IN THE CIRCUIT COURT OF ST. FRANCOIS COUNTY, STATE OF MISSOURI

JEFFREY WEINHAUS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 20SF-CC00053
	)	
STANLEY PAYNE,	)	
	)	
Respondent.	)	

SUGGESTIONS IN OPPOSITION TO MOTION FOR DISCOVERY

Following a jury trial, the Circuit Court of St. Francois County, Missouri convicted Jeffrey Weinhaus of first-degree assault on a law enforcement officer, armed criminal action, felony possession of a controlled substance (morphine) and misdemeanor possession of marijuana. The court sentenced Weinhaus to concurrent sentences of two years for possession of morphine, one-year for possession of marijuana, thirty years for first-degree assault of a law enforcement officer, and thirty years for armed criminal action. Weinhaus serves his sentence in the Eastern Reception Diagnostic Correctional Center, in St. Francois County where Stanley Payne is the Warden.

Mr. Weinhaus alleges in a motion for discovery that he has a good faith basis to believe that Respondent has in its possession "*through the Attorney General's Office*" evidence that it can use to impeach one of the witnesses from

Weinhaus' criminal trial, Sergeant Folsom. Discovery Motion at 1. He alleges that such material was requested before trial under Rule 25.03, a rule of criminal procedure. Weinhaus alleges that the Office of the Attorney General represented the Highway Patrol in defense of a wrongful termination suit by Sergeant Folsom, and therefore must have access to records that may be used to impeach Sergeant Folsom including, but not limited to, internal investigation reports and memoranda about his job performance, his medical and psychiatric records, and depositions about his diagnosis, treatment, and medications, and records regarding his termination from employment. *Id*. at 2–3.

But the respondent here is the Warden, who does not possess the things Weinhaus wants. The respondent is not the Highway Patrol or the attorneys who represented the Highway Patrol in a wrongful termination suit alleging discrimination under the Missouri Human Rights Act. And any discovery would be controlled by the rules of civil procedure, not Rule 25 of the Rules of Criminal Procedure. Weinhaus already appears to have the record from the civil suit, as it is in his appendix. Discovery beyond the public record in the civil Missouri Human Rights Act case would presumably be fall within the limitations in Rule 56.01 on cumulative, duplicative or overly burdensome discovery, and would presumably run into attorney client and work productive privilege bars on discovery, and into the Sergeant's privacy rights. But it is not

necessary to reach that level of analysis here because the respondent here is the Warden, not the Office of the Attorney General. And the Warden does not possess such material.

"A habeas action shall be a civil action in which the person seeking relief is the petitioner and the person against whom relief is sought is the respondent. Missouri Supreme Court Rule 91.01(c). In a Missouri habeas case, the warden of the prison where the offender is permanently confined is the proper party respondent. *State ex rel. Hawley v. Midkiff*, 543 S.W.3d 604, 607–08 (Mo. 2018). The Warden is required by statute and rule to be the respondent. *Id*. "The named respondent must be an individual who can effectuate a change in the offender's detention as directed by the court." *Id*. at 607.

Apparently, attorneys from the Litigation Section of the Attorney General's Office defended the Missouri Human Rights Act suit by Sergeant Folsom, against the Highway Patrol, detailed in Weinhaus's Appendix. But that does not mean the Warden, who is defended by the Public Safety Section of the Attorney General's Office in this habeas action, has any knowledge of any nonpublic details of the case under the Missouri Human Rights Act, nor should he. It is not uncommon for the Office of the Attorney General to defend civil actions in which the named defendant is a public official. *See. e.g. State ex rel. Zimmeran v. the Honorable David, Dolan*, 514 S.W. 603 (Mo. 2017) (challenge to probation revocation); *Young v. Hayes*, 218 F.3d 850 (8th Cir.

2000) (First Amendment suit against elected Circuit Attorney); *Bucklew v. Precythe*, 139 S. Ct. 1112 (Mo. 2018) (as applied Eighth Amendment challenge to Missouri death penalty procedures). As here, the defendants or respondents in those cases would not necessarily have any nonpublic knowledge about the facts of any of the other cases. The fact that the Attorney General's Office represented a defendant in one case does not impute whatever knowledge attorneys with the Office gained in that representation to the defendant in another case, who is also represented by the same office. The Warden simply does not possess the information that Weinhaus wants.

Habeas actions in trial level courts are conducted under Missouri Supreme Court Rule 91, and habeas cases in the appellate courts are conducted under Rule 84.22 through 84.26. Missouri Supreme Court Rule 91.01(a). If the habeas rules do not cover a matter, then the matter is covered by the rules of civil procedure and general principles of law. *Id.* The methods and scope of discovery in a civil case are set by Missouri Supreme Court 56.01. Rule 56.01 (b)(1) notes that the scope of discovery is limited among other things by a party's access to relevant information and by whether the burden and expense outweighs the benefit. Rule 56.01(b)(2)(A) deals with limits on discovery and notes that discovery is limited if it is cumulative, duplicative, or unduly inconvenient, expensive, or burdensome.

Here, Weinhaus essentially asks that the Warden be ordered to seek and disclose information about a witness from his 2013 criminal trial that may be known to the firm that defended a civil suit filed by that witness against his employer years later. But he has not actually sent any discovery requests to the Warden as provided for by the rules of civil procedure. Additionally, the requested information appears to include the witness's medical, psychiatric, and personnel records. That information is not appropriate in a request for discovery from the Warden, who does not possess the information. Additionally, Weinhaus appears to have already placed the public information about the suit by the witness in an appendix to this case.

The discovery request also would necessarily seem to include work product and attorney client material from the Missouri Human Rights Act law suit. Weinhaus already has the public record in the Missouri Human Rights Act case in his Appendix. What he is really asking for is tangible or intangible work product, both of which are protected from discovery. *See State ex rel. the Atchison, Topeka Railway Company v. O'Malley*, 898 S.W.2d 550 (Mo. 1995). (discussing the definition and protection of tangible and intangible work product and the dire consequences if it were not protected). Also, the information sought would seem to include attorney client material because the information would have come from the Highway Patrol to its attorneys for the purpose of litigation. *See State ex rel. Behrendt v. Neill*, 337 S.W.3d 727, 729

(2011) (noting that preserving attorney client privilege is of greater societal value than admitting all relevant and competent evidence in a particular case). And Sergeant Folsom would have privacy interests in his medical, psychiatric, and personnel records. This material is not the Warden's to turn over and it may be protected under the law. And the material in the Appendix from the suit in which Sergeant Folsom was the plaintiff adequately addresses the issues on which Weinhaus seeks further discovery.

Weinhaus could file a request under Missouri's sunshine law to the agencies who actually might possess any evidence relevant to his claim.[1] But instead, he asks this Court to direct the Warden to search for any evidence that might support his claim. It is the habeas petitioner's burden to prove his claim, not the Warden's. *State ex rel. Nixon v. Jaynes*, 73 S.W.3d 623, 624 (Mo. banc 2002). The Warden cannot comply with an order compelling disclosure of documents which he does not possess.

Conclusion

This Court should deny the motion for discovery.

[1] Respondent does not concede that Weinhaus could actually receive the information he seeks through a sunshine request, as that information may be privileged or otherwise exempt from disclosure. But a sunshine request to the proper agency, as opposed to a discovery request to the Warden, is the proper way for Weinhaus to try to find what he seeks, if it exists.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed by using the Case.Net system on this 9th day of September, 2020.

/s/Michael J. Spillane

Michael J. Spillane
Assistant Attorney General