IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
NO. 5:07-HC-2192-H

GEORGE EARL GOODE, JR.,	)	
	)	RESPONSE MEMORANDUM OPPOSING
Petitioner,	)	PETITIONER'S MOTION FOR RELIEF
v.	)	FROM JUDGMENT
	)	28 U.S.C. § 2254
GERALD BRANKER, Warden, Central Prison,	)	FRCP, Rule 60(b)(2), (3), (6)
	)	
Respondent.	)	

Summary of the Nature of the Case and Pertinent Facts

For a summary of the nature of this case and pertinent facts, Respondent refers this Court to pages 1-19 of its 90-page final order filed October 21, 2009.

Petitioner's Contention

Petitioner contends he has newly discovered evidence of fraud or misrepresentation entitling him to a new trial. He summarizes his newly discovered evidence claim on page 3 of his Rule 60(b) motion as follows:

> Petitioner is seeking a new trial as additional relief from this Court in light of recent revelations that the N.C. State Bureau of Investigation has engaged in a widespread and longstanding practice of misstating the results of forensic tests, concealing evidence favorable to the defense, and withholding material and potentially exculpatory evidence from numerous criminal defendants, including three defendant's who have been executed; four defendants currently on death row; 80 defendant's currently incarcerated; 190 defendant's convicted and Petitioner George Earl Goode, Jr., sentenced to death until he was re-sentenced to two life sentences subsequent to this Court granted habeas relief on October 21, 2009. Ex. 1 Swecker-Wolf-Report; Scathing SBI Audit Says 230 Cases Tainted by Shoddy Investigations, NEWS AND OBSERVER, August 19, 2010. [Footnote omitted]

Petitioner claims this newly discovered evidence of fraud or misrepresentation puts his case in a significantly different light than when this Court issued its October 21, 2009 final order and judgment, and warrants a new trial.

Legal Argument

1. Petitioner's newly discovered evidence of fraud or misrepresentation claim based on recent revelations about the SBI are non-exhausted and Respondent does not waive non-exhaustion.

Petitioner's Rule 60(b) motion attempts to raise a significantly new basis for federal habeas relief that has not been fairly presented to the state courts for adjudication. The Fourth Circuit has held that when a federal habeas petitioner adds new or additional information or material to support a ground for relief that "fundamentally alters" his claims or puts them in a "significantly different and stronger evidentiary posture," then when he raised them in state court, the claims are non-exhausted. See Winston v. Kelly, 592 F.3d 535, 550-52 (4th Cir.), cert. denied, U.S. , S.Ct. , L.Ed.2d (Oct. 4, 2010), citing Wise v. Warden, Maryland Penitentiary, 839 F.2d 1030, 1033 (4th Cir. 1988) and Brown v. Estelle, 701 F.2d 494, 495 (5th Cir. 1983). In the case at bar, the August 18, 2010 report of an independent investigation of the Forensic Biology Section of the State Bureau of Investigation (SBI), i.e., "An Independent Review of the SBI Forensic Laboratory" prepared

by Attorney Chris Swecker and Consultant Michael Wolf (Swecker-Wolf report), presents new and different information that was not fairly raised in Petitioner's original federal habeas petition or in state court. (see copy of report at Petitioner's Exhibit 1) Petitioner's assertions based on the Swecker-Wolf report are therefore non-exhausted under Winston v. Kelly, 592 F.3d 535, 550-52. See also, 28 U.S.C. § 2254(b)(1)(A) (federal habeas petition shall not be granted unless available state remedies have been exhausted) and Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982) (state prisoner's application for writ of habeas corpus in federal court under 28 U.S.C. § 2254 must be dismissed if it contains any issues not exhausted in the state courts even though it contains issues which have been exhausted). Petitioner should not be allowed to rely upon the Swecker-Wolf report in this federal habeas action without first presenting it to the state courts. See Bell v. Jarvis, 236 F.3d 149, 171 n.13 (4th Cir. 2000) (en banc) (affidavit not presented to state MAR court cannot be considered on federal habeas review), cert. denied, 534 U.S. 830, 122 S.Ct. 74, 151 L.Ed.2d 39 (2001). See also, Wilson v. Moore, 178 F.3d 266, 272-73 (4th Cir.) (same), cert. denied, 528 U.S. 880, 120 S.Ct. 191, 145 L.Ed.2d 160 (1999).

In order to properly exhaust available state remedies on the SBI related assertions regarding the Swecker-Wolf report,

Petitioner should raise them in federal constitutional terms in a post-conviction motion for appropriate relief (MAR) filed in the Superior Court of Johnston County pursuant to N.C.G.S. § 15A-1415(c) (2009) (newly discovered evidence claim may be raised at any time). If not satisfied with that court's adjudication of his newly discovered evidence of fraud or misrepresentation claim, Petitioner must first file a petition for certiorari in the North Carolina Court of Appeals pursuant to N.C.G.S. § 15A-1422(c)(3) (2009) and N.C.R. of App. P., Rule 21(e) (2010), before returning to federal court. In short, Petitioner's entire motion for relief from judgment filed in this Court on October 20, 2010, should be summarily dismissed on grounds of non-exhaustion.

In sum, Petitioner's Rule 60(b) motion should be summarily denied because he is attempting to raise a new and non-exhausted basis for relief. Respondent does not waive non-exhaustion.

2. Petitioner's newly discovered evidence of fraud or misrepresentation claim does not entitle him to a new trial under the particular circumstances of this case.

This Court has the power to deny Petitioner's newly discovered evidence of fraud or misrepresentation claim on the merits notwithstanding non-exhaustion and Respondent's refusal to waive non-exhaustion. See 28 U.S.C. § 2254(b)(2). This Court should do so here because the information contained in the Swecker-Wolf report does not warrant a new trial under the

particular circumstances of this case. First, a claim of "newly discovered" evidence is not by itself a cognizable claim for federal habeas relief, but can only serve as a "gateway" through which otherwise procedurally defaulted claims can be addressed, and then only if it establishes "actual innocence." See House v. Bell, 547 U.S. 518, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006) (refusing to define and adopt theoretical free-standing claim of actual innocence test based on newly discovered evidence and instead applying settled Schlup "gateway" test for allowing otherwise procedurally barred claims to be heard on merits); Herrera v. Collins, 506 U.S. 390, 400, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993) ("[C]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."); Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995); see also, Buckner v. Polk, 453 F.3d 195, 199 (4th Cir. 2006) (claims of "actual innocence standing alone" not grounds for federal habeas relief), cert. denied, 549 U.S. 1284, 127 S. Ct. 1817, 167 L. Ed. 2d 327 (2007); Spencer v. Murray, 5 F.3d 758 (4th Cir. 1993), cert. denied, 510 U.S. 1171, 114 S. Ct. 1208, 127 L. Ed. 2d 555 (1994); Stockton v. Angelone, 70 F.3d 12 (4th Cir.), cert. denied, 515 U.S. 1189, 116 S. Ct. 41, 132 L. Ed. 2d 919 (1995). To obtain such a "gateway,"

however, Petitioner must show that it is more likely than not, that no reasonable juror would find him guilty, absent the "newly discovered" evidence. Schulp, 513 U.S. at 327. Petitioner cannot met the Schulp test.[1]

Because this Court has already in effect determined that the jury was misled about the blood evidence testing in this case, and because this Court has already in effect determined that the misrepresentation could not reasonably have changed the outcome of the guilt phase of trial, Petitioner's newly discovered evidence claim is without merit. As this Court stated on pages 27-29, 32-22, and 68 of its October 21, 2009 final order:

> Petitioner contends the misleading evidence had a material effect at both the guilt and penalty phases of trial. Petitioner's defense at trial was that while he was present at the scene of the murders, he did not participate in the stabbings and remained far enough away not to get blood on him. He argues that without Agent Deaver's misleading testimony, counsel could have made the "powerful argument" that in contrast to the victims and his co-defendants who had substantial amounts of blood on them, petitioner did not have any blood of any kind on him. Petitioner contends, that in the face of the misleading evidence, he was denied this persuasive argument and the defense could only make the weak argument that the blood could have gotten on the boot at

[1] In his Rule 60(b) motion at pages 21-27, Petitioner overlooks the fact that there is a special standard for evaluating claims of newly discovered applicable on federal habeas review, as set forth in Schulp, House and Herrera, above. In other words, this Court may not issue a writ of habeas corpus on behalf of a state prisoner, based upon the general standards for evaluating claims of newly discovered evidence arising after a federal criminal trial, as contained in United States v. Custis, 988 F.2d 1355, 1359 (4th Cir. 1993), affirmed, 511 U.S. 485, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994).

some other time or from another source.

The court concludes there is not a reasonable likelihood of a different outcome at trial if the misleading evidence about the blood found on petitioner's boot was not admitted. When the evidence was introduced at trial, it was elicited that the amount was so small it was invisible to the eye, it could not be determined if it was even human blood, and it could not be determined when or where the blood was deposited on the boots. The jury also heard evidence indicating this "invisible" amount of blood on petitioner's boot was the only blood on his person, in contrast to significant amounts easily seen on the clothing of Chris Goode and Eugene DeCastro. [Footnote omitted] At trial, the State presented evidence against petitioner including that he was found near the scene, and had admitted and bragged of his involvement to Patrick Byrd. [Footnote omitted] Given the evidence against petitioner, if Agent Deaver's testimony about a microscopic amount of unidentified blood found on petitioner's boots had been omitted at trial, there is not a reasonable likelihood the jury would have reached a different outcome. [Footnote omitted]

Moreover, petitioner testified he was at the scene and placed himself not far from where the murders occurred and also placed himself around his brother Chris Goode as they fled. Under these circumstances a single microscopic spot of blood on his boot is not wholly inconsistent with his account. Finally, the State reminded the jury during closing argument that although Mrs. Batten had the more violent death with twenty-three stab wounds and her blood was found on the ground, her blood could not be positively identified on the clothing of any of the perpetrators. St. Ct. Rec. Vol. 12 of 45 at 122.

. . .

Petitioner, as he did in Claim I, argues that the MAR court's factual determinations that the jury was not mislead about the nature of Agent Deaver's testing and that it was "common knowledge" a phenolphthalein test was used are unreasonable in light of the record. For the reasons discussed pursuant to Claim I, supra, the court concludes the MAR court's findings that Agent Deaver's testimony did not give a false impression and that the

type of testing done was common knowledge are based on an unreasonable determination of the facts. However, in a habeas proceeding, even if the state court's ruling was based upon an unreasonable determination of facts or on an unreasonable application of clearly established federal law, a petitioner is only entitled to relief if the error had "'substantial and injurious effect or influence in determining the jury's verdict.'" Stephens v. Branker, 70 F.3d 198, 207 (4th Cir. 2009) (citing Kotteakos v. United States, 328 U.S. 750, 776 (1946)). Consequently, the arguments in Claim II of the petition will be considered by the court to determine if Petitioner can show he is entitled to relief.

To succeed on a claim the State withheld material exculpatory evidence, a defendant must show evidence was suppressed by the State; the evidence was favorable to the defense; and the evidence was material to guilt or punishment. Strickler, 537 U.S. at 281-82. Evidence is material "if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419, 434 (1995).

Even if the State improperly withheld Agent Deaver's report and information that Agent Deaver only performed a phenolphthalein test, petitioner cannot show he is entitled to relief on this claim. Petitioner is unable to show a reasonable probability that the result of proceeding would have been different had the information been disclosed to the defense.

As in Claim I, petitioner argues that "had the jury known the State never tested petitioner's boot for blood it would probably have accepted his testimony that he did not participate in the stabbings." Petition at 53. He argues the jury would have acquitted him of the murders, or at the least, not sentenced him to death. Id. However, for the same reasons the court concluded petitioner was unable to show a reasonable likelihood of a different outcome in its discussion of Claim I, petitioner is unable to show a reasonable probability of

> a different outcome at trial had the State disclosed to the defense prior to trial that Agent Deaver had only performed a presumptive, not conclusive, test for blood on petitioner's boot. As discussed, when all of the evidence implicating petitioner is considered, as well as the fact the jury heard the only blood on petitioner was an amount not visible to the naked eye, which could not be identified as human, and which Agent Deaver could not determine when or where it had been deposited, petitioner is unable to show a reasonable likelihood of a different outcome at either phase of trial if the defense had the information about Agent Deaver's testing.
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> . . .
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> Moreover, at the evidentiary hearing on the MAR, Dr. Miller and Dr. Sporn both conceded to some degree that it was not impossible a person could have inflicted a single stab wound and not gotten any blood on him. Dr. Sporn acknowledged that although it was unlikely, it was possible. St. Ct. Rec. Vol. 31 of 45 at 2141-42. Even Dr. Miller, who strongly believed a person could not have been an active participant in the murders and not been contaminated with blood, conceded that if George had inflicted only the first stab wound on Mr. Batten it was possible he would not have gotten any blood spatter on his clothing. See St. Ct. Rec. Vol. 26 of 45 at 1274. Consequently, when the State's evidence implicating petitioner, such as the eyewitness who saw all four men participating in the beating and the fact petitioner had the victim's wallet when arrested, is considered in light of the limitations in the expert testimony, petitioner cannot show a reasonable probability of a different outcome at the guilt phase of trial.

Thus, in light of this Court's above quoted October 21, 2009 final order, the Swecker-Wolf report cannot satisfy the Schlup test for newly discovered evidence under the particular circumstances of this case. In other words, even if Petitioner had the Swecker-Wolf report in hand at trial, he has failed to show it is more likely than not, that no reasonable juror would have found him guilty. See Schulp, 513 U.S. at 327.

Petitioner's Rule 60(b) motion based on the Swecker-Wolf report should therefore be summarily denied.

In sum, Petitioner's newly discovered evidence of fraud or misrepresentation claim is without merit under the particular circumstances of this case and should be summarily denied.

Conclusion

Petitioner's claim of newly discovered evidence of fraud or misrepresentation based on the Swecker-Wolf report is non-exhausted and Respondent does not waive exhaustion of state remedies. In addition, under the particular circumstances of this case, Petitioner's newly discovered evidence of fraud or misrepresentation claim, does not warrant a new trial and is therefore without merit. Petitioner's Rule 60(b) motion should be summarily denied.

Respectfully submitted, this the 29th day of October, 2010.

ROY COOPER
ATTORNEY GENERAL

/s/ Clarence DelForge
Clarence J. DelForge, III
Assistant Attorney General
P.O. Box 629
Raleigh, N.C. 27602
cdelforg@ncdoj.gov
(919) 716-6571
State Bar No. 12925

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification to the following:

Ms. Diane MB Savage, Attorney at Law
Dianes2@bellsouth.net

Respectfully submitted,

ROY COOPER
ATTORNEY GENERAL

/s/ Clarence J. DelForge, III
Clarence J. DelForge, III
Assistant Attorney General
P.O. Box 629
Raleigh, N.C. 27602
Phone: (919) 716-6571
Fax: (919) 716-0001
Email: cdelforg@ncdoj.gov