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OPINIONS AND ORDERS

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REHEARING ORDER

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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT (MAY 21, 2021)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRAD JENNINGS,

Plaintiff-Appellant,

v.

DANIEL F. NASH; JAMES MICHAEL RACKLEY; DALLAS COUNTY; GEORGE KNOWLES,

Defendants-Appellees.

No. 20-1894

Appeal from United States District Court
for the Western District of Missouri - Springfield

Before: SMITH, Chief Judge, ARNOLD and STRAS, Circuit Judges.

PER CURIAM.

Brad Jennings spent over eight years in prison after a jury found him guilty of murdering his wife. Once a Missouri court overturned his convictions, Jennings sued two of the investigating officers, one of their supervisors, and Dallas County for violating his constitutional rights. *See* 42 U.S.C. § 1983. Jennings

lost at trial on one of the claims and at summary judgment on the others. We affirm.

I.

We begin with the numerous challenges to the district court's[1] summary-judgment order. We review the grant of summary judgment de novo, viewing the evidence in the light most favorable to Jennings and drawing all reasonable inferences in his favor. *See Cronin v. Peterson*, 982 F.3d 1187, 1193 (8th Cir. 2020).

Several of the claims were based on the failure of Sergeant Daniel Nash and Sheriff James Rackley to disclose another officer's personnel report before the murder trial. The complaint alleges individual claims against both of them, another for civil conspiracy, and one more against Dallas County, Rackley's employer, for an unconstitutional policy or custom. We agree with the district court that all of these claims fail because the report was neither exculpatory nor material. *See McKay v. City of St. Louis*, 960 F.3d 1094, 1099 (8th Cir. 2020) (explaining that a due-process claim based on *Brady v. Maryland*, 373 U.S. 83 (1963), requires a showing that the undisclosed "evidence was material" and exculpatory); *see also Engesser v. Fox*, 993 F.3d 626, 632 (8th Cir. 2021) ("With no actual deprivation . . . , there can be no [conspiracy] liability." (internal quotation marks omitted)); *Kingsley v. Lawrence County*, 964 F.3d 690, 703 (8th Cir. 2020) ("[A]bsent a constitutional violation by a county employee, there can be no § 1983

[1] The Honorable Nanette K. Laughrey, United States District Judge for the Western District of Missouri.

or *Monell* liability for the county." (brackets and quotation marks omitted)).

The remaining conspiracy claims meet a similar fate. Sergeant Nash and Sheriff Rackley could not be liable for failing to tell Jennings that his wife had previously attempted suicide, because that fact was known and "readily available to the" defense. *See Helmig v. Fowler*, 828 F.3d 755, 761–62 (8th Cir. 2016); *Engesser*, 993 F.3d at 632. And there was no evidence that Nash and Rackley *agreed* to withhold the gunshot-residue test that ended up being the basis for overturning his convictions. *See Helmig*, 828 F.3d at 763 (observing that plaintiffs "must allege with particularity and specifically demonstrate" an agreement (quotation marks omitted)).

Finally, Lieutenant George Knowles was entitled to qualified immunity on the claim that he failed to adequately supervise Sergeant Nash. *See S.M. v. Krigbaum*, 808 F.3d 335, 340 (8th Cir. 2015). Jennings did not even allege, much less show, that Knowles directly participated in any violation of his constitutional rights, and there is no evidence that he "authorized" or "was deliberately indifferent to" a "pattern of unconstitutional acts." *Id.*

II.

Jennings also raises numerous challenges to the way the magistrate judge[2] conducted the trial. Like

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[2] The Honorable Willie J. Epps, Jr., United States Magistrate Judge for the Western District of Missouri, to whom the case was referred for final disposition by consent of the parties. *See* 28 U.S.C. § 636(c).

the rulings at summary judgment, there was no reversible error at trial either.

First, there was no abuse of discretion when the magistrate judge allowed the prosecutor from Jennings's criminal trial to testify that probable cause supported the murder charge. *See Valadez v. Watkins Motor Lines, Inc.*, 758 F.3d 975, 980 (8th Cir. 2014) (reviewing evidentiary rulings for an abuse of discretion). Jennings himself made probable cause a central issue by arguing that there had been no reason to suspect him of murder. It was fair game for Sergeant Nash to then call the prosecutor "to rebut the impression left by" testimony that Jennings had introduced. *Wright v. Ark. & Mo. R.R. Co.*, 574 F.3d 612, 619 (8th Cir. 2009); *see id.* (discussing the opening-the-door doctrine).

Second, the magistrate judge did not mishandle the testimony of any witnesses. Some of Jennings's arguments on appeal just misinterpret the record, like the one claiming that his expert witness was never able to testify about why she believed that Jennings's convictions were unlawful, when, in fact, she did. Similarly, despite Jennings's argument to the contrary, his gunshot-residue expert was able to explain how the dried blood on his hands suggested that he had not washed them. And when the prosecutor speculated that Jennings might have rinsed off the gunshot residue before the police arrived, the judge instructed the jury to disregard his statement. *See Smith v. SEECO, Inc.*, 922 F.3d 406, 414 (8th Cir. 2019) (explaining that we presume that juries follow instructions to disregard inadmissible evidence).

For the remaining challenges, we agree with the reasoning of the magistrate judge, who addressed them

all in an order denying Jennings's motion for a new trial.[3] *See* 8th Cir. R. 47B; *Whitmore v. Harrington*, 204 F.3d 784, 785 (8th Cir. 2000) (per curiam). Simply put, none justifies overturning the jury verdict.

III.

We accordingly affirm the judgment.

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[3] The only exceptions are Jennings's vague argument about "propensity evidence" and the evidentiary challenges he raises for the first time in his reply brief—none of which are properly before us. *See Montin v. Moore*, 846 F.3d 289, 295 (8th Cir. 2017) ("[C]laims not raised in an opening brief are deemed waived. . . . " (quotation marks omitted)); *Watson v. O'Neill*, 365 F.3d 609, 615 (8th Cir. 2004) ("address[ing]" only those "objectionable evidentiary rulings" that had been "sufficiently identified and discussed in [the plaintiff's] brief").

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI (FEBRUARY 27, 2020)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

BRAD JENNINGS,

Plaintiff,

v.

DANIEL NASH, ET AL.,

Defendants.

Case Number: 6:18-3261-CV-S-WJE

CLERK'S JUDGMENT

By the Court's order of 1/15/20, the motions for summary judgment by Defendants Knowles, Rackley, and Dallas County are granted. Defendant Nash's motion for summary judgment is denied as to Count I, but granted on Counts II, III, VI, and VII.

By Verdict of a Jury on 2/25/20, on Plaintiff Brad Jennings' claim against Defendant Daniel Nash, the jury finds in favor of Defendant Daniel Nash.

ENTERED ON:

February 27, 2020

Paige Wymore-Wynn
Clerk of Court
/s/

(By) Deputy Clerk

DECISION AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI DENYING PLAINTIFFS MOTIONS FOR A NEW TRIAL AND RELIEF FROM JUDGMENT (JULY 20, 2020)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

BRAD JENNINGS,

Plaintiff,

v.

DANIEL NASH,

Defendant.

JUDGMENT IN A CIVIL CASE

Case Number: 6:18-3261-CV-S-WJE

___ **JURY VERDICT**

The action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X DECISION BY COURT

This action came for consideration before the Court. The issues have been determined and a decision has been rendered.

IT IS ORDERED – Plaintiff's motion for new trial is DENIED as set forth in the order dated April 23, 2020, (DE #258).

IT IS ORDERED – Plaintiff's motion for relief from judgment is DENIED as set forth in the order dated April 23, 2020, (DE #259).

ENTERED ON: July 20, 2020

Paige Wymore-Wynn
Court Clerk

/s/ A. Geiser
(By) Deputy Clerk

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, SOUTHERN DIVISION DENYING MOTION FOR NEW TRIAL (APRIL 23, 2020)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

BRAD JENNINGS,

Plaintiff,

v.

DANIEL F. NASH,

Defendant.

No. 18-3261-CV-C-WJE

Before: Willie J. EPPS, JR.,
United States Magistrate Judge.

Pending before the Court is Plaintiff Brad Jennings' Motion for New Trial and suggestions in support thereof. (Docs. 248, 249). Defendant Daniel F. Nash filed amended suggestions in opposition (Doc. 254), to which Plaintiff filed a reply (Doc. 256). The motion is now ripe for consideration. For the following reasons, the motion is denied.

I. Background

This case arose from the death of Plaintiff's wife. (Doc. 1). Either late Christmas Eve or early Christmas morning in 2006, Lisa Jennings died in the Jennings' home from a gunshot wound to the right side of her head. (Doc. 233). Shortly thereafter, the Dallas County Sheriff's Office responded to a call from the Jennings' home. (Doc. 151-2). Plaintiff informed the officers that he and Ms. Jennings had an argument earlier in the evening. *Id.*; Tr. Vol. IV, 684:4-5; 699:22-700:4). After the argument, Plaintiff stated he went to his garage and played on a poker machine he owned. Tr. Vol. IV, 631:23-632:8). He testified that upon returning to the house, he found his wife in their bedroom closet with a gunshot wound. *Id.*; (Doc. 151-2). Plaintiff stated he held Ms. Jennings in his arms for several minutes and then called the police. (Doc. 151-2). At the time of Ms. Jennings' death, Plaintiff was wearing his black bathrobe. (Doc. 233).

Thereafter, the Dallas County Sheriff's Office processed the scene of the incident. (Doc. 151-8). A Dallas County Deputy took gunshot residue (GSR) swabs of both Plaintiff and Ms. Jennings' hands. (Doc. 151-2). Ms. Jennings' tested positive for GSR on her right hand while Plaintiff's GSR test results were negative. *Id.* When taking the GSR swabs from Plaintiff, the deputy noticed that Plaintiff had dried blood on his hands. (Doc. 233). Dallas County authorities determined that the cause of Ms. Jennings' death was suicide. (Doc. 151-8). Her death certificate listed "suicide" and "self-inflicted gunshot wound to the head" as the cause of death and noted that she had elevated blood alcohol levels. (Doc. 151-3).

In early January 2007, Ms. Jennings' sister asked the Missouri State Highway Patrol (MSHP) to review the case. (Doc. 233). The MSHP assigned Defendant to look into the matter. *Id.* Defendant contacted the Dallas County Sheriffs' Office and was granted access to the investigation file relating to Ms. Jennings' death. *Id.* Based on his review of blood stains in photographs in the file, Defendant concluded Ms. Jennings' death was more likely homicide than suicide. *Id.*

The MSHP then assigned Defendant to lead additional investigatory efforts into the death of Ms. Jennings in cooperation with the Dallas County Sheriff's Office. *Id.* In late March 2007, Defendant obtained Plaintiff's consent to seize a black bathrobe, a blue bathrobe, and a pair of slippers that he may have worn on the night of Ms. Jennings' death. *Id.* Defendant ordered blood and GSR testing on both robes and the slippers by the MSHP Crime Laboratory. *Id.* Testing revealed Ms. Jennings' blood on the sleeves of the black robe. *Id.* However, the black bathrobe was negative for GSR (GSR Report). *Id.*

As a result of the investigation, Plaintiff was charged with the murder of Ms. Jennings. *Id.* The prosecution informed Plaintiff's defense counsel prior to his criminal trial that the state was unaware of any exculpatory evidence regarding GSR testing on the black robe. *Id.* The GSR Report was not provided to Plaintiff's defense counsel. *Id.* In 2009, Plaintiff was convicted of second-degree murder and armed criminal action. *Id.* He was sentenced to twenty-five years in prison. *Id.*

Either deliberately or inadvertently, the GSR Report remained unproduced until 2015. (Doc. 172). In 2015, the MSHP discovered and disclosed the GSR

Report while collecting documents in response to counsel for Plaintiff's Sunshine Law records request. *Id.* On February 8, 2018, Plaintiff filed for a Writ of Habeas Corpus in the Circuit Court of Texas County. *Id.* The state habeas court found the GSR Report was *Brady* material sufficient to undermine the verdict, vacated Plaintiff's convictions, and ordered Plaintiff be retried or released. *Id*. The Missouri Attorney General decided not to retry Plaintiff and he was released. *Id.* Plaintiff spent approximately 8 1/2 years in prison before his convictions were vacated. *Id*.

On August 16, 2018, Plaintiff filed a seven-count complaint against Defendant and three other state actors, alleging two state common law torts and five civil rights violations under 42 U.S.C. § 1983. *Id.* In an order issued by Senior U.S. District Judge Nanette Laughrey, the Court granted summary judgment on all but one count. *Id.* As a result, the only triable issue for the Court was whether Defendant failed to disclose to the prosecution, in bad faith, evidence material to Plaintiff's defense and, by doing so, proximately caused the injury to Plaintiff. (Doc. 1); (Doc. 233, pp. 23-26).

In February 2020, the Court presided over a five-day jury trial on this matter in Springfield, Missouri. (Docs. 217, 230). At trial, Plaintiff attempted to prove his sole claim by offering circumstantial evidence that Defendant personally received but failed to disclose the GSR Report and offering evidence of Defendant's bad character. While Plaintiff put on various evidence to highlight Defendant's bad character, Plaintiff spent a substantial portion if not the majority of the trial arguing Defendant's bad character was apparent because probable cause in the murder investigation did not exist until Defendant became involved. Specif-

ically, Plaintiff claimed the evidence uncontrovertibly showed that Ms. Jennings committed suicide, and Defendant's contrary conclusion in the face of such evidence was another example of his bad character that fit into a larger career pattern of investigatory misconduct. A nine-person jury returned a verdict in favor of Defendant. (Docs. 236; 238). Plaintiff thereafter brought the instant motion for a new trial. (Doc. 248).

II. Legal Standard

Federal Rule of Civil Procedure 59(a) authorizes the Court to grant a motion for a new trial "on some or all of the issues." Fed. R. Civ. P. 59(a)(1). "A new trial may be granted when the first trial resulted in a miscarriage of justice, the verdict was against the weight of the evidence, the damages award was excessive, or there were legal errors at trial." *Landmark Infrastructure Holding Co. LLC v. R.E.D. Investments, LLC*, No. 2:15-CV-04064-NKL, 2018 WL 2013039, at *1 (W.D. Mo. Apr. 30, 2018), *aff'd*, 933 F.3d 906 (8th Cir. 2019) (citing *Gray v. Bucknell*, 86 F.3d 1472, 1480 (8th Cir. 1996)). Such motions should be granted when "erroneous evidentiary rulings 'had a substantial influence on the jury's verdict.'" *Landmark Infrastructure*, 2018 WL 2013039, at *1 (quoting *Littleton v. McNeely*, 562 F.3d 880, 888 (8th Cir. 2009)).

Moreover, the Court should grant a motion for a new trial "only if the jury's verdict is so against the great weight of the evidence that it constitutes a miscarriage of justice." *Landmark Infrastructure*, 2018 WL 2013039, at *1 (citing *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1010 (8th Cir. 2000)); *see also Berkley Ins. Co. v. Hawthorn Bank*, No. 2:16-CV-04136-NKL, 2018 WL 1516885, at *1 (W.D. Mo. Feb. 5, 2018) ("To

prevail on a Rule 59(e) motion, the movant must show that . . . a new trial considering the evidence would probably produce a different result.") (quoting *U.S. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006)).[1]

III. Analysis

Plaintiff alleges error during the trial in a litany of ways but essentially contends (1) the Court committed legal errors by purportedly allowing a mini-trial to determine whether Plaintiff murdered his wife; (2) the Court committed legal errors in its rulings and favored the defense; and (3) the weight of the evidence did not support the jury's verdict. Plaintiff also mentions the possibility of juror misconduct but has not substantively briefed the issue.

If a party fails to object at trial, the Court's decision is reviewed for plain error. *See Littleton*, 562 F.3d at 890; *Kight v. Auto Zone, Inc.*, 494 F.3d 727, 735 (8th Cir. 2007); *United States v. Patient Transfer Serv., Inc.*, 465 F.3d 826, 828 (8th Cir. 2006); *United States v. Johnson*, 327 F.3d 758, 759 (8th Cir. 2003); *cf.* Fed. R. Evid. 103. "Plain error exists when (1) there is error (2) which is plain and (3) affects substantial rights, and [the reviewing court] should only exercise [its] discretion to correct such error if it seriously affects

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[1] The Court notes that motions for a new trial are reviewed "for a clear abuse of discretion, with the key question being whether a new trial is necessary to prevent a miscarriage of justice." *Manning v. Jones*, 875 F.3d 408, 410 (8th Cir. 2017) (citing *Dindinger v. Allsteel, Inc.*, 853 F.3d 414, 421 (8th Cir. 2017)); *see Keller Farms, Inc. v. McGarity Flying Serv., LLC*, 944 F.3d 975, 984 (8th Cir. 2019) (stating that motions for a new trial "are generally disfavored") (citation and quotation marks omitted).

the fairness, integrity or public reputation of judicial proceedings." *United States v. Patient Transfer Serv., Inc.*, 465 F.3d 826, 828 (8th Cir. 2006) (citing *United States v. Olano*, 507 U.S. 725, 732-36 (1993)). The Court examines each category of Plaintiff's arguments in turn.

(1) Mini-Trial

Plaintiff essentially argues the Court allowed a mini-trial to occur during trial on whether Plaintiff murdered his wife, which unfairly tainted the jury. Plaintiff also contends Defendant should not have discussed his marital strife with Ms. Jennings. In response, Defendant argues Plaintiff opened the door by claiming probable cause did not exist in the murder case until Defendant intervened in the investigation. Defendant further argues he was authorized to rebut Plaintiff's claim of a happy marriage when evidence in the record suggested otherwise.

A party who prejudicially uses relevant evidence opens the door to corrective rebuttal evidence by the opposing party. *Valadez v. Watkins Motor Lines, Inc.*, 758 F.3d 975, 981 (8th Cir. 2014) (citing *United States v. Midkiff,* 614 F.3d 431, 442 (8th Cir. 2010)). "In theory, the admission of inadmissible evidence allows the injured party to cure the problem and 'clear up the false impression' or to 'clarify or complete an issue opened up by [opposing] counsel." *Valadez*, 758 F.3d at 981 (quoting *United States v. Womochil,* 778 F.2d 1311, 1315 (8th Cir. 1985)). However,

> [t]he rebuttal evidence offered to cure the error must be commensurate with the magnitude of the error itself, or the extent to which the door was opened. . . . Quite

> simply, a minor mistake by one party does not give permission to an opposing party to admit any and all otherwise inadmissible evidence that it so desires.

Valadez, 758 F.3d at 981–82; *see also United States v. Smith*, 591 F.3d 974, 982 (8th Cir. 2010); *cf. United States v. Spotted Bear*, 920 F.3d 1199, 1201-02 (8th Cir. 2019).

As an initial matter, Plaintiff made the health of his marriage an issue in this case in an apparent attempt to increase a potential damages award. Plaintiff was on notice that pictures showing a happy family on an international vacation "could possibly open the door" to bad acts surrounding Plaintiff's marriage. (Doc. 242, 7:1-11). Nonetheless, Plaintiff showed such pictures of himself and his wife on vacation and surrounded by family. (Doc. 235) (Plaintiff's exhibits 72, 143, 144). Plaintiff presented his frequent marital strife-including verbal conflicts and at least one altercation where he slapped Lisa Jennings with an open hand-as somewhat normal. (Tr. Vol. I, 105:3-106:1). Plaintiff sought to corroborate this claim with expert Terri Lynn Weaver, Ph.D., who testified that one incident involving violence did not amount to an abusive relationship. *Id.* Such actions allowed Defendant to rebut claims of a healthy, normal marriage, particularly because other evidence in the record suggested Lisa Jennings was having an affair with her boss and wanted to divorce Plaintiff.

Here, the Court finds Defendant's rebuttal showing some evidence of probable cause in the underlying murder investigation did not amount to a mini-trial on Plaintiff's ultimate guilt and did not substantially impact the verdict. Plaintiff chose to argue that no

probable cause existed to support Plaintiff's arrest—much less his conviction—without Defendant's interference. This strategy allowed Defendant to point to evidence supporting probable cause in the record. Simply because Plaintiff's wrongful conviction was overturned did not erase the existence of evidence of probable cause in Ms. Jennings' murder investigation.

Plaintiff was thoroughly on notice that arguments regarding the non-existence of probable cause would open the door to rebuttal. Before trial the Court ruled

> that Defendant may not produce evidence, statements, opinions, or arguments that Plaintiff allegedly murdered his wife for any purpose other than rebuttal or impeachment, should Plaintiff first open the door. In other words, if Plaintiff argues probable cause did not exist to support his arrest, claims little to no evidence suggested he murdered his wife, or makes other statements to similar effect, then Defendant would be allowed to rebut such claims. But the Court notes that Defendant cannot introduce rebuttal or impeachment evidence if Plaintiff merely states he is innocent of murdering his wife or his convictions were vacated.

(Doc. 203) (Order on Plaintiff's motions in limine). The Court ruled similarly on certain evidence of Plaintiff's bad character and evidence concerning bloodstain analysis. *Id.* The Court also addressed these issues at the pretrial conference on February 7, 2020. (Doc. 198). Before trial, Defendant likewise represented he did not intend to produce such evidence during his case-in-chief but would do so for impeachment and rebuttal if raised by Plaintiff. (Doc. 203).

Nonetheless, at trial Plaintiff decided to argue there was no probable cause to suggest he killed his wife, apparently attempting to bolster his bad faith claim and paint Defendant's allegedly bad acts even more negatively. Plaintiff pushed the door open during his opening statement and widened the gap throughout trial. Specifically, during opening statement Plaintiff's first words to the jury were that "Lisa Jennings committed suicide on December 25, 2006." (Tr. Vol. I, 14:24 25). He continued during opening with the following statements related to the alleged absence of probable cause in the murder investigation:

- "[The Dallas County Sheriff's Office] found her death to be a suicide, and they did this because of several factors. You will hear this, that they based this on, one, she had a blood alcohol level of .152; secondly, there was a positive gunshot residue on the Lisa Jennings' right dominant hand, suggesting that she had fired a weapon. They also did a gunshot residue test on the hands of Brad Jennings. That test was negative for gunshot residue, suggesting he did not fire a weapon. *Id.* at 15:7-15.
- "[Y]ou will hear evidence from the [Dallas County Sheriff's Office] deputy who administered that gunshot residue test to Brad Jennings that when he did the test, he saw dried blood from when Brad Jennings held his wife still on his hands, suggesting he had not washed his hands. *Id.* at 15:17-21.

- "[Plaintiff's expert Joseph Slemko] will testify that he believes Lisa Jennings death is one-hundred percent a suicide." *Id.* at 16:19-20.
- "[The GSR test on the robe] was negative for gunshot residue, suggesting [Plaintiff] had not fired a weapon." *Id.* at 18:11-12.
- "The prosecutor who charged and convicted Brad Jennings had admitted that this test was exculpatory, meaning tending to show that he wasn't guilty, to negate guilt." *Id.* at 18:13-15.

Plaintiff retained expert Joseph Slemko to testify about bloodstain analysis and expert Dan Jackson to testify about gunshot residue, despite the fact neither of these topics directly addressed whether Defendant intentionally suppressed a GSR Report. (Doc. 191). Such decisions allowed Defendant to rebut and contest claims that no probable cause existed in the murder investigation.

In sum, Plaintiff's claims of a mini-trial are without merit. Plaintiff could have stated he was innocent and did not murder his wife, and then turned to focus exclusively on whether Defendant intentionally withheld the GSR Report. Instead, he tried to bolster his bad faith claim against Defendant by contending little to no probable cause of his guilt existed in the murder investigation. Accordingly, Defendant was authorized to rebut and impeach such assertions and point to probable cause that existed for the arrest.[2] Plaintiff's

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[2] Plaintiff relies heavily on *White v. McKinley* to argue a mini-trial improperly occurred on whether Plaintiff murdered his wife. 605 F.3d 525 (8th Cir. 2010). In *White*, the plaintiff brought a civil suit alleging he was deprived of a fair trial after being

attempt to recast his strategic trial decisions as Court error does not warrant a new trial.

(2) Court Rulings

Next, Plaintiff argues the Court ruled erroneously and acted prejudicially on numerous issues during the trial. Specifically, Plaintiff highlights errors involving the testimony of psychologist Dr. Weaver, the testimony of state prosecutor Kevin Zoellner, Defendant's closing arguments, and numerous other issues.

i. Dr. Weaver's interactions with the Court and cross-examination by defense counsel do not warrant a new trial.

Plaintiff points to errors stemming from the testimony of his expert psychologist, Dr. Weaver. Plaintiff claims Defendant improperly asked on cross-examination whether Plaintiff was an abusive husband and had an overwhelming sense of guilt due to killing his wife. Plaintiff further argues the Court improperly commented on Dr. Weaver's testimony while she was

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wrongfully convicted of a crime and incarcerated for over five years. *Id.* at 528-32. The defendants were barred from introducing certain evidence of the plaintiff's actual guilt of the crime. *Id.* at 534, 37-38. Here, the facts in *White* are distinguishable because Plaintiff—not Defendant—opened the door to a discussion of probable cause in the murder case. Defendant did not seek to introduce evidence of probable cause before trial and was barred from doing so in the Court's pretrial rulings. Despite these rulings, Plaintiff decided to make a lack of probable cause a central tenant of his case, and intentionally made numerous statements and arguments to that effect. Defendant was authorized to rebut these assertions with evidence in the record. To have held otherwise would have allowed Plaintiff to make untrue assertions that strengthened his bad faith claim against Defendant.

on the stand but did not object to the Court's comments at trial.

As an initial matter, Defendant's questions on cross-examination were proper. These questions occurred after Plaintiff, during direct examination, specifically elicited testimony that Plaintiff hit his wife at least one time but was not abusive. (Tr. Vol. I, 105:23-106:1). Defense counsel's questions on guilt similarly occurred after the expert's testimony on direct examination that explained the possible reason why Plaintiff suffered from post-traumatic stress disorder. *Id.* at 106:18-24. Such questions were well within the bounds of cross-examination.

Here, the Court's interactions with Dr. Weaver did not amount to plain error. While Dr. Weaver responded to defense counsel's questions, she repeatedly failed to answer them directly. (Tr. Vol. I, 118:13-23; 119:1-120:23; 121:16-21; 123:6-124:7-126:14; 130:15-25). On several occasions she responded by asking questions of defense counsel. *Id.* at 121:4; 126:10, 12-14; 127:5; 131:2. During a sidebar Plaintiff objected to a cross-examination question posed to Dr. Weaver, and the Court noted the witness was not answering the question at issue. (Tr. Vol. I, 128:6 11). Dr. Weaver's final comment before the Court instructed her to answer was yet another question to defense counsel: "So I guess you're asking me to speak to a hypothetical. Am I correct in understanding that question?" *Id.* at 132:7-8. The Court then interjected.

> THE COURT: Ma'am, if you could listen clearly to counsel's question and give him a straight answer. If you know the answer, provide it. You are not to ask counsel questions.

THE WITNESS: Okay.

THE COURT: He asks the questions.

THE WITNESS: I apologize.

THE COURT: On redirect, your lawyer will give you a chance to make the statements you want to make.

THE WITNESS: And can I just ask, what do I ask if I don't understand the question? And do I—I don't want to answer a question that I don't understand, so I just need to know what to say if I don't understand the question.

THE COURT: You can turn to me, and I'll interpret for you.

THE WITNESS: Thank you.

THE COURT: Thank you.

THE WITNESS [to defense counsel]: Could you please repeat it one more time?

Id. at 132:9-25.

The Court finds its instructions to the witness did not amount to plain error. Indeed, even if Plaintiff had objected, the Court believes its interactions with Dr. Weaver fell far short of actual bias or the "appearance of advocacy or partiality," which is required to vacate a jury verdict for alleged trial misconduct in the Eight Circuit. *See Farmers Co-op Co. v. Senske & Son Transfer Co.*, 572 F.3d 492, 499 (8th Cir. 2009) (explaining the trial judge was simply "exercising proper control over the mode and order of witness[ ] interrogation" when the judge told a witness to "[g]et on to something that's important" during questioning) (citation and internal marks omitted).

Accordingly, the Court finds Plaintiff's arguments surrounding Dr. Weaver's testimony are without merit.

ii. Issues regarding Mr. Zoellner's testimony do not require a new trial.

Next, Plaintiff points to error surrounding the testimony of Mr. Zoellner. Plaintiff claims that testimony from Mr. Zoellner, who prosecuted the prior murder trial, was prejudicial when he referred to Ms. Jennings' death as a "murder" and a "killing" on the stand. Moreover, Plaintiff argues Defendant improperly asked Mr. Zoellner about the significance of the GSR Report when deciding whether to charge the Plaintiff with murder.

Here, the Court finds Mr. Zoellner's testimony did not warrant a new trial. The Court sustained Plaintiff's objection to categorizing the death as murder in front of the jury and noted on the record that the jury was previously instructed Plaintiff was presumed innocent. (Tr. Vol. IV, 720:22-721:8). The Court believes this act sufficiently cured Mr. Zoellner's improper comment. Any other similar references, including Mr. Zoellner describing the death as a killing, occurred during Plaintiff's cross-examination, to which Plaintiff did not object or correct at trial. These other references did not amount to plain error. While Plaintiff could have lodged an objection to this wording at the time, the Court does not believe Mr. Zoellner's use of the term "killing" twice met the high bar of plain error to warrant a new trial.

Relatedly, Mr. Zoellner permissibly testified as to the significance of the GSR Report and, based on all the evidence, that he would have criminally charged Plaintiff even after its disclosure. Plaintiff put the

issue of probable cause squarely at issue in an attempt to strengthen his bad faith claim. Mr. Zoellner's testimony was a direct rebuttal to Plaintiff's claim that probable cause did not exist in the prior murder investigation. Moreover, Plaintiff stipulated to the admission of the probable cause statement from the murder case, which was marked as Defendant's Exhibit 1. (Tr. Vol. IV, 722:1-3; (Doc. 235). Indeed, Plaintiff appeared to further open the door on this issue by testifying that he "thought we had a chance to beat [a possible second murder trial] easy with a good lawyer." (Tr. Vol. IV, 660:9-662:1). Defendant was therefore authorized to ask Mr. Zoellner if he still would have charged and tried Plaintiff even after obtaining the GSR Report.

iii. Defendant's closing arguments did not rise to plain error.

Plaintiff further contests Defendant's closing arguments. Plaintiff claims defense counsel "engaged in improper and prejudicial final arguments," and points to numerous cites in the trial transcript that primarily relate to the murder investigation and evidence of probable cause. (Doc. 248, p. 6). Plaintiff objected once during Defendant's closing for facts not in evidence, which was overruled. (Tr. Vol. V, 979:20-22). He did not object to any of the statements he now claims were improper.

A motion for a new trial "based on improper closing arguments" that went without objection at trial is reviewed for plain error. *See Lawrey v. Good Samaritan Hosp.*, 751 F.3d 947, 954 (8th Cir. 2014) (citation and internal marks omitted); *see also Dole v. USA Waste Servs., Inc.*, 100 F.3d 1384, 1388 (8th Cir.

1996) (finding defense counsel's closing statements that focused on the plaintiff's background rather than the claim, to which the plaintiff did not object, were "somewhat inflammatory and exhibited poor taste" but not plain error); *Fleming v. Harris*, 39 F.3d 905, 908 (8th Cir. 1994) ("If an arguably improper statement made during closing argument is not objected to by opposing counsel, [the Eighth Circuit] will reverse only under exceptional circumstances."); *Gee v. Pride*, 992 F.2d 159, 162 (8th Cir. 1993) (finding no plain error when defense counsel calling the plaintiff, who was allegedly the victim of excessive force used by police, a "gun-toting, dope-eating, stick-up man" during closing without objection).

Here, defense counsel's closing arguments did not rise to plain error. Plaintiff put these topics squarely at issue by arguing no probable cause existed for his arrest following the Defendant's murder investigation to cast Defendant's actions in a darker light. Plaintiff further opened the door for rebuttal after showcasing evidence of his marriage's so-called health, including pictures while on vacation and Dr. Weaver's testimony that Plaintiff's purportedly onetime physical abuse did not amount to an abusive relationship. Even if some of Defendant's statements did veer into the realm of impropriety, Plaintiff responded to these statements during his reserved time for additional arguments after Defendant's closing. *See Muhammad v. McCarrell*, 536 F.3d 934, 939 (8th Cir. 2008) (finding no plain error "because [the plaintiff's] attorney had an adequate opportunity to address the jury about any potential prejudicial effect" after defense counsel's improper statements during closing). The Court accord-

ingly finds Defendant's closing argument did not meet the high bar of plain error.[3]

iv. Remaining arguments do not warrant a new trial.

A miscellaneous bundle of Plaintiff's contentions remains. The Court briefly examines each remaining argument in turn.

Plaintiff claims the Court improperly allowed brief testimony that a video tape of Plaintiff "doing something he shouldn't do" to his wife apparently existed but was never found during the murder investigation. (Doc. 248, pp. 3-4). Even if improper, the Court finds the brief, relatively ambiguous, and somewhat unimportant testimony regarding an allegedly missing video tape did not substantially impact the jury's verdict.

Plaintiff claims the Court erred by instructing Plaintiff's counsel to ask his "questions succinctly so [the testifying] witness can answer succinctly" after a particularly verbose digression, thereby favoring the defense in front of the jury. (Tr. Vol. IV, 765:12-15). Plaintiff did not object to these comments during the trial. The Court finds that instructing counsel to ask succinct questions did not amount to plain error.

Plaintiff claims error because defense witness and former MSHP Member Steve Crain testified that

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[3] Had Plaintiff objected, the Court believes Defense counsel's statements were likely not "plainly unwarranted and clearly injurious," and did not substantially influence the verdict. *Keller Farms, Inc. v. McGarity Flying Serv., LLC*, 944 F.3d 975, 984-85 (8th Cir. 2019) (noting an opportunity to respond to improper closing arguments is one factor to determine whether a new trial is warranted) (citation omitted).

under MSHP policy, neither he nor Defendant would have a personal responsibility to ensure a prosecutor received the GSR Report if he or Defendant received it. (Tr. Vol. IV, 817:12 19). However, the Court finds Mr. Crain testified permissibly. Mr. Crain was authorized to testify about his understanding of the duties imposed on himself and other members through MSHP policies based on his experience as a MSHP member.

Plaintiff claims the Court should have allowed Plaintiff's witness Mr. Jackson—an expert on GSR—to speculate what the presence of blood evidence on Plaintiff combined with a lack of GSR could mean. (Tr. Vol. I, 152:14-154:7). However, the Court finds it properly sustained Defendant's objection because Plaintiff sought speculation on an issue outside of Mr. Jackson's expertise.

Plaintiff claims the Court erroneously excluded testimony that Defendant knew about Ms. Jennings' history of attempted suicide and did not include it in a report. (Tr. Vol. II, 291:2-292:18). But the Court notes this testimony is present in the record. *Id.*

Plaintiff claims defense counsel "deliberately misled the jury" and elicited Defendant to perjure himself, while noting that attorneys have an ethical obligation not to do so. However, the Court finds these contentions do not warrant a new trial, primarily because Plaintiff had the opportunity to cross-examine and impeach Defendant on any alleged inconsistencies between his deposition and trial testimony.

Plaintiff claims Defendant essentially testified as a bloodstain analysis expert by recounting his testimony from the murder trial while on the stand. However, the Court finds these contentions do not

warrant a new trial, primarily because Plaintiff cross-examined and attempted to impeach Defendant on this issue. (Tr. Vol. V, 951:4-953:24).

Plaintiff claims Defendant should not have stated that Plaintiff's robe was found "hanging off the bed, like somebody had just sat it there." (Tr. Vol. V, 882:5-9). However, the Court finds this somewhat insignificant statement regarding the placement of Plaintiff's robe did not substantially impact the jury's verdict.

In sum, none of Plaintiff's contentions with the Court's ruling merit a new trial. Plaintiff put many of the contentions outlined above squarely at issue during the trial. He had the opportunity to object or further inquire into many of these issues on redirect or cross-examination and either failed to do so or disliked the result.

(3) Weight of the Evidence

Similarly, Plaintiff argues the weight of the evidence did not support the verdict. Plaintiff specifically claims he "clearly and conclusively proved he was innocent" of murdering Ms. Jennings, and that it was "clear that no one was present in the room when [Ms.] Jennings shot herself." (Doc. 248, p. 8). Plaintiff further argues the weight of the evidence clearly demonstrated Defendant was untruthful about the events surrounding the GSR Report based on evidence in the record.

As an initial matter, the Court finds it perplexing that Plaintiff continues to use the instant case to argue his innocence in the murder case. The jury's sole charge in this matter was to determine if Defendant intentionally withheld the GSR Report.

Whether Plaintiff murdered his wife was largely irrelevant to the claim that Defendant suppressed the report. Indeed, the jury instructions contained no element requiring Plaintiff to prove probable cause did not exist in the murder case.[4] The jury could have determined if Defendant intentionally suppressed the GSR Report without having ever sat through the sideshow Plaintiff insisted on performing. The fact Plaintiff spent most of the trial arguing probable cause was lacking with Defendant enthusiastically and continually pointing to evidence of probable cause in response suggests Plaintiff did not fully appreciate how little this issue would demonstrate Defendant's culpability. Here, the Court finds the jury's verdict was not against the great weight of the evidence.

Plaintiff faced a high bar to prove Defendant intentionally suppressed the GSR Report. Plaintiff did not offer substantive, direct evidence that Defendant personally suppressed the GSR Report or violated MSHP policy. Instead, Plaintiff primarily argued Defendant must have intentionally withheld the GSR Report due to circumstantial evidence and his alleged bad character. Evidence of Defendant's bad character, evidence the GSR Report was faxed and mailed to the MSHP, testimony from former MSHP criminalist Nicholas Gerhardt, and testimony from former MSHP member Michael Rogers did not greatly outweigh Defendant's evidence that MSHP administrative clerks were primarily responsible for sending and receiving investigatory documents and that Defendant was never disciplined for violating MSHP policies after an internal

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[4] The Court adopted Plaintiff's proposed jury instructions for the sole claim in this case. (Doc. 233, pp. 23-26).

investigation into his conduct during the murder case. Defendant also explained a copy of the GSR Report was found in a MSHP clerk's locked cabinet that was inaccessible to Defendant.

Furthermore, the testimony of Mr. Gerhardt and Mr. Rogers did not foreclose a verdict for the Defendant. For example, Mr. Gerhardt did not testify to everything Plaintiff outlined in his opening statement. Plaintiff stated the evidence would show Mr. Gerhardt mailed and faxed the GSR Report to Defendant and told Defendant the results over the phone. (Tr. Vol. I, 21:22-25). But on the stand, Mr. Gerhardt was unsure if such a call actually occurred. (Tr. Vol. III, 468:18-487:15; 530:8-531:15). Mr. Gerhardt further testified he had no knowledge whether Defendant personally received the GSR Report by fax. *Id.* at 519:22-24. He also noted that such reports are placed in an outbox to be mailed to the MSHP. *Id*. at 481:22-482:8. Similarly, despite Plaintiff's briefing to the contrary, Mr. Rogers explicitly stated he was unsure if Defendant ever in fact received the GSR results. (Tr. Vol. V, 848:19-20). A verdict for Defendant was therefore not against the great weight of the evidence so that the outcome resulted in a miscarriage of justice.

(4) Juror Misconduct

Lastly, Plaintiff states "[t]here was jury misconduct" because the jury foreman allegedly failed to disclose he was Facebook friends with the ex-husband of Plaintiff's witness Penny Speake. (Doc. 248, p. 9). As support, Plaintiff simply included the affidavit of an individual claiming to have interviewed Ms. Speake and the ex-husband in question. Even assuming the allegations contained in Plaintiff's cursory briefing

and the affidavit are credible and accurate, such claims fall far short of justifying a new trial. A new trial may be warranted for juror misconduct where the moving party proves "(1) that the juror answered dishonestly, not just inaccurately; (2) that the juror was motivated by partiality; and (3) that the true facts, if known, would have supported striking the juror for cause" during *voir dire*. *United States v. Ruiz*, 446 F.3d 762, 770 (8th Cir. 2006). Plaintiff failed to offer any supportive citations on this issue and failed to prove—or allege—any of the above elements in his briefing.

IV. Conclusion

Plaintiff's motion for a new trial is DENIED as set forth herein.

IT IS THEREFORE ORDERED.

Dated this 23rd day of April, 2020, at Jefferson City, Missouri.

/s/ Willie J. Epps, Jr
United States Magistrate Judge

PRE-TRIAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, SOUTHERN DIVISION ON DEFENDANT'S MOTIONS IN LIMINE (FEBRUARY 12, 2020)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

BRAD JENNINGS,

Plaintiff,

v.

DANIEL F. NASH,

Defendant.

No. 18-3261-CV-C-WJE

Before: Willie J. EPPS, JR.,
United States Magistrate Judge.

Pending before the Court are Defendant Daniel Nash's motions in limine (MIL) and incorporated suggestions in support. (Doc. 179). Plaintiff Brad Jennings filed opposition briefing. (Doc. 185). Defendant's motions in limine will be granted in part and denied in part.

1) Defendant's motion is DENIED regarding the alleged omission of Lisa Jennings' personal and family history, and intoxication at death. The Court previously found this evidence did not amount to a *Brady* violation. (Doc. 172). However, this evidence is nonetheless admissible under Rules 401, 402, and 403. Defendant's credibility is directly at issue in this case. Defendant's alleged omissions of the evidence above could increase the probability he intentionally withheld a gunshot residue report to deprive Plaintiff of a fair trial. Moreover, such evidence would be more probative than prejudicial to Defendant because it goes directly to Defendant's credibility.

2) Defendant's motion is DENIED regarding the alleged false statements attributed to Bridgette Maddux by Defendant. The Court previously found this evidence did not amount to a *Brady* violation. (Doc. 172). However, this evidence is nonetheless admissible under Rules 401, 402, and 403. Defendant's allegedly false attributions to Ms. Maddux could increase the probability that he intentionally withheld a gunshot residue report to deprive Plaintiff of a fair trial. Moreover, such evidence would be more probative than prejudicial to Defendant because it goes directly to his credibility.

3) Defendant's motion is DENIED regarding any reference to Scott Rice's personnel file. The Court previously found this evidence was available to Plaintiff at his trial and therefore not a *Brady* violation. (Doc. 172). The Court

also found such evidence was of minimal impeachment value towards Defendant and did not rise to a *Brady* violation. *Id.* In the instant proceeding, however, this evidence is admissible under Rules 401, 402, and 403. Deputy Rice believed Ms. Jennings' death was due to suicide. Defendant's purported attempt to discredit Deputy Rice by attributing false statements to Ms. Maddux—including that Ms. Jennings and Deputy Rice were having an affair, and that Deputy Rice was harassing Ms. Maddux—could increase the probability that Defendant intentionally deprived Plaintiff of a fair trial by failing to disclose a gunshot residue analysis. Moreover, such evidence would be more probative than prejudicial to Defendant because it goes directly to his credibility. The Court cautions the parties not to stray too far into issues involving an alleged conspiracy between Defendant and Sheriff Rackley to discredit Deputy Rice; or internal infighting between Sheriff Rackley and Deputy Rice. These issues seem less probative of (if not irrelevant to) Defendant's credibility.

4) Defendant's motion is DENIED regarding any reference to alleged tampering with computer evidence. The Court previously ruled this evidence was not a *Brady* violation. (Doc. 172). However, this evidence is nonetheless admissible under Rules 401, 402, and 403. Defendant's alleged tampering with Ms. Jennings' electronic devices, including a thumb drive and two hard drives, could increase the

probability that Defendant deprived Plaintiff of a fair trial by intentionally withholding a gunshot residue analysis. Moreover, such evidence would be more probative than prejudicial to Defendant because it again goes directly to his credibility.

5) Defendant's motion is GRANTED regarding any reference to "missed blood evidence" in Sheriff Rackley's memo. Plaintiff offers no argument in opposition to this MIL.

6) Defendant's motion is DENIED regarding any reference to fabricated evidence. For the reasons discussed above, such evidence is admissible under Rules 401, 402, and 403. Moreover, such evidence would be more probative than prejudicial to Defendant.[1] However, the Court cautions the parties that if Plaintiff argues probable cause was fabricated or otherwise inadequate, claims that little to no evidence suggested he murdered his wife, or makes statements to similar effect, then Defendant would be allowed to rebut such claims with impeaching evidence.

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[1] In his response, Plaintiff claims he "will present evidence that Nash for some time (since at least a personnel evaluation in 2002) has exhibited a pattern of omitting key facts to obtain what he wants, has a reputation for dishonesty . . . and has" lied under oath. (Doc. 185, pp. 2-3). It appears Plaintiff would attempt to do so during cross examination under Rule 608(b). Defendant's MIL #6 does not appear to cover such evidence. The Court therefore declines to address the admissibility of this evidence in this order.

7) Defendant's motion is GRANTED regarding any reference to a cover-up or conspiracy between Defendant and Sheriff Rackley or another unnamed third party to hide the GSR lab report of Plaintiff's robe, specifically related to requests under Missouri's Sunshine Laws. Plaintiff has provided no argument to oppose this MIL.

8) Defendant's motion is GRANTED IN PART and DENIED IN PART regarding any reference to Defendant falsely arresting or maliciously prosecuting Plaintiff insofar as it does not conflict with the Court's above rulings. The Court previously dismissed Plaintiff's claims of being falsely arrested and maliciously prosecuted. (Doc. 172). Plaintiff has provided no argument to oppose this MIL. However, Plaintiff may nonetheless claim Defendant lacked probable cause for an arrest. If so, Defendant would be allowed to rebut this claim with impeaching evidence.

9) Defendant's motion is GRANTED regarding any reference to any incident involving Defendant's ex-wife, Jennifer Charleston. This character evidence is impermissible under Rule 404(a) and does not meet any of the permitted uses to show other acts for another purpose under Rule 404(b). Moreover, such evidence would appear to highly prejudice Defendant

without offering a similar level of probative value.[2]

10) Defendant's motion is GRANTED regarding any payment of any judgment made by Missouri's Legal Expense Fund. *Green v. Barron*, 879 F.2d 305, 310 (8th Cir. 1989) (explaining that in a § 1983 claim, the Court should not instruct the jury that the state will indemnify its employee). Plaintiff offers no argument opposing this MIL.

11) Defendant's motion is GRANTED regarding potential testimony from Dwight McNeil (Plaintiff's investigator) on his conversations with other witnesses without the witnesses first being called to testify, insofar as such testimony would amount to hearsay. Plaintiff has offered no argument opposing this MIL.

12) Defendant's motion is DENIED regarding any reference to Plaintiff being innocent. Plaintiff's convictions were vacated. He is therefore presumed innocent unless found guilty of a crime. *Nelson v. Colorado*, 137 S. Ct. 1249, 1255 (2017) (presumption of innocence is restored once a conviction is erased).

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[2] The Court notes its ruling on MIL #9 does not prohibit questions appropriate under Rule 608(b) to be used to gauge a witness' character for truthfulness or untruthfulness.

I. Conclusion

IT IS THEREFORE ORDERED that Defendant Daniel Nash's motions in limine (Doc. 179) are GRANTED IN PART and DENIED IN PART as set forth herein.

Dated this 12th day of February, 2020, at Jefferson City, Missouri.

/s/ Willie J. Epps, Jr
United States Magistrate Judge

PRE-TRIAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, SOUTHERN DIVISION ON PLAINTIFF'S MOTIONS IN LIMINE (FEBRUARY 12, 2020)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

BRAD JENNINGS,

Plaintiff,

v.

DANIEL F. NASH,

Defendant.

No. 18-3261-CV-C-WJE

Before: Willie J. EPPS, JR.,
United States Magistrate Judge.

Pending before the Court are Plaintiff Brad Jennings' motions in limine (MIL) and incorporated suggestions in support. (Doc. 176). Defendant Daniel Nash filed opposition briefing. (Doc. 192). Plaintiff's motions in limine will be granted in part and denied in part.

1) Plaintiff's motion is GRANTED IN PART and DENIED IN PART regarding evidence, statements, opinions, or arguments that plaintiff allegedly murdered his wife. As Plaintiff's convictions have been vacated, he is presumed innocent of a crime. *Nelson v. Colorado*, 137 S. Ct. 1249, 1255 (2017). Therefore, the prejudicial effect of allowing any statements, opinions, or arguments that plaintiff murdered his wife far outweighs their probative value. Fed. R. Evid. 403. Moreover, Defendant has stated he does not intend to produce this sort of evidence in his case-in-chief. However, Defendant reserves the right to produce evidence for rebuttal and impeachment. (Doc. 172). Accordingly, the Court concludes that Defendant may not produce evidence, statements, opinions, or arguments that Plaintiff allegedly murdered his wife for any purpose other than rebuttal or impeachment, should Plaintiff first open the door. In other words, if Plaintiff argues probable cause did not exist to support his arrest, claims little to no evidence suggested he murdered his wife, or makes other statements to similar effect, then Defendant would be allowed to rebut such claims. But the Court notes that Defendant cannot introduce rebuttal or impeachment evidence if Plaintiff merely states he is innocent of murdering his wife or his convictions were vacated.

2) Plaintiff's motion is GRANTED IN PART and DENIED IN PART regarding evidence, statements, opinions, or arguments about

Plaintiff's alleged prior bad acts and bad character. As stated in the Court's order on MIL #1, Plaintiff is presumed innocent from his vacated criminal convictions. It follows that potentially relevant evidence of prior bad acts to support Plaintiff's guilt in a criminal trial is irrelevant to the instant civil matter concerning Defendant's credibility. Defendant has agreed he does not intend to use this bad act evidence in his case in chief but may introduce character evidence for rebuttal and impeachment purposes. Therefore, evidence, statements, opinions, or arguments about plaintiff's alleged prior bad acts and bad character is barred unless Plaintiff puts these acts at issue.[1]

3) Plaintiff's motion is GRANTED IN PART and DENIED IN PART regarding evidence, statements, and arguments that Defendant had probable cause to arrest Plaintiff, as discussed in the Court's rulings on Defendant's MILs #1 and #2. Defendant may not introduce such evidence unless Plaintiff first opens the door to this matters.

4) Plaintiff's motion is GRANTED IN PART and DENIED IN PART regarding testimony that bloodstain patterns indicated Lisa Jennings' death was a homicide. Defendant admitted he does not intend to present blood spatter evidence. Moreover, as Defendant has

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[1] The Court notes its ruling on MIL #2 does not prohibit questions appropriate under Rule 608(b) to be used to gauge a witness' character for truthfulness or untruthfulness.

failed to name an expert witnesses he intends to call, any bloodstain analysis would need to meet the requirements of Rule 701 for lay witness opinions. Bloodstain patterns are by their nature highly technical. Accordingly, a lay witness would not be able to form an opinion without first relying on "scientific, technical, or other specialized knowledge." However, Defendant retains the right to rebut or impeach evidence offered by Plaintiff as discussed in the Court's rulings on MILs #1 and #2 above.

5) Plaintiff's motion is DENIED regarding other opinions expressed by Assistant Attorney General Kevin Zoellner. This evidence is admissible under Rules 401, 402, 403, and 701. Defendant's credibility is central to this matter, and Mr. Zoellner's opinion and knowledge of Defendant is highly probative. Mr. Zoellner may similarly testify to his past experience dealing with the Missouri State Highway Patrol's Crime Lab

6) Plaintiff's motion is DENIED regarding judicial notice of certain Missouri state court files. The Court may take judicial notice of "a fact that is not subject to reasonable dispute." Fed. R. Evid. 201. It is uncontested that Rule 201 allows the Court to take notice of judicial proceedings. *See Stutzka v. McCarville*, 420 F.3d 757, 760 n.2 (8th Cir. 2005) (noting that the court "may take judicial notice of judicial opinions and public records."). However, Plaintiff seeks a blanket determination that the documents and

transcripts contained in each state court file are admissible. Such a ruling would be inappropriate as there is a reasonable dispute about their admissibility. For example, these documents may be subject to the rule against hearsay. *Am. Prairie Const. Co. v. Hoich*, 560 F.3d 780, 797 (8th Cir. 2009) ("Caution must also be taken to avoid admitting evidence, through the use of judicial notice, in contravention of the relevancy, foundation, and hearsay rules." (emphasis added)). Moreover, the Court notes that rulings from previous cases cannot be used for preclusive effect unless Defendant was a party. *See Moore v. City of Desloge*, 647 F.3d 841, 847 (8th Cir. 2011) (order suppressing evidence is not preclusive against officer for want of privity). Therefore, the Court declines to rule on the admissibility of any court documents Plaintiff may seek to introduce into evidence at this time. The parties remain free to stipulate to the admissibility of such files and documents.

I. Conclusion

IT IS THEREFORE ORDERED that Plaintiff's motions in limine (Doc. 176) are GRANTED IN PART and DENIED IN PART as set forth herein.

Dated this 12th day of February, 2020, at Jefferson City, Missouri.

/s/ Willie J. Epps, Jr
United States Magistrate Judge

PROTECTIVE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI (DECEMBER 17, 2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

BRAD JENNINGS,

Plaintiff,

v.

SGT. DANIEL F. NASH, ET AL.,

Defendants.

Case No. 6:18-CV-03261-NKL

Before: Nanette K. LAUGHREY,
United States District Judge.

PROTECTIVE ORDER

IT IS HEREBY ORDERED THAT:

1. As used in this Order, CONFIDENTIAL MATERIAL shall mean and refer to the following:

A. Documents and records reflecting Missouri State Highway Patrol policies that discuss techniques, tactics, and procedures and personnel records and disciplinary files for Defendant Nash; however, state troopers' and other citizens' identifying and personal

> contact information including home address, home/cellular phone numbers, social security number, emergency contact and family information and date of birth may be redacted pursuant to this order. A parties' determination not to redact or inability to redact personal identifiable information from certain media does not result in losing confidential treatment.

2. All CONFIDENTIAL MATERIAL shall be retained only in the custody of counsel of record, who shall be responsible for restricting disclosure in accordance with the provisions of this Order. Specifically, counsel of record shall retain all CONFIDENTIAL MATERIAL within the confines of his/her personal offices except as is necessary to conduct the present litigation.

3. All CONFIDENTIAL MATERIAL and the facts and information in the CONFIDENTIAL MATERIAL shall not be disclosed to any person except as specifically provided for below.

4. All CONFIDENTIAL MATERIAL shall be designated as CONFIDENTIAL MATERIAL by marking the words "CONFIDENTIAL MATERIAL" or some similar phrase on the face of the documents. If a party makes a designation of confidentiality, the other parties retain the right to contest by request or by motion to the court, whether or not the material is confidential.

5. Access to CONFIDENTIAL MATERIAL shall be limited to plaintiff or defendants, defendants' insurer(s), counsel of record for the respective parties to this action, attorneys assisting them, and regular

employees and law clerks of said counsel who are assisting in conducting this litigation, expert witnesses identified by any party, consulting experts, and appropriate court personnel in the regular course of litigation.

6. Disclosure of the CONFIDENTIAL MATERIAL to the plaintiff or defendants and/or to any other persons other than counsel of record in accordance with the terms of this Protective Order must be accompanied by a copy of this Protective Order, and counsel must inform said person(s) of the terms of this Protective Order, and said person(s) agrees to be bound by its terms.

7. In the event a party or non-party seeks to maintain as confidential deposition testimony or all or a portion of a deposition transcript under the standards set forth in this Order, such party shall notify all of the parties during the deposition or no later than thirty (30) days after the receipt of the transcript of the deposition in question. The transcript and all materials included in or attached to the transcript will be treated as confidential until the foregoing time period has expired or any designation of confidentiality is made.

8. If it becomes necessary to submit CONFIDENTIAL MATERIAL to the Court in connection with any filings or proceedings in this litigation, the party using it shall move the Court to file such CONFIDENTIAL MATERIAL under seal with the Clerk of the Court.

9. Nothing in this Order shall be construed to restrict the use or disclosure of any documents which

a party or non-party shall have acquired from independent sources.

10. Disclosure of the CONFIDENTIAL MATERIAL does not constitute a waiver of any claim of attorney-client privilege or attorney work-product protection that might exist with respect to those documents produced or any other documents or communications, written or oral, including, without limitation, other communications referred to in any documents that may be produced. If any of the information or materials included in paragraph above is attorney-client privileged or work product privileged, the party or non-party producing the materials will provide plaintiff with a privilege log for plaintiff's inspection.

11. The production of privileged or work-product documents, electronically stored information ("ESI") or information, whether inadvertent or otherwise, is not a waiver of the privilege or protection from discovery in this case or any other federal or state proceeding. This order shall be interpreted to provide the maximum protection allowed by Federal Rule of Evidence 502(d).

12. Nothing contained herein is intended to or shall serve to limit a party or non-party's right to conduct a review of documents, ESI, or information (including metadata) for relevance, responsiveness and/or segregation of privileged and/or protected information before production.

13. The parties shall return any privileged material disclosed immediately upon notice of the disclosure.

14. Upon final conclusion of this litigation, counsel or parties to whom CONFIDENTIAL MATERIAL has

been disclosed shall return such CONFIDENTIAL MATERIAL, (and all copies thereof and all other papers containing such CONFIDENTIAL MATERIAL) to the party which produced it, or take measures to destroy copies of said CONFIDENTIAL MATERIAL. Without a motion by any party or an Order by this Court, each party shall ensure that this provision is complied with and shall file a certificate with this Court, served on the other side, stating that all documents were returned or destroyed in compliance with this Order.

15. This Order may be modified or amended by agreement of the parties or upon further Order of the Court.

So Ordered:

/s/ Nanette K. Laughrey
United States District Judge

Dated: December 17, 2018
Jefferson City, Missouri

ORDER AND JUDGMENT OF THE STATE OF MISSOURI, CIRCUIT COURT OF TEXAS COUNTY ON PETITION FOR WRIT OF HABEAS CORPUS (FEBRUARY 8, 2018)

IN THE CIRCUIT COURT OF TEXAS COUNTY
STATE OF MISSOURI

BRAD JENNINGS,

Petitioner,

v.

JEFF NORMAN,

Respondent.

Case No. 16TE-CC00470

Before: Hon. John D. BEGER, Circuit Judge.

ORDER AND JUDGMENT ON PETITION FOR WRIT OF HABEAS CORPUS

This matter arises from a petition for Writ of Habeas Corpus filed by Petitioner Brad Jennings. In response to that Petition this Court issued an order for Respondent to show cause why a writ should not be issued. The Court then conducted an evidentiary hearing on November 7-9, 2017. For the convenience of the Court and Counsel, and with their consent, the hearing was conducted at the Phelps County

Courthouse in Rolla, Missouri. At the hearing, both Petitioner and Respondent presented live testimony, deposition testimony and exhibits. After consideration of all the evidence this Court makes the following Findings of Fact and Conclusion of Law:

Findings of Fact

1. Respondent Jeff Norman is the Warden at South Central Correctional Center in Licking. Texas County, Missouri where Petitioner is confined.

2. Petitioner was convicted by a jury on August 19, 2009 of Murder in the Second Degree and Armed Criminal Action in the death of his wife, Lisa Jennings, which occurred on December 25, 2006. (TTR 827). He was sentenced on November 12, 2009 to a term of imprisonment of 20 years for Murder and 5 years for Armed Criminal Action, the sentences to run consecutively. (TTR 903-4)

3. Lisa Jennings died from a gunshot wound to the right side of her head. After the initial investigation, the Sheriff, Deputy Scott Rice, the Dallas County Prosecutor and the Coroner all agreed that the cause of death was a self-inflicted gunshot wound. (TTR 426, Evd. Hearing. pg. 149, 257)

4. On the night Lisa Jennings died and as part of the original investigation, Deputy Rice executed Gunshot Residue (GSR) Stubs on the deceased's and Petitioner's hands. At the hearing on this matter, Dallas County Sheriff Scott Rice, a deputy at the time of the incident, testified that there was what appeared to be dried blood on Petitioner's hands shortly after the death of Lisa Jennings. (Evd. Hearing. pg. 143-144). He stated that this indicated either Peti-

tioner had not washed his hands or had done a poor job of it. (Evd. Hearing. pg. 147)

5. The GSR analysis of the stubs established that Petitioner's hands were negative for gunshot residue, while the deceased hands were positive for gunshot residue. (TTR 524. Evd. Hearing. Pg. 365)

6. Bradley Jennings was wearing a black robe at the time his wife died.

7. Several months after the incident, that robe was seized from Petitioner's residence by Highway Patrol investigator Dan Nash. who ordered blood and gunshot residue testing be conducted by the Missouri State Highway Patrol Crime Lab. The blood testing established that the blood found on Petitioner's black bathrobe was the deceased's. This test result was provided to the defense in pre-trial discovery and was presented at trial to support the State's case against Petitioner. (TTR 606-613, TTR 687-697, Pet. Hearing Ex. 22, Processing of Brad Jennings' Clothing)

8. The MSHP, at the same time, conducted a gunshot residue test on the cuffs of the same bathrobe and the test showed no gunshot residue on the robe. (Pet. Hearing Ex. I. Evd. Hearing. pg. 366). This test result was not provided to the defense at any time, either pre-trial or post-trial. (Evd. Hearing. pg. 69-72, 291), At the hearing on this matter, the State presented testimony that the nondisclosure of the gunshot residue test on Petitioner's robe was due to its being inadvertently "lost" in the process of being faxed to Sgt. Dan Nash. (Evd. Hearing. pg. 291, 343-345). Petitioner's Hearing Exhibit 62. however, indicated that the gunshot residue result was, in fact. faxed to Sgt. Nash.

9. In Sgt. Nash's Report "Processing of Brad Jennings' Clothing" dated June 21, 2007, Sgt. Nash makes reference to the deceased's blood found on Bradley Jennings' robe. but the report contains no reference to the negative gunshot residue test or that a gunshot residue test had been conducted. (Pet. Hearing Ex. 22)

10. Respondent does not dispute that the undisclosed bathrobe GSR test was discovered for the first time by attorney Lindsey Phoenix, pursuant to a Sunshine Law request and inspection of the files from the MSHP Crime Lab in 2015. (Evd. Hearing. Pg. 72)

11. Respondent has admitted the gunshot residue test performed on the robe Bradley Jennings was wearing at the time of his wife's death was not disclosed. (Evd. Hearing. pg. 291)

12. At no time prior to or during Petitioner's trial did the State produce the bathrobe's negative GSR test result.

13. The prosecutor at trial argued that the negative GSR result from petitioner's hands was explainable by the likelihood that Petitioner may have taken a shower shortly after the incident but before the gunshot residue test on his hands. (TTR 767-778)

14. That argument was successful as evidenced by the jury's verdict against Petitioner.

15. Petitioner's trial attorney, on the other hand, during his final argument and in the hearing on his Motion for New Trial, questioned why the State had not performed a GSR test on the bathrobe, arguing that the results would either have tended to inculpate

Petitioner if positive or tended to exonerate him if negative. (TTR 894-895)

16. The trial judge noted in ruling on Mr. Jennings' Motion for New Trial that, "This is a circumstantial evidence case." (TTR 896-7)

17. This Court finds the following.

a. The State failed to disclose the negative gunshot residue test on Petitioner's robe.

b. The negative gunshot residue result was both exculpatory and impeaching.

Brady Violations and Habeas Relief — Applicable Standards

"Habeas corpus is the last judicial inquiry into the validity of a criminal conviction and serves as 'a bulwark against convictions that violate fundamental fairness.'" *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 545 (Mo. banc 2003). A writ should issue when a person is restrained of liberty in violation of his Constitutional rights. *State ex rel Engel v. Dormire,* 304 S.W.3d. 120, 126 (Mo 2010).

"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." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). To establish a *Brady* claim, the Petitioner must show,

(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. *Engel,* 304 S.W.3d at 126.

In other words, the Constitutional violation must have been caused by something external to the defense. *i.e.* a *Brady* violation.

"*Brady* is not a discovery rule but a rule of fairness and minimum prosecutorial obligation." *Miller,* 14 A.3d at 1107 (quoting *Curry v. United States*, 658 A.2d 193, 197 (D.C. 1995), It does not require the production of specific documents, It requires the production of information. *Id.*

The Supreme Court has held, "Even in the absence of a specific request, the prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about the defendant's guilt." *California v. Trombetta,* 467 U.S. 479, 485, 104 S. Ct. 2528, 2532 (1984) emphasis added), citing, *United States v. Agurs*, 427 U.S., at 112. The Court has also emphasized and expanded on this duty:

> "The individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, *see Brady,* 37 U.S. at 87), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable,"

Kyles v. Whitley, 514 U.S. 419, 437-38 (1995) (emphasis added). *See also*, *Merriweather v. State,* 294 S.W.3d 52, 56 (Mo. 2009).

A showing of "cause and prejudice" is necessary to overcome any procedural bar to *Brady* relief. Cause is established where there is a factor at issue external to the defense or beyond its responsibilities. *Engel v. Dormire Supra* at 125, If a Petitioner establishes the prejudice necessary to support his *Brady* claims, he also establishes the required prejudice to overcome the procedural bar for habeas relief, *Id* at 126.

The materiality standard for Brady claims is established 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," and, when analyzing whether there was prejudice to a petitioner as a result of the material evidence not being disclosed, the assessment questions whether the "trial resulted in a verdict worthy of confidence." *Id.* at 129 (emphasis added)

"Courts must consider the cumulative effect of excluded evidence in determining if a *Brady* violation occurred." *State ex rel. Engel Dormire,* 304 S.W.3d 120, 126 (Mo. 2010) (*See also: Kyles v. Whitley*, 514 U.S. at 436, 437).

The State argues, relying on *Schlup v. Delo,* 513 U.S. 298 (1995), that for Petitioner to be entitled to Habeas Corpus he must show a constitutional violation has probably resulted in the conviction of one who is actually innocent That is, "to pass through this gateway, a petitioner must present new reliable evidence, that when viewed with all the evidence shows

'it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence:'" *Schlup, Id.* at 327. Respondent's reliance on *Schlup* is misplaced. In *Schlup* the Court established the standard for a petitioner to overcome the Federal bar against second or subsequent Habeas petitions. *Schlup* does not apply to this case.

CONCLUSIONS OF LAW

The GSR test of Brad Jennings' Robe is Exculpatory

It is undisputed that the black robe tested by the Missouri State Highway Patrol Lab was the item of clothing Brad Jennings' was wearing when his wife died. In fact, the prosecution used blood recovered from that robe as evidence against him at his trial. (TTR 606-613), The fact that the deceased's blood was found on the robe is equally consistent with Brad Jennings' account of that night, that his wife committed suicide and that he cradled her head in his arms after discovering her body.

The negative gunshot residue test of Petitioner's robe is exculpatory because it tends to prove that Petitioner did not fire a weapon. It would have significantly bolstered the defense theory and evidence that the death of Lisa Jennings was a suicide. As noted above, it corroborates the defense that Petitioner did not fire a weapon.

It is uncontroverted that Mr. Jennings was wearing his black robe when Lisa Jennings died. At trial, the States experts testified that they would have expected to see gunshot residue on Mr. Jennings' hands and arms if he had tired the weapon. (TTR

430, 894-5). Therefore, the absence of gunshot residue on Mr. Jennings robe would not only have substantially corroborated the inference of his innocence from the negative gunshot residue results on his hands. but also would have supported a conclusion of suicide. The undisclosed gunshot residue report would have significantly undermined the strength of the States argument that no gunshot residue was found on Mr. Jennings' hands because he might have showered.

Even if this Court found that the undisclosed gunshot residue report was not exculpatory per se. Respondent, in a pleading in this case, admitted that the undisclosed gunshot residue test would constitute impeachment evidence:

> "The gunshot residue report states that no gunshot residue was detected on the cuffs of Jennings' robe seized by the Missouri State Highway Patrol three months after the murder. This evidence is not exculpatory based on Gerhardt's testimony already presented to the jury at trial. Gerhardt testified that the absence or presence of gunshot residue does not necessarily mean anything conclusive for the criminalist . . . He can only determine whether gunshot residue is present or not present but he cannot give a reason it is there or not there . . . <u>But this evidence would constitute impeachment evidence</u>." (Response to Order to Show Cause Why a Writ of habeas Corpus Should Not Be Granted pg. 43) (emphasis added)

Therefore, there can be no dispute as to the existence of one of the essential elements for establishing

a *Brady* violation. To prevail on *a Brady* claim a petitioner must satisfy three components:

> "1.) The evidence must be favourable to him, either because it is exculpatory or because it is impeaching of an adverse Witness . . . " (emphasis added);
>
> 2.) it must be suppressed;
>
> 3.) The petitioner must be prejudiced."

State ex rel. Woodworth v. Denney, 396 S.W.3d 330, 338, 2013 Mo. LEXIS 4 (Mo. Jan. 8, 2013), *Kyles v. Whitley., supra* at 334.

Based on respondent's admission, further inquiry over whether the suppressed evidence is exculpatory or impeaching is not necessary, However, it should be noted that the State's "blood spatter expert" at trial testified the blood on the robe was blow back blood from the gunshot. The absence of gunshot residue on the robe serves to impeach or call this opinion into question.

The GSR test of the Robe was not Disclosed to Petitioner

At the evidentiary hearing, trial prosecutor, Kevin Zoellner, testified that the negative. gunshot residue lest of Petitioner's robe was not disclosed to the defense. (Evd. Hearing. Pg. 291) The negative result was discovered for the first time by attorney Lindsey Phoenix. (Evd. Hearing. pg. 72), M. Phoenix sent in one request asking for the results of all lab testing in Mr. Jennings case and received everything but the negative gunshot residue result on his robe. The results of the testing were not discovered until Ms.

Phoenix sent in a second request specifically asking for the results of the gunshot residue testing on the black robe. (*Id*.)

Respondent asserts that the test was lost in the process of being faxed. *Brady* does trot distinguish between deliberate and inadvertent suppression. the result is the same:

> "The deception from a negligent nondisclosure causes no less injury to the administration of criminal justice than a suppression made by design or guile. The duty to disclose, whether under Brady or Rule 25.32, rests on the prosecutor, and the material and information are within his possession or control, the Cause of his failure cannot soften the sanction."

State v. Dayton, 535 S.W.2d 469, 477 (Mo. Ct. App. 1976) (emphasis added), citing. *Gigllo v. United State*, 405 U.S. 150, 154 (1972); *Levin v. Kaizenbach,* 124 U.S. App. D.C. 158, 363 F.2d 287, 290 (1966)

Thus, it is not necessary for this Court to decide the good or bad faith of the prosecution in this case. Petitioner has established a showing of cause so as to Overcome any procedural bar to *Brady* Relief because he has established that a factor external to the defense was the cause of any alleged default.

MATERIALITY

At the evidentiary hearing., Petitioner presented the credible testimony or Daniel Jackson, a forensic consultant and retired firearm and toolmark examiner with the St Louis County Police Department Crime Lab. This Court accepted Mr. Jackson, without

objection, as an Expert in firearm examinations. He testified that if Mr. Jennings robe was "just hanging there, if it was balled up in an evidence container. I would fully expect to still find gunshot residue. Gunshot residue doesn't dissipate on it's own." (Evd. Hear. Pg. 83) (emphasis added). He based his expert opinion partly on a 2009 study of a revolver used by the James Younger Gang and taken into custody in 1876, the results of which showed that there was still gunshot residue on the gun over 100 years later. (Evd. Hearing. Pg. 88-89).

Mr. Jackson's opinion further rested upon his personal experience. On prior occasions, he found gunshot residue on clothing even after it had been shaken, had been on a body for weeks and the body was in a decomposing state, and on clothing soaked in blood. (Evd. Hearing. Pg. 92-93). He also noted that revolvers (like the .38 revolver here) deposit a substantial amount of gunshot residue, having two different potential points where the gunshot residue can exist (Evd. Hearing. Pg. 93-94). This opinion evidence was uncontradicted.

The Respondent presented the testimony of former Missouri State Highway Patrol trim criminalist Nick Gerhardt. Mr. Gerhardt agreed with Jackson that the passing of time does not in and of itself affect gunshot residue collection and stated, "the science is very good at identifying gunshot residue." Evd. Hearing. pg. 366-367) Further, under questioning from the Court, he stated that he was aware of the James Younger Gang Study relied upon by Mr. Jackson and "would have no reason to doubt it," (Evd. Hearing. pg. 372)

There was no evidence presented at the hearing as to the condition of the robe or how it was stored before it was seized. Likewise, the State presented no evidence that investigators made any effort to determine the handling of the robe prior to its seizure. The best and only evidence of the condition of the robe is that it still had detectable blood on it, supporting an inference that the robe was not washed or significantly molested.

Based on the testimony of Dan Jackson and Nicholas Gerhardt this court finds that the gunshot residue test or Petitioner's robe is material. The undisputed evidence is that gunshot residue does not dissipate with the passage of time alone. Petitioner's robe still had bloodstains when it was tested, making it more likely that the robe would have retained gunshot residue than not. There is no evidence that the State even attempted to investigate the robe's provenance after the incident.

PREJUDICE

The gunshot residue evidence from the robe would have significantly bolstered the defense that Petitioner did not fire the weapon and that Lisa Jennings, by virtue of a positive gunshot residue lest on her hands, fired the weapon instead. Had the gunshot residue evidence from the robe been disclosed to the defense it could easily have tipped the scales in favor of another verdict — not guilty. At the very least, the nondisclosure undermines confidence in the verdict against Mr. Jennings and places the case in an entirely different light.

The Evidence of Brad Jennings Guilt was Far from Overwhelming

Respondent argues, in effect, that the evidence against Brad Jennings was sufficiently strong to have eliminated any prejudice from the nondisclosure of the negative gunshot residue results. (Response to Order to Show Cause Why a Writ of Habeas Corpus Should Not Be Granted, Pg. 12)

The *Kyles* court addressed a similar issue where the undisclosed evidence did not undercut every part of the prosecutions case, but noted that the physical evidence that was left unscathed after the discovery of the *Brady* evidence would not have amounted to overwhelming evidence:

> "Inconclusiveness of the physical evidence does not, to be sure prove Kyle's innocence . . . But the question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same. Confidence that it would have been cannot survive a recap of the suppressed evidence and its significance for the prosecution." *Kyles v. Whitley* (*supra*) at 451, 453. (emphasis added)

The Blood Evidence

The primary evidence of Petitioner's guilt was the opinion testimony of Sgt. Dan Nash, who believed the blood evidence from crime scene photographs proved that Lisa Jennings' death was a homicide. (TTR 550-576), However the hearing testimony from

Sgt. Nash, Sgt. Renken, and Mike Rackley undermined the credibility of that opinion evidence.

Mike Rackley, former Sheriff of Dallas County, led the original investigation into the death of Lisa Jennings. He, Deputy Rice, the coroner and the prosecuting attorney ail originally concluded that the death was a suicide. (Evd. Hearing. pg. 257). However, Rackley testified after Sgt. Dan Nash's analysis of the blood evidence in crime scene photographs, they, "changed the scope of the investigation." (Evd. Hearing. Pg. 258). Rackley relied on his understanding that Sgt. Nash had "extensive training," in blood spatter analysis, at least, "more than I had." *Id.* At trial, the prosecutor argued that. "A lot of this case is based on some of the evidence that Dan Nash did, when he took the investigation a step further." (TTR 808) (emphasis added)

However, Rackley's reliance on Sgt. Nash's expertise and training in blood spatter analysis is undermined by Nash's testimony and personnel file. At the time of his "analysis" of the crime scene photographs and his authorship of the Crime Scene Reconstruction Report, Sgt. Nash had not even taken the basic bloodstain analysis class. (Evd. Hearing. pg. 352. Pet. Hearing Ex. 19, Ex, 75, 64). In fact, Sgt. Nash asked Sgt. Roger Renken to do the bloodstain analysis in this Case[1] because, in his words, "Roger was the most experienced, he was the most trained,. and he's just a very good bloodstain pattern analyst." (Evd. Hearing. pg. 314)

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[1] Sgt. Renken did not testify at Petitioner's trial. Instead, Sgt. Nash testified as to his opinion on the blood evidence.

However, Sgt. Roger Renken, testified at the evidentiary hearing that at ate time of preparing his bloodstain analysis in this case he had only completed 72 hours of training in bloodstain analysis and he did not consider himself an expert. (Evd. Hearing. pg. 229, 230) Sgt. Renken admitted an error in his report regarding the amount of blood on the revolver, saying he no longer agrees with his own assessment that the revolver was "covered in the victims blood," and terming it a "poor choice of words." (Evd. Hearing. pg. 223, Pet. Hearing. Ex. 73). Sgt. Renken testified that back spatter, or "blowback," which he explained as coming out in a cone shaped pattern. appeared on both sides of the same closet wall. (Evd. Hearing. Pg. 239). He opined that this was possible because her head must have been even with the doorframe, *ld.* This Court finds that this testimony defies logic in that it would be highly unlikely, if not impossible, that impact spatter, or "blowback," would have been on opposite sides of the same wall.

Moreover, Sgt. Renken's hearing testimony contradicts Sgt. Nash's trial testimony, Sgt. Renken testified at hearing that the blood and tissue from a contact gunshot wound blows back in a cone shape (Evd. Hearing. Pg. 208) and that Lisa Jennings's blood could be on both sides of the closet wall (the wall to the left of the closet opening as an observer faces the opening from outside the closet, see Petitioner's Exhibit 23)) because at the time of the shot the side of her head was even with the edge the wall at the opening of the closet (Evd. Hearing. pg. 238-239). For that to happen the side of her head would have to have been facing the edge of the wall, *i.e.* perpendicular to the wall.

Sgt. Nash testified at trial to a "ghosting pattern" or "void" in the blow back blood spatter pattern at the entrance to the closet that was "in the middle front area of the closet Entrance of the closet." (TTR 637-638) This pattern is shown in Petitioner's Exhibit 23. For this pattern to have been blow back the side of her head would have had to have been facing the outside of the closet or parallel to the wall, not perpendicular to it. The two opinions (*Sgt. Renken vs. Sgt. Nash*) are mutually exclusive.

Petitioner called as a witness, Joseph Slemko, an Edmonton, Alberta, Canada police officer with impressive credentials in blood spatter analysis, including training. experience, teaching, research and publication. (Petitioner's Exhibit 17) Respondent objected to Slemko's testimony because it was not "new evidence". (Evd. Hearing Tr. P 18; Respondent's Suggestions p8) Respondent chose to call Sgts. Renken and Nash. The Court can and does consider Off. Slemko's testimony as rebuttal evidence to their testimony. Off. Slemko's testimony resolves the conflict in testimony between Sgts. Nash and Renken because, in his opinion, the blood on the outside or the closet wall is not blow back but "castoff" blood. (Evd. Hearing pp 29-31) Blood cast off of a moving hand would be consistent with Petitioner's statement that he picked up his wife's torso and embraced it, then blood being castoff from his hand.

Off. Slemko also testified Petitioner's Exhibit 23 showed a pattern of blow back blood that did not contain a void that would have been indicative of someone else being beside Lisa Jennings at that time of the fatal shot, contrary to Sgt. Nash's trial testimony.

Respondent requested that this Court make credibility determinations because it is in a superior position to do so, citing *Hurst v State,* 301 S.W.3d 112, 119 (Mo. App. E.D. 2010) citing *Jackson v. State,* 205 S.W.3d 282, 287 (Mo. App. E.D. 2006) in this case the Court finds Mr. Slemko's testimony to be more credible and reliable to that of Sgt. Renken or Nash.

This Court considers the testimony of Sgts. Nash and Renken, as well as that of Off. Slemko, as described herein to be evidence uncovered after trial which this Court can consider in arriving at the conclusion that Petitioner's verdicts are not worthy of confidence. "When reviewing a habeas petition premised on an alleged *Brady* violation, [the] Court considers all available evidence uncovered following the *State ex rel. Woodworth v. Denny*, 396 S.W.3d 330, 338 (Mo. 2012)

Based on the testimony of the investigative officers in the Lisa Jennings death investigation. this court finds the following with respect to the blood evidence; Rackley relied on Nash; Nash relied on Renken; Renken was, by his own admission, not a blood spatter expert. Neither was Nash, not having undergone even basic course in bloodstain analysis. Therefore, the primary—and only forensic evidence—against Petitioner rested upon the questionable credentials of the State's purported experts and the bootstrapping of unsubstantiated and illogical opinion evidence. Therefore, the blood evidence, as presented at trial, does not constitute strong, credible evidence of Petitioner's guilt.

In *Woodworth v. Denney* (*supra*), the Missouri Supreme Court found (in adopting the findings of its special master) that the failure to disclose exculpatory

evidence prejudiced Mr. Woodworth because, "due to the weakness of the case against him, any additional advantage that could have been gleaned from this evidence might have resulted in a verdict of 'not guilty'" *Woodworth, (supra)* at pg. 347.

There is no Missouri case precisely on point as to whether undisclosed gunshot residue tests are either material or prejudicial under *Brady*. However, the Wisconsin Court of Appeals decided an analogous Case in *State v. DelReal*, 225 Wis.2d 565 (1999). There, the Defendant was taken into custody a short time after he allegedly fired a gun. *Id* at 567. His hands were swabbed for gunshot residue. *Id*. The gunshot residue test on the swabs of defendant's hands was not performed and the fact that his hands were swabbed was not disclosed. *Id* at 569. During trial, defense counsel was not able to conclude if defendant's hands were swabbed or not based on the conflicting testimony of investigating officers. *Id*. After the defendant's conviction, the swabs were discovered, tested and yielded a negative result for gunshot residue, *Id*. The Court held the following:

> "(The State) failed to disclose relevant exculpatory evidence. In the factual context of this ease, the evidence was relevant for impeachment purposes, for challenging the police investigation, and liar arguing the defense theory that Del Real was not the shooter." *Id*. at 576.

The court, in ruling that the error was not harmless, addressed a similar argument to the one Respondent makes in the instant case.

> "(T)he test cannot conclusively prove that DelReal was riot the shooter because he may have taken some action to eliminate any positive evidence, such as washing his hands to remove any residue, just as a defendant may take action to ensure his fingerprints do not remain it a scene by wearing gloves or wiping the surface clean. This, however, does not make like test or its results irrelevant or inadmissible. Rather, these factors are arguments with respect to the weight of the evidence. The negative evidence may not disprove a defendant's guilt, but It certainly has a 'tendency' to make it 'less probable.'"

Id. at 574. (emphasis added)

The court goes on to say that the State's case against DelReal was "by no means airtight," and they cannot find harmless error because. "The evidence presented here is not so overwhelming that the State's failure to disclose relevant potentially exculpatory evidence was harmless," *Id* at 577.

Here, as in *Woodworth* and *DelReal,* the State's case against Petitioner was thin. The trial court concluded that the State's evidence was circumstantial. (TTR S96-7). Other than Nash's blood spatter analysis testimony the State's other evidence can be summarized as follows:

a) What can only be described as testimony of Brad Jennings' alleged bad character;

b) Testimony that Lisa Jennings actions before her death were not consistent with someone who would want to end their own life, such as having cosmetic surgery; (TTR 762)

c. Hearsay evidence that the deceased was going to leave Mr. Jennings;

d. Testimony from Mr. Jennings stepdaughter, Laci Deckard, that he and the deceased had an argument the day she died. Laci Deckard is the biological daughter of Lisa Jennings. She admitted being "full of hatred' towards Mr. Jennings, that it was her "first instinct" that he did something to her mother. (TTR 275-6)

In 2009 there were 36,909 deaths by suicide in the United States. (National Center for Injury Prevention and Control, CDC) The Court accepts that in many, if not most, of these case the death comes as a complete surprise to the decedent's friends and family. Conversely, hundreds of thousands or even millions of people in this country go through the breakup of a marriage or intimate relationship without ending their own life or that of their spouse/significant other. In short, The Court does not consider this type of evidence to be particularly probative of Petitioner's guilt.

Although some of the circumstances in *DelReal* are different from those in the instant case, the basic pillars are the same, weak evidence against the defendant at trial and an undisclosed negative gunshot residue test Similar to *DelReal,* Mr. Jennings could have used this evidence to effectively counter the State's argument that the absence of gunshot residue on his hands was because he washed them and was of no evidential value to the defense. This evidence would have strengthened the defense that Mr. Jennings did not fire the weapon. The inference from the negative gunshot residue test result on his robe would have supported Mr. Jennings' argument that

he was not the shooter and that Lisa Jennings took her own life.

Petitioner's trial counsel argued in support of the Motion for New Trial that the prosecution had presented no evidence that Mr. Jennings handled the .38 caliber revolver in question. Both during his closing argument and at the Motion for New Trial hearing, he questioned why gunshot residue testing had not been done on the robe;

> "Now, the State's experts testified that if Mr. Jennings . . . if he was holding a gun and he shot someone, here is what you would expect to see there would be gunshot residue on the hand and arm that was holding the weapon. That's their position. That's not controverted, that's a fact before the jury that they to consider.
>
> I would agree with that, And the problem in this case is the gunshot residue Lest on his hand was negative, he didn't have any. Now the State had this robe for more than two years. Not once did they conduct a gunshot residue on the robe. On the right sleeve of the robe, on the left sleeve of the robe, anyplace on the on the robe to determine if Mr. Jennings was holding a .38 caliber weapon, and shot somebody. If there had been gunshot residue on that robe, that would have been a fact this jury could have considered and would have placed the gun in the hands of Mr. Jennings.
>
> The State failed to present any evidence that Mr. Jennings handled that weapon. They

> had available to them the ability to test that robe for more than two years to determine if it had gunshot residue on it, and they did not do that." (TTR, 894-5, emphasis added)

Defense counsel unknowingly demonstrated the materiality of this evidence by questioning why gunshot residue testing had not been done on the robe and by articulating how a negative result would have been crucial to the defense. He correctly argued that the test would have put the State's evidence against Petitioner in a totally different light.

The prosecution argued that the absence of gunshot residue on Mr. Jennings' hands had no evidential value because it was likely that he had washed them. (TTR 767). The negative gunshot residue test on the robe would have substantially weakened that argument. Further, the prosecution used the blood on the robe as evidence against Mr. Jennings at trial. But this evidence actually provides a very strong argument that the robe was not washed before it was tested for gunshot residue, as it still had Lisa's blood on it from when Mr. Jennings found her and held her.

Petitioner would not only have been able to refute the State's argument that he washed his hands. but would have been able to substantially enhance his own argument that he did not fire the weapon. The negative gunshot residue test on the robe would have more forcefully bolstered the inference from the positive gunshot residue result on Lisa Jennings hands *i.e.* that it was highly likely that Lisa Jennings fired the weapon and much less likely that Mr. Jennings did.

The Court wishes to make one other observation. The trial prosecutor. Kevin Zoellner testified that he

was not aware of the exculpatory gunshot residue test and had he been he would have disclosed it because he is well aware of his obligation to do so. The Court found his testimony to be credible. Sgt. Nash, the State's main witness at trial, testified that he submitted the robe to the Highway Patrol Lab for testing for blood, DNA and gunshot residue. Mr. Zoellner is an experienced prosecutor and this Court is aware of the amount of time an experienced prosecutor would spend with a key witness to prepare that witness for trial. Sgt. Nash was the key witness at the trial of this cast and this Court is unable to explain how Sgt. Nash did not mention to Mr. Zoellner that. in addition to blood and DNA testing, the robe was submitted for gunshot residue.

At a minimum, this Court finds that the non-disclosure of this key exculpatory evidence is sufficient to undermine confidence in the verdict.

CONCLUSION

Based on the facts, evidence and circumstances, this Court finds that there was a suppression of material exculpatory evidence, that the suppression was a factor external to the defense, that Petitioner was prejudiced and the verdict against him is not worthy of confidence. used on the applicable law, the admissions of the Missouri Attorney General that this piece evidence was not disclosed, the testimony of Sgt. Nash and Sgt. Renken and the un-contradicted testimony of Firearms Expert Dan Jackson at the evidentiary hearing in this case this court finds:

1. The discovery provided to the defense should have included the gunshot residue test and results on Brad Jennings' robe;

2. The State failed to disclose the gunshot residue test;

3. The negative gunshot residue test on Brad Jennings' robe is exculpatory and impeaching *Brady* Material. and;

4. The failure to disclose the gunshot residue test prejudiced Petitioner as the test is exculpatory and would not only have significantly bolstered the argument that Brad Jennings did not shoot his wife, but also substantially weakened the States argument that the reason he did not have gunshot residue on his hands was because he washed his hands.

5. The failure to disclose this test prejudiced the Petitioner rendering the verdicts against him not worthy of confidence.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, the Writ of Habeas Corpus is granted and this Court orders the convictions of Brad Jennings vacated and the Respondent is ordered to release Petitioner, Brad Jennings. unless the Missouri Attorney General schedules Petitioner for retrial within 120 days.

SO ORDERED THIS 8th DAY OF FEBRUARY, 2018.

/s/ Hon. John D. Beger
Circuit Judge, Division II
Twenty-fifth Judicial Circuit

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING (JULY 19, 2021)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRAD JENNINGS,

Appellant,

v.

DANIEL F. NASH; ET Al.,

Appellees.

No. 20-1894

Appeal from U.S. District Court for the Western District of Missouri–Springfield (6:18-cv-03261-WJE)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

JURY QUESTION PROPOSED TO DR. TERRI WEAVER (FEBRUARY 27, 2020)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

BRAD JENNINGS,

Plaintiff,

v.

DANIEL F. NASH,

Defendant.

No. 18-3261-CV-C-WJE

Can overwhelming suit be one of the emotions that could lead to PTSD?