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.,	)
	)
Petitioner	)
	)
v.	)
	)
	)
GERALD BRANKER, Warden Central Prison, Raleigh North Carolina,	)
	)
Respondent	)

REPLY TO RESPONDENT'S MEMORANDUM OPPOSING
PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT

Pursuant to Fed. R.Civ.P. 60(b)(2),(3) and (6) and upon such terms as are just, Petitioner George Earl Goode, Jr., through counsel, seeks further relief from judgment, entered by the Court on October 21, 2009.

Respondent incorrectly claims that Petitioner has exhausted his remedies in state court. Respondent is wrong because he reads the exhaustion requirement far more narrowly than either the United States Supreme Court or the Court of Appeals for the Fourth Circuit does in similar cases. The exhaustion requirement does not prohibit a district court from considering evidence not presented to the state courts. *Vasquez v. Hillery*, 474 U.S. 254 (1986). "[S]upplemental evidence" that does not "fundamentally alter the legal claim already considered by the state courts" can properly be considered by a district court. *Id.* at 260.

Petitioner contends the new evidence presented by his Motion For Relief from Judgment does not fundamentally alter the nature of the claim presented to this Court upon its initial *habeas* review and therefore exhaustion is not required. *Winston v. Kelley*, 592 F.3d 535, 549-50

(4th Cir. 2010) (reading *Vasquez v. Hillery*, 474 U.S. 254 (1986) "to permit a district court to consider new evidence if it supports factual allegations for which there is already at least some support in the state record"); see also *Morris v. Dretke*, 413 F.3d 484 (5th Cir. 2005). (Morris's presentation of new evidence merely supplemented the Atkins claim he had already presented to the state courts; cited by *Winston v. Kelley*).

Petitioner had no way of knowing that the State, through Agent Deaver, withheld exculpatory serology evidence in the case of Gregory Taylor, which then led to the investigation of the State Bureau of Investigation (SBI), followed by an audit by former FBI agents Swecker and Wolf, leading to a report confirming that Deaver's withholding of exculpatory evidence, and presenting false and misleading testimony, were not an isolated incident but were in fact, a practice commonplace and similar to what Deaver did in Petitioner's case. Respondent's argument would require more than the law can reasonably ask of any man, as Petitioner would have to be clairvoyant to be able to foresee the circumstances through which the new evidence has been discovered. Moreover, the new evidence, as outlined in Petitioner's Motion, undermines the very foundation of the government's case.

Petitioner is aware of the significant restraints imposed in raising a Rule 60(b) motion. If the Attorney General is correct, however, Rule 60(b)(2) "newly discovered evidence that, with reasonable diligence could not have been discovered in time to move for a new trial under Rule 59(b), would never be a basis for Relief from a Judgment or Order because the time necessary to exhaust the issue would prohibit you from meeting the year deadline under Rule 60(c)(1). Adopting Respondent's reasoning would render Rule 60(b)(2) a nullity.

Petitioner respectfully contends that Respondent's second argument is likewise meritless.[1] Respondent's argument that Petitioner's claim does not entitle him to a new trial under the particular circumstances of this cases relies to its detriment on *House v. Bell*, 547 U.S. 518 (2006) and *Herrera v. Collins*, 506 U.S. 390 (1993). Respondent asserts, relying on *House*, that 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." Respondent's Response Memorandum p.5.

First, Petitioner's claim was not procedurally defaulted. Had it been so, Petitioner would not have received the sentencing relief this Court has already granted. Second, Respondent gravely misconstrues the nature of Petitioner's Motion. Petitioner has made no claim that his "actual innocence standing alone" entitles him to federal *habeas* relief. Respondent's Response Memorandum p.5. Rather, the new evidence Petitioner submits goes directly to the claims raised in his original petition: to wit, that the State unconstitutionally misled the jury by presenting evidence and argument that it found blood on Petitioner's boot; that the State withheld material exculpatory evidence; and that the Petitioner received ineffective assistance of counsel due to counsel's failure to adequately prepare to meet the State's evidence including testimony presented by Agent Deaver to show Mr. Goode could have participated in the murders without getting blood on him.

Even if the *Schlup* "gateway" test applied, Petitioner would prevail. Under *Schlup*, given the new evidence described in Petitioner's motion, this Court can no longer have confidence in

[1] Respondent's response does not address 60(b)(2),(3)and (6) separately, but focuses only on 60(b)(2) in its second argument.

the outcome of Petitioner's trial, especially since this Court was already not satisfied that the trial was free from non harmless constitutional error.[2] See *Schlup v. Delo*, 513 U.S. 298 (1995).

In *Schlup*, the U.S. Supreme Court has adhered to the principle that *habeas corpus* is, at its core, an equitable remedy. *Id.* In appropriate cases, the same principles that accommodate the systemic interests in finality, comity and conservation of judicial resources "must yield to the imperative of correcting a fundamentally unjust incarceration" and permit the Court to work justice in the "extraordinary case." *Murray v. Carrier*, 477 U.S. 478, 495-496 (1986) (internal citations omitted).

This case is the first of its kind. It was litigated during an unprecedented time in the history of the State of North Carolina when the State Bureau of Investigation, a pivotal player in Petitioner's trial and conviction, came under investigation and was exposed as an agency whose laboratory employees have falsified evidence and engaged in serious misconduct. The same Agent Deaver, who was a prominent witness at Petitioner's trial and during his Motion For Appropriate Relief Hearing, now faces perjury charges before the North Carolina Innocence Commission. A division of the SBI Laboratory that Agent Deaver hailed from, the blood stain pattern unit, has been indefinitely suspended. The facts about the depth of problems at the State Bureau of Investigation are still unfolding.

Petitioner has shown that no reasonable juror would have convicted him in the light of the new evidence. *Schlup*, 513 U.S. at 329. It is not this Court's independent judgment as to whether reasonable doubt exists that the *Schlup* standard addresses. Rather the standard requires this Court to make a probabilistic determination about what reasonable, properly instructed jurors would do. *Id.*

[2] In addition to finding the trial attorneys were ineffective for failing to accept a recess and make further efforts to find a blood spatter expert to challenge Agent Deaver, the State's blood spatter expert, this Court also found a *Napue* violation but did not find that a new trial was warranted. Order p. 21.

CONCLUSION

Petitioner reiterates that the shocking nature and scope of these developments are such that Petitioner deserves a new trial. For the reasons set forth in Petitioner's Motion and this Reply, George Earl Goode, Jr. respectfully requests that this Court grant his motion for relief from judgment as follows:

1. Reopen judgment and enter an Order granting a writ of *habeas corpus* vacating the convictions and allowing the State of North Carolina reasonable time to retry the Petitioner.

2. Such other relief as the Court deems just and proper including an evidentiary hearing.

Respectfully submitted this the 3rd day of November, 2010.

/s/Diane MB Savage
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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing Reply to Respondent's Memorandum Opposing Petitioner's Motion for Relief from Judgment with the Clerk of Court using the CM/ECF system, which will send notification of such filing to Clarence J. DelForge, III, Assistant Attorney General, North Carolina Department of Justice, cdelforg@ncdoj.gov.

This the 3rd day of November, 2010.

/s/Diane MB Savage
Diane MB Savage
Attorney for Petitioner