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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

WILLIAM ERNEST KUENZEL, Petitioner, vs. RICHARD F. ALLEN, Commissioner of the Alabama Department of Corrections, and the ATTORNEY GENERAL OF THE STATE OF ALABAMA, Respondents.	)	Case No. 1:00-cv-316-IPJ-TMP

LIMITED DISCOVERY ORDER

The court has before it motions by both the petitioner and the respondents for leave to conduct limited discovery in this death-penalty *habeas* action pursuant to 28 U.S.C. § 2254. (See Docs. 126 and 127). The court already has dismissed the petition as time-barred under 28 U.S.C. § 2244(d), but there is a pending motion pursuant to Rule 60(b) to set aside the dismissal, in which it is asserted that the respondents' failure to produce for inspection the prosecutorial and investigative files from the original state prosecution tainted the "integrity of the proceedings" leading to the dismissal.[1] Petitioner's motion for discovery, contained in his reply (Doc. 127), seeks the following broad categories of discovery:

[1] Petitioner recognizes that merely arguing that the court incorrectly decided that he has not shown "actual innocence," for purposes of avoiding the time bar, amounts to nothing more than asserting a "second or successive" petition, barred by § 2254(b). See Gonzalez v. Crosby, 545 U.S. 524, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005). The Rule 60(b) motion can be considered only insofar as it raises questions about whether and how there were defects in the "integrity of the proceedings" leading to the court's decision, not the merits of the decision itself.

1. Production of the entire investigative and prosecutorial file related to the prosecution of petitioner and his co-defendant, Harvey Venn.

2. Discovery relating to whether the State investigated whether the shotgun lent by Sam Gibbons to Harvey Venn was a .16 gauge, rather than a .12 gauge shotgun.

3. Discovery concerning gaps in the transcript of Crystal Floyd's grand jury testimony.

4. Production of witness statements from any and all of the 50 witnesses listed in Appendix A to Dennis Surrett's affidavit.

5. Discovery concerning the reasons why the respondents have waited until "only recently" to review the prosecutorial and investigative files from the State.

The respondents seek more limited discovery in the form of production of any witness statements obtained from Sam Gibbons and Crystal Floyd by petitioner's trial counsel or investigators working for counsel, and any other documents in petitioner's possession relating to the shotgun Harvey Venn borrowed from Sam Gibbons. Respondents' motion for discovery (Doc. 126) is MOOT, the petitioner having already responded to it, disclaiming the existence of any known documents evidencing an investigation of the Gibbons shotgun by petitioner's original trial counsel or any witness statements taken from Sam Gibbons or Crystal Floyd.

As mentioned in the footnote above, the proper focus of this inquiry must be whether the petitioner's Rule 60(b) motion raises substantial questions about the "integrity of the proceedings" leading up to the court's dismissal of the *habeas* petition. A mere re-argument that petitioner has shown his "factual innocence" would mean that the motion is nothing more than a successive § 2254 petition, barred by § 2254(b). See Gonzalez v. Crosby, 545 U.S. 524, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005). At this stage, the argument in support of allowing discovery must be tied to whether discovery might help either party show that the integrity of the proceedings was or was not

compromised in a way supporting Rule 60(b) relief from the judgment. Due to the post-conviction nature of the remedy, there is no right to conduct discovery in a § 2254 *habeas* action. The benefits of allowing discovery must be balanced against the costs such would involve for such societal goals as finality and federal-state comity. The Supreme Court has reminded us that:

> A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course. Thus, in Harris v. Nelson, 394 U.S. 286, 295, 89 S. Ct. 1082, 1088-1089, 22 L. Ed. 2d 281 (1969), we concluded that the "broad discovery provisions" of the Federal Rules of Civil Procedure did not apply in habeas proceedings. We held, however, that the All Writs Act, 28 U.S.C. § 1651, gave federal courts the power to "fashion appropriate modes of procedure," 394 U.S., at 299, 89 S. Ct., at 1090, including discovery, to dispose of habeas petitions "as law and justice require," id., at 300, 89 S. Ct., at 1091. We then recommended that "the rule-making machinery... be invoked to formulate rules of practice with respect to federal habeas corpus... proceedings." Id., at 300, n. 7, 89 S. Ct., at 1091, n. 7. Accordingly, in 1976, we promulgated and Congress adopted the Rules Governing § 2254 Cases. Of particular relevance to this case is Rule 6(a), which provides:
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> > A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

Bracy v. Gramley, 520 U.S. 899, 904, 117 S. Ct. 1793, 1797, 138 L. Ed. 2d 97 (1997); Arthur v Allen, 459 F.3d 1310 (11th Cir. 2006) (Discovery is available "'where specific allegations... show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he ... is entitled to relief.'") (quoting Bracy, 520 U.S. at 908-09, 117 S.Ct. at 1799 (quoting Harris v. Nelson, 394 U.S. 286, 300, 89 S. Ct. 1082, 1091, 22 L. Ed. 2d 281 (1969))).

The core issue in the instant case is whether petitioner can establish that he is actually innocent of the murder of Linda Offord. The court has concluded, once again, that the § 2244(d)

time bar applies to this case under Pace v. Diguglielmo, 544 U.S. 408, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005), and Allen v. Siebert, 552 U.S. 3, 128 S. Ct. 2, 169 L. Ed. 2d 329 (2007). Petitioner seeks to avoid the time bar by arguing that he is actually innocent of the murder, but the court's dismissal in December rejected that argument, finding that petitioner had not made a sufficient showing of innocence. Now the question presented is whether that conclusion should be vacated and set aside under Rule 60(b)(1), (2), (3), or (6) on the basis that the respondents' failure to review for themselves and to produce the prosecutorial and investigative files has undermined the "integrity of the proceedings." Of importance to the current motions is whether there is "good cause" to believe that, "if the facts are fully developed, [petitioner will] be able to demonstrate that he... is entitled to relief." Arthur v Allen, 459 F.3d 1310 (11th Cir. 2006). The "relief" in question presently is not ultimate *habeas* relief, but whether petitioner is entitled to Rule 60(b) relief.

The court believes that there is good cause for limited discovery focused on whether the respondents (including the State of Alabama) possess additional information tending to raise doubts about the petitioner's guilt or that affirmatively supports a conclusion that he is innocent. Only after the court concluded that petitioner had not shown his factual innocence did the respondents produce six documents relating to testimony that either was or could have been given at trial had it been known to petitioner at the time. These documents are:

1. The handwritten notes of an apparent police interview with Crystal Floyd made during the police investigation of the Offord murder.

2. The grand jury testimony of Crystal Floyd.

3. The typed transcript of a recorded police interview with Crystal Epperson, made apparently during the police investigation of the Offord murder.

4. The grand jury testimony of Crystal Epperson.

5. The typed transcript of a recorded police interview with April Harris, made apparently during the police investigation of the Offord murder.

6. The grand jury testimony of April Harris.

An understanding of the cast of characters is important. Crystal Floyd was Harvey Venn's 13-year old girlfriend at the time of the murder. Crystal Epperson and April Harris were two teenage girls who knew both Harvey Venn and petitioner. Of these three, only April Harris testified at petitioner's trial.[2] She testified that, on the night of the murder, she and Crystal Epperson were driving by the store between 9:30 and 10:00 p.m., on their way home, when she saw not only Harvey Venn's car parked at the store, but saw also both Venn and petitioner inside the door to the store. The grand jury testimony of April Harris is both helpful and harmful to petitioner. Helpful in the sense that she was much more unsure of her identification of petitioner and Venn before the grand

[2] It is fair to say that the most critical evidence against petitioner was the testimony of Harvey Venn, his 18-year old co-defendant, testifying under a plea agreement with the State. Venn testified at trial, in substance, that he and petitioner intended to rob the convenience store at which Linda Offord worked. Venn claimed that he had a .12 gauge shotgun and that petitioner had a .16 gauge shotgun, and that petitioner went into the store a little after 11:00 P.M., on November 9, 1987, to rob it. Venn claims that he remained in the car, but heard a gun shot and saw Offord fall backward behind the store counter. He testified that petitioner then ran out of the store, jumped in the car, and told Venn to "haul ass." Police later confirmed that the murder weapon had been a .16 gauge shotgun, based on the size of the plastic wadding found at the scene. Police also determined, again based on the wadding, that the shotgun shell fired was probably a Remington brand shell, and they later found a burned Remington shell in a trash barrel at petitioner's and Venn's shared residence. Forensic tests determined that the shell found in the trash barrel was fired in the Harrington and Richardson .16 gauge shotgun petitioner borrowed from his step-father. Venn's credibility was severely tested on cross-examination, and he could not explain how human blood of the same type as the victim's blood ended up on his pants. Most of the other evidence at trial dealt with supporting or challenging Venn's version of the events, and to corroborate his accomplice testimony. Petitioner's defense at trial, and an argument he has made through his post-conviction challenges to the conviction, was that he was not involved in the robbery and shooting, and that Venn was framing him to save himself from the death penalty.

jury than she was at trial. But is was also less favorable then her trial testimony in that she estimated the time frame to be from 10:00 to 10:45, much closer in time to the murder than indicated by her trial testimony.

Petitioner argues that these six, recently produced documents are favorable to him, either being exculpatory or, at least, useful in impeaching the testimony of prosecution witnesses. He contends that the fact that these documents were not produced to petitioner, either during the criminal prosecution or in all of the years of post-conviction litigation, raises the alarming possibility that additional favorable evidence exists in the State's files, which has been suppressed by the respondents to prevent him from proving his factual innocence. He claims he should be allowed discovery to explore whether such suppression by the respondents has occurred and whether its warrants Rule 60(b) relief from the judgment of dismissal.

While the court is skeptical that the mere recent production of these documents is sufficient to establish "good cause" to authorize petitioner to conduct discovery, the court does not forget that the central issue now before it is whether the petitioner can show his actual, factual innocence of the murder of Linda Offord. So far, the evidence brought forward simply questions the credibility of the witnesses and trial evidence against him. It does not establish positive proof of innocence in the way in which DNA evidence or a new eyewitness or a recantation might — some evidence that positively refutes the possibility that the defendant committed the crime. Petitioner's evidence attempts to increase the level of doubt about the credibility of prosecution evidence, and particularly the testimony of Venn.

Nevertheless, the court is willing to authorize petitioner to engage in *limited* discovery, but certainly not the broad waterfront of discovery he seeks. Petitioner's theory of innocence implies

that the State of Alabama has actively or tacitly assisted Venn in framing him for the murder by hiding evidence of his innocence at the time of trial and for over two decades since. The court has a very hard time swallowing this theory. To address this theory, and either prove it or refute, petitioner's motion for discovery is GRANTED IN PART, and it is

ORDERED, pursuant to Rule 6(a) of the Rules Governing Section 2254 Cases, that within thirty (30) days after this Order, the respondents shall produce to petitioner any and all documents, statements, recordings, reports, and other information (other than such created by or known to petitioner or his counsel) in any investigative or prosecutorial file created by law enforcement personnel, forensics personnel, or prosecutors in relation to the murder of Linda Offord, that:

1. State or imply that petitioner did not kill Linda Offord;

2. State or imply that petitioner was not present at or during the murder of Linda Offord;

3. State or imply that petitioner is innocent of the murder of Linda Offord;

4. Expressly or implicitly contradicts or impeaches the trial testimony of any prosecution witness presented during petitioner's trial;

5. State or imply that the murder weapon was anything other than the Harrington and Richardson .16 gauge shotgun petitioner borrowed from his stepfather;

6. State or imply that Harvey Venn possessed a .16 gauge shotgun (other than the shotgun borrowed from petitioner's stepfather), rather than a .12 gauge shotgun, at the time of the murder of Linda Offord;.

7. State or imply that anyone other than petitioner was with Harvey Venn at the time of the murder of Linda Offord, or that Harvey Venn was and acted alone at that time;

8. State or imply whether and how police investigated whether the shotgun Harvey Venn borrowed from Sam Gibbons was a .12 or .16 gauge shotgun, and how (if at all) it was excluded as the murder weapon.

In responding to this Order, the respondents are **not** required to produce any document or information that was produced in discovery at the time of trial or at any stage of the post-conviction proceedings in state or federal court. The respondents are **not** required to produce any document created by petitioner or his attorneys, or which is already known to them. The express purpose of this Order is to require the respondents to assure that there no longer exist any previously undisclosed documents or information in the investigative or prosecutorial files of this case that might support the petitioner's twenty-year contention that he is innocent of the murder of Linda Offord.

If and when respondents make any further production required by this Order, counsel for respondents shall certify to the court that such production has occurred, and shall describe with reasonable specificity such documents or information produced to petitioner so that a record will exist as to the documents and information so produced.

Within thirty (30) days following the production and certification required herein, petitioner may file with the court a supplemental evidentiary showing, limited to the documents and information produced per this Order, in support of his contention that he is factually innocent of the murder of Linda Offord.

Respondents may file a reply evidentiary showing within twenty (20) days after any filing by petitioner.

Except as provided above, the petitioner's motion for discovery is DENIED in all other respects.

The petitioner's motion to transcribe out-of-court proceedings by videotape (Doc. 129) is DENIED.

DONE this 6th day of August, 2010.

INGE PRYTZ JOHNSON
U.S. DISTRICT JUDGE