely filed a petition for discretionary review with this Court (case # SC85404). On August 26, 2003, this petition was denied.

On September 2, 2003, petitioner filed, *pro se*, a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (case # 03-0798-CV-W-GAF-P) in the United

States District Court, Western District of Missouri. On May 4, 2004, the District Court (the Honorable Gary Fenner) appointed Kansas City attorney Philip Klawuhn to represent petitioner in all further proceedings.

On November 19, 2004, after receiving numerous extensions of time, Klawuhn filed an amended petition for writ of habeas corpus on behalf of petitioner. On January 28, 2005, the State of Missouri filed its response to the petition.

On February 24, 2005, nearly one month later, after receiving no reply (traverse) from petitioner's court-appointed attorney to the State's response, in violation of Western District Local Rule 9.2(I),² and because no timely request for an extension to reply was filed, the District Court entered an order denying petitioner's petition for writ of habeas corpus.

On March 10, 2005, Klawuhn filed a motion for reconsideration under Fed. R. Cir. Pro. 59(e) and a motion to expand the record to include newly discovered evidence under § 2254 Rule 7. These motions were denied by the District Court on April 6, 2005.

Petitioner appealed this judgment to the Eighth Circuit Court of Appeals (Case # 05-2439). On February 7, 2006, an Eighth Circuit panel denied petitioner's

² This local rule requires a traverse or reply to be filed within seven days. The failure to file a timely traverse results in an admission that all facts pleaded in the state's response are true.

application for Certificate of Appealability and dismissed the appeal. On February 21, 2006, Klawuhn filed a petition for rehearing, which was denied on March 16, 2006.

Petitioner thereafter filed the present Rule 91 petition in the Circuit Court of Cole County, Missouri with the assistance of undersigned counsel, raising the same claims he raised in his federal habeas action based upon newly discovered *evidence* that did not become available until it was unearthed by civil litigation involving co-defendant Steven Manning. *Engel v. Dormire*, No. 06-AC-CC01100. The case was assigned to Circuit Judge Richard Callahan, who ordered the State of Missouri to answer the petition. After full briefing and oral argument, Judge Callahan issued an order and judgment on July 11, 2007 denying the petition, primarily on procedural grounds. (*See* Exh. L). Judge Callahan's order copied verbatim much of the state's response to the petition and incorporated nearly identical language in his order denying habeas relief. (*See* Exh. M).

On April 18, 2008, petitioner filed a Rule 91 petition in the Missouri Court of Appeals Western District. *Engel v. Dormire*, WD 69561. The Court ordered the State of Missouri to answer the petition. The State filed a response to the petition on May 1, 2008. Petitioner filed a reply on May 6, 2008. Judge Holliger issued a one-line order denying the petition on October 31, 2008, with Judge Lowenstein concurring. (Exh. P).

B. PROCEDURAL BACKGROUND OF CO-DEFENDANT STEVEN MANNING

After petitioner and his co-defendant Steven Manning were convicted in Missouri,³ Manning was returned to Chicago, Illinois to stand trial on murder charges involving the murder of James Pellegrino. In October of 1993, Manning was convicted of First Degree Murder and sentenced to death in Cook County. The Pellegrino murder investigation was conducted for the most part by Chicago FBI agent Robert Buchan, who was also the lead investigator in the Missouri kidnapping case. Manning then appealed his murder conviction to the Illinois Supreme Court.

In April 1998, Manning's murder conviction was reversed and the case was remanded for a new trial. *People v. Manning*, 695 N.E.2d 423 (Ill. 1998). Because of investigative improprieties in that case involving jailhouse informant Tommy Dye, Cook County, Illinois prosecutors determined not to pursue Manning further, and dropped all charges in the case. Manning was then released from Illinois' death row and returned to Missouri to serve out his kidnapping sentences. In January 2002, Manning filed a federal civil suit under *Bivens v. Six Unknown Agents*, 403 U.S. 388

³ Manning was tried twice in this case. His first trial resulted in a hung jury in October 1991. At his second trial in January 1992, Manning was convicted as charged and subsequently sentenced to consecutive life sentences.

(1971) against FBI Agent Buchan and others, alleging he was framed by Buchan for the Pellegrino murder. Mills, *Ex-Death Row Inmate Sues: "FBI Prosecutors 'Fixed' Murder Case, Lawyer Says"*, Chicago Tribune, January 17, 2002.

In November 2002, Manning's convictions in Missouri were reversed by the Eighth Circuit Court of Appeals. *Manning v. Bowersox*, 310 F.3d 571 (8th Cir. 2002). The Eighth Circuit sidestepped the *Brady*/perjured testimony issues presented by Manning and by petitioner in this action because a new trial was granted on other grounds and those issues could be more thoroughly examined at Manning's retrial. *Id.* at 574 n. 3. In September 2003, Manning was released from the Missouri Department of Corrections and returned to Clay County, Missouri, for retrial there. On February 26, 2004, Clay County prosecutors elected to dismiss the charges, and Manning was released. (*See* Exh. G).

Manning was then allowed to amend his original federal civil suit to include his Missouri convictions, where he alleged that FBI Agent Buchan had manufactured false evidence, suborned the perjury of witnesses, and secretly paid a witness to testify. In December 2004, a civil trial was held before District Court Judge Mathew Kennelly and a jury in United States District Court in Chicago. *See Manning v. Buchan and Miller et al.*, case # 02C372 (N.D. IL.), hereinafter referred to as "Civil Trial."

After nearly three weeks of testimony and a week of deliberations, on January 24, 2005, the jury issued a *unanimous* verdict in favor of Manning on his *Bivens* claims, awarding him over 6.5 million dollars in damages. (App. 1-6). This verdict was entered into the record March 25, 2005.

Attorneys for the FBI agents and the Federal Government then filed post-trial motions to overturn the jury verdict before the District Court. On November 14, 2005, Judge Kennelly issued a Memorandum, Opinion and Order (hereinafter referred to as “Memorandum”) denying this request. (*See* Pet. Exh. G).

On February 14, 2006, co-defendant Manning then filed a federal civil suit against the Village of Buffalo Grove, Illinois, and retired Sgt. Robert Quid and former Cmdr. Gary Del Re, for their roles in falsely convicting Manning in the Missouri kidnapping case. (*See Manning v. Quid and Del Re, et al.*, Case # 06C820 (N.D. IL.)). This suit was resolved in a confidential settlement in 2007.

On September 28, 2006, Judge Kennelly issued an order and judgment ruling against Mr. Manning on his separate and distinct claim against the FBI under the Federal Tort Claims Act (FTCA). However, as Judge Kennelly pointed out, to prevail on a claim under the FTCA the government is entitled to prevail if there was probable cause to prosecute Manning, and the issue of fabricated or hidden evidence is irrelevant. As Judge Kennelly pointed out at the outset: “The court’s conclusion

that there was probable cause to prosecute Manning is in no way inconsistent with the jury's finding on the constitutional law claims against the two FBI agents. On those claims, the jury reasonably concluded that the evidence that the agents fabricated and/or withheld was 'material' and made the difference in his state court convictions." (9/28, 2006 Order at p. 2). Later in this same opinion, Judge Kennelly stated: "There is no question that a deal was made at some point before Mammolito testified at Manning's Kansas City trials to pay him some amount of money... The deal to pay Mammolito was not disclosed to Manning's attorneys in the Missouri case." (*Id.* at p. 23).

Judge Kennelly's subsequent order of December 26, 2006 setting aside the jury verdict on Manning's *Bivens* claims also does not impact the jury's findings regarding the *Brady*/perjured testimony claims against the law enforcement officers who investigated the case. As Judge Kennelly pointed out, his decision to vacate the jury verdict had nothing to do with the merits of the claims involved, but instead hinged upon a statutory provision under the FTCA precluding dual recovery. In this regard, the decision to vacate the jury verdict on the *Brady*/perjured testimony claims was based upon the plain language of 28 U.S.C § 2676, which states: "The judgment in any action under §1346(b) of this title shall constitute a complete bar to any action by the claimant by reason of the same subject matter, against the employee of the

government whose act or omission gave rise to the claim.”⁴ Because the legal questions are entirely distinct under the FTCA, it is clear that the jury’s findings in *Manning* remain the most powerful evidence in this case, demonstrating that the investigating officers violated Manning’s and Engel’s rights, resulting in their wrongful convictions.

C. PETITIONER’S TRIAL

Petitioner was convicted of multiple charges arising from the armed kidnapping of Charles Ford and Mark Harris that allegedly occurred in Clay County, Missouri, in February 1984. Mr. Ford, who was a major drug dealer, did not report this kidnapping until months later, while negotiating a plea bargain in connection with pending federal drug charges against him. (Exh. Q p. 30). Authorities did not actively investigate this kidnapping until 1989, when they interviewed Anthony Mammolito at a federal prison facility on an unrelated matter.

Neither of the victims could identify their assailants (*Id.* 2-117). No evidence connected petitioner Engel to this crime until federal prisoner Anthony Mammolito

⁴ Judge Kennelly’s order was affirmed by the Seventh Circuit in *Manning v. United States*, 546 F.3d 430 (7th Cir. 2008). Manning’s petition for a writ of certiorari was denied by the United States Supreme Court on November 9, 2009. *Manning v. United States*, No. 08-1595.

told Sgt. Robert Quid of the Buffalo Grove, Illinois Police Department, and agent Robert Buchan, FBI, Chicago Office, about the kidnapping, in 1989. At that time, Mammolito gave a statement to the authorities and later testified that he recruited Engel, Steven Manning, and Thomas McKillip, all from Chicago, to kidnap Mr. Ford and to hold him for ransom, because Mammolito knew that Ford had substantial amounts of cash he had acquired through his illegal drug dealing activities. Throughout the proceedings, including two preliminary hearings and three jury trials, Anthony Mammolito repeatedly denied that he received *any* deals or favorable treatment from the government for his testimony against petitioner Engel and his co-defendant Steven Manning, other than an understanding that he would not be prosecuted for the kidnapping.⁵ (*Id.* 177).

The only other evidence implicating petitioner Engel came from Sharon Dugan, the ex-wife of petitioner, who testified that in 1984, she picked Engel up from Midway Airport in Chicago, and that Engel told her he had been to Kansas City, Mo, and had scored down there. Dugan also testified that she took, without petitioner's

⁵ Trial counsel filed two detailed requests for disclosure under Rule 25.03 prior to trial explicitly requesting any deals or promises of leniency given to prosecution witnesses. (*See* Pet. Exh. H).

knowledge, a diamond ring from her husband upon his return from Kansas City that Engel told her was a part of the score. (*Id.* 207-220).

The jury returned a verdict of guilty on all counts. Petitioner was sentenced to a total of 90 years imprisonment and was remanded to the Missouri Department of Corrections, where he continues to serve these sentences in the custody of respondent at the Jefferson City Correctional Center.

D. NEWLY DISCOVERED EVIDENCE FROM THE MANNING LITIGATION

The newly discovered evidence that forms the basis for this habeas corpus petition came to light during the discovery process in Steven Manning's federal habeas corpus action and subsequent *Bivens* trial. In summary, this evidence reveals that:

1. Agent Buchan (FBI) and Sgt. Quid (Buffalo Grove, IL Police Department) conspired together to frame petitioner and his co-defendant for crimes they did not commit.
2. Agent Buchan and Sgt. Quid failed to disclose to petitioner and the Clay County prosecutors a deal they had made with State's star witness Anthony Mammolito, whereby Mammolito would receive monetary compensation and other

inducements, as well as intervention by the investigators in securing his release from federal prison, in exchange for his testimony against Engel and Manning.

3. Buchan and Quid hid from Clay County prosecutors their investigative technique of disseminating information to witnesses before their testimony to make them appear more credible in the eyes of the jury.

4. Buchan and Quid produced false documentation of witness statements in an effort to persuade Clay County prosecutors to accept and file this case.

5. Newly discovered exculpatory and impeachment evidence, which was never disclosed to Manning or petitioner, was discovered for the first time during Manning's civil trial fifteen years later.

U.S. District Court Judge Kennelly's Memorandum of November 2005 provides a clear and concise summary of the evidence that supported Manning's civil jury verdict. (*See* Exh. G). Remarkably, the Clay County prosecutors simply failed to investigate their own case, and instead relied on the word of these out-of-state rogue law enforcement agents to make their case.

As evidenced by Manning's civil trial, this was not the only case where Agent Buchan committed misconduct. After securing tainted convictions against petitioner and his co-defendant in Missouri, Agent Buchan returned to Illinois and conspired with fellow agent Gary Miller to falsely convict Manning for a murder in Illinois that

landed him on death row. Manning became the thirteenth man released from Illinois death row after being wrongly convicted, which influenced former Governor George Ryan to place a moratorium on state executions in Illinois.

The civil jury verdict, as well as Judge Kennelly's Memorandum, shows that once again, as with Mammolito in Missouri, Buchan paid a witness (Tommy Dye) \$2,000.00 to make false statements and/or to fabricate claims about the Pellegrino murder, and concealed that fact from Illinois prosecutors. (*See* Exh. F, G). In short, Manning offered compelling proof at his civil trial that Buchan and Quid secured his conviction by fabricating evidence and withholding exculpatory and impeachment evidence which would have exonerated him.⁶

In 1998, petitioner's co-defendant, Steven Manning, was challenging his Missouri convictions before the federal courts pursuant to 28 U.S.C. § 2254. During those proceedings, District Judge Ortrie Smith ordered discovery, directing the Clay County Prosecutor's Office and Buffalo Grove, IL Police Department to produce all documents from its files regarding the Manning and Engel investigation and

⁶ Because the sequence of events, beginning with the initial investigation of the case in 1989 through the Manning civil litigation, is important to the disposition of this case, a chronological summary of these events was attached to the habeas petition as Exhibit N.

prosecution. *Manning v. Bowersox*, W.D. Mo. #4:97-CV-0036-ODS, (Order of 9/01/98).

It was during this discovery process that the letters from Mammolito to Sgt. Quid and Clay County prosecutor...now Judge Rex Gabbert...came to light. (*See* Pet. Exh's B; D; App. 7-15). The Gabbert letter was written by Mammolito and received by the Clay County Prosecutor's Office on April 16, 1991 prior to petitioner's trial. (App. 7-8). Although prosecutor Bryan Klopfenstein and Judge Gabbert gave sworn testimony at the Manning civil trial that they had never seen this letter, or were even aware of its existence, both of the letters were considered by the jury in Manning's civil trial. Both letters clearly indicate that Mammolito reached an agreement with the government to be paid for his testimony against Manning and Engel. (*Id.* 7-15) The Quid letter was dated February 7, 1992, shortly after Manning's second trial concluded. (*Id.* 9-15).

Mr. Mammolito's letters to Mr. Gabbert and Sgt. Quid make for interesting reading. In the Gabbert letter, Mammolito opens with the phrase: "Just a little note to remind you of our agreement of \$25.00 per week starting October 1 of 1990." (*Id.* 8). In the Quid letter, Mr. Mammolito, apart from asking for payment, made another damaging admission which proves that authorities fed him investigative reports and other information before he testified against Engel and Manning. In this regard,

Mammolito stated: “As you no [*sic*] I’ve read all of the investigation’s reports on this case and I must say that I’m quite impressed at the way you put this case together on my slim statement given in August of 1989...” (App. 9).

After congratulating Sgt. Quid on obtaining Manning’s conviction, Mammolito proceeded to the main point of his letter, regarding his agreement with the authorities under which he expected to be paid for his testimony. In this regard, Mammolito states:

Well Bob I would like to take this opportunity to remind you of the agreement that we made in March of 1990, that you made with no reservations, and as you no [*sic*] I fulfilled my end of the bargain and that was your department or some department would reimburse me for my expenses, that I incurred by staying in the county jail and save someone the \$1200 dollars it would cost per trip to take me back and forth. The agreement was for \$25.00 a week beginning October 1, 1990 through the end of my stay in the county jail, January 30, 1992...

(App. 10). At the end of his letter, Mr. Mammolito asked Sgt. Quid to send the money to his mother Virginia Mammolito and listed her address and phone number.

(App. 11).

A different letter surfaced at Manning's civil trial that was never turned over by the Buffalo Grove Police Department in response to Judge Smith's order for discovery. In addition to the other letters Mammolito had written averring to a secret deal for monetary compensation, this newly discovered letter corroborated Mammolito's assertions that a deal for payment in exchange for testimony existed. This letter, dated November 9, 1992, written by Buffalo Grove P.D. Cmdr. Del Re to Mammolito's mother, with an enclosed check for \$500.00, states that he wished they could have sent Mammolito more money "for the help Tony provided in this very important case." (*See* Pet. Exh. C; App. 16-17).

It was also revealed at Manning's civil trial for the first time that Mammolito had made statements, prior to petitioner's trial, to a Clay County prosecutor that contradicted his trial testimony. Prosecutor Klopfenstein gave sworn testimony that Mammolito told him that there had been a different person involved in the Missouri kidnapping scenario who Mammolito refused to name because that person had since died. (C.T. V15: 192-94).⁷ The statement was never documented in any report, nor was it relayed to petitioner in any manner prior to or during trial.

⁷ Petitioner will designate citations from Manning's civil trial as "C.T." followed by the volume number then page number. Transcript excerpts from Manning's civil trial were attached to the habeas petition as Exhibit O.

Additional undisclosed evidence surfaced at the Manning civil trial that Sgt. Quid had made an additional visit to Mammolito in Louisiana in July, 1990 that was withheld from petitioner. (C.T. V14: 172). Quid was adamant that he made a report of this visit (when Mammolito changed his story to comport with law enforcement's new version of events), but this report was never disclosed to petitioner prior to or at his criminal trial, nor to Manning pursuant to Judge Smith's discovery order, or at Manning's civil trial. Coincidentally, this document is the only "critical" report missing from Buffalo Grove's entire file. (C.T. V14: 174-77).

During the civil trial, Cmdr. Del Re and Sgt. Quid insisted there was no deal made with Mammolito, but when pressed by Manning's attorney, neither could explain why they did not respond with any sort of denial when they received Mammolito's letter demanding they honor their deal. (C.T. V15: 15-16; V16: 204-06). The fact is that Quid and Del Re sent Mammolito's mother \$500 in a letter expressing regret that they could not send him more for his efforts in securing petitioner's and Manning's convictions. (*See App.* 16-17).

After considering the evidence, Manning's civil jury found that Buchan, Quid, and Mammolito had a "deal" in place prior to his testimony at petitioner's trial. (*App.* 1-6). Judge Kennelly's assessment of the evidence concerning this finding buttresses the civil jury verdict. (*Exh. G*). There is no longer any question whether this

undisclosed deal with Mammolito existed; Manning has proven that it did, and the civil jury's verdict confirms it. (App. 1-6).

In addition, evidence was presented at Manning's civil trial that an agreement was made between Buchan, Quid, and Mammolito prior to petitioner's trial for the investigators to assist Mammolito in securing his release from federal prison. (*See* Pet. Exh. E; App. 18-19). Sgt. Quid sent a letter to the parole commission on March 20, 1992 seeking leniency for Mammolito. (*Id.*) Prosecutor Klopfenstein also sent a letter to AUSA Paul Becker in Kansas City on behalf of Mammolito, touting Mammolito's unquestioned cooperation in this case. (*See* Pet. Exh. I).

The civil jury also found that Carolyn Heldenbrand's false identification of Manning constituted undisclosed exculpatory evidence which could have been used to impeach her. (*See* Exh. G at 17). Petitioner was also not apprized of this exculpatory evidence at his trial.

In preparing for the civil trial, Manning's Chicago attorneys took several depositions. On July 29, 2004, the deposition of Anthony Mammolito was taken in Kansas City, Missouri. During that proceeding, Mammolito gave sworn testimony, for the first time, that he had written a letter to the Buffalo Grove police prior to being brought back to Missouri for his testimony. (*See* Pet. Exh. J; Mammolito deposition at 40). Mammolito stated that this letter was written approximately ten days after

Quid's undisclosed July 1990 meeting with Mammolito in Louisiana. (*See* Pet. Exh. J; Mammolito deposition at 9). This newly discovered evidence of a third undisclosed letter demanding payment was also intentionally withheld from petitioner. (*See* Pet. Exh. H; p. 2). This exculpatory letter was withheld throughout Manning's two trials, the federal discovery orders issued by Judge Smith in 1998, and is either still being withheld by Quid, or is also an additional document "missing" from Buffalo Grove's files. In any event, this undisclosed letter was *Brady* material that should have been disclosed prior to petitioner's trial.

In addition, during the pre-civil trial deposition of Sharon Dugan taken on October 7, 2004, Dugan gave sworn testimony revealing for the first time that she received a monetary compensation for her testimony. (*See* Pet. Exh. K; Dugan deposition at 55). Not only were her transportation and lodging costs in Kansas City paid for by the FBI, but she brought along her new husband (who was not involved in this case whatsoever) and they were given an additional spending allowance during their stay in Kansas City. This *Brady* material was never disclosed by law enforcement to the prosecutor or to petitioner prior to, or at trial.

One of the victims in this case, Charles Ford, gave sworn testimony at the civil trial that he told Buchan at the first interview that he believed one of the actual kidnapers was Carl Spero, (C.T. V11: 183-86), an individual that Ford knew

personally. Documentation of this exculpatory statement was withheld by both Buchan and Quid from prosecutors and petitioner at his trial, but finally surfaced during Manning's second trial.

After hearing extensive testimony from Mammolito, Dugan, and all of the law enforcement personnel involved in Manning and Engel's trials, Manning's Chicago jury explicitly found that agents Buchan and Miller knowingly induced or caused law enforcement officers to induce Mammolito, Dugan, and Carolyn Heldenbrand to give false testimony and concealed information from prosecutors. (App. 1-6). Manning's jury also found that Buchan had promised to pay Anthony Mammolito for his testimony. (*Id.*)

The foregoing chronology of events also conclusively demonstrates that this information was not available to petitioner during his direct appeal or his Rule 29.15 action. Thus, this proceeding is petitioner's only available avenue to seek judicial review of his claims of governmental misconduct that resulted in his wrongful conviction. Further facts will be developed in the argument section of this brief.

FILED

DEC X 4 2009

Thomas F. Simon,
CLERK, SUPREME COURT

*Leave granted
to file corrected
p. 21
12/4/09*

POINTS RELIED ON

1. PETITIONER IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS DISCHARGING HIM FROM HIS UNCONSTITUTIONAL CONVICTIONS AND NINETY (90) YEAR SENTENCES FOR THE CRIMES OF KIDNAPPING AND ARMED CRIMINAL ACTION IMPOSED BY THE CIRCUIT COURT OF CLAY COUNTY BECAUSE AGENTS OF THE PROSECUTION FAILED TO DISCLOSE MATERIAL EXCULPATORY AND IMPEACHMENT EVIDENCE THAT UNDERMINED CONFIDENCE IN THE OUTCOME OF PETITIONER'S TRIAL IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, ARTICLE I § 10 OF THE CONSTITUTION OF MISSOURI, AND MISSOURI SUPREME COURT RULE 25.03.

Banks v. Dretke, 540 U.S. 668 (2004)

Strickler v. Greene, 527 U.S. 263 (1999)

Merriweather v. State, ___ S.W.3d ____, 2009 WL 2762467 (Mo. banc September 1, 2009)

Benn v. Lambert, 283 F.3d 1040 (9th Cir. 2009)

U.S. Const. Am. XIV

Mo. Const. Art. I § 10

Mo. S.Ct. Rule 25.03

2. PETITIONER IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS DISCHARGING HIM FROM HIS UNCONSTITUTIONAL CONVICTIONS AND NINETY (90) YEAR SENTENCE FOR THE CRIMES OF KIDNAPPING AND ARMED CRIMINAL ACTION IMPOSED BY THE CIRCUIT COURT OF CLAY COUNTY BECAUSE PETITIONER'S CONVICTIONS WERE SECURED IN VIOLATION OF HIS RIGHT TO DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT DUE TO THE GOVERNMENT'S USE OF AND FAILURE TO CORRECT PERJURED TESTIMONY, THE FABRICATION OF POLICE REPORTS, PROVIDING MONETARY PAYMENT AND OTHER INDUCEMENTS TO SECURE FALSE TESTIMONY, BY PROVIDING ANTHONY MAMMOLITO WITH COPIES OF ALL POLICE REPORTS AND PRETRIAL DEPOSITIONS OF ALL OF THE STATE'S WITNESSES TO ENHANCE THE CREDIBILITY OF HIS FALSE TESTIMONY, ALL OF WHICH AFFECTED THE JUDGMENT OF THE JURY.

Napue v. Illinois, 360 U.S. 264 (1959)

Giglio v. United States, 405 U.S. 150 (1972)

Jackson v. Brown, 513 F.3d 1057 (9th Cir. 2008)

Killian v. Poole, 282 F.3d 1204 (9th Cir. 2002)

U.S. Const. Am. XIV

3. PETITIONER IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS DISCHARGING HIM FROM HIS CONVICTIONS AND SENTENCES FOR TWO COUNTS OF ARMED CRIMINAL ACTION BECAUSE THESE CONVICTIONS WERE SECURED IN VIOLATION OF STATE LAW BECAUSE THESE CHARGES WERE NOT FILED WITHIN THE THREE YEAR STATUTE OF LIMITATION FOR THOSE OFFENSES.

State v. Hyman, 87 S.W.3d 384 Mo. App. W.D. 2001)

State, ex rel. Simmons v. Roper, 112 S.W.3d 397 (Mo. banc 2003)

Reed v. Ross, 468 U.S. 1 (1984)

Brown v. Gammon, 947 S.W.2d 437 (Mo. App. W.D. 1997)

§ 556.036 R.S.Mo. (2000)

ARGUMENT I

PETITIONER IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS DISCHARGING HIM FROM HIS UNCONSTITUTIONAL CONVICTIONS AND NINETY (90) YEAR SENTENCES FOR THE CRIMES OF KIDNAPPING AND ARMED CRIMINAL ACTION IMPOSED BY THE CIRCUIT COURT OF CLAY COUNTY BECAUSE AGENTS OF THE PROSECUTION FAILED TO DISCLOSE MATERIAL EXCULPATORY AND IMPEACHMENT EVIDENCE THAT UNDERMINED CONFIDENCE IN THE OUTCOME OF PETITIONER’S TRIAL IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, ARTICLE I § 10 OF THE CONSTITUTION OF MISSOURI, AND MISSOURI SUPREME COURT RULE 25.03.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.* at 87. Later, in *Strickler v. Greene*, 527 U.S. 263 (1999), the court more precisely articulated the three essential elements for establishing a *Brady* claim: “the evidence at issue must

be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the state, either willfully or inadvertently; and prejudice must have ensued.” *Id.* at 281-282. It is also well settled that the *Brady* rule encompasses evidence “known only to police investigators and not the prosecutor...In order to comply with *Brady*, therefore, ‘the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government’s behalf in this case, including the police.’” *Id.* at 280-281; quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

Like the due process requirements of the *Brady* line of cases, Missouri Rule 25.03 requires the prosecution, upon written request of defendant’s counsel, to disclose exculpatory evidence to the accused prior to trial. This rule “imposes an affirmative requirement of diligence and good faith on the state to locate records not only in its own possession or control but in the control of other government personnel.” *Merriweather v. State*, ____ S.W.3d ____ 2009 WL 2762467 (Mo. banc September 1, 2009) at *4. Although discovery violations under Rule 25.03 are trial errors that normally must be raised on direct appeal, this Court recently held that such claims may be considered in a subsequent post-conviction action in exceptional circumstances in the interest of fundamental fairness. *Id.* at *3.

As a threshold matter, in the courts below, respondent has asserted various procedural bar defenses arising from the undisputed fact that this *Brady* claim was not presented in petitioner's 29.15 or direct appeal. A habeas petitioner can overcome a procedural bar defense if he can show "cause" for not presenting his claims in state court and "prejudice" resulting from a Constitutional error, or a fundamental miscarriage of justice. *See e.g. Coleman v. Thompson*, 501 U.S. 722, 750 (1991). "Cause" as defined in *Murray v. Carrier*, 477 U.S. 478, 488 (1986), is a factor external to the defense or a cause for which the defense is not responsible.

In this action, the state has wisely abandoned its previous position that petitioner cannot establish cause for the default arising from the fact that the *Brady* claim was not raised on direct appeal or during the 29.15 proceedings. As the chronology of events set forth in the petition and in this brief demonstrates, cause exists because the factual basis for the claim was not available to petitioner during prior proceedings because the government "hid the ball" until it was forced to reveal this *Brady* material during the Steven Manning litigation. *See e.g. Williams v. Taylor*, 529 U.S. 420, 443-444 (2000). Thus, cause is established because interference by law enforcement officials made it impossible for the petitioner to advance his claims in state court in a timely and procedurally correct manner. *See Amadeo v. Zant*, 486 U.S. 214, 222 (1987); *Strickler*, 527 U.S. at 281-284.

The prejudice requirement to overcome a procedural bar is identical to the *Brady* materiality test. *Id.* at 282; *Banks v. Dretke*, 540 U.S. 668, 691 (2004). To establish *Brady* materiality, petitioner must “show a reasonable probability of a different result.” *Kyles*, 514 U.S. at 434. In assessing prejudice or materiality, reviewing courts must consider the totality of the exculpatory evidence suppressed by the government and consider its cumulative impact in light of the whole case. *Id.* at 436-437. *See also State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 545 (Mo. banc 2003).

In *Banks*, the Supreme Court noted that the cause and prejudice test in the context of a defaulted *Brady* claim “parallel two of the three components of the alleged *Brady* violation itself.” 540 U.S. at 691. Thus, if petitioner can demonstrate cause and prejudice and establish the third component of a *Brady* violation that the excluded evidence was favorable to him, he can establish his entitlement to habeas relief under *Brady*. *Id.*

As noted earlier, there can be little dispute that petitioner can meet the first part of the *Brady* test because the excluded evidence was clearly favorable to the accused. The evidence is overwhelming that Anthony Mammolito reached an agreement to be paid for his testimony and he was in fact paid \$500.00 by the Buffalo Grove Police Department after he testified against petitioner and Steven Manning. (App. 7-17).

In *Banks*, the state failed to disclose that a key prosecution witness was paid \$200.00 for his testimony. 540 U.S. at 685. In light of this fact, the Court in *Banks* held that it was beyond genuine debate that this witness's paid informant status qualified as evidence advantageous to *Banks*. *Id.* at 691. Other courts have found *Brady* violations in similar circumstances where government witnesses were paid for their testimony and this fact was not disclosed to the defense at trial. *United States v. Librach*, 520 F.2d 550, 553-554 (8th Cir. 1975); *Benn v. Lambert*, 283 F.3d 1040 (9th Cir. 2002). In *Benn*, among the other undisclosed impeachment evidence that was considered by that court, a key prosecution witness was given \$150.00 by the police in exchange for his promise to incriminate Benn. *Id.* at 1056-1057.

Apart from the Mammolito payment issue, other favorable evidence to the accused was suppressed by the government. The fact that Sharon Dugan was compensated for her trips to Kansas City was not disclosed to the jury. Likewise, it was not disclosed to the defense that Mammolito was provided with reports and depositions of other witnesses in the case and was in effect coached into providing testimony that fit in with Buchan and Quid's theory of the case. In similar circumstances, several reviewing courts have found that excluded evidence regarding law enforcement manipulation or coaching of prosecution witnesses is *Brady* material that is favorable to the accused. *See e.g. Banks*, 540 U.S. at 675; *Tillman v. State*, 128

P.2d 1123, 1139-1143 (Ut. 2005); *United States v. Boyd*, 833 F. Supp. 1277, 1344-1346 (N.D. Ill. 1993). Likewise, the post-trial letters written on Mammolito's behalf to federal authorities by Quid and Klopfenstein asking for leniency due to his cooperation in this case are undoubtedly favorable to petitioner. *See Jackson v. Brown*, 513 F.3d 1057, 1070-1071 (9th Cir. 2008). Finally, the failure to disclose Ford's statement that Carl Spero was involved in the kidnapping is also clearly exculpatory *Brady* material. *See Graves v. Dretke*, 442 F.3d 333, 340-344 (5th Cir. 2006).

As to the second and third elements of the *Brady* test, there is no dispute that government agents suppressed this exculpatory evidence until they were forced to reveal it during Steven Manning's federal habeas corpus and subsequent *Bivens* actions. As noted earlier, by conceding the cause element to overcome the procedural bar that had previously advanced in the courts below, respondent has already tacitly conceded that the government suppressed exculpatory evidence in this case.

Regarding the materiality of the suppressed evidence, petitioner submits that there can be no stronger argument for "materiality" or "prejudice" than the findings of Manning's civil jury. This case involves a unique situation where a reviewing court has the benefit of a jury verdict explicitly finding that exculpatory and impeachment evidence was withheld from petitioner's and Manning's trial counsel.

This civil jury verdict clearly rebuffs any procedural bar defense and shows an entitlement to habeas relief on the merits of the underlying claims.

The following evidence was presented and findings made by the jury and judge in Manning's *Bivens* action:

1. Mammolito was promised and paid money by government agents and was induced to give false testimony against Manning and Engel. (App. 4).

2. Carolyn Heldenbrand was induced to falsely identify Manning, and Sharon Dugan was induced to make false statements. (*Id.*, Exh. G at 17).

3. Mammolito's letter to Buffalo Grove Police in July 1990 was withheld by the government. (Pet. Exh. J at 40).

4. Sgt. Quid's undisclosed visit to Mammolito on July 12, 1990 was suppressed. (C.T. V14:172).

5. Quid's now "missing" report depicting Mammolito's new revelations at the above undisclosed visit was not disclosed. (C.T. V14: 174-77).

6. Dugan's "spending allowance" for her testimony was not disclosed. (Pet. Exh. K at 55).

7. Quid's "missing" (or intentionally withheld) reports regarding undisclosed meetings with Dugan were suppressed. (C.T. V14: 174-75).

8. Buchan or Quid's intentionally withheld documentation of (victim) Ford's exculpatory information relating to Carl Spero's involvement. (C.T. V11:183-86).

9. Mammolito's undisclosed and undocumented statements to prosecutor Klopfenstein regarding a different perpetrator of this kidnapping. (C.T. V15: 192-94).

10. Mammolito's undisclosed letter to Clay County prosecutors demanding payment prior to petitioner's trial. (App. 7-8).

To establish materiality from the suppression of this evidence, petitioner does not have to demonstrate that it is more likely than not that he would have received a different verdict with the evidence; rather, "[a] 'reasonable probability' of a different result is ... shown when the government's evidentiary suppression, 'undermines confidence in the outcome of the trial.'" *Kyles*, 514 U.S. at 434; quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985). It is not a close question that the suppression of the aforementioned impeachment evidence that would have utterly destroyed the credibility of star witness Anthony Mammolito and the other key prosecution witness Sharon Dugan, meets the *Brady* materiality test because these two witnesses were central to the prosecution's case and the excluded evidence "would have provided powerful and unique impeachment evidence demonstrating

that [Mammolito] had an interest in fabricating his testimony.” *Horton v. Mayle*, 408 F.3d 570, 578-579 (9th Cir. 2005).

Even when this case was tried in 1991, the evidence of petitioner’s guilt was tenuous at best. Both Mammolito and Dugan had inherent credibility problems even then. Mammolito was a multiple convicted felon and “snitch.” (See Exh. Q pp. 118-119). Dugan’s credibility was called into question because she was the bitter ex-wife of petitioner. (*Id.* pp. 208, 226-229). In light of the evidence that has emerged during litigation involving co-defendant Steven Manning that further undermines their credibility, it is not a close question that this additional impeaching information, had it been disclosed to the jury, is sufficiently compelling to entitle petitioner to a new trial because there is a reasonable probability the result at trial would have been different. *Strickler v. Greene*, 527 U.S. 263, 289-290 (1999). As this Court recently held in *Merriweather*, prejudice for related violations of *Brady* and Rule 25.03 “doubtlessly ensued because the credibility of the state’s witness was pivotal” and the excluded evidence would have impacted the jury’s assessment of credibility. *Id.* at *5.

Had petitioner’s jury heard the facts contained in Mammolito’s letters to the prosecutor and Buffalo Grove Police Department referencing a deal for payment (Pet. Exh. B, D) and Del Re’s letter to Mammolito’s mother enclosed with a five hundred

dollar check (Pet. Exh. C), along with Buffalo Grove's letter (Pet. Exh. E) and Klopfenstein's letter (Pet. Exh. I) to the U.S. Parole Board and U.S. Attorney on behalf of Mammolito for leniency, coupled with Sharon Dugan's payment and other evidence of investigative misconduct, there is more than a reasonable likelihood that petitioner would have been acquitted. *See e.g. United States v. Foster*, 874 U.S. 491, 494-495 (8th Cir. 1998); *Kyles*, 514 U.S. at 444; *Banks* 540 U.S. at 699-703 (finding that non-disclosure of paid-informant status of key prosecution witness was material). The cumulative impact of the suppressed evidence would have completely undermined the credibility of the two key government witnesses: Sharon Dugan and Anthony Mammolito. *See Simmons v. Beard*, 581 F.3d 158, 171-172 (3rd Cir. 2009) (relief granted where collective impact of four *Brady* violations would make the state's two key witnesses "substantially less credible."). These facts present a textbook case of a *Brady* violation undermining confidence in the verdict as demonstrated by the subsequent verdict in Manning's civil trial and the fact that Clay County prosecutor, when confronted with this newly discovered evidence in 2004, dismissed all charges against Steven Manning. (*See* Exh. G).

Article IV, Section 1 of the United States Constitution dictates that full faith and credit shall be given by each state to foreign judicial proceedings. Had Mr. Engel been the plaintiff against the United States, Buchan, and Miller, this Court would be

collaterally estopped from re-adjudicating the *Brady* violations with respect to Engel because these very same violations were previously adjudicated with respect to the same defendants in *Manning v. United States*. “The doctrine of collateral estoppel, or issue preclusion, precludes the same parties or those in privity from relitigating issues that were necessarily and unambiguously decided in a previous judgment.” *Deatherage v. Cleghorn*, 115 S.W.3d 447, 454 (Mo.App. S. D. 2003), quoting *Jeffrey v. Cathers*, 104 S.W.3d 424, 430 (Mo. App. E.D. 2003).

The elements of collateral estoppel are: (1) the issue decided in the prior adjudications mirrors that in the present action; (2) the prior adjudication resulted in a final decision on the merits; (3) the party against whom collateral estoppel may apply participated as a party or in privity with a party to the prior adjudication; and (4) the party against whom the doctrine may apply has had a full and fair opportunity to litigate the issue.

In re Marriage of Evans, 155 S.W.3d 90, 96 (Mo. App. S.D. 2004).

All four elements would clearly be met, and Missouri is obligated to recognize a foreign judgment “unless that judgment is void for lack of jurisdiction over the person or over the subject matter, or is obtained by fraud.” *Phillips v. Fallen*, 6 S.W.3d 862, 864 (Mo. banc 1999). The same holds true concerning federal

judgments. *Creative Walking, Inc. v. American States Ins. Co.*, 25 S.W.3d 682, 687 (Mo. App. E.D. 2000).

Petitioner has spent nearly twenty years in prison for a crime he did not commit. Like Steven Manning, petitioner deserves a new trial and his freedom because of egregious governmental misconduct. Because the evidence convincingly establishes that the government withheld material exculpatory evidence from petitioner prior to trial, habeas relief is warranted.

ARGUMENT II

PETITIONER IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS DISCHARGING HIM FROM HIS UNCONSTITUTIONAL CONVICTIONS AND NINETY (90) YEAR SENTENCE FOR THE CRIMES OF KIDNAPPING AND ARMED CRIMINAL ACTION IMPOSED BY THE CIRCUIT COURT OF CLAY COUNTY BECAUSE PETITIONER'S CONVICTIONS WERE SECURED IN VIOLATION OF HIS RIGHT TO DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT DUE TO THE GOVERNMENT'S USE OF AND FAILURE TO CORRECT PERJURED TESTIMONY, THE FABRICATION OF POLICE REPORTS, PROVIDING MONETARY PAYMENT AND OTHER INDUCEMENTS TO SECURE FALSE TESTIMONY, BY PROVIDING ANTHONY MAMMOLITO

WITH COPIES OF ALL POLICE REPORTS AND PRETRIAL DEPOSITIONS OF ALL OF THE STATE’S WITNESSES TO ENHANCE THE CREDIBILITY OF HIS FALSE TESTIMONY, ALL OF WHICH AFFECTED THE JUDGMENT OF THE JURY.

In addition to the *Brady* claim set forth above, the same evidence also establishes a related due process violation arising from the fact that petitioner’s conviction was secured through the use of perjured testimony.⁸ Manning’s jury explicitly found that Agent Buchan suborned the perjury of Mammolito, Dugan, and Carolyn Heldenbrand. (App. 4). Manning’s jury also found that the FBI failed to inform Clay County prosecutors that they had manipulated and fabricated the testimony of those witnesses. (*Id.*) The FBI documented the fabricated statements of each witness in official police reports, and misrepresented to Clay County prosecutors that the statements made by each witness were their own recollection of events surrounding the alleged kidnapping.

⁸ Reviewing courts have differed as to whether a perjured testimony claim is distinct from a *Brady* claim in situations involving undisclosed deals made with prosecution witnesses. *See e.g. Jackson v. Brown*, 513 F.3d 1057, 1076, n. 12 (9th Cir. 2008). The Supreme Court, in *Banks*, declined to address whether such claims “fit under one umbrella.” 540 U.S. at 690, n. 11.

Quid and Buchan were very fortunate to have found Mammolito to be such a malleable witness. Unfortunately, Mammolito, whom the investigators were desperately trying to get to corroborate their scripted scenario of the kidnapping, could not keep this manufactured script straight in his own mind. To get around this dilemma, the agents arranged for Mammolito to receive copies of all the witness statements and pre-trial depositions at the Platte County Jail where he was being held prior to Manning and Engel's trial. The fact that he received these documents is evidenced by Mammolito's handwritten February 1992 letter to Sgt. Quid (App. 9-15) and is corroborated by the affidavit of Harold Bascom, who saw and read these documents for himself. (*See* Pet. Exh. A).

In sworn testimony presented to the civil jury, Judge Gabbert and prosecutor Klopfenstein adamantly denied giving Mammolito any of these documents. The responsibility for this misconduct has to fall on the only two people, other than the prosecutors, to have possession of these documents, Buchan and Quid, since these documents could not have come from any other source.

One of the most cherished principles of our criminal justice system, "implicit in any concept of ordered liberty," is that the state may not use false evidence to obtain a criminal conviction. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Deliberate deception of a judge and a jury is "inconsistent with the rudimentary demands of

justice.” *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). Therefore, “a conviction obtained through the use of false evidence, known to be such by representatives of the state, must fall under the Fourteenth Amendment.” *Napue*, 360 U.S. at 269. Where it can be shown that the government knowingly permitted the introduction of false testimony, reversal is “virtually automatic.” *United States v. Stofsky*, 527 F.2d 237, 243 (2nd Cir. 1975).

The government also violates a criminal defendant’s right to due process of law, guaranteed by the Fourteenth Amendment when it allows false evidence to go uncorrected when it is presented. *Giglio v. United States*, 405 U.S. 150, 155 (1972); *Pyle v. Kansas*, 317 U.S. 213 (1942). As summarized below, there can be little doubt that petitioner’s conviction was secured through the use of perjured testimony, known by agents of the government to be false when it was presented.

A. Anthony Mammolito

As noted earlier under Argument I, the civil jury in *Manning* unanimously found that Buchan had manipulated the criminal trial testimony of Anthony Mammolito, the State's star witness, and hid this fact from the prosecutors. (App. 4). The civil jury also unanimously found that Mammolito had a "deal" in place with Buchan and Quid prior to his criminal trial testimony, where he (Mammolito) would be secretly paid for his testimony against petitioner and his co-defendant, and that

information of this deal was withheld from Missouri prosecutors by Buchan (and Quid). (*Id.*) Both of these unanimous jury findings are bolstered by District Judge Kennelly's assessment of the evidence in his Memorandum. (*See* Exh. G, pp. 17-18).

Prior to his trial, petitioner, through his attorney, had filed two motions for discovery, specifically requesting information of any deals, understandings or agreements, or offer of such, with Mammolito or any other witness. (*See* Pet. Exh. H). When Mammolito testified at the trials of Manning and petitioner, he was specifically asked by then prosecutor Gabbert if there had been any agreements for his testimony to which Mammolito responded, “No nothing whatsoever, no agreements.” (Exh. Q, Tr. 177). At Manning’s two trials, Mammolito also emphatically denied he received any deals from any law enforcement agency. (Manning 1st Trial Tr. 156-157; 2nd Trial Tr. 389). Mammolito, when asked by the prosecutor if he expected any assistance from any law enforcement agency, Mammolito stated: “None whatsoever. And I haven’t been seeking any assistance.” (*Id.* 449). Buchan and Quid *knew* that Mammolito was perjuring himself and failed to inform either prosecutor of the situation or correct this false testimony when they subsequently took the stand at petitioner’s trial. The government’s use of and failure to correct Mammolito’s false testimony, therefore, violates due process under *Giglio v. United States*, 405 U.S. 150, 155 (1972) and *Napue*.

In addition, Buchan and Quid withheld from the prosecutors the methods they employed, and how and under what circumstances they successfully manipulated Mammolito's testimony, by providing Mammolito with witness statements of the other witnesses. (See Pet. Exh. A; App. 9; Exh. G at 20, n. 6). Mammolito's undisclosed February 1992 letter to Sgt. Quid (Pet. Exh. D) is significant for other reasons apart from the money issue. Just before demanding his promised payoff, Mammolito mentions that, "as (they) know" he has "read all investigative reports." (App. 9). The obvious inference is that Mammolito is exerting his leverage over the investigators by flaunting the fact that government agents provided him these documents to help convict petitioner and his co-defendant, and the agents had better stand by their promise to pay him.

B. Sharon Dugan

In previous appeals, the respondent has always relied upon the testimony of Sharon Dugan to bolster Mammolito's credibility. This argument is no longer viable. The civil jury in *Manning* found that Dugan's testimony had been manipulated and fabricated as well, by Agent Buchan. (App. 4). The civil jury was entitled to find (and did find) that Dugan's trial testimony was not credible. Evidence emerged at Manning's civil trial to suggest that her testimony at petitioner's trial was false. (See C.T. V13:172-202). Manning's civil jury concluded that Buchan and Quid withheld

from the Clay County prosecutors the manner in which they had disseminated critical information to Dugan. (*See* Exh. G at 20). As was done with Mammolito, Buchan and Quid had armed Dugan with facts of the case she otherwise would not have known, which gave her the necessary credibility to secure the conviction of petitioner and his co-defendant at their respective trials.

As an example, civil trial testimony revealed that Quid started out this “fishing trip” (his own words) by asking Dugan in 1989 if she remembered her former husband ever going to Kansas City, and whether 1984 would be the right year, to which she replied “probably.” (C.T. V14: 161-162). By the time of petitioner’s trial...after several undocumented meetings with Buchan and Quid ...Dugan provided a vivid account of details and events she claimed occurred in February 1984, (C.T. V13: 191-95). How she went from point A (“probably”) to point B (vivid dates and details) is a mystery and cannot be explained in any police report or witness statement.

Another curious event occurred during Dugan’s first meeting with Quid, where Quid described for Dugan a ring they were seeking, even showing Dugan a drawing of the ring that Quid had made. It took Dugan about a week to come up with such a ring (from among several diamond rings that she insisted petitioner had given her, although she bizarrely stated she had thrown the rest of them in the garbage). (C.T.

V13: 182-84). However, the ring she produced did not match the number of diamonds the ring contained as described by Ford, or even the drawing Quid had made and memorialized in his report, nor the official report submitted by Agent Buchan. (C.T. V13: 185-86).

Perhaps the most telling example of the government's manipulation of Dugan involved Buchan showing Dugan a paperback book titled: "How to Rip off Drug Dealers," that Buchan allegedly recovered from a briefcase belonging to petitioner. Thereafter, Dugan suddenly "remembered" having seen petitioner reading this book approximately *seven months* prior to the alleged kidnapping. Buchan quickly documented this sudden revelation in an official report. Months later, Dugan repeated this reference to the book in a sworn deposition. After that deposition, and to Buchan's dismay, he learned the paperback book was not published until *one month* prior to the alleged kidnapping. By the time of the trial, and after numerous undocumented meetings with Buchan (Exh. Q pp. 236), Dugan changed her prior sworn testimony and stated that she saw this book at a time that comported with its date of publication (*See* Exh. O, Tr. 478-81). During the civil trial, when it became time for Dugan to confirm that she had actually told law enforcement what they had documented in their official reports, she could not do so. (C.T. V13: 172-202).

Finally, like Mammolito, Dugan also admitted receiving payment for her testimony. (See Pet. Exh. K; Dugan deposition at 55).

C. Witness Carolyn Heldenbrand

Although this witness never identified petitioner as being a perpetrator of the alleged kidnapping, her discredited identification of co-defendant Manning provides additional evidence regarding the scope and magnitude of Buchan's misconduct. Manning's civil jury found that Heldenbrand's trial testimony regarding events of the alleged kidnapping was tainted and had been manipulated by Buchan and Quid, and that these actions by these agents had been withheld from Missouri prosecutors. (App. 4). The civil jury also concluded that Heldenbrand was coerced into falsely identifying Manning as the person who picked up the ransom money. (See Exh. G at 14-17). Moreover, these agents created false official documents of this "alleged" identification (Buchan's report has Heldenbrand's I.D. of Manning being 100% positive) and presented those reports to Clay County prosecutors in an effort to get them to file charges in this case.

Furthermore, evidence was presented at the civil trial of other questionable actions by Buchan involving Heldenbrand. Almost one year after visiting Heldenbrand and securing her identification of Manning, Agent Buchan happened to be re-inventorying the results of a 1986 search of Manning's storage locker (that was

originally not relevant to this case) when he discovered that Manning owned a hat “with side flaps.” (C.T. V11: 170). As he had previously done with Dugan, Buchan alleged that Heldenbrand called him out of the blue one year later and reported that she had “just remembered” that the “bagman” wore a hat with side flaps. (*Id.* at 170-73). It is apparent that the civil jury did not believe Buchan's explanation for Heldenbrand’s revelation in reaching its verdict.

D. Victim Charles Ford

Buchan and Quid left no stone unturned in their crusade to secure the convictions of petitioner and his co-defendant. Even one of the victims (Charles Ford) was manipulated by Buchan and Quid into changing his testimony.

Ford gave sworn testimony that the agents had “pressured” him into changing his recollection of the events and dates in his story to comport with Buchan's and Quid's version or script. (C.T. V11: 183-86). Ford further testified about how he kept telling Buchan that it was his firm belief that one of the kidnapers was Carl Spero (a person known to the victim), who was blown up and killed by someone thirty days after the alleged kidnapping.⁹ Buchan's insistence on ignoring this

⁹ The involvement of Spero could have completely undermined the prosecution’s case against petitioner in the minds of the jury because Spero was killed in January 1984 (C.T. V14: 183-186).

legitimate lead, and Mammolito's undisclosed statement to prosecutor Klopfenstein that there was a different person involved in this kidnapping whom Mammolito refused to name because that person had since died (C.T. V15: 192-94), lends additional credence to the civil jury verdict and the premise that petitioner and his co-defendant were framed by Buchan and Quid.

Respondent, in past appeals, has always alluded to Ford's "positive identification" of the ring that Dugan was alleged to have turned over to the investigators as unassailable proof of petitioner's involvement. Ford's original statement to Buchan and Quid was that a ring had been taken from him by the kidnapers, and the ring contained *five* diamonds, according to Buchan's reports. (Tr. 438). The ring that Dugan was alleged to have turned over to authorities, almost six years later, contained *seven* diamonds. (Id. 439). Ford's oddly-equivocal identification of the ring at petitioner's trial was "It *looks* like my ring." (Exh. Q 24, 25, 71). The ring allegedly turned over by Dugan may very well have resembled or was even shaped like Ford's stolen ring, but diamonds have never been known to reproduce. One would expect that Ford, who testified the stolen ring was "made special for (him)," and who had to pay for each diamond in that ring, would know exactly how many diamonds that this ring contained.

Petitioner submits that, in the initial interview with Buchan, Ford truthfully described his stolen ring as having *five* diamonds on it. It was only through Buchan's "pressure" (Ford's words) that Ford made the half-hearted attempt to identify the *seven* diamond ring as, "it looks like it."

E. Agent Buchan and Sgt. Quid

Both Agent Buchan and Sgt. Quid both testified at petitioner's and his co-defendant's trials, immediately after Mammolito. (Tr. 291-465). The Manning verdict leads to the conclusion that both Buchan and Quid knew Mammolito testified falsely about undisclosed deals and willfully created documents containing false witness statements. Buchan and Quid *knew* that Mammolito's testimony was false and that other evidence was manipulated through their actions, and failed to inform the prosecutors of what they had done. Instead, they simply remained mute and knowingly and intentionally perpetuated a fraud upon the trial court. These repugnant actions on the part of these agents undoubtedly violated the Constitution under *Napue* and *Giglio*. Additionally, as noted by Judge Kennelly (Exh. G at 16), Agent Buchan did everything possible at the civil trial to obstruct Manning's presentation of his evidence establishing governmental misconduct.

To prevail on the due process violation involving perjured testimony under *Napue* and *Giglio*, a petitioner must establish that the prosecution knew or should

have known that false testimony was utilized and that prejudice ensued. *Jackson v. Brown*, 513 F.3d at 1071-1072. The test for prejudice resulting from the use of perjured testimony is more lenient than the *Brady* materiality test and a new trial is required where there is any reasonable likelihood that the perjured testimony could have “affected the judgment of the jury.” *United States v. Bagley*, 473 U.S. 667, 678 (1985).

Despite the fact that the prosecutors testified and Manning’s civil jury found that they did not have personal knowledge that Mammolito was committing perjury regarding his deals, petitioner can still meet the first prong of the *Napue-Giglio* test. In *Napue*, the Supreme Court explicitly stated: “[I]t is established that a conviction obtained through the use of false evidence, known to be such by representatives of the state, must fall under the Fourteenth Amendment. The same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears.” *Napue*, 360 U.S. at 269. In *Giglio*, the court also found a *Napue* violation when the prosecutor lacked personal knowledge of the perjury. In that case, the court held that one prosecutor’s unknowing failure to correct false testimony that disavowed promises made by another prosecutor violated due process. 405 U.S. at 155. In reaching this conclusion, the court in *Giglio* stated: “The prosecutor’s office is an entity and as such it is the spokesman for the government. A promise made by

one attorney must be attributed for these purposes, to the government.” *Id.* at 154. Thus, *Napue* and *Giglio* stand for the proposition that the element of the “knowing use” of perjured testimony is established when any of the state’s representatives, including the police, would know that the testimony presented at trial was false. *Jackson v. Brown*, 513 F.3d at 1075 (finding *Napue* violation resulting from promises of leniency given to a prosecution witness by the police that was concealed from the prosecution).

The substance of and chronology surrounding the discovery of the suppressed exculpatory evidence, including letters written by Mammolito, Quid, and Klopfenstein prior to and after the trial conclusively demonstrates that the prosecution and its agents clearly knew or should have known that Mammolito was committing perjury. Coupled with the fact that the jury in Manning’s *Bivens* trial explicitly found that Buchan’s suborned perjury from Dugan and Mammolito, there can be little doubt that petitioner’s convictions were unconstitutionally tainted by Mammolito and Dugan’s perjured testimony. For the reasons set forth regarding the discussion of *Brady* materiality under Argument I, it is beyond dispute that this perjured testimony affected the judgment of the jury.

In *Killian v. Poole*, 282 F.3d 1204 (9th Cir. 2002), the Ninth Circuit granted habeas relief to a California prisoner due to the presentation of perjured testimony of

the prosecution's star witness. *Id.* at 1209-1210. As in this case, the key witness against Killian falsely denied that he had received any deals from the state in exchange for his testimony. *Id.* at 1208. Remarkably, part of the evidence that established perjury in *Killian* consisted of a letter that this witness wrote to the prosecutor after the trial. *Id.* at 1208-1209.

In *Jackson v. Brown, supra*, the Ninth Circuit granted the petitioner a new trial on a *Brady*/perjured testimony claim that involved strikingly similar facts to those presented in this case. Like this case, *Jackson* involved the state's failure to disclose deals made with two key government witnesses involving promises of leniency. 513 F.3d at 1070-1072. With regard to one informant, the prosecution failed to disclose that he had promised to write a letter on the inmate's behalf to allow him to serve out his California prison sentence in Arizona in exchange for his cooperation, *Id.* at 1070, and therefore knew that this witness was perjuring himself when he denied receiving any deals for his testimony. *Id.* at 1071-1072.

The second informant in *Brown* received promises of leniency from members of the sheriff and police departments involving other criminal charges in exchange for his testimony. *Id.* Despite the fact that the prosecutor had no personal knowledge of these agreements between the witness and the police, the Ninth Circuit found a *Napue* violation. *Id.* at 1071-1077. On the issue of materiality, the court in *Jackson*

had little difficulty in finding that the *Brady* and *Napue* violations affected the judgment of the jury because both of these witnesses' willingness to perjure themselves to keep the promises of leniency made to them secret would certainly have called into question in the minds of the jury the truth of all of their testimony. *Id.* at 1076-1078.

Like Gloria Killian and Earl Jackson, petitioner deserves a new and fair trial untainted by the stench of perjury. Habeas relief is warranted.

ARGUMENT III

PETITIONER IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS DISCHARGING HIM FROM HIS CONVICTIONS AND SENTENCES FOR TWO COUNTS OF ARMED CRIMINAL ACTION BECAUSE THESE CONVICTIONS WERE SECURED IN VIOLATION OF STATE LAW BECAUSE THESE CHARGES WERE NOT FILED WITHIN THE THREE YEAR STATUTE OF LIMITATION FOR THOSE OFFENSES.

The Clay County Prosecutor's Office lacked the jurisdiction to charge, and the trial court lacked the jurisdiction to proceed to trial on the two armed criminal action charges. Petitioner's charges arose from an alleged crime that occurred on or about February 9, 1984, in Clay County, Missouri. Petitioner was charged by way of complaint in the Seventh Judicial Circuit Court of Clay County on July 20, 1990, with

two counts of kidnapping (Class A felony) and two counts of armed criminal action, over six years after the alleged crimes were committed. Armed criminal action charges must be filed within a three year statute of limitation period. *State v. Hyman*, 37 S.W. 3d. 384 (Mo. App. W.D. 2001). In *Hyman*, the Missouri Court of Appeals held that because the felony of armed criminal action has no classification, and includes its own penalty, it is an unclassified code offense that is subject to the three year statute of limitation period. *Id.* at 389-390; *see also*, § 556.036 R.S. Mo. (2000).

The circuit court below declined to address this claim finding it to be procedurally barred because it was not raised on direct appeal or at the time of trial. (See Exh. L at p. 15-16). The circuit court also expressed the view that petitioner could not show cause and prejudice because he and his attorney “were fully able to raise this claim at the time of trial and chose not to do so.” (*Id.* 16).

The circuit court’s procedural bar analysis fails to take into account the fact that the intervening *Hyman* case created the legal basis for raising a statute of limitations challenge to the armed criminal action statute. 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 armed criminal action charges was unavailable to him. *See State v. Hyman*, 37 S.W. 3d. 384 (Mo. App. W.D. 2001).

This Court, in striking down the juvenile death penalty, rejected an identical procedural bar argument from the Missouri Attorney General. *State ex. rel. Simmons v. Roper*, 112 S.W.3d 397, 400-401 (Mo. banc 2003) *affd.*, *sub. nom.*, *Roper v. Simmons*, 543 U.S. 551 (2005). Like the *Atkins* decision in *Simmons*, the *Hyman* decision establishes cause under the novelty exception to the procedural bar rule. *Id.* If respondent's procedural bar argument he advanced in the circuit court had merit, Christopher Simmons would have been executed in 2003.

At the time *Hyman* was decided, the armed criminal action statute had been on the books for approximately 25 years. Prior to the *Hyman* litigation, no criminal defense lawyer in this state had ever believed they had a legal ground to argue that ACA charges must be brought within a three year statute of limitation. Because the *Hyman* decision was a "bolt from the blue," this novel legal development establishes cause under *Reed* because there was no reasonable basis in existing law for Engel's trial or appellate counsel to raise a time bar challenge to these charges in the early 1990s. 468 U.S. at 14-16. Because there was no lack of diligence or deliberate bypass, the lack of knowledge of the legal basis for this claim overcomes any procedural bar. *See Brown v. Gammon*, 947 S.W.2d 437, 440 (Mo. App. W.D. 1997).

In light of *Hyman*, the prosecutor's office lacked the jurisdiction to charge this crime in 1990, since the statute of limitation had expired more than three years prior

to the time the original complaint was filed. Furthermore, when co-defendant Manning was returned to Clay County, Missouri for possible retrial there, the charges of armed criminal action were immediately dismissed when the *Hyman* ruling was brought to the attention of the prosecutors, before they made the decision to dismiss the remaining charges and allow Manning to secure his freedom. Petitioner's armed criminal action convictions and sentences should be set aside.

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 12,230 words, excluding the cover, table of contents, table of authorities, jurisdictional statement, 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 a true and correct copy of the attached brief, a computer disk containing a copy of this brief, were mail, postage prepaid, this ___ day of November 2009, to:

Andrew Hassell
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Jefferson City, MO 65102

KENT E. GIPSON