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

PATRICIA LYNN RORRER,	**:**	**Civil Action No.**
Petitioner	**:**	
	:	**19-cv-1398**
v.	**:**	
	:	
WENDY K. NICHOLAS, *et al.*,	**:**	
Respondents	**:**	

MOTION FOR RECONSIDERATION

AND NOW, comes the District Attorney of Lehigh County, by and through Christine Murphy, Senior Deputy District Attorney, on behalf of Respondents, and respectfully moves for reconsideration of this Court's October 26, 2021 Order granting Petitioner's motion for discovery; and in support of this Motion hereby avers the following.

Facts and Procedural History

As set forth more fully in Respondents' brief in response to Petitioner's Motion for Discovery, Petitioner is presently serving two sentences of life imprisonment and two terms of ten to twenty years of consecutive incarceration for the kidnapping and murder of Joann Katrinak and her infant son, Alex, who were last seen alive in December 1994 and found dead in April 1995.

The Pennsylvania Superior Court in its opinion on direct appeal, affirming Petitioner's judgments of sentence, cogently set forth the facts as follows:

> [Petitioner] is the former girlfriend of Andrew Katrinak. On December 12, 1994, appellant telephoned the Katrinak residence, where Andrew lived with his wife, Joann, and their infant son, Alex. Joann told appellant never to call there again. Three days later, Joann and the baby disappeared. Their bodies were discovered in a wooded area where appellant once stabled and rode her horses. The results of an autopsy established that Joann had been beaten and shot in the face with a .22 caliber handgun. The cause of death of the baby could not be determined conclusively. His death was the result of either suffocation or exposure to the elements. Following an extensive two-year police investigation, [petitioner] was arrested at her home in North Carolina and charged with kidnapping and murder.

Commonwealth v. Rorrer, 3080 PHL 1998 (10/22/99). Additionally, the police investigation included DNA testing of hairs found at the crime scene and in Joann Katrinak's car. The results of the testing could not exclude petitioner. Specifically relevant to this matter, Petitioner challenges DNA evidence of hairs that were removed from the seatback of the victim's car, and which match to Petitioner.

Petitioner initiated this federal action on April 2, 2019 by filing a pro se petition for writ of habeas corpus. The matter was stayed pending resolution of petitioner's fifth PCRA proceeding in state court. Following the conclusion of that matter, this Court directed the instant federal matter to proceed, and issued a briefing schedule. Instead of filing a brief with counseled claims, on March 15, 2021, Petitioner filed a Motion for Discovery and Consolidated Memorandum. In that filing, Petitioner concedes that her Petition for Writ of Habeas Corpus is

facially untimely and therefore procedurally defaulted. Nevertheless, she sought discovery for the purpose of looking for evidence which might overcome the time bar. Respondents opposed the motion, asserting there is no good cause for the discovery and Petitioner has not shown she can overcome the federal habeas time-bar, which expired fifteen years before she filed her Petition for Writ of Habeas Corpus.

By Order dated October 26, 2021, this Honorable Court granted petitioner's discovery motion, and directed Respondents to comply within 90 days; and further that Petitioner shall file any amended petition within 45 days of receiving discovery. Respondents respectfully move for reconsideration of that Order.

Discussion

Reconsideration is permitted under Local Rule 7.1 to correct errors of law, or to present newly discovered evidence. See Burger King Corp. v. New England Hood and Duct Cleaning Company, 2000 WL 133756, at *2 (E.D.Pa. Feb. 4, 2000). See also Max's Seafood Café v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999) (holding that a motion for reconsideration will be granted if the moving party can demonstrate, inter alia, the need to correct a clear error of law or fact to prevent manifest injustice).

Here, Respondents respectfully submit that this Honorable Court erred in substituting its discretion for application of the "good cause" standard as set forth

in clearly established federal law, and thus respectfully requests this Court exercise its discretion and reconsider the matter in order to correct clear error of law.

I. The Court erred in concluding the state-court decisions are irrelevant to its discovery determination.

As the Court held, discovery in this matter is governed by Rule 6 of the Rules Governing § 2254 Cases in the United States District Courts ("Habeas Rules"), which states: "A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery." Habeas Rule 6; Williams v. Beard, 637 F.3d 195, 209 (3d Cir. 2011).

Good cause for discovery under Rule 6 exists only where "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, 908-909 (1997). "Bald assertions and conclusory allegations do not provide sufficient ground to warrant requiring the state to respond to discovery." Zettlemoyer v. Fulcomer, 923 F.2d 284, 301 (3d Cir. 1991). Similarly, speculative discovery requests are meritless. Williams, 637 F.3d at 210-211. "Rule 6 does not authorize fishing expeditions." Id.

Here, this Court noted the applicability of Rule 6, rather than § 2254(d), and then concluded that "Therefore, the fact that the state courts have rejected claims by [Petitioner] after her 2015 FOIA request was made is not relevant to [the Court's] decision here." (Memorandum Opinion, at 8.) In support of this

conclusion, the Court quotes Williams v. Beard, supra, for the proposition that application of the § 2254 deferential standard to discovery requests "surely imposes an overly stringent burden" that Petitioner is unlikely to be able to meet. Id. However, a reading of Williams does not support the Court's conclusion that the state-court opinions are, therefore, irrelevant.

On the contrary, in Williams, the United States Court of Appeals for the Third Circuit rejected a petitioner's request for discovery precisely because the Williams petitioner's discovery claims had been fully and fairly heard in the state courts, where, the District Court properly determined, he had "received all the information he is constitutionally entitled to" in order to proceed with his claims. Williams, 637 F.3d at 211. Thus, it is clear that state-court decisions on discovery matters, while perhaps not entitled to the full scope of deference allowed on the merits of habeas claims, are both relevant and rightly considered in federal court as part of a discovery analysis. This Court erred in stating that the state-courts' evaluations are not relevant here.[1]

a. *The Court's "good cause" analysis*

The Court's Memorandum Opinion does not clearly state facts which

[1] Moreover, as discussed more fully below, the state-court decisions, viewed with the deference that *does* govern Petitioner's substantive claims, is highly relevant to a determination of her likelihood of success on the merits.

support its conclusion there is good cause for granting discovery. Respondents construe the Memorandum Opinion as concluding there is good cause for two reasons. First, because petitioner has previously asked for the requested discovery and not received it: "Despite diligently *attempting* to obtain these documents, there has yet to be a complete response to [Petitioner's] prior requests". (Memorandum Opinion, at 9 (emphasis in original).) Second, because Petitioner is looking for evidence to support a gateway claim of "actual innocence" to overcome the timebar.[2] Id. Neither satisfies the good cause standard.

The law is clear that the fact that a petitioner *could possibly find* something relevant does not establish good cause for discovery. "While it is possible that Petitioner could uncover evidence through discovery that would establish his actual innocence, as could any petitioner, 'petitioners are not entitled to go on a fishing expedition through the government's files in hopes of finding some damaging evidence.'" Swainson v. Walsh, 2014 @WL 3508642, at *9 (E.D.Pa. July 16, 2014)(Padova, J.) (quoting Deputy v. Taylor, 19 F.3d 1485, 1493 (3d Cir. 1994) (quoting Munoz v. Keane, 777 F.Supp. 282, 287 (S.D.N.Y.1991), *aff'd*, 964 F.2d 1295 (2d Cir.1992)); see also Murphy v. Johnson, 205 F.3d 809, 814 (5th

[2] The Court further notes that it has relied upon argument which is "not part of the discovery request itself…concerning the other evidence [Petitioner] would attack in a habeas petition, if in fact a threshold determination of actual innocence may be established"; but does not specify what argument this is.

Cir.2000) ("Simply put, Rule 6 does not authorize fishing expeditions.").

Further, the Court expressly did not evaluate whether the state courts were correct in denying Petitioner relief on this basis. See Memorandum Opinion, at 6 (noting that indisputably, the PCRA court denied relief after petitioner gleaned information via her 2015 FOIA request, giving rise to her claim of new evidence; but nevertheless concluding the Court was "not constrained to determining if that decision is correct, as [Petitioner] seeks not a review of the state court's decision, but instead seeks additional discovery to establish a gateway claim of actual innocence"). By failing to look at the merits of Petitioner's purported (or potential) claims, the Court cannot evaluate whether discovery is actually merited.

b. Actual Innocence

Actual innocence can be used, sparingly, as "a gateway for consideration of procedurally defaulted claims" and requires a showing "that it is more likely than not that no reasonable juror would have convicted [the petitioner] in light of the new evidence." Wright v. Superintendent Somerset SCI, 610 Fed.Appx. 115, 119 (3d Cir. 2015)(citing McQuiggan v. Perkins, 569 U.S. 383 (2013), Schlup v. Delo, 513 U.S. 298, 327-29 (1995)). The use of a "gateway claim of actual innocence" seeks equitable relief from the AEDPA's timeliness requirement, implicating the "fundamental miscarriage of justice" exception. See McQuiggan, 569 U.S. at 392-393. This exception should be used only in extraordinary cases and "applies to a

severely confined category: cases in which new evidence shows 'it is more likely than not that no reasonable juror would have convicted [the petitioner].'" Id. at 395 (quoting Schlup, 513 at 329).

A claim of actual innocence must be based on reliable new evidence not presented at trial, and as a threshold matter, a petitioner must show that it is "more likely than not that no reasonable juror would have found him [guilty]." Schlup v. Delo, 513 U.S. 298, 315, 324, 326-27, 329 (1995). "Proving actual innocence based on new evidence requires the petitioner to demonstrate (1) new evidence (2) that is reliable and (3) so probative of innocence that no reasonable juror would have convicted the petitioner." Sistrunk v. Rozum, 674 F.3d 181, 191 (3d Cir. 2012) (citing Schlup).

Given this standard, "[t]enable actual-innocence gateway pleas are rare". McQuiggan, 569 U.S. at 386. See also House v. Bell, 547 U.S. 518, 538 (2006) (noting that although the standard does not require "absolute certainty about the petitioner's guilt or innocence, it is nevertheless "demanding and permits review only in the 'extraordinary' case."). "Actual innocence in this regard means 'factual innocence, not mere legal insufficiency.'" United States v. Murray, 2015 WL 3947173, at *3 (E.D.Pa. June 29, 2015)(Tucker, C.J.)(citing Bousley v. United States, 523 U.S. 614, 623 (1998); McQuiggan, 133 S.Ct. at 1928)).

Respondents acknowledge that discovery motions are governed by Rule 6,

not by the more deferential standard of review set forth in § 2254. However, that deferential standard must be considered in determining whether Petitioner can show, after discovery, that she may be entitled to relief in this federal habeas proceeding. Bracy, 520 U.S. at 909. Thus, in denying a discovery motion elsewhere, this Honorable Court has noted: "On habeas review, this Court is not permitted to reweigh the evidence or redetermine the credibility of the witnesses. See Marshall v. Longberger, 459 U.S. 422, 433–35 (1983); see also 28 U.S.C. § 2254(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.')" Cairns v. McGinley, 2021 WL 4192042, at *2 (E.D.Pa. Sept. 15, 2021) (Lloret, M.J.). Overlooking the extraordinarily high burden required to establish a gateway showing of actual innocence diminishes the import of the discovery rules.

II. The Court erred in concluding Petitioner has exercised due diligence.

Respondents respectfully submit this Court also erred in concluding Petitioner exercised due diligence in obtaining the records she seeks. The United States Supreme Court has made clear that due diligence is a necessary consideration in determining whether a habeas petitioner is entitled to discovery in federal court. "A state prisoner seeking federal habeas relief is not entitled to discovery in federal court if he did not diligently pursue the discovery in state

court. See Cullen v. Pinholster, 131 S.Ct. 1388, 1401 (2011) ("Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings"). See also McQuiggan, 569 U.S. at 399-400 ("Unexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing [of actual innocence]….Considering a petitioner's diligence, not discretely, but as part of the assessment whether actual innocence has been convincingly shown, attends to the State's concern that it will be prejudiced by a prisoner's untoward delay in proferring new evidence."); Williams v. Taylor, 529 U.S. 420, 437 (2000); Brown v. Wenerowicz, 663 F.3d 619, 629 (3d Cir. 2011).

"Diligence requires, in the usual case, that the petitioner, at a minimum, seek discovery in state court 'in the manner prescribed by state law.' Williams, 529 U.S. at 437. The petitioner bears the burden of proving that he diligently pursued discovery in state court. See id. at 440." Williams v. Garman, 2018 F.Supp. 7505574, at *25 (E.D.Pa. Sept. 20, 2018)(Report and Recommendation of United States Magistrate Judge Henry S. Perkin, approved and adopted, 2019 WL 1046024 (March 4, 2019)).

Here, this Court concluded petitioner exercised due diligence in seeking the records which are the subject of the instant Motion for Discovery. However, the Court's Memorandum Opinion does not state any actions by Petitioner which

support this conclusion. Rather, the Court notes that Petitioner received "fragments of reports" from a FOIA request in 2015. (Memorandum Opinion, at 8.) This does not address the fact that Petitioner failed to make any efforts to obtain any FBI reports from the time she was charged in 1997 until nearly 20 years later, when she filed the FOIA request. Indeed, as Respondents previously argued, the Superior Court of Pennsylvania held that petitioner "did not put forth reasonable efforts to obtain the FBI reports; she readily could have accessed them any time after she was charged in 1997, almost twenty years before she decided to do so." Commonwealth v. Rorrer, 2017 WL 4861621, at *6 (Pa.Super. Oct. 26, 2017).

Although Respondents acknowledge that Rule 6 governs the instant request, this Court is nevertheless required to evaluate Petitioner's due diligence in determining whether she can establish a "gateway claim" of actual innocence. This is necessary for a determination of good cause for discovery. The Court erred in failing to address Petitioner's blatant lack of diligence. That she eventually exercised *some* diligence and filed a FOIA request to the FBI, even if it resulted in what the Court characterizes as an "[in]complete response" (Memorandum Opinion, at 9), does not excuse her failure to exercise *due* diligence in seeking the desired records, for purposes of timeliness. In other words, the Court must consider the likelihood that Petitioner will succeed on the merits of her actual innocence claim in order to conclude there is good cause, however, the Court failed

to engage in this analysis.

The Court's Memorandum Opinion characterizes "documents apparently provided in response to the FOIA request" has having been provided by the Commonwealth, however, this is incorrect. Specifically, the Court notes at page 9 that "the fact that the Commonwealth responded to the FOIA request with some documents is insufficient support for the Commonwealth's argument" that Petitioner failed to exercise due diligence in seeking those documents. (Memorandum Opinion, at 8.) However, Petitioner's documentation, specifically her pages "SA1-SA4" appended to her Reply Brief (Document 36-2), make clear that Petitioner directed her FOIA request to the Federal Bureau of Investigation, which responded. The Commonwealth had no part in selecting which pages of the FBI's records could be disclosed in response to the FOIA request, nor the redaction of the pages that were provided.

The relevance of Petitioner's ability to glean information from the FOIA request is that the information – whatever the FBI was willing to provide – was readily available and Petitioner knew of her FBI-related interest more than 20 years ago. She simply failed to pursue it until 2015.

III. Granting discovery without a finding of good cause is contrary to clearly established federal law and sets an improper precedent.

Granting a motion for discovery, without adequately articulating good cause, contributes to a growing body of case law within this District suggesting that

discovery may be obtained routinely in habeas proceedings simply because Rule 6 confers discretion upon the District Courts. This is directly contrary to Bracy, which expressly held that a habeas petitioner is *not* entitled to discovery as a matter of course but only under unusual circumstances. Bracy, 520 U.S. at 904. Respondents acknowledge this Court's discretion to award discovery where the appropriate showing has been made. However, that discretion cannot be exercised absent the requisite findings. The Court may exercise such discretion *after* a finding of good cause. That is, where a petitioner has made an articulable showing that discovery may lead to success on the merits of her petition, discovery may be granted. Clearly established federal law firmly holds that discovery is not to be granted liberally, nor is "actual innocence" an easy burden to meet. On the contrary, the standards for both are exceedingly difficult to meet, and intentionally so.

Conclusion

By not evaluating Petitioner's likelihood of success on the merits in determining there is "good cause" for discovery, the Court's order contributes to a growing presumption that a petitioner who asks for discovery can expect to receive it, which is expressly contrary to Bracy. Moreover, the Court erred in holding that the state-court decisions are irrelevant to a determination of discovery entitlement under Rule 6. On the contrary, state-court rulings are not only relevant but

necessary for a determination of whether Petitioner has shown she can succeed on the merits of her claims after discovery, thereby informing the good-cause analysis. Respondents respectfully request that the Court consider the state-court opinions in ruling on the discovery motion.

Accordingly, for all the foregoing reasons, Respondents respectfully request this Court reconsider its October 26, 2021 Order and stay the Order pending resolution of the instant motion for reconsideration.

Respectfully submitted,

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WENDY K. NICHOLAS, *et al.*,	:	
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CERTIFICATE OF SERVICE

I hereby certify that on this date, I have served a true and correct copy of the attached *Response to Motion* upon the person(s) and in the manner indicated below which satisfies the requirements of F.R.A.P. 25(c):

Copy will be delivered via Electronic-Mail through cm/ecf procedures to:

The Honorable Richard A. Lloret
U.S. Magistrate Judge

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Date: November 9, 2021

/s/ Christine F. Murphy
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Office of the District Attorney
Lehigh County, Pennsylvania
On behalf of Respondents