

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MUMIA ABU-JAMAL
Petitioner,

CIVIL ACTION

v.

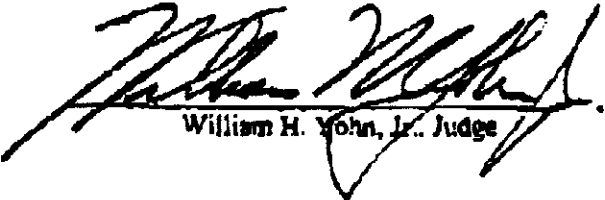
MARTIN HORN, Commissioner, Pennsylvania
Department of Corrections, ET AL.,
Respondents.

NO. 99-5089

FILED JUL 19 2001

ORDER

And now, this 9 day of July, 2001, upon consideration of petitioner's emergency motion for order authorizing deposition (Doc. No. 78), petitioner's supporting memoranda (Doc. Nos. 33, 91) and the Commonwealth's responses thereto (Doc. Nos. 80, 93), it is hereby **ORDERED** that the motion is **DENIED**.


William H. Yohn, Jr., Judge

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MEMORANDUM AND ORDER

JOHN J.

July 19, 2001

Mumia Abu-Jamal ("petitioner") was arrested on December 9, 1981 and subsequently charged with the murder of Philadelphia Police Officer Daniel Paulkner. Following a much-publicized jury trial, petitioner was convicted and sentenced to death.

On October 15, 1999, petitioner filed an action in this court seeking a writ of habeas corpus. In support of his petition, 160 pages in length, Jamal has presented twenty-nine claims, with unnumbered but numerous subparts. He separately has moved in a nineteen page filing, plus exhibits, for an evidentiary hearing and/or discovery on some claims and in a 100 page filing, plus exhibits, for this court to set-aside the factual determinations of the state court in whole as unreasonable.

By order of April 6, 2001 (Doc. No. 62), this court approved the withdrawal of petitioner's counsel upon the entry of appearance of new counsel. New counsel entered their appearance on May 4, 2001. Currently before me is petitioner's motion for an order authorizing

7-20-01

the deposition of Arnold Beverly (Doc. No. 78), whom petitioner claims has confessed to the murder of Officer Faulkner.

On May 4, 2001, petitioner also filed with this court a declaration of Arnold Beverly (Doc. No. 73). The declaration is dated June 8, 1999 and states, *inter alia*, that Beverly was "hired, along with another guy, and paid to shoot and kill Faulkner" as "Faulkner was a problem for the mob and corrupt policemen because he interfered with the graft and payoffs made to allow illegal activity including prostitution, gambling, [and] drugs[,] without prosecution in the center city area."

Petitioner argues that because Beverly has now confessed to the murder, thereby proving petitioner's innocence, petitioner has demonstrated the requisite good cause to depose Beverly. Petitioner also contends that the Beverly declaration provides "circumstantial evidence" supporting claims one and two of his petition for relief. As to claim one, if Beverly did shoot petitioner, then the eyewitness testimony that petitioner shot Faulkner was fabricated, thereby suggesting that the government manipulated two eyewitnesses to identify falsely petitioner as the shooter. Regarding claim two, if Beverly shot petitioner and immediately left the scene, petitioner's claim that the true shooter fled is substantiated, thereby suggesting that the Commonwealth suppressed this information. Petitioner adds that this deposition is necessary because "[i]here is serious reason to believe that as a result of [Beverly's] confession he is in physical danger."

The Commonwealth opposes petitioner's motion, on the basis that petitioner has failed to show good cause for the requested discovery. Specifically, the Commonwealth asserts that the information contained in the Beverly declaration does not relate to any claim for relief set forth in

Jamal's habeas petition. Instead, the Commonwealth argues, the information relates to a claim of innocence which is not before the court and in any event, could not be brought in federal court at this time. As such, because the statute of limitations for asserting the Beverly claim has expired, petitioner is also precluded from requesting discovery regarding the claim. Moreover, the Commonwealth argues that because petitioner cannot satisfy the requirements for an evidentiary hearing as set forth in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132 § 104, 110 Stat. 1214, he is likewise not entitled to discovery concerning the Beverly claim. I conclude that the Commonwealth is correct.

"A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." Rule 6(a) Fed. R. Civ. P. 26(d). That is, unlike other federal civil litigants, a habeas petitioner must show "good cause" in order to conduct discovery. A showing of good cause is made "[w]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief." *Bracy v. Gramley*, 520 U.S. 899, 908-09 (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)); see also *Payne v. Bell*, 89 F. Supp.2d 967, 970 (W.D. Tenn. 2000) ("Petitioner need not show that the additional discovery would definitely lead to relief. Rather, he need only show good cause that the evidence sought would lead to relevant evidence regarding his petition."). In the Third Circuit, good cause is established "[i]f a petitioner can point to specific evidence that might be discovered that would support a constitutional claim." *Marshall v. Hendricks*, 103 F. Supp.2d 749, 760 (D.N.J. 2000) (citing *Deputy v. Taylor*, 19 F.3d 1485, 1493 (3d Cir. 1994)). Central to this standard is the requirement

that the discovery sought relate to a constitutional claim raised in the petition for habeas relief. See *Bracy*, 520 U.S. at 904 (stating that court must identify the essential elements of the constitutional claim before determining whether petitioner is entitled to discovery); *Payne v. Bell*, 89 F. Supp.2d 967, 971 (W.D. Tenn. 2000) (noting that each request for discovery must be related to a claim raised in the petition).

Nevertheless, the enactment of AEDPA served to limit the availability of federal habeas relief in many respects. Important here is § 2254(e)(2) which precludes a district court from hearing and considering new factual evidence not developed in state court if petitioner was at fault for the incomplete factual basis of the claim in the state court record.¹ Petitioner may

¹After enactment of AEDPA, amended § 2254(e) provides:

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(b)-(e) (1994 & Supp. 2000).

Baldwin, 1999 WL 694110, at *2; see also generally *Payne v. Bell*, 89 F. Supp.2d at 970 (reasoning that the standard for granting an evidentiary hearing should not apply to requests for discovery where an evidentiary hearing is not the ultimate goal of the discovery motion).

overcome this bar only if he surmounts the considerable hurdles of § 2254(e)(2)(A) and (B). That is, petitioner must show either (1) that his claim relies on a new rule of constitutional law that was previously unavailable and made retroactive to cases on collateral review by the Supreme Court; or (2) an instance where the facts could not have been discovered through the exercise of diligence, see 28 U.S.C. § 2254(e)(2)(A)(i) & (ii), plus a "convincing claim of innocence." *Michael Williams*, 529 U.S. at 435 (citing 28 U.S.C. § 2254(e)(2)(B)). It follows that if petitioner only seeks discovery regarding new evidence to support the merits of a claim, under AEDPA standards, petitioner cannot establish good cause where he fails to demonstrate that he is entitled to a hearing at which the discovered evidence may be admitted. See *Cherrix v. Braxton*, 131 F. Supp.2d 756, 776 (E.D. Va. 2000); *Charles v. Baldwin*, No. CV-97-380-ST, 1999 WL 694716, at *1-2 (D. Or. Aug. 2, 1999).⁷

petitioner's requested discovery does not relate to any claim for relief currently before the court. Petitioner asserts that the Beverly declaration provides circumstantial evidence concerning claims one and two. Claim one asserts specific violations of *Brady v. Maryland*, 373 U.S. 83 (1963). In short, petitioner alleges that the Commonwealth struck deals with two eye-witnesses, Cynthia White and Robert Chobert, in exchange for false testimony that petitioner shot Faulkner, and that

⁷A habeas petitioner perhaps may seek discovery to locate evidence to establish that he was not provided a procedural bar. Such a request for discovery, however, would not implicate § 2254(e)(2) and good cause should then be established pursuant to Rule 6. See *Charles v. Baldwin*, 1999 WL 694716, at *2; see also generally *Payne v. Bell*, 89 F. Supp.2d at 970 (reasoning that the standard for granting an evidentiary hearing should not apply to requests for discovery where an evidentiary hearing is not the ultimate goal of the discovery motion).

the deals were never disclosed.¹ "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; the evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Even if Beverly's statements were found to be credible, this does not prove that the government possessed and suppressed information that it struck deals with White and Chobert. As such, because petitioner cannot point to specific evidence that would support this *Brady* claim, petitioner has not demonstrated the requisite good cause.

Petitioner's second claim for relief is also premised upon a violation of *Brady*. In short, petitioner argues that the prosecutor had, by various means, suppressed evidence that the true shooter fled. Petitioner maintains that testimony of several witnesses was either coerced (and coercion not disclosed) or that certain witnesses were suppressed. In support of these allegations, petitioner alleges the following facts:

1. Chobert renounced his initial report to the police at the scene of the shooting that he saw someone flee.
2. Veronica Jones testified at a PCRA hearing that she changed her testimony in exchange for prosecutorial leniency in an unrelated felony charge against her.
3. William Singletary originally signed a statement that the shooter had fled the scene and was not petitioner and that Cynthia White was not present at

¹In claim one, petitioner also asserts two additional allegations of constitutional violation: (1) that his rights were violated when the trial court did not permit him to cross-examine Chobert at trial concerning Chobert's probationary status and resultant possible bias; and (2) that his rights were violated when the prosecutor improperly vouched for Chobert in closing argument. It is clear, however, that information contained in the Beverly declaration would not serve to support these allegations. Moreover, petitioner does not argue that the Beverly declaration is relevant here.

the scene as she had testified. His statement was destroyed and, after coercion, he signed a false statement, which was given to defense counsel.

4. Police recovered Arnold Howard's driver's license application from Faulkner's body, raising an inference that a third person was present at the scene. Howard was taken into custody and interviewed and his hands were tested for gunpowder. The presence of the document was never disclosed and a witness statement from Howard was allegedly misleading, incomplete, and forged.
5. Dessie Hightower, the only trial witness to the fleeing man, was forced to submit to a polygraph during which he was never asked about the fleeing man. He was told that he passed, but the polygraph was suppressed.
6. Deborah Kordansky told police officers that she saw a man fleeing the shooting scene, but was deemed unavailable for trial despite defense counsel's express desire to procure her as a witness and his notice to the court that he was unaware of how to secure her testimony.
7. William Cook, petitioner's brother, did not testify out of fear of self-incrimination and retaliation. See Pet. for Relief ¶¶ 96-160.

Again, the court fails to see how the information contained in Beverly's declaration could prove these assertions to be true. Additionally, Beverly's statements are not relevant to this Brady claim, because they do nothing to advance petitioner's theory that the government possessed and suppressed information that the true shooter fled. Accordingly, I conclude that the Beverly declaration does not present specific evidence that supports this Brady claim. As such, petitioner has failed to show good cause for his request to depose Beverly and therefore, that request must be denied.

In any event, even if I were to conclude that the Beverly declaration related either to claim one or two, petitioner cannot meet the requirements for an evidentiary hearing imposed by § 2254(e). An evidentiary hearing will be barred under the provisions of § 2254(e)(2) where a petitioner has "failed to develop the factual basis of a claim in State court proceedings" unless

the claim surmounts the considerable hurdles of § 2254(e)(2)(A)&(B) (new rule of constitutional law or facts that could not have been previously discovered in the exercise of diligence, and clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found petitioner guilty). Petitioner does not suggest that he can meet this entire standard. Rather, petitioner only argues that the Beverly declaration amounts to clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found petitioner guilty of shooting Faulkner. Petitioner, however, fails to demonstrate either of the other two requirements set forth in § 2254(e)(2)(A). Indeed, both of these prerequisites are inapplicable here: there is not a new rule of constitutional law, nor can the court conclude that facts regarding Beverly could not have been discovered through the exercise of due diligence where petitioner was aware of the existence of this witness since at least June 8, 1999 and chose to withhold this information until May 4, 2001. Accordingly, because petitioner would not be entitled to an evidentiary hearing regarding Beverly, he likewise is not entitled to discovery.

Furthermore, even though both parties reference a potential claim for actual innocence, such a claim, absent an independent constitutional violation, may not be the subject of a federal habeas petition. See *Herrera v. Collins*, 506 U.S. 390, 395 (1993). In any event, even assuming that petitioner may bring his Beverly claim on the basis of an independent constitutional violation, petitioner would not be entitled to a hearing regarding this new claim for three reasons. First, at this stage, AEDPA's statute of limitations appears to bar petitioner from now asserting this claim.⁴ There is absolutely no mention of Beverly or these claims in any of the documents

⁴28 U.S.C. § 2244(c) states, in pertinent part:

(i) A 1-year period of limitation shall apply to an application for a writ of habeas

filed by petitioner between October 15, 1999 and July 11, 2000. Even assuming petitioner claims that the facts regarding Beverly that he now wishes to raise could not have been discovered through the exercise of due diligence before June 8, 1999, the date of Beverly's declaration (a best-case scenario for petitioner and six months prior to the filing of his federal habeas petition), AEDPA would impose a deadline of June 8, 2000 for bringing this claim. The motion was not filed until May 4, 2001. Clearly, this deadline has passed. See generally, *United States v. Thomas*, 221 F.3d 430, 435 (3d Cir. 2000) (finding that a habeas petition may not be amended after the time limit imposed under AEDPA has passed); *Hull v. Kyler*, 190 F.3d 103-04 (3d Cir. 1999) (same).

Second, as discussed more fully above, petitioner cannot meet the hurdles imposed by §

corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C § 2254(d) (Supp. 2000).

2254(e)(2).

Third, this claim is unexhausted. Before a district court can consider the merits of a state prisoner's habeas corpus petition, he must have exhausted all available state remedies. See 28 U.S.C. § 2254(b). Petitioner has never exhausted this claim in state court. It appears, however, that petitioner is attempting to raise this claim in state court at this time. See, e.g., Pet'r Notice of Filing Pet. for Post-Conviction Relief, Doc. No. 98. Although the ultimate decision in this case rests with the state court, based on the existing state precedent in other cases, I conclude for present purposes that petitioner is barred from further state post conviction review because more than one year has expired after conclusion of direct review. See 42 Pa. P.C.S.A. § 9545; *Commonwealth v. Cross*, 726 A.2d 333, 335 (Pa. 1999) (applying § 9545 to bar an untimely PCRA claim in a capital case). See also *Campbell v. Meyers*, No. CIV. A. 97-4984, 1999 WL 793509, at *3 (E.D. Pa. Oct. 6, 1999) (examining recent Pennsylvania Supreme Court decisions and concluding that in capital cases, the state court consistently and regularly applied the PCRA one year statute of limitations to bar untimely petitions); *Fittler v. Gillis*, No. CIV. A. 96-6507, 1999 WL 596940, at *3 (E.D. Pa. Aug. 9, 1999) (same). Petitioner perhaps could have met one of exceptions stated in § 9545 on the basis that the facts upon which this claim is predicated were unknown to him and could not have been ascertained by the exercise of due diligence. However, § 9545 requires any petition invoking this exception to be filed within 60 days of the date the claim could have been presented. As a result, I conclude, pending a contrary ruling in state court, that the claim is time barred in state court and petitioner has defaulted his federal claim pursuant to an independent and adequate state procedural rule.

A procedurally defaulted claim may only be reviewed by a federal habeas court if the

petitioner shows cause for his noncompliance with the state procedural rule and actual prejudice from the alleged violation or a fundamental miscarriage of justice. See *Coleman v. Thompson*, 501 U.S. 722, 748-49 (1991), *Schlup v. Delo*, 513 U.S. 298, 314-15 (1995). Petitioner alleges that Beverly's evidence of "actual innocence" is sufficient under the "fundamental miscarriage of justice" doctrine to relieve his procedural default. The Third Circuit has held that this exception to the procedural default rule generally only applies in "extraordinary cases . . . 'where a constitutional violation has probably resulted in the conviction of one who is actually innocent . . .'" *Werts*, 228 F.3d at 193 (quotation and citations omitted). Moreover, the Supreme Court has set forth the following standard: "when a prisoner who has been sentenced to death raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his constitutional claim," the "petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 326-27 (1995).

When all of the circumstances surrounding petitioner's Beverly claim are considered, I cannot conclude that petitioner has alleged information sufficient to establish that had the statements contained in the Beverly declaration been presented at trial, no reasonable juror would have found petitioner guilty beyond a reasonable doubt. Significant among these circumstances is the fact that petitioner chose not to present this claim to the state court or even to this court until May 2001. Moreover, given that the state presented testimony of four eyewitness, none of which corroborates Beverly's story, a reasonable juror still could have found petitioner guilty beyond a reasonable doubt. As such, petitioner fails to overcome the procedural bar to his Beverly claim.

Finally, petitioner styles his motion as an "emergency" motion and requests expedited consideration. The statement of Beverly is dated June 8, 1999. Petitioner did not seek to preserve the testimony of Beverly in 1999 when he first learned of it. Moreover, no supporting facts of any nature are alleged as to why there is suddenly an emergency, almost two years later or why Beverly is allegedly now in physical danger, rather than two years ago.³

For the foregoing reasons, petitioner's motion will be denied.

³If petitioner was concerned with Beverly's safety, petitioner could have filed the Beverly declaration and motion under seal to avoid making them open to the public and to avoid generating publicity about this declaration.