

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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DONNIE E. JOHNSON,	)	
	)	
Petitioner,	)	
	)	
V.	)	No. 97-3052-D
	)	
RICKY BELL, Warden,	)	
RIVERBEND MAXIMUM SECURITY	)	
INSTITUTION,	)	
	)	
Respondent.	)	

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ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT  
ORDER DENYING MOTION FOR A STATUS CONFERENCE

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Before the Court is Petitioner's Motion to Alter or Amend Judgment pursuant to Fed. R. Civ. P. 59(e). Petitioner contends that the Court has erred in denying his motion for equitable relief from the Court's previous judgment granting Respondent summary judgment as to all claims raised in Petitioner's application for habeas relief. The Court entered its judgment granting Respondent summary judgment on February 28, 2001. See Memorandum and Order On Respondent's Motion For Partial Summary Judgment ("Summary Judgment Order"), R. 84. The Court's judgment was affirmed on appeal. Johnson v. Bell, 344 F.3d 567 (6th Cir. 2003), cert. denied, 541 U.S. 1010 (2004). The Court denied Petitioner's motion for equitable relief on December 1, 2005, see Order Denying Motion For Relief From Judgment ("Order"), R. 122, and Petitioner subsequently

filed the instant motion. For the reasons stated below, Petitioner's Motion to Alter or Amend Judgment is DENIED.

**I. STANDARDS APPLICABLE TO A MOTION TO ALTER OR AMEND**

A motion pursuant to Rule 59 is not an opportunity to re-litigate a case. Sault Ste. Marie Tribe of Chippewa Indians v. Engler, 146 F.3d 367, 374 (6th Cir. 1998). Rather, a motion to alter or amend judgment should be granted only if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent a manifest injustice. GenCorp, Inc. v. American Intern. Underwriters, 178 F.3d 804, 834 (6th Cir. 1999) (citations omitted).

**II. PETITIONER'S ALLEGATION OF ERROR**

Petitioner contends that the Court has erred in concluding that he failed to exhaust his state-court remedies regarding his claim that the State unconstitutionally withheld from him evidence of a deal it allegedly reached for the testimony of Ronnie McCoy at Petitioner's trial. See generally Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. U.S., 405 U.S. 150 (1972). The Court found Petitioner's McCoy claim procedurally defaulted because it was not presented in the state courts. See Summary Judgment Order, R. 84 at 112-13. In Petitioner's motion for equitable relief from that judgment, he contended that the Supreme Court's intervening decision in Banks v. Dretke, 540 U.S. 668 (2004), makes clear that there can be no procedural default of the McCoy claim because the state has allegedly withheld evidence of the purported deal, thus

providing cause for the default. The Court found Petitioner's reliance on Banks misplaced, distinguishing that decision in many respects. First, the Court concluded that, unlike in Banks (and as expressly required by the Supreme Court in Banks), Petitioner had failed to exhaust his McCoy claim in the state courts. See Order, R. 122 at 19-20. Furthermore, the Court noted that the evidence submitted by Petitioner in support of his McCoy claim in no way conclusively substantiated the claim, and, at any rate, was hardly tantamount to the unequivocal evidence confirming a due process violation that the Supreme Court dealt with in Banks. Id. at 21-23. Finally, the Court was also concerned with the lack of diligence evident in Petitioner proffering new evidence in support of the McCoy claim more than three years after the Court's finding of procedural default, while failing to explain the cause for the delay or even asserting that the State precluded him from offering the new evidence prior to its initial submission in October 2004. Id. at 23-24. Citing to prior pleadings and the record of his state-court post-conviction proceedings, Petitioner now contends that the Court erred in its conclusion that he failed to present his McCoy claim in the state courts.<sup>1</sup>

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<sup>1</sup> Petitioner's contentions in this regard necessarily presume that the pro se briefs he filed during separate rounds of his post-conviction proceedings sufficiently allege the instant claim for purposes of exhaustion in federal habeas corpus. Petitioner filed the pro se briefs because he was apparently unhappy with post-conviction counsel's representation and failure to raise certain issues he wished to have raised. See Motion To Alter Or Amend at 2. Petitioner does not, however, clarify whether and to what extent the State courts relied upon or considered his pro se briefs in adjudicating his post-conviction proceedings.

### III. ANALYSIS

In order for a claim to be exhausted in the state courts, the claim must be "fairly presented." Baldwin v. Reese, 541 U.S. 27, 29 (2004). This requires the presentation of both the legal and factual basis for the specific claim that the petitioner seeks to assert in habeas proceedings. The Sixth Circuit has identified four circumstances informing the determination of whether or not a habeas petitioner has "fairly presented" the factual and legal basis for his claim in the state courts. These include whether the petitioner: "(1) reli[es] upon federal cases employing constitutional analysis; (2) reli[es] upon state cases employing federal constitutional analysis; (3) phras[es] the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleg[es] facts well within the mainstream of constitutional law." Whiting v. Burt, 395 F.3d 602, 613 (6th Cir. 2005) (citing McMeans v. Brigano, 228 F.3d 674, 681 (6th Cir. 2000)). Thus, in order to have fairly presented the instant Brady claim in the state courts, Petitioner must have phrased the claim in language sufficiently particular to alert the state court that it was considering specifically a due process claim that the State suppressed evidence of a deal for the testimony of McCoy against Petitioner.

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Respondent has not answered the instant motion and has, therefore, not addressed this issue. Because the Court finds that Petitioner's pro se briefs did not raise the instant Brady claim sufficient to deem it exhausted, the Court need not decide the underlying issue of whether the pro se briefs can be credited with the legally consequential ability to exhaust any claims.

Petitioner asserts that the McCoy claim was raised in the state courts during his first and second rounds of post-conviction proceedings. First, Petitioner contends that his pro se brief to the Tennessee Supreme Court during his initial post-conviction proceedings fairly presents the instant Brady claim sufficient for this Court to deem the claim exhausted. In the brief, in a prolonged discussion of the numerous reasons why he believed his trial counsel was ineffective, Petitioner sets forth several circumstances regarding the treatment of McCoy and states as follows:

I will leave this [the inference that McCoy was granted a deal for his testimony against Petitioner] for further comment. This is just another example of Mr. Crow's failure to investigate and render effective assistance of counsel,

. . . .

Further had Mr. Crow brought to the Court's attention the questionable issue as to the possible deal that McCoy had made with the state, not to prosecute him even for his admitted involvement, McCoy had surely made some agreement, which all indications point to this, and the record is void of why Mr. McCoy was allowed to walk away scott free, especially even taking his testimony and admission as truth as to his involvement. Had trail [sic] counsel properly challenged this evidence and offered rebuttal testimony it would have allowed the jury to see that this blood stained evidence in fact had nothing to do with the victim in the case before them, this evidence in the manner it was allowed to ne [sic] presented was more prejudicial than probative in value.

Supplemental Brief Filed Pro Se, R. 7 at Add. 36, pgs. 27, 29-30. Thus, from the foregoing it is evident that any discussion of the instant McCoy claim during Petitioner's initial state post-conviction proceedings was wholly within the context of his claim

that trial counsel was ineffective for failing to uncover or otherwise investigate whether a deal was struck for McCoy's testimony.

Similarly, Petitioner also claims that he raised the McCoy claim in a pro se brief filed during his second round of post-conviction proceedings. However, in the brief the only reference to any Brady claim concerning McCoy was Petitioner's allegation that his trial and appellate counsel were ineffective for failing to raise his claim that the prosecution "withheld the exculpatory evidence that one Ron McCoy was the actual killer, and not the Petitioner." Petition For Post-Conviction Relief at 6 ¶ 11(H), exhibit 14 to doc. no. 75: Petitioner's Response To Respondent's First Motion For Partial Summary Judgment. Thus, assuming, without holding, that Petitioner's pro se brief during his second post-conviction proceeding alone is sufficient to exhaust claims now asserted in federal habeas review, Petitioner did not allege a discrete constitutional violation flowing from the alleged suppression of evidence of an alleged "deal" for the testimony of McCoy. Rather, Petitioner alleged a Brady violation based on the State's suppression of evidence which purportedly established that McCoy was the murderer. Furthermore, that Brady reference to McCoy was, just as in Petitioner's pro se brief to the Tennessee Supreme Court during his initial post-conviction proceedings, within the confines of Petitioner's allegations concerning the ineffective assistance of counsel.

As demonstrated above, Petitioner's only arguable allusion to the instant Brady claim in any state court pleadings was in the context of Petitioner's allegations regarding the ineffectiveness of his trial counsel. Therefore, he has not "fairly presented" the instant Brady claim in the state courts, such that those courts were given the opportunity to resolve any federal constitutional violation raised by the claim.

Moreover, the Sixth Circuit has established that raising a Brady violation within the context of presenting an ineffectiveness claim in the state courts does not "fairly present" the underlying Brady claim for purposes of exhaustion. In Buell v. Mitchell, 274 F.3d 337, 361 (6th Cir. 2001), the habeas petitioner sought to present a Brady claim based on the prosecution's failure to disclose evidence regarding the mental health of a witness at the petitioner's trial:

Buell also now contends that the State failed to disclose evidence regarding witness Roy Wilson's mental capacity. This claim was not raised in Buell's direct appeal or his post-conviction petition, although Buell was aware of the claim when he pursued his post-conviction remedies since he argued at the time that his trial counsel was ineffective in investigating Roy Wilson's mental state. We agree with the State that Buell's post-conviction ineffective assistance of counsel claim does not constitute a fair presentation of the underlying claim for federal habeas purposes.

Thus, it is apparent that alleging a Brady violation within the context of a state-court ineffectiveness claim is not sufficient to exhaust the Brady claim for "federal habeas purposes." See also Lott v. Coyle, 261 F.3d 594, 617 (6th Cir. 2001) ("The question

before us is whether Lott's direct appeal of this issue [alleged Brady violations] in the context of an ineffective-assistance-of-counsel claim is sufficient to save this issue from being deemed procedurally barred. As we have already noted, it does not."). But see Odem v. Hopkins, 192 F.3d 772, 775-76 (8th Cir. 1999) (holding that habeas petitioner's state court ineffectiveness claim did sufficiently allege Brady violation for purposes of exhaustion where, though Brady itself was not mentioned, the claim offered legal argument and citation of cases "that involve withholding of exculpatory evidence claims and do not deal with ineffective assistance of counsel issues."). The Sixth Circuit has recognized that this distinction might be considered "unduly punitive" in that it penalizes the habeas petitioner for the failure of his counsel, or presumably himself if he proceeds pro se as Petitioner attempted to do in this case, to "engage in what might be viewed as double-pleading-that is, assigning error to a discrete violation, and then using the same alleged violation as a predicate for an ineffectiveness claim." Id. at 617 n. 13. However, as the Sixth Circuit stated, "the law on this point is clear, and we are bound to follow it." Id. This Court is equally bound. Accordingly, the Court reiterates its holding that Petitioner has not exhausted his state-court remedies regarding the McCoy claim. Given the failure to exhaust and the other circumstances distinguishing Petitioner's case from Banks discussed supra, pgs. 2-3, the Court finds that Petitioner is not entitled to



relief from judgment on the basis of Banks. Therefore, Petitioner's Motion To Alter Or Amend Judgment is DENIED.

**IV. PENDING MOTION**

Petitioner's Motion For A Status Conference, dkt. no. 121, is mooted by the Court's judgments denying relief from judgment and denying Petitioner's motion to alter or amend that judgment. Accordingly, Petitioner's Motion For A Status Conference is DENIED as moot.

**V. CONCLUSION**

For all of the reasons given above, Petitioner's Motion To Alter Or Amend Judgment is without merit and is therefore DENIED. Petitioner's Motion For A Status Conference, dkt. no. 121, is mooted by the Court's judgments denying equitable relief and denying the instant motion, and is therefore DENIED.

IT IS SO ORDERED, this 10th day of May, 2006.

S/Bernice Bouie Donald  
BERNICE BOUIE DONALD  
UNITED STATES DISTRICT JUDGE

