IN THE CIRCUIT COURT OF ST. FRANCOIS COUNTY, MISSOURI
TWENTY-FOURTH JUDICIAL CIRCUIT

JEFFREY WEINHAUS Petitioner	)	
v.	)	Case No. 20SF-CC00053
STANLEY PAYNE, Warden Eastern Reception, Diagnostic and Correctional Center, Respondent.	)	

PETITIONER'S REPLY TO RESPONSE TO SHOW CAUSE ORDER

Respondent concedes that the State failed to disclose evidence that its key witness, Sgt. Folsom, suffered from PTSD and was under the influence of psychiatric medication at the time he shot Mr. Weinhaus four times. Respondent's pleading does not deny or dispute: 1) that the Missouri State Highway Patrol learned of Sgt. Folsom's condition following mandatory drug testing immediately after this officer-involved shooting; 2) that defense counsel timely requested disclosure of impeachment evidence about State's witnesses; and 3) that the State did not disclose this information despite its duty to do so.

Instead, Respondent's sole argument on the actual merits of Mr. Weinhaus' Petition is that the State's failure to disclose Folsom's medicated psychiatric condition was not *material*, and thus, not sufficiently prejudicial to require redress by this Court. Fortunately, despite Respondent's invalid procedural objections discussed below, Missouri's Rule 91 jurisprudence empowers this Court to correct

fundamental miscarriages of justice such as the one that has been suffered by Mr. Weinhaus. Indeed, habeas review is driven by the "imperative of correcting a fundamentally unjust incarceration." *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc 2000), citing *Schlup v. Delo*, 513 U.S. 298, 320-21 (1985).

Respondent's scant recitation of the facts in the final three paragraphs of its response is both incomplete and inaccurate. This Court should not accept Respondent's attempted diminution of the importance of Folsom's perception of events upon the jury's verdict, or the significance of not being able to impeach those perceptions with the fact that he experienced them through the lens of PTSD. A review of the State's evidence clearly shows that Mr. Weinhaus' convictions hinged upon Folsom's perceptions of Mr. Weinhaus' alleged actions.

First, Respondent fails to mention that the jury found Mr. Weinhaus "not guilty" of identical charges involving Corporal Mertens. To assert that Mertens' testimony merely mimicked Sgt. Folsom's is simply incorrect. It is more reasonable to assume that the jury disbelieved a significant portion of Mertens' testimony, because it convicted only on the counts where Folsom was alleged as the victim. Mertens, in fact, testified that he never saw Mr. Weinhaus' weapon come out of the holster, and he did not see the butt, handle or grip of Mr. Weinhaus' gun. (TR 421). He only saw him reach underneath the holster (TR 421). Mertens also testified that when Mr. Weinhaus fell to the ground after being shot in the head and chest, the weapon was still in the holster – he never saw the weapon come out of Mr. Weinhaus' holster. (TR 431-434).

Second, Respondent attempts to paint a nefarious gloss on the fact there were three loaded weapons in Mr. Weinhaus' car. Yet the State has never once asserted that Mr. Weinhaus did not have every legal right to own and possess those weapons. Indeed, Mr. Weinhaus was never charged with possessing an unlawful weapon of any sort. Further, the record shows that when Mr. Weinhaus met up with the officers, under the ruse concocted by them to return his computers, he did not exit his vehicle with anything but a lawfully holstered weapon on his hip, which he is entitled to openly carry under Missouri law. There is absolutely no evidence that, in the mere seconds between Mr. Weinhaus exiting his car to when he was gunned down by Folsom, that he ever tried to access any weapon inside the car.

Instead, the one and only issue for the jury's resolve was whether Mr. Weinhaus was attempting to draw his weapon at the time Sgt. Folsom shot him. This is precisely why the existence of Sgt. Folsom's pre-existing PTSD diagnosis and his medicated condition were so critically important for the jury to hear. Had the jury been privy to the lens through which Sgt. Folsom was experiencing and describing this encounter with Mr. Weinhaus, it would have made a material difference to the verdict.

For example, with expert testimony, defense counsel could have educated the jury about the dangerous misperceptions caused by the hyperarousal of Folsom's PTSD condition. Indeed, following this shooting, Respondent's own doctors determined that Sgt. Folsom's PTSD "gives him false signals of being under threat, he is fearful of pulling a gun and shooting someone when they are merely reaching into

their back pocket for a wallet, etc." (A13-A28, p.9). After Mr. Weinhaus' trial, Respondent litigated at length against Sgt. Folsom in a sealed civil wrongful termination case to establish just how serious Folsom's PTSD condition was and is, and how it prevented him from holding a job in law enforcement. Yet now, Respondent claims that such evidence, undisclosed in Mr. Weinhaus' criminal case, is simply not *material*. Such assertion is not only inconsistent, it is decidedly disingenuous. If this admittedly undisclosed condition was material enough to end Sgt. Folsom's career in law enforcement, it was certainly material for the jury's consideration before taking away Mr. Weinhaus' freedom.

Respondent also does not deny that the way in which defense counsel made strategy decisions would have been drastically altered had the State disclosed Sgt. Folsom's condition. For example, before Folsom became aware that Mr. Weinhaus had captured this encounter on his wrist-watch video, Folsom completely fabricated what had occurred. His initial descriptions of the encounter with Mr. Weinhaus are completely opposite of what was captured on the video.

Trial counsel believed that Folsom's lies were designed to cover up a bad shooting and to make it look justified. Counsel hypothesized that the physical tremors in Folsom's hand – a condition that was disclosed, but minimized by the State – caused a premature firing. While that may also be true, what counsel did not know is that Folsom had likely misjudged the situation entirely due to the hyperarousal caused by his PTSD – a psychiatric condition that he had, until that day, kept hidden from MSHP. Indeed, MSHP did not discover Folsom's pre-existing PTSD condition until after Folsom had shot Mr. Weinhaus. At that

point, MSHP removed him, understanding that he could not function as a law enforcement officer.

It is undeniable that Folsom's perception of events was key to the jury's determination of Mr. Weinhaus' actions, and that Folsom's PTSD condition directly affected those perceptions. Expert testimony could have explained the effect that the hyperarousal from PTSD would have on the tremors in Folsom's hand. Because the State suppressed this information about Folsom, defense counsel was unaware of it, could not investigate it, and could not educate the jury about it.

Further, had counsel known about Folsom's PTSD condition, counsel may have called the two FBI agents who were also on the scene at the gas station, albeit further away. Neither Agent Maruschak nor Agent Cunningham ever saw a gun in Mr. Weinhaus' hand (A184, p.25, A203, pp.19-20, A204, pp.22-23). In fact, as Mertens had also described, Mr. Weinhaus' gun was still in the holster when Sgt. Folsom removed it from underneath Mr. Weinhaus' gunshot-riddled body (A205, pp.25-26). Certainly, there was a danger for defense counsel to call additional law enforcement officers at trial, especially when the State did not call them as witnesses, because law enforcement officers would have a natural tendency to try and justify the use of force. Here, however, had Folsom's PTSD condition been lawfully disclosed to defense counsel, the calculus of showing just how faulty Folsom's perception of events was during the encounter would have been significantly altered, and would have justified calling additional witnesses who did not see what Folsom thought he saw.

Also, Respondent argues that Mr. Weinhaus' statement at a pretrial hearing where he was *pro se* and without counsel, and where the prosecutor acknowledged having previously requested a 552 exam of him, somehow shows that the State's failure to disclose Folsom's impeachment evidence was not material (Response 14). Ironically, this alleged statement was introduced through the testimony of Corporal Mertens which, as discussed above, the jury necessarily rejected. But even if it were considered an "admission" and not simply an argumentative, uncounseled retort about the officers being there to kill him, the fact remains that his statement alone would not justify the officers use of deadly force – Mertens admitted as much (TR.449). The only issue was whether Sgt. Folsom's testimony – that Mr. Weinhaus was drawing his weapon – was correct. Mr. Weinhaus' guilt or innocence hinged on Folsom's perception of this encounter, yet the most important facts to impeach his perception were hidden by the State from the defense.

Finally, Respondent attempts to justify Sgt. Folsom's failure to disclose his condition and medication history at his pre-trial deposition, alleging that defense counsel failed to specifically ask him if he was taking medication for PTSD. (Response 14-15). This begs the question of how defense counsel would know to ask Folsom about being medicated for PTSD when the State failed to disclose the fact that Folsom had PTSD in the first place. The State had been aware of Folsom's PTSD for the better part of a year when Folsom's deposition took place, yet it kept the defense in the dark. The question asked at the deposition, "What medication do you take?" surely encompasses the

medication that Folsom was taking for his PTSD. See *Evenstad v. Carlson*, 470 F.3d 777, 784 (8th Cir.2006) ("The Brady rule applies to evidence which 'impeaches the credibility of a ... witness'... whether or not the accused has specifically requested the information.") (citation omitted). Beyond that, Respondent's duty to disclose Folsom's condition continued even beyond Mr. Weinhaus' trial; this is especially true where Respondent subsequently litigated against Folsom in a sealed civil wrongful termination case, on the exact issue of Folsom's PTSD condition, yet it still failed to inform the defense about what it had known about Folsom all along.

Reply to Respondent's Legal Analysis

Respondent's response is completely void of any reference to recent habeas cases from the Missouri Supreme Court and our intermediate appellate courts directly addressing constitutional violations under *Brady v. Maryland*, 373 U.S. 83 (1963), raised for the first time in state habeas. This is likely because under a methodical analysis of those cases, Mr. Weinhaus is entitled to habeas relief from this court as well. The Supreme Court of Missouri has made clear that relief in habeas is available for procedurally barred claims where: (a) the procedural defect is caused by something external to the defense – that is, a cause for which the defense is not responsible – and (b) prejudice resulted from the underlying error that worked to the petitioner's actual and substantial disadvantage. *State ex rel. Clemons v. Larkins*, 475 S.W.3d 60, 75 (Mo. 2015).

In *Clemons*, for example, the Court unequivocally stated that "[e]vidence that has been deliberately concealed by the state is not

reasonably available to counsel and constitutes cause for raising otherwise procedurally barred claims in a petition for a writ of habeas corpus." *Id*. at 76, citing *Amadeo v. Zant*, 486 U.S. 214, 222 (1988). As will be discussed below, Mr. Weinhaus meets all of the standards for habeas relief set out in *Clemons* and similar Missouri cases.

Instead of focusing on the relevant standards, Respondent attempts to muddle this case with irrelevant procedural gamesmanship, beginning with its purported rebuttal to a *free-standing* actual innocence argument that Mr. Weinhaus never made.[1] While Respondent's *Amrine* analysis is apropos of nothing presented to this Court, it is also faulty and deserves to be corrected.

Respondent claims that free-standing innocence claims are not available in non-capital cases. Respondent made this same argument in *State ex. rel Ricky Kidd v. Korneman*, Dekalb County Case No. 18DK-CC00017 (August 14, 2019), but such argument was rejected by that habeas court, and not appealed further by Respondent. In Mr. Kidd's case, as here, Respondent cited to *State ex rel. Lincoln v. Cassady*, 517 S.W.3d 11 (Mo. App. W.D. 2017*)*, arguing that a non-capital habeas petitioner cannot make a free-standing actual innocence claim. The habeas court in Mr. Kidd's case rejected this argument, recognizing that in *In re Robinson v. Cassady*, SC No. 95892 (Mo. May 1, 2018) – a habeas case where a non-capital defendant had also asserted an

[1] Lest there be any doubt, Mr. Weinhaus maintains that he is actually innocent, and that he was the victim, not the perpetrator, of a shooting. But the claim brought before this Court rests on the constitutional *Brady* violation perpetrated by the State at his trial.

Amrine[2] actual innocence claim along with a due process violation claim regarding perjured testimony – the Supreme Court of Missouri appointed a special master to hear evidence on Robinson's claims, including his *Amrine* innocence claim. Mr. Kidd's habeas judge noted that, if the Western District's logic in *Lincoln v. Cassady* was correct, the Supreme Court would not have directed the special master to hear evidence on a claim it could not grant.[3]

Indeed, Missouri recognizes entitlement to habeas relief "in extraordinary circumstances, when the petitioner can demonstrate that a 'manifest injustice' would result unless habeas relief is granted." *Lincoln*, 517 S.W.3d at 16 (internal citations omitted). It is this correction of "manifest injustice" that forms both the basis of gateway claims noted in *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc 2000) (citing *Duvall v. Purkett*, 15 F.3d 745, 747 (8th Cir. 1994)), raised here, and also the basis of actual innocence claims as in *Amrine*, 102 S.W.3d at 545-47.

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[2] *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. 2003).

[3] The Special Master's report recommended relief on all claims, including the *Amrine* claim. *Robinson v. Cassady*, No. 95892, Master's Report to the Supreme Court of Missouri and Findings of Fact and Conclusions of Law (Mo. filed May 1, 2018) (unpublished). While the Supreme Court issued the Writ based on the master's finding that Robinson proved his "'gateway' claim of innocence in light of the constitutional violations that occurred during his trial," *Robinson*, No. 95892, the final order is not a rejection of the court's original exercise of jurisdiction; rather, it is an application of the principle that the habeas court will "address no more than that which is necessary to conclude that the habeas court's issuance of the writ of habeas corpus must be upheld." *State ex rel. Koster v. McElwain*, 340 S.W.3d 221, 258 (Mo. App. W.D. 2011).

The "manifest injustice" that must be corrected in Mr. Weinhaus' case is the constitutional violation that occurred when the State concededly withheld exculpatory evidence that Sgt. Folsom – its key eyewitness and alleged victim – suffered from PTSD and was medicated at the time he shot Mr. Weinhaus. Folsom's pre-existing psychiatric condition necessarily affected his perception of events at the time of the encounter and, thus, how this encounter was presented to the jury. Folsom has acknowledged that he perceives situations incorrectly due to his condition and the jury needed to hear that, because of his PTSD, Folsom likely misinterpreted that Mr. Weinhaus was drawing a weapon, when in fact, he was not. Had the jury known that Sgt. Folsom's perceptions were severely compromised by mental illness, it is more likely than not that no reasonable juror would have convicted him. The jury had already acquitted Mr. Weinhaus of taking any threatening action against Corp. Mertens, and the sole thread implicating Mr. Weinhaus in attempting to draw his weapon on Folsom was Folsom's own skewed interpretation of events viewed through the lens of his PTSD. The State's withholding of this exculpatory, material *Brady* evidence is the constitutional violation and the gateway for this Court to grant relief to Mr. Weinhaus.

The manifest injustice or miscarriage of justice standard requires Mr. Weinhaus "to show that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent,'" *Schlup*, 513 U.S. at 327 (1995) (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)), and "[t]o establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have

convicted him in the light [of new evidence of innocence]." *Id.* There are numerous habeas cases, in the same procedural posture as Mr. Weinhaus', involving similar material *Brady* violations, where courts around this State have granted relief. Mr. Weinhaus asks this Court to review these cases and, likewise, grant his petition.

State ex rel. Clemons v. Larkins, 475 S.W.3d 60 (Mo. 2015)

For example, in *Clemons*, the state deliberately suppressed and concealed observations contained in a pretrial release form, written by a bond investigator, about an injury to Mr. Clemons' face after he was interrogated by the police. 475 S.W.3d at 72-77. Clemons did not raise this *Brady* issue on direct appeal or during his post-conviction case. *Id.* Nevertheless, our Supreme Court granted relief in state habeas, finding that Clemons had shown cause and prejudice for the procedural default.

The Court instructed: "[t]o demonstrate cause, the petitioner must show that an effort to comply with the State's procedural rules was hindered by some objective factor external to the defense." *Id.* at 76 (quoting *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 336-337 (Mo. banc 2013)). It continued, "[e]vidence that has been deliberately concealed by the state is not reasonably available to counsel and constitutes cause for raising otherwise procedurally barred claims in a petition for a writ of habeas corpus." *Id.* (citing *Amadeo*, 486 U.S. at 222).

In *Clemons*, the Court found that the existence of a written record created by an employee of the board of probation and parole noting a significant injury to Mr. Clemons' face less than three hours after he

was booked, that was altered after the lead prosecutor for the state had knowledge of the report's content and attempted to get the author of the report to change his statements, was substantial evidence that the state deliberately concealed the evidence and that this evidence was not, therefore, reasonably available to defense counsel due to an objective factor external to the defense. *Id.* at 77. Accordingly, the Court determined that Mr. Clemons had established the cause needed to overcome the procedural bar to review of his habeas claim by showing that this evidence was not reasonably available to counsel because of a reason external to the defense, i.e., the *Brady* violation. *Id.*

The same is true in Mr. Weinhaus' case. The suppressed *Brady* material about Sgt. Folsom's psychiatric condition was, in fact, suppressed by the State and material to Mr. Weinhaus' trial. Mr. Weinhaus was not on notice that Sgt. Folsom's pre-existing PTSD existed. Indeed, counsel requested disclosure of such impeachment evidence and the State was aware of Folsom's condition. Folsom also was deposed and asked about what medication he was taking. But despite MSHP knowing about Folsom's PTSD and removing him from the Highway Patrol because of it, the State withheld this information from Mr. Weinhaus' defense counsel. There was no failure to use diligence on his part and therefore no default.

Certainly, Mr. Weinhaus had no reason to suspect this information, or to suspect that the state withheld this exculpatory evidence. In any event, Mr. Weinhaus could not have independently obtained HIPAA-protected medical and psychiatric records of a state employee. There was no default of this claim. The State's failure to

disclose evidence material to the defense satisfies the cause and prejudice test to excuse Mr. Weinhaus' failure to raise this claim in an earlier proceeding. *McElwain*, 340 S.W.3d at 248 (citing *Amadeo*, 486 U.S. 214).

Turning to the prejudice prong of habeas review, the *Clemons*' Court stated that "[t]he determination of whether prejudice resulted from the underlying error under a cause and prejudice standard is identical to this Court's assessment of prejudice in evaluating Mr. Clemons' Brady claims." *Id.*, 475 S.W.3d at 77. Therefore, if Mr. Clemons "establishes the prejudice necessary to support his Brady claims, he will have shown the required prejudice to overcome the procedural bar for habeas relief." *Id.* This is undoubtedly why Respondent – although never citing the main *Brady* habeas cases – nevertheless focuses its argument on the *materiality* of the suppressed *Brady* evidence. Under *Clemons*, if Mr. Weinhaus establishes the prejudice necessary to support his *Brady* claim, he will have shown the required prejudice to overcome the procedural bar for habeas relief. And he can.

In determining the materiality of the evidence to guilt or punishment and, therefore, prejudice, it is not required that the disclosure of the suppressed evidence would have ultimately resulted in the defendant's acquittal. *Woodworth*, 396 S.W.3d at 338; *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Rather, a defendant is prejudiced by the suppressed evidence if the "favorable evidence is material" and "there is a reasonable probability that, had the evidence been disclosed

to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433.

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial.

Id. at 434 (internal quotations omitted); *see also Woodworth*, 396 S.W.3d at 338.

The *Clemons'* Court found that the Petitioner showed prejudice to overcome the procedural bar to habeas relief because the undisclosed evidence would have served to contradict and impeach other witnesses' testimony, and would have lent substantial credibility to Mr. Clemons' claim that his confession was coerced by law enforcement by physical means during his interrogation. *Id.* at 79-80. The same prejudice exists in Mr. Weinhaus' case, but to an even greater degree. The evidence against Mr. Weinhaus was not strong, as evidenced by the jury finding him not guilty of one of the assault and ACA counts, and the others depended upon Sgt. Folsom's credibility. The undisclosed PTSD evidence would have served to contradict and impeach Folsom's perception of events. Without it, the verdict against Mr. Weinhaus is not worthy of confidence.

State ex rel. Woodworth v. Denney, 396 S.W.3d 330 (Mo. 2013)

Similarly, in *Woodworth*, the Petitioner sought relief in the state habeas court, alleging violations of the State's duty under *Brady v.*

Maryland, to disclose potentially exculpatory evidence to the defense. Woodworth alleged that he discovered through a reporter's investigation after the second trial that the State had failed to disclose letters (the "Lewis letters") involving an assistant attorney general, Judge Lewis – who originally had been assigned the case – and Mr. Robertson. He also alleged that the State did not disclose evidence that Rochelle Robertson reported to police several violations by Mr. Thomure of the ex parte order of protection she obtained against him after the murder of her mother. In addition, he alleged that the State concealed the testimony of two persons that discredited Mr. Thomure's alibi and so was material and favorable to his defense. Woodworth asserted that the State's failure to disclose this evidence violated *Brady* and that these violations cast doubt on Mr. Thomure's alibi and on the sufficiency and impartiality of the sheriff's investigation, resulted in a "verdict not worthy of confidence." *Woodworth*, 396 S.W.3d at 336.

Although Woodworth did not raise his *Brady* claims on direct appeal or in his post-conviction case, the Court found "a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials made compliance impracticable." *Id.* at 337 (quoting *Murray v. Carrier,* 477 U.S. at 488). Such a failure to disclose the exculpatory evidence constituted adequate cause for failure to earlier raise the error. *See State ex rel. Griffin v. Denney,* 347 S.W.3d 73, 77 (Mo. banc 2011) (State's failure to disclose evidence that an inmate other than the defendant possessed a weapon

at the time of victim's murder in jail yard constituted "cause" to overcome objection that defendant did not raise the issue at trial).

As to prejudice, the Court held that without the use of the undisclosed *Brady* evidence, Woodworth's attempts to impeach key prosecution witnesses "were deprived of substantial evidentiary force." *Woodworth*, 396 S.W.3d at 342. Had the defense been in possession of this material at trial, it would have bolstered their attempts to impeach key prosecution witnesses and would have assisted the defense in demonstrating that the State's investigation was not impartial and would have shown that the investigation improperly focused on him rather than another suspect. *Id.* Confidence in the verdict was undermined.

At least two additional cases warrant this Court's review: *Ferguson v. Dormire*, 413 S.W.3d 40 (Mo.App.W.D.2013) and *State ex rel. Koster v. McElwain*, 340 S.W.3d 221 (Mo.App.W.D.2011). Both are *Brady* state habeas cases that also granted relief on claims that are indistinguishable from Mr. Weinhaus'. Respondent cites one case that distinguishes *Ferguson* and *McElwain*, but Respondent never explains why they should not be followed in Mr. Weinhaus' case. Respondent cites *In re Lincoln v. Cassady*, 517 S.W.3d 11 (Mo. App. W.D. 2016), which merely amplifies why Mr. Weinhaus deserves relief. The *Lincoln* court stated:

> This case is thus to be distinguished from habeas cases where suppressed evidence revealed a previously unknown basis to impeach a key, material witness under circumstances where the defendant's trial strategy was likely implicated. *See, e.g.*, *Ferguson v. Dormire*, 413 S.W.3d

> 40, 62–64 (Mo.App.W.D.2013) (holding that *Brady* prejudice was established where an undisclosed interview with wife of key eyewitness identification witness would have provided a basis to impeach the witness not otherwise available to defendant); *State ex rel. Koster v. McElwain*, 340 S.W.3d 221, 252 (Mo.App.W.D.2011) (holding that *Brady* prejudice was established where all evidence of reports of domestic violence by victim's estranged husband had been suppressed by the State).

While it is unnecessary for Petitioner to fully detail the cause and prejudice analyses from *Ferguson* and *McElwain*, it is sufficient to state that a review of those cases clearly show that the facts of Mr. Weinhaus' claim are directly encompassed by them. The State possessed evidence which it failed to disclose, which was material and exculpatory to the defense regarding a key state's witness, and the Petitioner was prejudiced by the State's lack of disclosure.

Just as in *Ferguson*, whether Folsom's psychiatric condition was known only to MSHP in the months leading up to trial is of no import, because "it is no hindrance to [a] *Brady* claim that the prosecutor did not have the same knowledge about his case as the investigators. The prosecutor's lack of knowledge about information asserted in a *Brady* claim is not an impediment because the prosecutor is considered 'the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Ferguson* 413 S.W.3d at 57-58 (quoting *State ex rel. Engel v.*

Dormire, 304 S.W.3d 120, 127 (Mo. banc 2010) (footnote omitted) (quoting *Strickler v. Greene*, 527 U.S. 263, 281 (1999)).

Respondent's lack of citation to *Ferguson* is important for yet another reason; namely, in *Ferguson*, Respondent attempted to argue that, even if Petitioner was not aware of the *Brady* material during his direct appeal or post-conviction case because of the State failure to disclose it, Petitioner was still at fault because he could have learned about it through a more diligent investigation. *Id*. at 58. The Court rejected that argument this way:

> Ferguson "cannot be faulted for failing to raise the nondisclosure of evidence that he did not know about." *Buck*, 70 S.W.3d at 445. The United States Supreme Court has observed that the nondisclosure of information as to which the defendant was not otherwise aware "ordinarily establish[es] the existence of cause for a procedural default." *Strickler*, 527 U.S. at 283, 119 S.Ct. 1936. "[T]he notion that defendants must scavenge for hints of undisclosed *Brady* material" is without support. *Banks*, 540 U.S. at 695, 124 S.Ct. 1256. Any rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Id*. at 696, 124 S.Ct. 1256.
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> To suggest, as the State does, that [Ferguson] should be penalized for the State's failure to timely honor its legal disclosure obligations by having [Barbara Trump's interview] entirely disregarded [because it was not earlier discovered] is repugnant to the concept of fundamental fairness. The only reason for the ... delay was the State's failure to disclose impeachment evidence it had a legal duty to provide to the defense prior to or during trial in the first place. Thus, [Ferguson] cannot be faulted for failing to raise and fully investigate the State's nondisclosure of *Brady*

> evidence that he did not know about until ... years had passed.

Ferguson, 413 S.W.3d at 59-60 (quoting *State v. Parker*, 198 S.W.3d 178, 193–94 (Mo. App. W.D.2006) (J. Ellis, dissenting) (citation omitted).

Just as in *Ferguson*, this Court should find that the undisclosed impeachment evidence regarding Sgt. Folsom was material. The suppressed information about Folsom's psychiatric condition impeached the perceptions of an important government witness whose testimony was heavily relied upon by the State to secure Mr. Weinhaus' convictions. The undisclosed information also would have led Mr. Weinhaus' counsel to discover additional evidence about Sgt. Folsom and his condition that would have aided in his defense. Sgt. Folsom's perception of Mr. Weinhaus' actions was critical to securing his convictions, yet the State withheld information critical to impeaching such observations.

In *Ferguson*, an alleged co-defendant implicated Ferguson in the crimes, and yet, the undisclosed *Brady* evidence regarding another eyewitness was sufficiently material and prejudicial to undermine confidence in the verdict. Mr. Weinhaus' case is no different. The jury's acquittal of the Corp. Mertens' counts, "seriously challenges" the jury's belief in his testimony, and the State failed to disclose important impeachment evidence about the State's remaining witness/victim.

Respondent should not be heard to contest the materiality of the undisclosed evidence when the undisclosed evidence would have impeached evidence heavily relied on by the State at trial. "[A] useful measure of the importance of a given witness ... and the materiality of

Brady evidence affecting [his] credibility is the amount of emphasis the prosecutor placed on the witness['s] testimony at trial." *Parker*, 198 S.W.3d at 192 n. 8 (J. Ellis, dissenting) (citing *Kyles*, 514 U.S. at 444, 115 S.Ct. 1555). Here the State repeatedly emphasized Folsom's explanation of events during closing argument: "He went for his gun and they defended themselves." (TR 640). But whether that version of evidence was true hinged upon Folsom's credibility and perception of events. The determination of that credibility is solely within the province of the jury and it is entitled to any information [possessed by the State] which might bear on that credibility. *Parker*, 198 S.W.3d at 188 (J. Ellis, dissenting) (quoting *State v. Brooks*, 513 S.W.2d 168, 173 (Mo. App. E.D.1973)). Under the facts of this case, "any undisclosed evidence tending to discredit or impeach [Folsom's perception of events] ... would have had 'the potential to alter the jury's assessment of the credibility of a significant prosecution witness.' " *Id*. (quoting *U.S. v. Avellino*, 136 F.3d 249, 255 (2d Cir.1998)).

Mr. Weinhaus' conviction is not worthy of confidence and this Court, through Rule 91, has the power to remedy the manifest injustice that has occurred by the State's suppression of critical evidence that would, more likely than not, have made a difference at Mr. Weinhaus' trial. "'Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.'" *State v. Rodriguez*, 985 S.W.2d 863, 865 (Mo. App. W.D. 1998) (quoting *Brady*, 373 U.S. at 87). The undisclosed but plainly material information about Sgt. Folsom's

psychiatric condition "'undermines confidence in the outcome of [Mr. Weinhaus'] trial.'" *Id.* at 434, 115 S.Ct. 1555 (citation omitted). A *Brady* violation occurred: the State suppressed the evidence, the evidence was favorable to Mr. Weinhaus, and Mr. Weinhaus was prejudiced. See also *State ex rel. Griffin v. Denney*, 347 S.W.3d 73, 76-79 (Mo. 2011) and *State ex rel. Engel v. Dormire*, 304 S.W.3d 120 (Mo. 2010). This Court must grant relief.

WHEREFORE, for all of the foregoing reasons, Petitioner Weinhaus respectfully prays that this Court:

A. Grant the Writ of Habeas Corpus and order that Mr. Weinhaus be discharged from the State's custody based upon his illegal confinement and the record before the court; or

B. Conduct an evidentiary hearing on the allegations of Mr. Weinhaus' Petition; or

C. Grant such further relief as the Court deems consistent with the ends of justice.

Respectfully submitted,

/s/ Amy M. Bartholow

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CERTIFICATE REGARDING SERVICE

I hereby certify that it is my belief and understanding that counsel for Respondent, Michael Spillane, is a participant in the Court's e-filing program and that separate service of the foregoing document is not required beyond the Notification of Electronic Filing to be forwarded on July 27, 2020, upon the filing of the foregoing document.

/s/ Amy M. Bartholow