

IN THE MISSOURI COURT OF APPEALS,
EASTERN DISTRICT

JEFFREY WEINHAUS)	
<i>Petitioner,</i>)	
)	Case No. _____
v.)	
)	
STANLEY PAYNE, Warden)	
Eastern Reception, Diagnostic)	
and Correctional Center,)	
<i>Respondent.</i>)	

PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner, Mr. Jeffrey Weinhaus, by counsel, petitions this Court for a Writ of Habeas Corpus pursuant to the Missouri Constitution, Art. I, § 12, § 532.430 RSMo., and Missouri Court Rule 91. In support, Mr. Weinhaus states as follows:

1. Mr. Weinhaus petitions this Court for a Writ of Habeas Corpus seeking release from his thirty-year aggregate prison sentence for attempted assault and armed criminal action (ACA) because the State withheld critical exculpatory evidence from the defense that would have exonerated him. Mr. Weinhaus' convictions and sentences violate the Constitution of the United States, the Missouri Constitution and Missouri Statutes.
2. This Court has jurisdiction pursuant to Missouri Constitution, Art. I § 12, § 532.430 RSMo., and Missouri Rule 91.
3. Mr. Weinhaus is presently in the custody of Stanley Payne, Warden of the Eastern Reception, Diagnostic, and Correctional Center, Department of Corrections, 2727 Highway K, Bonne Terre, MO.

INTRODUCTION

4. On September 11, 2012, Missouri State Highway Patrol Sergeant Henry J. Folsom shot Mr. Weinhaus twice in the head and twice in the chest, nearly killing him. (A138, p.74-75). It was not the first time Sgt. Folsom had shot someone while on duty. (A60, A140-41). The State charged Mr. Weinhaus with two counts of attempted first-degree assault of Folsom and his partner, Scott Mertens, based on Folsom's allegation that he observed Mr. Weinhaus pull a weapon.
5. Following a jury trial on October 8-10, 2013, however, Mr. Weinhaus was acquitted of attempting to assault Mertens, and another charge was dismissed by the court for lack of evidence. Mr. Weinhaus was convicted of possessing a small amount of drugs, and for an attempted first-degree assault of Sgt. Folsom, including a corresponding count of armed criminal action. He is presently serving an aggregate thirty-year prison sentence.
6. The State's sole evidence supporting an attempted first-degree assault of Folsom was the testimony of Folsom himself. It was the lynchpin of the State's case, and without it Mr. Weinhaus likely would have been acquitted of this assault as well.
7. Unfortunately, the State withheld critical evidence from the defense directly impacting Folsom's testimony about his encounter with Mr. Weinhaus. The State violated Mr. Weinhaus' constitutional right to have exculpatory evidence disclosed to him, resulting in an unfair trial.
8. Only three people were in the immediate vicinity where Folsom shot Mr. Weinhaus. Only one of the three, Folsom, had ever killed anyone. In 2000, Folsom shot and killed another suspect. (A60, A140-141). Although Folsom would later discuss this 2000 shooting during his deposition in Mr. Weinhaus' criminal case, Folsom failed to disclose the critical fact that, as a result of that shooting, he developed Post-Traumatic Stress Disorder

(PTSD). Neither Folsom, Mertens, MSHP, nor the prosecution disclosed Folsom's mental health condition to Mr. Weinhaus' defense counsel.

9. Additionally, when Folsom was asked directly what medication he was taking and whether he was taking medication at the time he shot Mr. Weinhaus, Folsom denied taking any medication at all. (A139, p.79). This was a lie. The truth is that Folsom was being medicated for PTSD with at least two separate medications at the time he shot Mr. Weinhaus (A1, A11). Defense counsel was never informed of this critical information.
10. The MSHP chain of command also knew about Folsom's diagnosis because these medications were discovered during Folsom's immediate post-shooting drug test; following that test, Folsom was forced to disclose his PTSD diagnosis and that he was being treated and medicated for it when he shot Mr. Weinhaus (A1, A4-A9, A11). None of this critical information was disclosed to the defense before Mr. Weinhaus' trial one year later.
11. The information about Folsom's PTSD and the fact he was medicated for it could not have been independently obtained by the defense, not only because Folsom lied about it when asked about it directly, but also due to privacy regulations surrounding medical information of state employees.
12. This information was not discovered until long after Folsom himself sued MSHP in Cole County Circuit Court for wrongful termination and discrimination after he was fired from MSHP. The records in the Circuit Court were kept under seal and were not publicly known or available.
13. The Attorney General's office defended MSHP against Folsom's civil case against that agency. At the same time, the Attorney General's office represented the State in upholding the criminal convictions obtained against Mr. Weinhaus in Mr. Weinhaus' direct appeal, post-conviction appeal, and federal habeas cases. The Attorney General's office, well-

aware of Folsom's PTSD diagnosis and medications, never disclosed these facts to the defense during any of these proceedings, even though it had a continuing duty to do so. See *Embler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976) ("after a conviction the prosecutor also was bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.")

14. After Folsom lost at the summary judgment stage, he appealed, *Folsom v. MSHP*, WD82081. Only with the release of the Western District's opinion on August 20, 2019, did Mr. Weinhaus discover that on September 11, 2012, Folsom was medicated for PTSD, a serious psychiatric condition affecting his perception of events and making him hyper-responsive under stressful conditions. Folsom was also under investigation for "depart[ing] from the truth," intimidating subordinates and causing low morale due to his "quickly changing emotional patterns." (A6-A7). Mr. Weinhaus was entitled to this information at the time of trial, but the State withheld it.
15. "If a habeas record establishes a showing of the gateway of cause and prejudice, then the habeas court is entitled to review the merits of constitutional claims associated with that showing." *State ex rel. Koster v. McElwain*, 340 S.W.3d 221, 245 (Mo. App. 2011). The prosecutor's "failure to disclose evidence material to the defense can satisfy the cause and prejudice test to excuse a defendant's failure to raise a claim in an earlier proceeding." *Id.* p. 248, citing *Amadeo v. Zant*, 486 U.S. 214 (1988).
16. Petitioner Weinhaus' habeas record establishes cause and prejudice for this Court to review the merits of his constitutional claims.
17. Had Mr. Weinhaus' counsel been aware of this information at trial, there is a reasonable likelihood it would have affected the judgment of the jury. Mr. Weinhaus petitions this Court to correct this injustice, grant him relief under this Writ, and Order that he be immediately released.

FACTUAL ALLEGATIONS

Trial evidence regarding the September 11, 2012 shooting of Jeffrey Weinhaus and his subsequent criminal charges

18. On September 11, 2012, just seconds after Mr. Weinhaus emerged from his vehicle at a prearranged meeting set up by MSHP Sgt. Folsom, Folsom shot Mr. Weinhaus twice in the chest and twice in the head. (Tr.223, 227, 330, 339, 349; Ex.15). The circumstances leading to that shooting are as follows:
 19. On August 18, 2012, Sgt. Folsom began investigating a YouTube video posted by Mr. Weinhaus. (Tr.168-169).
 20. Mr. Weinhaus is a citizen-journalist and he had been publishing newsletters and broadcasting videos since 1996; his “Bulletinman” publications were critical of the government and the judiciary, and sought to expose the corruption of elected public officials and certain law enforcement officers. (Lf.75, 95-6, 129-132). Mr. Weinhaus was also running for the office of Coroner of Crawford County. (PTr. 9/12/13, p.75).
 21. While Mr. Weinhaus’ publications occasionally contained critical or offensive statements about elected officials, he had no record of violence and no criminal history other than minor traffic violations. (Lf.75-76,129-132).
 22. Sgt. Folsom met with other officers to “determine the validity of the threats” contained in Mr. Weinhaus’ video, and they determined that most of the comments in the video constituted free speech; however, Folsom decided to contact Mr. Weinhaus at his home to discuss the video and to further evaluate his intent. (Tr.171).

23. The trial judge would later dismiss a criminal charge brought against Mr. Weinhaus related to this YouTube video, finding that the video constituted protected First Amendment speech and contained no criminal act. (Tr.544-545).
24. When Sgt. Folsom and Corp. Mertens arrived, Mr. Weinhaus spoke with them for approximately 25-30 minutes outside of his home, assuring them that he was a peaceful person. (Tr.174).
25. According to Folsom, Mr. Weinhaus wavered between peaceful statements and radical statements. (Tr.175).
26. Folsom also stated that Mr. Weinhaus gave them some of his literature and explained his personal beliefs about the Lord Jesus Christ. (Tr.176).
27. Folsom testified that, while standing outside of Mr. Weinhaus' home, he smelled a strong odor of marijuana coming from the home, and he asked Mr. Weinhaus if there was pot inside. (Tr.173).
28. When Mr. Weinhaus tried to reenter his home, Folsom placed him in handcuffs, telling him that he was going to apply for a warrant. (Tr.176).
29. During the subsequent search of Mr. Weinhaus' home, to purportedly search for drugs, the officers seized Mr. Weinhaus' computer equipment and video cameras. (Tr.180).
30. Folsom would later be reprimanded for executing this search warrant without properly notifying the local Sheriff's office. (A6).
31. During the search, officers also observed a loaded handgun and a green Army retention holster in a nightstand drawer in the master bedroom, along with paperwork showing it was legally registered; this gun was not seized, as it was legally owned and not evidence of any crime. (Tr.180-81).
32. Sgt. Folsom provided Mr. Weinhaus with the search inventory, along with Folsom's business card. (Tr.206).

33. Thereafter, Mr. Weinhaus emailed Folsom asking for his computers to be returned to him, as he relied on them for his publishing work; Mr. Weinhaus also called Folsom's supervisors at MSHP to complain that items had been stolen from his home. (Tr.207-210, 273).
34. On September 10, 2012, the MSHP decided to arrest Mr. Weinhaus on drug and tampering charges in order to have him in custody before September 17, Constitution Day – the date mentioned in Mr. Weinhaus' YouTube video. (Tr.207, 274).
35. Folsom said he made it "very, very clear" to his chain-of-command that he wanted to be removed from the Weinhaus investigation because Mr. Weinhaus was agitated with him for taking his computers. (Tr.274, A5).
36. Although Folsom felt his further involvement with Mr. Weinhaus was inappropriate, he testified that his direct supervisor ordered him to place Mr. Weinhaus under arrest. (Tr.274-275, A5).
37. Folsom obtained an arrest warrant. (Tr.208, 274).
38. On September 11, 2012, Folsom devised a ruse wherein he and Corp. Mertens would arrange a meeting with Mr. Weinhaus, on the false premise that they were returning his computers, but they were planning to take him into custody instead. (Tr.208, 385).
39. Folsom called Mr. Weinhaus and arranged to meet him at an MFA gas station near Mr. Weinhaus' home. (Tr.209-210).
40. At Folsom's request, two undercover FBI agents were present at the MFA station as backup. (Tr.277).
41. Mr. Weinhaus agreed to meet Folsom there, but Mr. Weinhaus also tried to find a clergy member to accompany him to the gas station. (Ex.15).

42. Mr. Weinhaus could not find a pastor who was available to accompany him to meet the officers, so he spent time praying and singing hymns on the way to meet them. (Ex.15).
43. As Mr. Weinhaus entered the MFA parking lot, Folsom and Mertens got out of their car; Folsom instructed Mertens to open their trunk to maintain the ruse that they had Mr. Weinhaus' computer equipment. (Tr.218, 390).
44. Mr. Weinhaus exited his car wearing a shirt and tie, and both of his hands were empty. Folsom observed that Mr. Weinhaus was openly carrying a holstered gun, which he is legally entitled to do. (Tr.219, 304, 403).
45. Seeing Mr. Weinhaus with a gun on his hip "shocked" Folsom. (Tr.286).
46. Folsom testified that he thought Mr. Weinhaus had "mental issues," although he testified that he had no education in mental health issues. (Tr.286).
47. Folsom stated that when he saw Mr. Weinhaus' gun, he unholstered his own weapon and asked Mr. Weinhaus about his gun. (Tr.219, 317; Ex.15).
48. Unbeknownst to the officers, Mr. Weinhaus was wearing a video camera wristwatch on his left wrist, and the entire 12-second interaction between Mr. Weinhaus and the officers is contained on this video. (Tr.229; Ex.15).
49. As reflected in the video, Mr. Weinhaus responded by asking Folsom what he had a gun for. (Tr.220, 317; Ex.15).
50. Folsom told Mr. Weinhaus that he was authorized to have a gun, and Mr. Weinhaus replied that he also was authorized to have a gun. (Tr.220, 317; Ex.15).
51. Folsom testified that he observed Mr. Weinhaus manipulate the flap of his holster with his right hand, pull down the safety ring to disengage the flap, sweep the flap up and place his hand on the gun. (Tr.220-221).

52. Folsom stated that he also observed Mr. Weinhaus start shaking, and heard him say, “you’re going to have to shoot me,” as he started to pull the gun from the holster. (Tr.223, 321, 327).
53. Folsom testified at trial that he watched the weapon come all the way up out of the holster, except for about the last inch. (Tr.223).
54. Corp. Mertens saw something “absolutely” different than Folsom. (Tr.407).
55. Mertens said the gun never came free of Mr. Weinhaus’ holster. (Tr.421). He testified, “to my knowledge, it never came free of the holster.” (Tr.421).
56. Mertens did not see Mr. Weinhaus take a “bladed position” as described by Folsom (Tr.407), nor did he see the butt, handle or grip of Mr. Weinhaus’ gun. (Tr.421).
57. Mertens also described Folsom’s markings on the map, indicating locations of the people involved, as inaccurate. (Tr.423).
58. Three seconds after telling Mr. Weinhaus to get on the ground, Folsom shot Mr. Weinhaus twice in the chest and twice in the head. (Tr.223, 227, 330, 339, 349; Ex.15).
59. Folsom testified that when he approached Mr. Weinhaus after he fell to the ground, the gun was lying underneath him, just out of the holster, and that his hand was not near the trigger; Folsom said he put the gun back into the holster to secure it. (Tr.228).
60. Mertens never saw Folsom put the gun back in the holster. (Tr.432-433). Mertens saw Folsom throw the holster with the gun in it behind him. (Tr.433-434).
61. Corporal Jeff White testified about the proper use of lethal force by law enforcement in the shooting of Mr. Weinhaus. He testified that his opinion assumed what Mr. Weinhaus’ right hand was doing which, in turn, was based upon what Folsom and Mertens said it was doing because you cannot see Mr. Weinhaus right hand in the video. (Tr.499).

62. Corporal White also testified that an officer who is confronted by someone who had personally criticized him would potentially have more elevated stress level than an officer who had no previous interaction with the suspect, which would change his perception of the potential danger and threat level, as well as distorting his memory of the event. (Tr.507).
63. After a three-day trial which took place October 8-10, 2013, the jury deliberated. While deliberating, the jury asked to see the “still photos” from the watch video that the defense used as demonstrative evidence during trial (Tr.340-347), the watch video itself (Ex.15), and a transcript of Folsom’s and Mertens’ testimony regarding the placement of Mr. Weinhaus’ gun before and after the shooting. (Tr.642; Lf.194).
64. The jury found Mr. Weinhaus not guilty of attempted first-degree assault of Corp. Mertens and the accompanying ACA count (Lf.199-200; Tr.652); however, it found him guilty of attempted first-degree assault of Sgt. Folsom, and the accompanying ACA count. (Lf.195-198; Tr.651).
65. After a sentencing phase, the jury returned sentencing verdicts, which the Court imposed, sentencing Mr. Weinhaus to a total of thirty years’ imprisonment. (Lf.212-214; Sent.Tr.43-44).

Folsom’s Medical Issues Known to Defense Counsel at Trial

66. Long before his October, 2013, trial, Mr. Weinhaus, through counsel, filed a “Request for Discovery,” which requested, in part:
 10. Any material or information, within the possession or control of the State, which tends to negate the guilt of the defendant as to the offense charged mitigate the degree of the offense charged, or reduce the punishment.

13. The memoranda or summaries of any oral statement made to an agent of the State by any person in connection with the subject matter of this cause whether or not:

- a. the statement, if in writing, has been signed or approved by the witness, and
- b. the statement relates to the proposed subject matter of the direct testimony of the witness at trial.

14. The statements of persons or memoranda or recordings of any oral statement pertinent to the subject matter of this case whether or not made to any agent of the State.

15. Any memoranda, documents or statements used by the State during the investigation of this case.

16. The names and addresses of all persons who may have some knowledge of the facts of the present case.

17. All reports and memoranda prepared on behalf of the State or otherwise used in connection with the investigation of this case.

18. All reports, memoranda and any other data in the hands of the State and its agents in regard to defendant (Lf.26-29).

67. At trial, Folsom testified about nerve damage to his hand which gives him partial paralysis; it makes his hands shake, and his tremors are worse in the presence of adrenaline (Tr.365).

68. Folsom had disclosed this medical condition before the October, 2013 trial: At his pretrial deposition on June 6, 2013, Folsom explained that he has nerve damage affecting his ulnar nerve that runs through his right and left arms, and if he gets into a stressful situation, his hands shake like he has Alzheimer's or Parkinson's. (A137, pp.71-72).

69. Folsom further explained that these symptoms kick in *after* he has fired his weapon, because of the adrenaline dump. (A139, pp.77-78).
70. At this same deposition, Folsom was specifically asked what medication he takes and whether he was on medication at the time he shot Mr. Weinhaus. Folsom answered that “the Army gave me some medication for the tremors to see if it would stop and it didn’t work,” and he “hadn’t taken it in years.” (A139, p.79).
71. Folsom specifically denied being on any medication at the time he shot Mr. Weinhaus. (A139, p.79).
72. Folsom did not indicate any other conditions which would have affected him at the time of the shooting. (A119-176).
73. At his deposition, Folsom was shown a copy of his incident report narrative, and he was asked if he would change or add anything to the report; he stated he would not. (A141, p.87).
74. At his deposition, Folsom was shown a copy of Sgt. Perry Smith’s report of Smith’s investigative interview with Folsom, and Folsom stated that it accurately reflected his statements to Sgt. Smith. (A141, p.88).
75. The State did not disclose, before or at any time after Mr. Weinhaus’ October, 2013 trial, any additional physical or mental conditions of Folsom which existed at the time he shot Mr. Weinhaus.
76. The State also did not disclose, before or at any time after trial, any medications that Folsom was taking at the time he shot Mr. Weinhaus.

UNDISCLOSED BRADY MATERIAL

- **Sgt. Folsom had pre-existing Post-Traumatic Stress Disorder (PTSD) that he was medicated for at the time he shot Mr. Weinhaus, which the State knew about, but did not disclose to the defense before trial, and Folsom actively concealed this information during a discovery deposition also before Mr. Weinhaus' trial.**

77. After Folsom shot Mr. Weinhaus, the MSHP investigated the circumstances of the shooting, placed Folsom on leave, and eventually terminated his employment because he was unfit for duty. (A1-A2).
78. As part of the investigation immediately following the shooting, Folsom was required to submit to a drug test. The urinalysis showed that he had Ambien and Prozac in his system. Because of this, he was ordered to show his prescriptions to his MSHP command staff and to reveal that he had Post-Traumatic Stress Disorder (PTSD). (A1).
79. Although the State was aware of Folsom's diagnosis and medications more than a year before Mr. Weinhaus' trial, this information was never disclosed to the defense before trial, or at any point after trial, while Mr. Weinhaus' case was pending on direct appeal, post-conviction, post-conviction appeal and federal habeas. Mr. Weinhaus' jury never heard that Folsom, the State's key witness – who described Mr. Weinhaus' actions on the day in question – was on medication for a pre-existing mental illness which affects his perception of events, and that Folsom's condition had been present for at least twelve years before he shot Mr. Weinhaus.

80. On November 14, 2012, Folsom was ordered to submit to a fitness for duty evaluation, which he failed. He was ordered to use his accumulated paid personal leave time. (A1).
81. Leading up to Folsom's termination, his supervisors in the MSHP command staff, conducted an investigation pursuant to the Americans with Disabilities Act, and Veteran Status Discrimination, because Folsom had made an allegation of discrimination. (A4-A9).
82. An Interdepartmental Communication from the Director of the MSHP Professional Standards Division stated that on October 22, 2014, Sgt. Folsom made allegations that his commander, Captain Sarah L. Eberhard of the Division of Drug and Crime Control, had treated him in such a way that prevented him from returning to work after his absence due to PTSD. (A4).
83. In that allegation, Folsom asserted that his diagnosis of PTSD was first established as a result of his service in the military – which would have been prior to January, 1997. (A1, A4).
84. On October 29, 2014, MSHP Lieutenant Roger D. Whittler conducted a recorded interview with Sgt. Folsom regarding his claim of discrimination. (A4-A9).
85. During that interview with Lt. Whittler, Folsom stated that during the investigation of his shooting of Mr. Weinhaus, Folsom told his commander Sarah Eberhard that he suffered from PTSD, and that is when he started to be subjected to discrimination. (A4-A9).
86. Folsom indicated that he had requested to be removed from the Weinhaus case before the shooting occurred, but his request was denied. (A5).

87. Folsom told Lt. Whittler that some of the symptoms of his PTSD diagnosis are that he has angry outbursts and he admitted to speaking to his commander, Eberhard, in an angry manner. (A6).
88. Folsom also stated to Lt. Whittler that “he has been undergoing treatment for PTSD for eight years, and that he was afraid to report his condition earlier because he feared for his job if he revealed his condition.” (A6)
89. Lt. Whittler’s report also details his interview with Captain Sarah Eberhard regarding Sgt. Folsom’s allegations of discrimination. (A8-A9).
90. Captain Eberhard “recalled that she first learned that Sergeant Folsom suffered from Post-Traumatic Stress Disorder when he notified her during a meeting that occurred several days after the officer involved shooting that occurred September 1, 2012 (sic).” (A8). This would have been in September, 2012, more than a year before Mr. Weinhaus’ October, 2013 trial.
91. Captain Eberhard further “recalled that Sergeant Folsom had c[o]me to her office and wanted to meet with her and Lieutenant Shawn Satterfield. It was at that time Sergeant Folsom said he was a disabled veteran with PTSD.” (A8).
92. Captain Eberhard indicated she “tried to limit contact with Sergeant Folsom because he became very agitated each time she spoke to him” and “she chose to minimize her contact with him in order to alleviate causing Sergeant Folsom more stress.” (A9).
93. Lt. Whittler determined that Folsom had not been discriminated against because of his disability. (A9).
94. Lt. Whittler’s report, which details Folsom’s PTSD and the MSHP command staff’s awareness of his condition and medications shortly after the shooting of Mr. Weinhaus, was sent to Captain David A. Flannigan

and Colonel Ronald K. Replogle on November 5, 2014. Capt. Flannigan and Col. Replogle agreed with Whittler's findings and Folsom's complaint of discrimination was classified as unfounded. (A9).

95. On December 23, 2014, Captain Tony Flanagan advised Folsom that his employment was terminated due to his unfitness for duty and his lack of remaining available time off. (A2).
96. Folsom filed a "Charge of Discrimination" with the Missouri Department of Labor and Industrial Relations Commission on Human Rights, on January 27, 2015, alleging that he was terminated from MSHP because of his Post-Traumatic Stress Disorder. (A1-A2).
97. In this "Charge of Discrimination," Folsom stated the following facts:
 - He was involved in a shooting on October 28, 2000, in Maries County where he sustained an injury and also killed a suspect.
 - After this 2000 shooting, he was diagnosed with Post-Traumatic Stress Disorder and put on prescription medication.
 - Twelve years later, following the shooting of Mr. Weinhaus in 2012, Folsom "was required to submit to a drug test."
 - "The urinalysis showed that [he] had Ambien and Prozac in [his] system."
 - He "was ordered to show [his] prescription and reveal that I had Post-Traumatic Stress Disorder," and was "then relieved of duty and given a counseling statement."

(A1-A2).

98. On January 15, 2016, the Missouri Commission on Human Rights issued Folsom his "Notice of Right to Sue" MSHP. (A3).
99. On April 11, 2016, in Cole County Circuit Court, Folsom filed a Petition for Unlawful Discriminatory Practice in his Termination pursuant to

Section 213.111 (A10-A12). The lawsuit was filed against MSHP and Cpt. Sarah Eberhard, and it was assigned case number 16AC-CC00150. (A12).

100. In his Petition, Folsom made the following factual allegations:

- 7. “Plaintiff has Post-Traumatic Stress Disorder (“PTSD”) arising out of an on-the-job shooting and injury that occurred in October of 2000.”
- 8. “Plaintiff takes prescription medication for his PTSD.” ...
- 13. “[Following the shooting of Weinhaus], Plaintiff was ordered to submit to a drug test.”
- 14. Said drug test revealed that Plaintiff was taking medication for his PTSD.”
- 15. “On or about that time, Plaintiff informed [his supervisor] of his PTSD.”
- 16. “[MSHP] then relieved Plaintiff of his duties.” ...
- 18. “Between December 2012 and December 2014 Plaintiff used two years of accrued paid leave.”
- 19. “Defendants failed or refused to make reasonable accommodation for Plaintiff’s PTSD.”
- 20. “On December 23, 2014, Plaintiff’s employment was terminated.”

(A10-A12).

101. In MSHP’s response to Folsom’s Petition, MSHP admitted that:

- “a drug test was directed following the referenced shooting incident in accord with MSHP procedure”
- “on or about October 15, 2012, [Folsom] revealed to MSHP that he believed [he] had PTSD.”

102. At the same time that Folsom's civil case against MSHP et al., was being litigated in Cole County, Mr. Weinhaus' post-conviction case, post-conviction appeal and federal habeas was being litigated in the state and federal courts. However, because of Folsom's false testimony generated at trial to explain his PTSD symptoms as being something else altogether, and because of his misrepresentations that he was on no medication at the time he shot Mr. Weinhaus, defense counsel had no reason to further investigate the true nature of Folsom's disability.
103. Throughout Folsom's litigation in the Cole County Circuit Court, MSHP was defended by the Attorney General's office. At the same time, the Attorney General's office represented the State against Mr. Weinhaus' state appeal and post-conviction claims and his federal habeas claims. Although the Attorney General's office was also fully aware of the timing of Folsom's PTSD diagnosis and medications, no one on behalf of the State disclosed this information to any of Mr. Weinhaus' defense attorneys at any point during his state and federal litigation, even though they had a duty to do so. See *Embler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976) ("after a conviction the prosecutor also was bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.")
104. As part of the litigation in Cole County Circuit Court against MSHP, Folsom filed Exhibit J, which was a letter dated October 25, 2016, to the Employee Benefits Department regarding an appeal of their decision to close his long-term disability and continuing benefits. (A70-A74).
105. In Exhibit J, Folsom lists, in addition to his "disabling PTSD," several "other physical disabilities that preclude me from being employed in the open market," including:

- A cervical spine injury that he received at work in 2011, for which he is medicated with daily ibuprofen and chiropractor treatments;
- Right knee injury as noted by the Veterans Administration (VA), for which he receiving cortisone shots in both knees and right ankle due to this disability;
- Asthma which requires the use of two different daily inhalers;
- Urticaria which requires him to receive steroid shots and cream as needed multiple times per year as noted by the VA;
- Hand tremors causing dexterity issues with no known treatment and has caused permanent partial paralysis due to nerve damage as noted by the VA;
- Severe sleep Apnea from PTSD medications and their side effects, which requires the daily use of CPAP machine to maintain breathing and cardiac functioning.
- Allergies which require daily medicine as noted by the VA;
- Gout and high blood pressure, for which he takes daily medication.

(A70-A74).

106. In addition to listing his medical issues, Folsom's October 25, 2016 letter details the medication side effects of his "PTSD and Major Depression," which include, among others: sleep problems, concentration issues, and irritability and memory problems. (A70-A71).

107. Folsom's letter also notes a medical report from Dr. David J. Lutz Ph.D, and asserts that Dr. Lutz indicates that Folsom's "psychological difficulties" related to his PTSD "cause significant work related difficulties," including that Folsom is:

- Hyper-responsive;
- Argumentative; and
- Rigid; and
- Uses force inappropriately at the work place;
- Has anger outbursts on a daily basis;
- Is unable to watch his small children on a continuing basis due to his anger outbursts as a result of disabling PTSD.

(A71-A72).

108. Folsom's letter also notes an evaluation conducted by Mr. Phillip Eldred, M.S., C.R.C. of Rehabilitation Counseling Service, which notes his "pre-existing injuries and psychiatric and medical conditions" before September 11, 2012, as well as "side effect from the medicines used to control" his PTSD. (A72).
109. Folsom's letter also recites portions of a letter from Dr. Akeson which notes that due to the results of his MMPI-2 and the Detailed Assessment of Post-Traumatic Stress tests, Folsom would be unable to "get along with co-workers without distractions or behavior extremes" and "complete a normal workday and work week without psychologically based symptoms." (A73).
110. The Cole County Circuit Court granted MSHP's Motion for Summary Judgment against Folsom's claims for discrimination in his termination and failure to accommodate his disability of PTSD. (A111-A112).
111. In Folsom's motion for rehearing and to reconsider, Folsom reiterated the facts currently before the Court, including:
 - The 2012 shooting [of Weinhaus] exacerbated [Folsom's] PTSD and he was not able to perform his then current duties as an enforcement officer;

- Folsom requested an accommodation for “light duty administrative tasks that would not exacerbate his PTSD, such as mowing the lawn, answering phones, taking care of paperwork, etc.”
- Folsom “informed his human resources captain of the type of work environment that he would need so as to not exacerbate his PTSD;

112. The trial court denied the rehearing and Folsom appealed to the Western District Court of Appeals in Case No. WD82081. (A114-A116).

113. In MSHP’s Respondent’s Brief on Appeal, MSHP noted the following in its Statement of Facts:

- “Folsom was employed with the Patrol from January 1997 until December 2014 as a trooper (sergeant).” (p.4)
- “Folsom suffers from Post-Traumatic Stress Disorder that he claims started after a work-related shooting in 2000.” (p.4)
- “Medical records show that Folsom was formally diagnosed with PTSD around 2005.” (p.4)
- “Folsom was involved in a second on-the-job shooting on September 11, 2012.” (p.4)
- “After the second shooting, Folsom was never medically determined to be fit for duty and never returned to work as a trooper.” (p.4-5).
- “Folsom concedes that... [t]he 2012 shooting incident at issue exacerbated [Folsom’s] PTSD and he was not able to perform his then current duties as an enforcement officer.” (p.6).
- “[I]n June 2014, Folsom was seen by Dr. Wayne A. Stillings, an Assistant Professor of Clinical Psychiatry at the Washington

University School of Medicine. Dr. Stillings' report includes the following summary from his interview with Folsom:

- i. ...He stated that he will never work in law enforcement again. Because his 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. (p.9).

(A13-A28).

114. On August 20, 2019, the Western District Court of Appeals issued its opinion affirming the trial court's grant of summary judgment in favor of MSHP, which became final on September 11, 2019. (A59-A69).
115. The following fact-findings come directly from the Western District's opinion:
 - o "Folsom was diagnosed with post-traumatic stress disorder ("PTSD") after he was involved in a work-related shooting in 2000. In September 2012, when Folsom had the rank of sergeant and was a criminal investigator with the Highway Patrol, he was involved in a second work-related shooting. This second shooting incident exacerbated his PTSD. Folsom did not return to work at the Patrol after the 2012 shooting."
 - o "The fact that he has gone through two shooting incidents heightens his vulnerability for symptoms even further...[Folsom] would not be able to function effectively in such a situation, as his symptoms, including hypervigilance and hyper-responsiveness, are likely to be reactivated even more easily."
 - o "...his 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."

- "...Folsom told multiple mental health professionals that he did not believe he was capable of carrying a firearm, or of responding appropriately to the sort of stressful and confrontational situations to which a Trooper is required to respond...Folsom concedes that as a result of the exacerbation of his PTSD following the 2012 shooting, 'he was not able to perform his then current duties as an enforcement officer.'" (A59-A69).
- **Internal MSHP documents show: 1) Sgt. Folsom was under investigation by MSHP before he disclosed to his supervisors that he had PTSD; 2) Folsom believed MSHP was not conducting the Weinhaus investigation correctly; and 3) Folsom believed MSHP was actively retaliating against him while Mr. Weinhaus' case was pending. None of this information was disclosed to the defense.**

116. According to the 10/29/14 report by Lt. Whittler, "Sgt. Folsom said that he was subjected to retaliation because he did not agree with the manner which the Patrol staff chose to proceed with the investigation of the officer involved shooting, and the subsequent decision not to prosecute Winehouse (sic) for the charges that Sergeant Folsom was seeking as part of his investigation. Sergeant Folsom said after the investigation of the shooting, he revealed to his commander Sarah Eberhard, he suffered from PTSD, and that is when he started to be subjected to discrimination... Sergeant Folsom said he continued over the course of several months to publicly criticize Captain Eberhard and Lieutenant George Knowles regarding how the investigation was handled. Sergeant Folsom and Captain Eberhard and Lieutenant Knowles started an investigation on

him by interviewing his co-workers about his ability to get along with other employees.” (A5).

117. Lt. Whittler spoke with Captain Eberhard about Sgt. Folsom’s allegations, and Captain Eberhard said that the preliminary investigation of Folsom began after she was informed of a warrant that Sgt. Folsom served. During the serving of the warrant, Sgt. Folsom did not notify the sheriff of the warrant as required by policy. Eberhard told Whittler that prior to that, Sgt. Folsom had made allegations against many Patrol staff members, and those claims amounted to allegations of misconduct on the part of Patrol staff. Captain Eberhard indicated there was a volatile climate in Troop I, and the Division of Drug and Crime Control. Captain Eberhard denied that the preliminary investigation of Folsom had anything to do with Sgt. Folsom’s disability, and that “the investigation was prior to her being informed of his disability.” (A8).
118. After he was declared unfit for duty, Folsom alleged that Captain Eberhard and Lt. Knowles started an investigation on him by interviewing his co-workers about his ability to get along with other employees. (A5-A7).
119. Folsom referred to an Inter-Office Communication titled “Informal Inquiry into Troop I Investigation Unit” dated October 14, 2012, from Captain Eberhard to Major Luke Vislay. This document “contains written details of interviews with Patrol employees who report that Sergeant Folsom departs from the truth, and subordinates of Sergeant Folsom are intimidated, and suffer low morale due to Sergeant Folsom’s quickly changing emotional patterns.” (A6-A7). This inquiry into Folsom was conducted one year before Mr. Weinhaus’ trial, but was never disclosed to the defense.

120. In later civil litigation against the attorney who represented him against MSHP, Folsom alleged that MSHP retaliated against him by treating him differently and not accepting his subpoenas and sending process servers to his home, when MSHP's policy is to accept subpoenas for troopers at Troop locations. (A79-A81).
121. In the above-referenced civil litigation against his attorney, Folsom alleged as proof that MSHP was retaliating against him, an email from Kimberly J. McDowell to Troop I radio operators dated 1/29/13, which allegedly states, "Sgt. Taylor advised, and has verified with her respected LT, that any and all subpoenas for Sgt. Folsom are to be denied acceptance and advised to serve him personally at his residence." (A79).
122. Folsom also alleged that he had "made a written memorandum of complaint concerning his retaliation based upon his disability and sent same to Colonel Replogle on 9/4/13." (A80).
123. Folsom also alleged that he had "made another written memorandum of complaint concerning his retaliation based upon his disability and sent same to Colonel Replogle on 1/17/14." (A80).
124. Folsom further alleged that he had made a "10/22/14 complaint of discrimination, retaliation and harassment...directly with the MSHP." (A80).
125. Folsom also alleged that the "discovery responses...indicated that Col. Replogle consciously chose to disregard Folsom's 1/17/14 complaints of retaliation and wrote on document MSHP 00079, 'At this time, it is prudent that he [Folsom] focus on his recovery, and the issues in this correspondence will be addressed when he returned to duty'...[a]t the time Replogle wrote the comment, he knew full well that he would never return Folsom to duty and therefore, his complaints of retaliation and

discrimination would never have to be investigated or otherwise addressed or remediated.” (A80).

126. Folsom further alleged there is a report indicating that “Folsom’s supervisor did not believe he actually had PTSD but was ‘pulling off this little PTSD stunt.’” (A81).
127. Folsom also alleged that there is a report which “includes 7 numbered paragraphs detailing evidence of discrimination and retaliation related to Folsom’s disability and his speaking out on matters of public concern and in retaliation for him making allegations of disability discrimination.” (A81).
128. Folsom additionally alleged that there is a report which indicates that Col. Replogle denied Folsom the ability to comply with subpoenas in criminal cases and “should notify requesting parties that he is on extended leave and unavailable...” including “the Sabla homicide investigation in Laclede County...on 4/15/14” and “a Texas County murder trial on 4/24 and 4/25/14.” (A81).
129. Folsom alleged that Col. Replogle’s 2/5/14 refusals to return him to duty to comply with two lawfully served subpoenas were a retaliatory action because a report from Dr. Stephen Acheson stated that “Folsom could be returned to duty when ‘compelled by the courts.’” (A81-A82).

CLAIMS FOR RELIEF

Claim 1

1. The State Failed To Disclose Favorable Evidence Regarding Sgt. Folsom's preexisting PTSD diagnosis that he was Medicated for when he shot Mr. Weinhaus, which Undermined the Proceedings in Violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

130. As fully described above, Mr. Weinhaus' defense was that he never touched his weapon, the weapon never left his holster, he stated, "you don't have to shoot me, man" as Folsom aimed his weapon at him, and he had no opportunity to comply with the officers commands in the few seconds before Sgt. Folsom shot him four times.
131. As fully described above, Sergeant Henry Folsom's trial testimony – his observations about Mr. Weinhaus' alleged behavior prior to Folsom shooting him – was the State's sole credited evidence to support Mr. Weinhaus' first degree assault and ACA convictions.
132. As fully described above, the jury found Mr. Weinhaus not guilty of the alleged attempted first-degree assault and ACA of Corp. Mertens; therefore, the jury discounted or disbelieved Corp. Mertens testimony regarding Mr. Weinhaus alleged behavior.
133. Folsom was the State's critical witness describing Mr. Weinhaus' conduct during the 12 seconds in question. The State relied on Folsom's observations to establish the elements of attempted first degree assault against Mr. Weinhaus.
134. The State failed to disclose critical favorable evidence directly affecting Sgt. Folsom's observations and reaction on the day he shot Mr. Weinhaus,

namely, that Sgt. Folsom had pre-existing PTSD and was taking medication for such condition at the time.

135. **Standard:** To prevail on a *Brady* claim, Petitioner “must show each of the following: (1) the evidence at issue is favorable to him, either because it is exculpatory or because it is impeaching; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) he was prejudiced.” *State ex rel. Koster v. Green*, 388 S.W.3d 603, 308 (Mo. App. W.D. 2012), quoting *State ex rel. Engel v. Dormire*, 304 S.W.3d 120, 126 (Mo. banc 2010).
136. The State of Missouri withheld material, exculpatory evidence from Mr. Weinhaus in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, the Court stated, “We now hold 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 (Emphasis added.) See also *Giglio v. United States*, 405 U.S. 150, 153-154 (1972) (clarifying that the rule stated in *Brady* applies to evidence undermining witness credibility).
137. Evidence qualifies as material when there is “any reasonable likelihood” it could have “affected the judgment of the jury.” *Wearry v. Cain*, 136 S.Ct. 1002, 1006 (2016) (citing *Giglio, supra*, at 1514 (quoting *Napue v. Illinois*, 360 U.S. 264, 271 1959)). To prevail on his *Brady* claim, Mr. Weinhaus need not show that he “more likely than not” would have been acquitted had the new evidence been admitted. *Smith v. Cain*, 565 U.S. 73 (2012). He must only show that the new evidence is sufficient to “undermine confidence” in the verdict. *Id.*
138. Here, Sgt. Folsom, MSHP command staff and the State knew:

- that Folsom had pre-existing PTSD before he shot Mr. Weinhaus;
 - that Folsom was medicated for such condition at the time he shot Mr. Weinhaus;
 - that Folsom was under investigation before disclosing he had PTSD;
 - that Folsom was unhappy with the way MSHP was investigating the Weinhaus case;
 - that Folsom felt he was being retaliated against by MSHP because of his PTSD.
139. None of this critical information about Folsom was disclosed to defense counsel before trial or at any time after trial;
140. Before trial, defense counsel took Folsom’s deposition.
141. When Folsom was asked at his deposition about his medical conditions and any medication he was taking at the time of his encounter with Mr. Weinhaus, Folsom did not disclose the existence of his pre-existing PTSD and the medication he was taking to address it;
142. At his deposition, Folsom denied being on any medication at the time he shot Mr. Weinhaus;
143. The State’s nondisclosure prejudiced Mr. Weinhaus;
144. The materiality standard for Brady claims is met when “the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Kyles v. Whitley*, 514 U.S. at 435. A habeas petition must be granted if the petitioner shows “a reasonable probability of a different result.” *Banks v. Dretke*, 540 U.S. 668, 699 (2004).
145. The materiality/prejudice question must be resolved by evaluating the evidence cumulatively; it is error to “evaluate[] the materiality of each

piece of evidence in isolation rather than cumulatively.” *Wearry v. Cain*, 136 S.Ct. at 1007.

146. As explained fully above, Mr. Weinhaus’ conviction rests on Sgt. Folsom’s description of how the seconds-long encounter with Mr. Weinhaus unfolded.
147. The video watch recording captured only a very jolting and shaky portion of the encounter.
148. Further, the audio from the video watch is susceptible to differing interpretations. While Mr. Weinhaus stated that he told Folsom, “you don’t have to shoot me man,” when Folsom aimed his weapon at Mr. Weinhaus, Folsom testified that Mr. Weinhaus said, “you’re gonna have to shoot me man.” These are vastly different, yet what Folsom heard was filtered through the hyperarousal of his PTSD, of which defense counsel, and the jury, were unaware.
149. Again, as described by Dr. Wayne A. Stillings, who evaluated Sgt. Folsom, 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.”
150. Additionally, Folsom claimed that Mr. Weinhaus was wearing his weapon on his right hip, and that Mr. Weinhaus is right-handed and was reaching for his weapon with his right hand. Mr. Weinhaus maintained that his weapon was on his left-side as he had just emerged from his vehicle where he cannot wear his weapon on the right side due to the location of his seat belt. Again, Folsom’s perceptions of the weapon, its location, and whether Mr. Weinhaus was attempting to reach for it, were affected by his PTSD, of which defense counsel and the jury were unaware.

151. According to a publication by the United States Department of Justice (USDOJ), Community Oriented Policing Services, research has shown that PTSD impacts the critical decision-making of police officers. Violanti, John, Dispatch, *PTSD among Police Officers: Impact on Critical Decision Making*, Dispatch E-newsletter, May 2018, Volume 11, Issue 5.¹
152. According to the USDOJ, results of a study measuring brain function to determine the effect of PTSD on police decision making, showed that officers who have higher levels of PTSD had greater brain activation in areas related to rapid decision making, and disruptions in rapid decision making by an officer who has PTSD may affect brain systems due to heightened arousal to threats, inability to screen out interfering information, or the inability to keep attention. T.J. Covey, Janet L. Shucard, John M. Violanti, and David Shucard, “The Effects of Exposure to Traumatic Stressors on Inhibitory Control in Police Officers: A Dense Electrode Array Study Using a Go/No Go Continuous Performance Task, *International Journal of Psychophysiology*, 87 (2013); 363-375.
153. Defense counsel was precluded from challenging Sgt. Folsom’s observations and impeaching him with any of this critical medical information that directly affected his observations, decision-making and memory of the encounter with Mr. Weinhaus, because none of this information was disclosed: 1) by Folsom, when he was directly asked about medical conditions and medications at his deposition; and 2) by MSHP chain of command who all were aware of Folsom’s pre-existing

¹ <https://cops.usdoj.gov/html/dispatch/05-2018/PTSD.html>

PTSD diagnosis and that he was medicated at the time he shot Mr. Weinhaus.

154. The State's nondisclosure of Folsom's PTSD and medication prejudiced Mr. Weinhaus. *See Buchli v. State*, 242 S.W.3d 449, 454 (Mo. App. 2007), quoting *State v. Parker*, 198 S.W.3d 178, 180 (Mo. App. 2006) ("It appears to us...that the United States Supreme Court would have us ask whether or not the undisclosed evidence would have been significant to the defendant in the way that he tried his case: Would it have provided him with plausible and persuasive evidence to support his theory of innocence...?").
155. Defense counsel would have used this critical information about Folsom to impeach him at trial and cast significant doubts upon his observations, memory and version of events.
156. Defense counsel also would have re-evaluated the entirety of the available evidence and would have made different strategic decision regarding the presentation of the case.
157. For example, Corp. Mertens was Sgt. Folsom's long-time partner at MSHP. Had defense counsel known that Folsom had long-term pre-existing PTSD, it certainly would have opened another avenue of investigation as to whether Mertens was aware of Folsom's diagnosis, how Mertens' observations were affected by knowledge of Folsom's PTSD, and how his testimony might have been skewed or biased based upon his knowledge of Folsom's condition.
158. As another example, before trial, defense counsel deposed FBI Special Agents Patrick Cunningham and Michael Maruschak who were present at the scene in plain clothes. They were backup during Folsom's

encounter with Mr. Weinhaus, located approximately 60 yards away.
(A202, p.13).

159. At his deposition, Special Agent Cunningham testified that while Folsom and Mr. Weinhaus were talking, Mr. Weinhaus' hands were in front of his waistband. Folsom raised his right hand, drew his weapon, took a step back to his left, and then started firing. (A183-184, pp.23-25).
160. Cunningham testified that he never saw a gun on Mr. Weinhaus. Cunningham only saw Mr. Weinhaus' hands in front of his body. Cunningham never saw Mr. Weinhaus' left hand move, and Mr. Weinhaus' hands were never in the air. (A184, p.25).
161. At his deposition, Special Agent Maruschak testified that could not see a lot of Mr. Weinhaus, but did not see a gun. Maruschak said Mr. Weinhaus assumed a little bit of a blade position, but Maruschak still did not see a gun. (A203, pp.19-20).
162. Maruschak could not see Mr. Weinhaus' hands before Folsom fired on him. Mr. Weinhaus' hands were in front of him. Maruschak saw a sudden movement in Mr. Weinhaus' left elbow seconds or milliseconds before the shooting. Maruschak could not see his left hand at all. Maruschak never saw a gun in Mr. Weinhaus' hand. (A204, pp.22-23).
163. Maruschak saw the gun and it was in the holster when Folsom removed it from underneath Mr. Weinhaus. (A205, pp.25-26).
164. While Mr. Weinhaus raised trial counsel's failure to call the FBI agents as ineffective assistance of trial counsel in his post-conviction case, this Court upheld the denial of this and other claims on the basis that the evidence would only have impeached Sergeant Folsom's testimony that Mr. Weinhaus was in the act of drawing a weapon when Sergeant Folsom shot him. *Weinhaus v. State*, 501 S.W.3d 523, 529 (Mo. App. E.D. 2016).

165. This Court repeatedly stated that impeachment of Sergeant Folsom's testimony, alone, without an allegation that the testimony would have negated one of the elements of the crimes, is not sufficient to warrant relief. *Weinhaus v. State*, 501 S.W.3d 523, 530 (Mo. App. E.D. 2016). The point is that had the State disclosed critical evidence that would have negated Folsom's observations, the use of the FBI agents' observations would have been evaluated much differently by defense counsel.
166. Further, impeachment evidence is material as a matter of law if the witness is "the only evidence linking [the defendant] to the crime." *Smith v. Cain*, 565 U.S. 73, 76 (2012). Here, the jury disbelieved Corp. Mertens' testimony as it acquitted Mr. Weinhaus of the counts where Mertens was alleged to be a victim. Folsom's testimony about his observations of Mr. Weinhaus' conduct during those 12 seconds before Folsom shot him are the only evidence linking Mr. Weinhaus to any crime.
167. Under the relevant statute at the time, a person commits the crime of first-degree assault of a law enforcement officer if such person attempts to kill or "knowingly causes or attempts to cause serious physical injury to a law enforcement officer or emergency personnel." §565.081.1.
168. Assault in the first-degree requires proof of a very specific intent on the part of the actor to cause serious physical injury. *State v. Chambers*, 998 S.W.2d 85, 90 (Mo.App.W.D.1999). "Assault in the first-degree, without injury to the victim, requires proof of a very specific intent on the part of the actor to cause serious physical injury. The intent element, however, is generally not susceptible of proof by direct evidence; and may be shown

by circumstantial evidence.” *State v. Schnelle*, 7 S.W.3d 447,451 (Mo. App. W.D. 1999) (quoting *State v. Burton*, 863 S.W.2d 16, 17 (Mo. App. E.D. 1993)).

169. An “attempt” to commit a crime has two elements: (1) Appellant has to have the purpose to commit the underlying offense, and (2) Appellant must perform an act that is a substantial step toward the commission of that offense. A “substantial step” is conduct which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense. *State v. Withrow*, 8 S.W.3d 75, 78 (Mo. 1999).
170. Here, Sgt. Folsom’s testimony was the direct link to establish that Mr. Weinhaus performed an act that was a substantial step toward committing assault on a law enforcement officer. If Folsom’s perception that Mr. Weinhaus was reaching for a weapon and/or was pulling a weapon from his holster was believed, Mr. Weinhaus was guilty; if Folsom’s perceptions were inaccurate and disbelieved, Mr. Weinhaus was not guilty.
171. The materiality standard for Brady claims is met when “the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Kyles*, 514 U.S. at 435. A habeas petition must be granted if the petitioner shows “a reasonable probability of a different result.” *Banks*, 540 U.S. at 699.
172. Evidence qualifies as material when there is “any reasonable likelihood” it could have “affected the judgment of the jury.” *Wearry v. Cain*, 136 S.Ct. 1002, 1006 (2016) (citing *Giglio, supra*, at 1514 (quoting *Napue v. Illinois*, 360 U.S. 264, 271 1959)). To prevail on his *Brady* claim, Mr. Weinhaus need not show that he “more likely than not” would have been acquitted had the new evidence been admitted. *Smith v. Cain*, 565 U.S. 73

(2012). He must only show that the new evidence is sufficient to “undermine confidence” in the verdict. *Id.*

173. Again, evaluating the evidence cumulatively, and not in isolation, the entire defense case would have been prepared differently, and the State’s evidence would have been viewed differently by the jury had Folsom’s PTSD and medication been disclosed to the defense.
174. This claim and the evidence to support it have not previously been presented in state court proceedings because all of the evidence that forms the basis for Mr. Weinhaus’ *Brady* claim was discovered by undersigned counsel after the time in which he could have raised it in his Rule 29.15 motion.
175. Indeed, diligent counsel was not on notice to seek out this information. Although Mr. Weinhaus’ attorneys were aware that Folsom had shot another suspect in 2000, the State not only created misdirection by explaining Folsom’s “shaky hand,” as nerve damage, but misleading counsel away from Folsom’s underlying PTSD diagnosis and medication status. The notice – not provided by the state – is essential to creating a duty of diligence on the part of counsel.
176. Neither trial nor post-conviction counsel had any reason to suspect Folsom’s pre-existing PTSD given Folsom’s deceptive answers at his deposition and at trial. In fact, affirmative measures were taken to prevent discovery of his condition. Folsom deliberately created the impression at Mr. Weinhaus’ sentencing, that his shooting of Mr. Weinhaus is what caused his PTSD (Tr.669). This was another lie. Folsom failed to mention that he had *pre-existing* PTSD, which likely caused him to shoot Mr. Weinhaus without any just cause to do so.

177. Further, state statutes and regulations make personnel and mental or physical health records of state employees confidential. They are specifically exempted from the Sunshine Law. See Section 610.021(3)(5)(13). Defense counsel could not have obtained them.
178. The information was discovered by Mr. Weinhaus' current counsel when the Western District's published opinion was handed down in Case No. WD82081. This opinion upheld the Cole County Circuit Court's grant of summary judgment in favor of MSHP against Folsom's claims of discrimination. In that opinion, counsel learned for the first time of Folsom's pre-existing PTSD, the fact he was medicated for it at the time he shot Mr. Weinhaus, and that MSHP was fully aware of this evidence in the fall of 2012 – a full year before Mr. Weinhaus' trial.
179. The evidence was unknown to Mr. Weinhaus' trial counsel because the State failed to disclose it.
180. "If a habeas record establishes a showing of the gateway of cause and prejudice, then the habeas court is entitled to review the merits of constitutional claims associated with that showing." *State ex rel. Koster v. McElwain*, 340 S.W.3d 221, 245 (Mo. App. 2011).
181. The prosecutor's "failure to disclose evidence material to the defense can satisfy the cause and prejudice test to excuse a defendant's failure to raise a claim in an earlier proceeding." *Id.* p. 248, *citing Amadeo v. Zant*, 486 U.S. 214 (1988).
182. A petitioner shows "cause" when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence. *Banks*, 540 U.S. at 691, *citing Strickler*, 527 U.S. at 282; see also *Ferguson v. Dormire*, 413 S.W.3d 40, 48 (Mo. App. 2013), ("the

prejudice prong of the gateway of cause and prejudice...is coextensive with the third element of a Brady violation.”)

183. The evidence establishes cause and prejudice for this claim.

CLAIM 2

- **The State failed to disclose critical favorable evidence directly affecting Sgt. Folsom’s testimony, namely: 1) Folsom was under investigation by MSHP; 2) Folsom believed MSHP was mishandling the Weinhaus investigation; 3) Folsom believed that MSHP was actively retaliating against him, all of which affected his testimony and undermined the proceedings in violation of Brady v. Maryland, 373 U.S. 83 (1963).**

184. As fully incorporated above, The State failed to disclose critical favorable evidence directly affecting Sgt. Folsom’s testimony, namely, that he was under investigation by MSHP, that he believed MSHP was mishandling the Weinhaus investigation, and he believed that MSHP was actively retaliating against him.

185. After he was declared unfit for duty, Folsom alleged that Captain Eberhard and Lt. Knowles started an investigation on him by interviewing his co-workers about his ability to get along with other employees. (A5-A7).

186. Folsom referred to an Inter-Office Communication titled “Informal Inquiry into Troop I Investigation Unit” dated October 14, 2012, from Captain Eberhard to Major Luke Vislay. This document “contains written details of interviews with Patrol employees who report that Sergeant Folsom departs from the truth, and subordinates of Sergeant Folsom are

intimidated, and suffer low morale due to Sergeant Folsom's quickly changing emotional patterns." (A6-A7).

187. According to Lt. Whittler's report about this matter, "Sgt. Folsom said that he was subjected to retaliation because he did not agree with the manner which the Patrol staff chose to proceed with the investigation of the officer involved shooting, and the subsequent decision not to prosecute Winehouse (sic) for the charges that Sergeant Folsom was seeking as part of his investigation. Sergeant Folsom said after the investigation of the shooting, he revealed to his commander Sarah Eberhard, he suffered from PTSD, and that is when he started to be subjected to discrimination... Sergeant Folsom said he continued over the course of several months to publicly criticize Captain Eberhard and Lieutenant George Knowles regarding how the investigation was handled. Sergeant Folsom and Captain Eberhard and Lieutenant Knowles started an investigation on him by interviewing his co-workers about his ability to get along with other employees." (A5-A7).
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192. Folsom also alleged that he had "made another written memorandum of complaint concerning his retaliation based upon his disability and sent same to Colonel Replogle on 1/17/14." (A80).
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194. Folsom also alleged that the "discovery responses...indicated that Col. Replogle consciously chose to disregard Folsom's 1/17/14 complaints of retaliation and wrote on document MSHP 00079, 'At this time, it is prudent that he [Folsom] focus on his recovery, and the issues in this correspondence will be addressed when he returned to duty'...[a]t the

time Replogle wrote the comment, he knew full well that he would never return Folsom to duty and therefore, his complaints of retaliation and discrimination would never have to be investigated or otherwise addressed or remediated.” (A80).

195. Folsom further alleged there is a report indicating that “Folsom’s supervisor did not believe he actually had PTSD but was ‘pulling off this little PTSD stunt.’” (A81).
196. Folsom also alleged that there is a report which “includes 7 numbered paragraphs detailing evidence of discrimination and retaliation related to Folsom’s disability and his speaking out on matters of public concern and in retaliation for him making allegations of disability discrimination.” (A81).
197. Folsom additionally alleged that there is a report which indicates that Col. Replogle denied Folsom the ability to comply with subpoenas in criminal cases and “should notify requesting parties that he is on extended leave and unavailable...” including “the Sabla homicide investigation in Laclede County...on 4/15/14” and “a Texas County murder trial on 4/24 and 4/25/14.” (A81).
198. Folsom alleged that Col. Replogle’s 2/5/14 refusals to return him to duty to comply with two lawfully served subpoenas were a retaliatory action because a report from Dr. Stephen Acheson stated that “Folsom could be returned to duty when ‘compelled by the courts.’” (A81-A82).
199. None of this critical information about Folsom’s hostile and deceitful interactions with his coworkers and command staff, nor the fact that he was under investigation and was upset about MSHP’s handling of Mr. Weinhaus’ case was disclosed to defense counsel before trial or at any time after trial;

200. Before trial, defense counsel took Folsom's deposition and none of this information was mentioned.
201. The State's nondisclosure prejudiced Mr. Weinhaus;
202. The materiality standard for Brady claims is met when "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. at 435. A habeas petition must be granted if the petitioner shows "a reasonable probability of a different result." *Banks v. Dretke*, 540 U.S. 668, 699 (2004).
203. The materiality/prejudice question must be resolved by evaluating the evidence cumulatively; it is error to "evaluate[] the materiality of each piece of evidence in isolation rather than cumulatively." *Wearry v. Cain*, 136 S.Ct. at 1007.
204. As explained fully above, Mr. Weinhaus' conviction rests on Sgt. Folsom's description of how the seconds-long encounter with Mr. Weinhaus unfolded.
205. The video watch recording captured only a very jolting and shaky portion of the encounter.
206. Further, the audio from the video watch is susceptible to multiple interpretations. While Mr. Weinhaus stated that he told Folsom, "you don't have to shoot me man," when Folsom aimed his weapon at Mr. Weinhaus, Folsom testified that Mr. Weinhaus said, "you're gonna have to shoot me man." These are vastly different interpretations, yet what Folsom heard was filtered not only through the hyperarousal of his PTSD, but through the ongoing feud that he was having with MSHP regarding their handling of him and the Weinhaus investigation.

207. Additionally, Folsom claimed that Mr. Weinhaus was wearing his weapon on his right hip, and that Mr. Weinhaus is right-handed and was reaching for his weapon with his right hand. Mr. Weinhaus maintained that his weapon was on his left-side as he had just emerged from his vehicle where he cannot wear his weapon on the right side due to the location of his seat belt. Again, Folsom's perceptions of the weapon, its location, and whether Mr. Weinhaus was attempting to reach for it, were not only affected by his PTSD, but by his potential bias to make a case against Mr. Weinhaus that he perceived had not properly investigated by MSHP.
208. Additionally, the jury was unaware that Sgt. Folsom had been characterized by his coworkers as departing from the truth, intimidating fellow officers, and causing low moral due to his "quickly changing emotional patterns." These are all reasons to impeach Sgt. Folsom's testimony regarding his interactions with Mr. Weinhaus, yet defense counsel was unaware of this information because the State failed to disclose any of it.
209. Defense counsel was precluded from challenging Sgt. Folsom's observations and impeaching him with any of this critical information about his struggles with MSHP, which would directly affect his trial testimony.
210. The State's nondisclosure of Folsom's reported and investigated angst against and turmoil with MSHP prejudiced Mr. Weinhaus. *See Buchli v. State*, 242 S.W.3d 449, 454 (Mo. App. 2007), quoting *State v. Parker*, 198 S.W.3d 178, 180 (Mo. App. 2006) ("It appears to us...that the United States Supreme Court would have us ask whether or not the undisclosed evidence would have been significant to the defendant in the way that he

tried his case: Would it have provided him with plausible and persuasive evidence to support his theory of innocence...?”).

211. Defense counsel would have used this critical information about Folsom to impeach him at trial and cast significant doubt upon his bias and motive to lie or provide an incomplete or inaccurate version of events vis-à-vis his 12 second interaction with Mr. Weinhaus.
212. Defense counsel also would have re-evaluated the entirety of the available evidence and would have made different strategic decision regarding the presentation of the case.
213. For example, before trial, defense counsel deposed FBI Special Agents Patrick Cunningham and Michael Maruschak who were present at the scene in plain clothes. They were backup during Folsom’s encounter with Mr. Weinhaus, located approximately 60 yards away. (A202, p.13).
214. At his deposition, Special Agent Cunningham testified that while Folsom and Mr. Weinhaus were talking, Mr. Weinhaus’ hands were in front of his waistband. Folsom raised his right hand, drew his weapon, took a step back to his left, and then started firing. (A183-184, pp.23-25).
215. Cunningham testified that he never saw a gun on Mr. Weinhaus. Cunningham only saw Mr. Weinhaus’ hands in front of his body. Cunningham never saw Mr. Weinhaus’ left hand move, and Mr. Weinhaus’ hands were never in the air. (A184, p.25).
216. At his deposition, Special Agent Maruschak testified that could not see a lot of Mr. Weinhaus, but did not see a gun. Maruschak said Mr. Weinhaus assumed a little bit of a blade position, but Maruschak still did not see a gun. (A203, pp.19-20).
217. Maruschak could not see Mr. Weinhaus’ hands before Folsom fired on him. Mr. Weinhaus’ hands were in front of him. Maruschak saw a sudden

movement in Mr. Weinhaus' left elbow seconds or milliseconds before the shooting. Maruschak could not see Mr. Weinhaus' left hand at all.

Maruschak never saw a gun in Mr. Weinhaus' hand. (A204, pp.22-23).

218. Maruschak saw the gun in the holster when Folsom removed it from underneath Mr. Weinhaus. (A205, 25-26).
219. While Mr. Weinhaus raised trial counsel's failure to call the FBI agents as ineffective assistance of trial counsel in his post-conviction case, this Court upheld the denial of this and other claims on the basis that the evidence would only have impeached Sergeant Folsom's testimony that Mr. Weinhaus was in the act of drawing a weapon when Sergeant Folsom shot him. *Weinhaus v. State*, 501 S.W.3d 523, 529 (Mo. App. E.D. 2016).
220. This Court repeatedly stated that impeachment of Sergeant Folsom's testimony, alone, without an allegation that the testimony would have negated one of the elements of the crimes, is not sufficient to warrant relief. *Weinhaus v. State*, 501 S.W.3d 523, 530 (Mo. App. E.D. 2016). The point is that had the State disclosed critical evidence that would have negated Folsom's observations, including his bias and motive to lie about the interaction with Mr. Weinhaus, the use of the FBI agents observations would have been evaluated much differently by defense counsel.
221. Further, impeachment evidence is material as a matter of law if the witness is "the only evidence linking [the defendant] to the crime." *Smith v. Cain*, 565 U.S. 73, 76 (2012). Here, the jury disbelieved Corp. Mertens' testimony as it acquitted Mr. Weinhaus of the counts where Mertens was alleged to be a victim. Folsom's testimony about his observations of Mr.

Weinhaus' conduct during those 12 seconds before Folsom shot him are the only evidence linking Mr. Weinhaus to any crime.

222. Under the relevant statute at the time, a person commits the crime of first-degree assault of a law enforcement officer if such person attempts to kill or "knowingly causes or attempts to cause serious physical injury to a law enforcement officer or emergency personnel." §565.081.1.
223. Assault in the first-degree requires proof of a very specific intent on the part of the actor to cause serious physical injury. *State v. Chambers*, 998 S.W.2d 85, 90 (Mo.App.W.D.1999). "Assault in the first-degree, without injury to the victim, requires proof of a very specific intent on the part of the actor to cause serious physical injury. The intent element, however, is generally not susceptible of proof by direct evidence; and may be shown by circumstantial evidence." *State v. Schnelle*, 7 S.W.3d 447,451 (Mo. App. W.D. 1999) (quoting *State v. Burton*, 863 S.W.2d 16, 17 (Mo. App. E.D. 1993)).
224. An "attempt" to commit a crime has two elements: (1) Appellant has to have the purpose to commit the underlying offense, and (2) Appellant must perform an act that is a substantial step toward the commission of that offense. A "substantial step" is conduct which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense. *State v. Withrow*, 8 S.W.3d 75, 78 (Mo. 1999).
225. Here, Sgt. Folsom's testimony was the direct link in the State's case to establish that Mr. Weinhaus performed an act that was a substantial step toward committing assault on a law enforcement officer. If Folsom's testimony that Mr. Weinhaus was reaching for a weapon and/or was pulling a weapon from his holster, was believed, Mr. Weinhaus was guilty; if Folsom's testimony was disbelieved, Mr. Weinhaus was not guilty. Mr. Weinhaus' ability to impeach Folsom with the undisclosed

information about his bias against MSHP and his motive to lie, was material as a matter of law.

226. The materiality standard for Brady claims is met when “the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Kyles*, 514 U.S. at 435. A habeas petition must be granted if the petitioner shows “a reasonable probability of a different result.” *Banks*, 540 U.S. at 699.
227. Again, evaluating the evidence cumulatively, and not in isolation, the entire defense case would have been prepared differently, and the State’s evidence would have been viewed differently by the jury had the investigation of Folsom by MSHP, and his anger towards MSHP been disclosed to the defense.
228. This claim and the evidence to support it have not previously been presented in state court proceedings because all of the evidence that forms the basis for Mr. Weinhaus’ *Brady* claim was discovered by undersigned counsel after the time in which he could have raised it in his Rule 29.15 motion.
229. Again, diligent counsel was not on notice to seek out this information. The notice – not provided by the state – is essential to creating a duty of diligence on the part of counsel. Neither trial nor post-conviction counsel had any reason to suspect Folsom was under investigation for, in part, departing from the truth, had made later claims of discrimination against MSHP and harbored animosity towards MSHP for what he believed was an inadequate investigation or handling of Mr. Weinhaus’ case. Further, state statutes and regulations make personnel records of state employees

confidential. They are specifically exempted from the Sunshine Law. See Section 610.021(3)(13).

230. The information was only discovered by Mr. Weinhaus' current counsel when the Western District's published opinion was handed down in Case No. WD82081. This opinion upheld the Cole County Circuit Court's grant of summary judgment in favor of MSHP against Folsom's claims of discrimination. In that opinion, counsel learned for the first time about Folsom's pre-existing PTSD, the fact he was medicated for it at the time he shot Mr. Weinhaus, and that MSHP was fully aware of this evidence in the fall of 2012 – one year before Mr. Weinhaus' October, 2013 trial.
231. Further investigation of Folsom's medical information yielded further evidence that Folsom already had been under investigation for, in part, departing from the truth, had made later claims of discrimination against MSHP and harbored animosity towards MSHP for what he believed was an inadequate investigation or handling of Mr. Weinhaus' case.
232. The evidence was unknown to Mr. Weinhaus' trial counsel because the State failed to disclose any of it.
233. "If a habeas record establishes a showing of the gateway of cause and prejudice, then the habeas court is entitled to review the merits of constitutional claims associated with that showing." *State ex rel. Koster v. McElwain*, 340 S.W.3d 221, 245 (Mo. App. 2011).
234. The prosecutor's "failure to disclose evidence material to the defense can satisfy the cause and prejudice test to excuse a defendant's failure to raise a claim in an earlier proceeding." *Id.* p. 248, *citing Amadeo v. Zant*, 486 U.S. 214 (1988).
235. A petitioner shows "cause" when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant

evidence. *Banks*, 540 U.S. at 691, citing *Strickler*, 527 U.S. at 282; see also *Ferguson v. Dormire*, 413 S.W.3d 40, 48 (Mo. App. 2013), (“the prejudice prong of the gateway of cause and prejudice...is coextensive with the third element of a Brady violation.”)

236. The evidence establishes cause and prejudice for this claim.

CONCLUSION

Mr. Weinhaus is entitled to the issuance of the writ of habeas corpus. “[I]n appropriate cases, the principles of comity and finality...must yield to the imperative of correcting a fundamentally unjust incarceration.” *Murray v. Carrier*, 477 U.S. 478, 495 (1986), quoting *Engle v. Isaac*, 456 U.S. 101, 135 (1982). Mr. Weinhaus incarceration is fundamentally unjust because the State failed to disclose critical favorable evidence that undermined the proceedings in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

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

- A. Grant the Writ of Habeas Corpus discharging Mr. Weinhaus from custody based upon Mr. Weinhaus’ illegal confinement and the record before the court; or
- B. In the alternative, enter its order requiring Respondent to answer Mr. Weinhaus’ Petition for Writ of Habeas Corpus;
- C. Allow counsel for Petitioner a reasonable time within which to respond to Respondent’s Answer;
- D. Expand the record to include the exhibits set forth in the appendix submitted herewith;
- E. Appoint a special master to conduct an evidentiary hearing on the allegations of Mr. Weinhaus’ Petition;

F. 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 December 7, 2020, upon the filing of the foregoing document.

/s/ Amy M. Bartholow

Amy M. Bartholow