

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SCOTT WINFIELD DAVIS,)	
)	
Petitioner,)	
)	CIVIL ACTION NO.
v.)	
)	1:13-CV-1434-AT
ERIC SELLERS,)	
)	
Respondent.)	

REPLY TO RESPONSE CONCERNING AMENDED MOTION TO RECONSIDER

COMES NOW, Petitioner Scott Davis, by and through undersigned counsel, and hereby files this Reply to the Response (Doc. #86) filed by Respondent concerning Mr. Davis's Amended Motion to Reconsider (Doc. #83). As will be set out below, Respondent has incorrectly described what happened. The Warden therefore reaches the wrong conclusion as to whether this Court should stay this matter so that the state court system can address the "...troubling constitutional prospect that the prosecution failed to turn over a second audio tape to Petitioner's counsel that might have been potentially exculpatory, and in any event, clearly had been requested by Defense counsel." (Doc #68-28.)

Mr. Davis will first review Respondent's position. Next, Petitioner will set out the Warden's factual errors. Finally, Petitioner will again demonstrate that the Court should stay the

matter for a reasonable period so that these issues can be litigated in the state court system, or in the alternative should amend the COA to include whether such a stay should have been granted.

I. RESPONDENT'S POSITION

The Warden presents three basic positions when arguing that the Court should not use the "stay and abeyance" from Rhines v. Weber, 544 U.S. 269, 125 S. Ct. 1528, 161 L.Ed. 2d 440(2005). Each position is based on factual errors.

A. There is nothing new

The Warden claims that Mr. Davis's amended Motion to Reconsider merely "rehashes" previous points. Respondent contends the Amended Motion to Reconsider is not based on any new evidence or law, but merely relies on a "clandestine" interview of former Detective Marchal Walker. (Doc.#86-3). The affidavit from Marcia Schein is merely a "regurgitation" of what has already been presented, according to the Warden. Id.

Respondent also suggests that the Court already considered and rejected the evidence showing that now-retired Detective Marchal Walker told investigator Jennifer Bland that there were two tape recording devices during the crucial interview, and that Walker had turned over whatever he had to the District Attorney. Additionally, the Warden contends that the Court had listened to and rejected the evidence from the taped interviews

with Detective Walker, at least in part because the questioner (Ms. Bland) had asked leading question. Respondent also claims that this evidence was rejected because Mr. Davis had never ascertained the content of this second alleged tape. Id., at 4.

B. Opposition to “stay and abeyance”

The Warden contends that the stay and abeyance procedure only applies to unexhausted claims. Next, Respondent says that the Brady/Giglio claim for not turning over the second tape recording that Detective Walker now admits exists was exhausted by virtue of procedural default.

Turning to the standards for stays in this context, the Warden says that there is no good reason that Mr. Davis failed to exhaust this Brady/Giglio claim. Respondent contends that the factual predicate for the claim could have been discovered through due diligence, there was no reason not to call Detective Walker at the state habeas hearing, and that the substance of the claim could have been investigated during the state proceedings. Id., at 5-6.

The Warden also suggests that this is not a situation in which new evidence only came to light during the federal proceedings. Respondent suggests that when challenging the authenticity of the one tape that was turned over (by calling expert witnesses who analyzed the item) Mr. Davis should somehow have divined that Detective Walker would contradict the other

detective who had long denied the existence of a second recording device or tape recording. The Warden faults Petitioner for not calling Walker as a state habeas witness. Additionally, Respondent contends that Mr. Davis has not and cannot demonstrate the materiality of the suppressed tape recording. Finally, the Warden suggests that the entire system requiring exhaustion of claims would evaporate if the Court finds good cause here for Mr. Davis's failure to do so. Id., at 6-7.

C. The COA

After reciting the standards for issuing a COA on a procedural issue, the Warden renews his claim that there is no good cause for failing to bring this Brady/Giglio claim up during the state habeas proceedings. Furthermore, Respondent says that no COA should issue because Mr. Davis has failed to show the materiality of the suppressed statement.

II. THE FACTUAL ERRORS

Respondent has factually erred in a number of areas. These errors are important.

1) Detective Walker did testify at the state habeas hearing, despite the Warden's numerous claims to the contrary as noted above. However, this is only part of the error.

Recall that before trial, Mr. Davis's legal team made the usual request for all evidence of any statements by the Defendant. The State said it had only one tape and one

transcript from the session attended by Detectives Walker and Chambers. At trial, Chambers vehemently denied that there was more than one recording device or recording.

Leading up to the state habeas proceedings, post-conviction counsel consulted with witnesses regarding the one tape turned over by the State. Counsel knew that the transcript itself mentioned "tape #2", and interviewed several experts who were of the opinion that the single recording turned over by the State seemed to show stops, alterations, and that a second recorder was operating in the room.

However, post-conviction counsel also knew that Detective Chambers continued denying the existence of a second tape and recording device. Detective Walker **at that time** also claimed no knowledge of a second recording. Recall that Mr. Davis previously filed the affidavit from Licensed Private Investigator Deborah Mulder. (Doc. # 64-1). Ms. Mulder met face-to-face with Detective Walker on June 2, 2010. She confronted him with the fact that indications on the tape recording and the transcript turned over by the prosecution to the defense seem to show the existence of a second recording device. Walker insisted **at that time** there was only one recorder in the room that crucial evening.

With both law enforcement officials saying that there was only one tape, post-conviction counsel made the only reasonable

professional decision, and focused attention on whether trial counsel had performed adequately regarding the tape that had been turned over. If at that time Detective Walker had said what he has now repeated three times, it is clear that post-conviction counsel would have raised a Brady/Giglio claim based on the State's failure to turn over the second recording, instead of focusing on a claim of ineffective assistance of counsel.

Placed in this context, the "failure" to question Detective Walker at the state habeas hearing about the existence of the second recording device was not only reasonable, it likely was the only ethically available course of action. Counsel was faced with two law enforcement officials who were going to say under oath that there was only one recording device in the room that evening. So, while Detective Walker did testify at the state habeas hearing, the failure to question him about this second recording is not Petitioner's fault. Instead, the decision to not question Walker about the existence of a second recording and transcript likely was the only ethical course of action available at that time for post-conviction counsel. Remember, Petitioner is only asking that this Court send the case back to the state system so that court can get to the bottom of why Detective Walker waited so long to make his multiple statements about a second recording device.

2) Respondent says Mr. Davis has failed to show the contents of the second tape, and therefore has failed to show its materiality. Again, this factual error requires context.

It bears repeating, Mr. Davis has for years said that he was threatened with the death penalty at points when Detective Walker was not in the room with Petitioner and Detective Chambers. A second recording device would capture statements during the times when the first machine was stopped (as the experts indicated at the state habeas hearing had happened with the one tape that the State did produce).

Recall also the enormous effort expended by post-conviction counsel to show how so much evidence was destroyed, discarded and simply ignored for almost a decade. The Court has already considered Petitioner's arguments that the loss and destruction of so much evidence violates due process and shows bad faith. Therefore, while Mr. Davis cannot produce the tape at this point, that is not his fault, especially considering the volume of evidence that the state did lose.

3) The Warden describes Jennifer Bland's two interviews with Detective Walker as "clandestine" affairs. Along with denigrating Ms. Bland's efforts, Respondent says that Ms. Schein's affidavit is merely a "regurgitation." Again, the Warden is incorrect.

Assuming for the moment that Walker did not appreciate what Ms. Bland was trying to accomplish when she spoke to him on multiple occasions, the former detective could have had no illusions when a member of the Bar came to talk with him about the same subject, face to face. As noted in Ms. Schein's affidavit, she clearly explained who she was, why she wanted to talk with the detective, and what he told her. Her affidavit is not merely a rehashing of what Walker told Ms. Bland. Instead, Ms. Schein's affidavit demonstrates that an experienced law enforcement official, aware that he was talking with an officer of the Court, repeated chapter and verse what he had previously told Jennifer Bland. This is not a regurgitation, it is an exclamation point that Walker apparently intends to repeat his statements under oath, if ever called upon to do so. It is worth remembering that Petitioner is not asking the Court to determine if Ms. Bland and Ms. Schein are telling the truth. Instead, Mr. Davis is merely asking that the case be sent to a court that is permitted to hear testimony from all parties, in order to get to the truth of what happened.

4) The Warden claims that Mr. Davis "...has made no showing that this second alleged tape exists." Again, Respondent has erred.

The tape recording that was used during the trial is still in evidence. This is the tape that Mr. Davis has been asking

the Court to listen to. This is the tape that the experts analyzed and testified about in the state habeas hearing. This tape itself demonstrates the existence of another recording device.

The experts analyzing the tape heard stops and alterations, and a reference to turning the tape over. In conjunction with the reference in the transcript to "tape #2", this is evidence of a second tape recording. Again, it bears repeating, Petitioner is only asking that this Court allow the state court system the chance to get to the bottom of whether the prosecution failed to turn over a recording to trial counsel.

III. THE COURT SHOULD GRANT RELIEF

Other Courts have addressed similar situations in which new claims or evidence came to light only after the matter was brought to federal court. These other decisions remanded similar §2254 cases back to the state system so that those courts could properly determine whether the new evidence or claim does or does not show a due process violation. Petitioner suggests that this Court should do the same.

The Court should consider the stay and abeyance process. As noted previously, a stay should be granted when the District Court determines there was 1) good cause for the Petitioner's failure to exhaust his claims first in state court, 2) the unexhausted claims are not plainly meritless, and 3) the

Petitioner has not engaged in abusive litigation tactics or otherwise intentionally delayed the proceeding. Dean v. Warden, 2016 WL 6871257 (S.D. Ga. Nov. 21, 2016)(granting stay and abeyance when Petitioner had unexhausted ineffective assistance of counsel claim and a colorable argument for filing a successive State Petition).

The Warden relies primarily on the argument that there is no "good cause" here for failing to raise this Brady/Giglio claim in state court. Neither the Supreme Court nor the Eleventh Circuit have defined "good cause" in this context. Courts in this Circuit have defined the concept broadly, finding "good cause" when an external and objective factor not attributable to the Petitioner was the reason why a claim was not properly exhausted in the state court system. Dean v. Warden, supra, at *7. ; Zones v. Smith, 2016 WL 6650852, *8 (D. Minn. Oct. 17, 2016)(good cause in this context is less than other situations). Shimp v. Paramo, 2013 WL 526053 (S.D. Cal. Feb. 11, 2013) (good cause in the stay and abeyance context "requires something less than a showing of 'extraordinary circumstances.'"(quoting Jackson v. Roe, 425 F. 3d 654, 661-62 (9th Cir. 2005)).

In this situation, good cause is shown by looking at context. Detective Walker at first indicated that he would back up Detective Chambers' trial testimony that there was only a single recording. Therefore, it only made sense for post-

conviction counsel to avoid claiming a Brady/Giglio violation, with two police officers saying something at odds with what the Defendant contended. Only years later did Walker recant, not once, not twice, but three times, and the final one to an officer of the Court who made him aware of the purpose for her interview. In this context, there is ample reason why the issue only came to light recently. Again, it is worth remembering that Petitioner is not asking that the Court decide who is telling the truth. Mr. Davis merely wants the opportunity for a hearing in state court. This is exactly the sort of "external and objective factor not attributable to the Petitioner" that other courts have found constitutes good cause for not exhausting a claim. Dean v. Warden, supra, at *7;

There is good cause for why Mr. Davis failed to adequately exhaust the Brady/Giglio claim regarding the second tape. The factual predicate only arose during the §2254 proceedings. Petitioner therefore asks that this Court stay his §2254, and hold the matter in abeyance while he returns to the state habeas court.

This Court should allow the Georgia courts their opportunity to find out what actually happened during Petitioner's 1996 police interview. The Court already noted the "troubling" prospect that evidence turned over by the police was not provided to the defense. On three occasions, Detective

Walker has indicated that there were two recordings, and, most importantly, that whatever he had he gave to the District Attorney's office. Walker's recent statements are not merely an isolated instance of potential misconduct, but should be considered in conjunction with the other "troubling" aspects of the case this Court already identified in its earlier Order. This sum of this information more than satisfies the requirements for a stay.

Finally, should the Court deny the request for a stay, Petitioner reiterates his request for an expansion of the COA. This is a unique issue. The Eleventh Circuit's standards in this arena are undeveloped. Reasonable jurists can easily differ as to how these standards apply to these facts. As a result, the COA should include the question as to whether the Court should have used the stay and abeyance procedure.

Dated: This 23rd day of August, 2017.

Respectfully submitted,

/s/ Paul S. Kish

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing filing into this District's ECF System, which will automatically forward a copy to counsel of record in this matter.

Dated: This 23rd day of August, 2017.

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