

motion for reconsideration, to wit, subsections (d)(1) and (d)(2) -- are integral to the analysis of whether to hold an evidentiary hearing. Respondents contend that if we were to conclude that the decision of the state court denying petitioner's claim on the papers was not "contrary to" or "involv[ing] an unreasonable application of" clearly established federal law as determined by the Supreme Court, it would prove to be a waste of judicial resources to hold an evidentiary hearing. Respondents also argue that convening a hearing would be inconsistent with the spirit of federalism and comity that animates the AEDPA.

We stand by our decision that an evidentiary hearing is not only permissible, but warranted. First, a hearing serves the interests of constitutional avoidance and judicial economy in that if petitioner cannot establish the factual basis of his claim, it will moot difficult constitutional and statutory questions. Mem. at 6-7. Second, a hearing will allow petitioner to crystallize his claim. Mem. at 7. Intrinsic to a claim under Brady is that the prosecution has withheld some information. It is impossible for us to know the full extent of what the prosecution has withheld (if anything) until we hold an evidentiary hearing.

As noted in our Memorandum, petitioner attempted to get a hearing in state court. Since his effort was frustrated through no fault of his own, the AEDPA does not prevent us from

affording him a habeas hearing.¹ Mem. at 7-10. Lastly, abstract federalism principles must yield to what the AEDPA specifically affords petitioner.

We would be remiss if we did not remind respondents of Rule 60's limited scope. "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovery evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1986). Respondents' motion accomplishes neither purpose.

As to petitioner's motion to take discovery in preparation for the evidentiary hearing, petitioner (through his

¹ It is not clear why respondents think that subsection (d)(2) forecloses an evidentiary hearing. Subsection (d)(2) mandates deference to state court determinations of facts.

The state court did not determine any facts as to this Brady claim. It declined to, determining that a hearing was unwarranted because the Brady claim failed as a matter of law. A state court decision that the facts alleged by a litigant do not warrant legal relief is obviously not a "determination of the facts." A determination of the facts for purpose of habeas review concerns "basic, primary or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators.'" Berryman v. Morton, 100 F.3d 1089, 1094 (3d Cir. 1996) (quoting Townsend v. Sain, 372 U.S. 293, 309 (1963)); accord McGhee v. Yukins, 229 F.3d 506, 513 (6th Cir. 2000); Coombs v. Maine, 202 F.3d 14, 18 (1st Cir. 2000); Bryson v. Ward, 187 F.3d 1193, 1211 (10th Cir. 1999); 1 Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 20.2c, at 827, n.73 (4th ed. 2001). Nothing the state court said or opined in denying this Brady claim can be construed as a determination of facts. Thus, there is simply no determination of facts to defer to.

As to the state court's view that petitioner did not present enough evidence to obtain a hearing (another legal conclusion, and not a determination of facts), the impact of its ruling on our authority to conduct an evidentiary hearing is discussed in footnote 9 and the accompanying text of our Memorandum.

counsel) wishes to depose the prosecutor at his trial, Michael McGovern, Esq. Since the Brady claim in issue involves an exculpatory statement that Commonwealth witness Tyrone Mackey allegedly made to the prosecutor during a trial recess, McGovern is a witness to the Brady matter here alleged. Petitioner asserts that he unsuccessfully attempted to reach McGovern to interview him. Pet's. Mot. at ¶ 3.

Petitioner submits that limited discovery would serve several purposes. First, it may allow him to prove that he is entitled to relief. Second, "it will help streamline the issues to be resolved at the hearing." Third, "it may well promote the presentation of evidence via stipulation." Fourth, depending on what the deposition of McGovern reveals, it may obviate the need to call Buzz Bissinger and Tyrone Mackey as witnesses -- conserving judicial resources and minimizing the burden placed on third parties. "Finally, and perhaps of primary concern to petitioner, it will avoid the possibility of any surprise testimony." Pet's Mot. at ¶ 4.

These reasons constitute the requisite good cause to take discovery under Rule 6(a) of the Rules Governing Section 2254 Cases.² Petitioner is granted leave to conduct discovery

² Rule 6(a) provides: "A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." See Johnston v. Love, 165 F.R.D. 444, 445 (E.D. Pa. 1996) ("[A] court may not deny a habeas corpus petitioner's motion for leave to conduct discovery if
(continued...)

for the limited purpose, and to the limited extent, of preparation for the evidentiary hearing.³

It is hereby ORDERED that:

1. Respondent's Motion and Supporting Memorandum for Reconsideration of March 4, 2003 Order Granting Evidentiary Hearing (Doc. No. 29) is DENIED;

2. The evidentiary hearing set by our March 4, 2003 Order and then postponed is RESCHEDULED for 10:00 a.m. on June 4, 2003, in Courtroom 10B;

3. Petitioner's Motion for Leave to Conduct Discovery Pursuant to Rule 6(a) of the Rules Governing Section 2254 Cases (Doc. No. 34) is GRANTED; and

²(...continued)
there is a sound basis for concluding that the requested discovery might allow him to demonstrate that he has been confined illegally.").

³ Respondents contend that any discovery should exclude deposition of the book author, Buzz Bissinger. They contend that: "Since there is no evidence that Mr. Bissinger was present during the pre-trial meeting between McGovern and Mackey, which would be the only relevant focus of the Court's attention if a hearing were held, nothing that Mr. Bissinger had to say in a second-hand manner would be relevant or admissible." Resp'ts' Comprehensive Reply (Doc. No. 37) at 23.

Because discovery subjects need not be admissible so long as reasonably calculated to lead to the discovery of admissible evidence, and because the transcript of the deposition of Mr. Bissinger may be introduced on impeachment of Mackey and McGovern at the discretion of the court, Fed. R. Civ. P. 26(b); Fed. R. Civ. P. 613(b), we decline to curtail discovery in the manner that respondents suggest. If after taking Mr. McGovern's deposition petitioner remains of the view that Mr. Bissinger's testimony is necessary, petitioner's counsel shall arrange and conduct Mr. Bissinger's deposition in ways that minimize the witness's inconvenience.

4. Petitioner is granted LEAVE to take discovery limited to his allegation in Grounds One and Two of his petition for habeas corpus that witness Tyrone Mackey informed the prosecutor during a trial recess that Giovanni Reid was fifteen feet away from the victim and the prosecutor "threatened" Mackey.

BY THE COURT:

Stewart Dalzell, J.