IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

DERRICK E. VINZANT,

:

Petitioner, Case No. 3:04-cv-444

:

-vs- Magistrate Judge Michael R. Merz

ALAN LAZAROFF, Warden,

:

Respondent.

DECISION AND ORDER ON THE MERITS

This habeas corpus case is before the Court for decision on the merits.

The parties unanimously consented to plenary magistrate judge jurisdiction under 28 U.S.C. § 636(c) and the case was referred on that basis (Doc. No. 25). The undersigned is therefore authorized to order the entry of judgment in this case.

In the Amended Petition filed April 15, 2009, Petitioner, who is represented by appointed counsel, pled the following Grounds for Relief:

> **Ground One:** Ineffective assistance of Counsel.
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> **Ground Two:** Plain error in not allowing voir dire of jurors individually when victim[']s mother prejudiced one juror.
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> **Ground Three:** The trial court did not comply with Ohio Rule of Crim. Procedure 43(A).
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> **Ground Four:** The Verdict was against the manifest weight of the evidence.
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> **Ground Five:** Petitioner was denied due process of law guaranteed by the Fifth and Fourteenth Amendments of the United States

> Constitution when he was denied a new trial based on newly discovered evidence of petitioner's actual innocence due to self defense.

(Amended Petition, Doc. No. 34, at 1-2.) However, in his Reply and Motion for Evidentiary Hearing (Doc. No. 37) Petitioner withdrew Grounds One through Four. Accordingly, only Ground Five for Relief remains for adjudication.

On June 22, 2009, the Court granted Petitioner's request for an evidentiary hearing limited to "any evidence which would support any of his theories of timeliness which is not already of record, . . ." (Doc. No. 38). Given that limitation, Petitioner identified himself, his mother (Barbara Vinzant), and William J. Lewinski as witnesses. However, at the time of the hearing, the Court announced it had tentatively decided the timeliness issue in Petitioner's favor, and no witnesses were heard.

Timeliness of the Petition

Respondent seeks dismissal of the Amended Petition on the ground it is barred by the one-year statute of limitations enacted by the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214)(the "AEDPA"). 28 U.S.C. § 2244 as thus enacted provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —
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> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
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> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
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> (C) the date on which the constitutional right asserted was initially

> recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Respondent has asserted from the outset of the case that it is time barred. Much of Respondent's original argument is now moot because Petitioner has withdrawn all of the claims made in the original Petition. The Court must, however, decide whether Ground Five is barred.

The Fifth Ground for Relief was added to this case by amendment on Petitioner's Motion to Amend, filed August 4, 2005 (Doc. No. 31) and the Court's Decision and Order granting that Motion (Doc. No. 32). As the Court noted in that Decision, the Fifth Ground for Relief was at that time properly stated hypothetically because the Montgomery County Common Pleas Court had not yet decided whether to grant a new trial. The Court also declined to consider the then-pending Motion to Dismiss on statute of limitations grounds because

> in deciding the motion for new trial, the Common Pleas Court may well make findings which are relevant to this Court's eventual determination of timeliness as they relate to Petitioner's diligence in bringing the new trial motion.

Id. at 3.

Judge Froelich did indeed make a relevant finding, to wit, that Petitioner was "unavoidably prevented from discovering the evidence" which he wishes to present at a new trial. (Decision, Order and Entry Denying Defendant's Motion for a New Trial, Montgomery County Common Pleas Case

No. 99-CR-2456, Aug. 13, 2007, copy at Doc. No. 37-4 at 11.)

This is not precisely the same issue as is posed by 28 U.S.C. § 2244(A)(1)(D), but it has many of the features which ordinarily lead a court to give conclusions of another court collateral estoppel effect, to wit, the State was represented and had an opportunity and incentive to litigate the question of Mr. Vinzant's diligence, actually did litigate it, and lost on the issue. *Compare Bobby v. Bies*, ___ U.S. ___, 129 S. Ct. 2145; 173 L. Ed. 2d 1173 (2009). This is a determination of a largely factual issue which is entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1) and the State has not offered sufficient evidence to overcome the presumption. This Court concludes, as did Judge Froelich, that when Petitioner learned of the possibility Dr. Lewinski might render an opinion favorable to his self-defense theory, he pursued that possibility diligently until he received Dr. Lewinski's opinion.

The relevant date on which Petitioner discovered the factual predicate of his claim is December 20, 2004, the date of Dr. Lewinski's letter offering his opinion that the ballistics evidence from the shooting was consistent with Petitioner's theory of self-defense. The relevant discovery date is not when Dr. Lewinski's name and the nature of his research became available to the general public when telecast in March 2003. Until the facts of his case had been presented to Lewinski and Lewinski had offered an opinion about them, Petitioner could not know that Lewinski's opinion would constitute evidence in his favor.

Respondent argues that the factual predicate was discovered earlier when Petitioner decided to claim self-defense (Answer/Return of Writ, Doc. No. 35, at 24-25). While legislative history for the AEDPA is notoriously lacking, the Court cannot agree with Respondent's theory. The statute speaks of the "factual predicate of the claim," that is, the habeas corpus claim. Petitioner's Fifth Ground for Relief is that he is constitutionally entitled to a new trial at which Dr. Lewinski would

testify. The factual predicate of that claim is the existence of the favorable Lewinski testimony. Compare *Johnson v. United States*, 544 U.S. 295 (2005), where the Court held that the factual predicate for a claim about an enhanced federal sentence was the vacatur of the state court sentence which had supported the federal enhancement; all nine Justices found the same date for the factual predicate, although the majority held the petitioner was not diligent in seeking the state vacatur. If Respondent's reading of "factual predicate" had been applied in *Johnson*, time would have run from when Johnson knew his federal sentence had been enhanced by the old conviction.

The amendment to the Petition to assert Ground Five was made within one year of Petitioner's discovery of the factual predicate for that claim and thus the amendment with Ground Five is not time barred. Of course, because the other four grounds have been withdrawn, the Court has no occasion to consider whether they were time barred. Nor need the Court consider the separate claim of equitable tolling.

The Merits of Ground Five

Petitioner claims in Ground Five that it was a denial of due process of law for the State courts to fail to grant him a new trial at which Dr. Lewinski's testimony could be presented.

In one prong of its response, the State argues that only state law questions were presented on the motion for new trial and this Court has no authority to grant habeas relief for error in applying state law. That argument is, of course, correct. Federal habeas corpus is available only to correct federal constitutional violations. 28 U.S.C. §2254(a); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990); *Smith v. Phillips*, 455 U.S. 209 (1982); *Barclay v. Florida*, 463 U.S. 939 (1983). "[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions.

In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

As Respondent correctly points out, Petitioner presented his claim to the Common Pleas Court purely in terms of Ohio R. Crim. P. 33 (See Motion for New Trial, copy at Doc. No. 37-3.) Mr. Vinzant was appointed counsel for the hearings on the new trial motion, but Judge Froelich's decision evinces no citation of any federal authority to him. Instead, he decided the motion under Ohio law, specifically relying on *State v. Hawkins*, 66 Ohio St.3d 339 (1993), setting forth the elements to be proved under Ohio R. Crim. P. 33 (Decision, Order and Entry Denying Defendant's Motion for a New Trial, Montgomery County Common Pleas Case No. 99-CR-2456, Aug. 13, 2007, copy at Doc. No. 37-4 at 10).

On appeal from Judge Froelich's decision, Petitioner raised only one assignment of error, to wit, "that the trial court erred in denying his motion for new trial." *State v. Vinzant*, 2008 Ohio 4399, 2008 Ohio App. Lexis 3706 at ¶5 (Ohio App. 2nd Dist. Feb. 4, 2009). Judge Wolff's opinion for that court does not rely on or even cite federal law.

Petitioner's response is that he is not seeking review of the decision of Ohio law, but is instead presenting a Due Process claim, the right to present a defense. As Petitioner phrases the claim:

> Contrary to the Respondent's assertion, Mr. Vinzant's sole ground for relief does not merely allege that the trial court erred in denying his motion for a new trial pursuant to Ohio Criminal Rule 33. Petitioner's claim asserts that preventing Dr. Lewinski from testifying at a new trial infringed on his constitutional right to present a defense guaranteed by the due process clause of the Fifth and Fourteenth amendments. This is especially true given that the state court determined Dr. Lewinski could give expert testimony, and that this expert scientific testimony would corroborate Petitioner's testimony and theory of self defense. (Exhibit C at 6-10, 14-15; Exhibit D at 5).

(Petitioner's Reply, Doc. No. 37, at 4.) Insofar as he makes the claim in this way, Petitioner concedes

– and rightly so – that this Court cannot review what the Ohio courts' – a rule-based claim under Ohio Crim. R. 33.

By rephrasing the claim as a constitutional claim in this Court, however, Petitioner puts himself in the position of not having exhausted his constitutional claim in the state courts. Federal habeas courts may grant only exhausted claims. 28 U.S.C. §2254(b) and (c); *Picard v. Connor*, 404 U.S. 270 (1971). Since Petitioner made a closely-related claim under state law, the state courts would probably not hear an amended new trial motion making the same claim as a federal constitutional claim because it could have been presented that way in the first instance in the Common Pleas Court. Indeed, Petitioner had phrased it as a constitutional claim when he added Ground Five well before anything substantial happened in his state court new trial proceedings and he never amended in those courts to raise the claim as a federal constitutional claim.

There are occasions when a state court defendant will have made claims in the state courts which, while not explicitly invoking the United States Constitution, in fact fairly place before the state courts the substance, both facts and legal theory, of a claim or claims later made in habeas corpus. In *Franklin v. Rose*, 811 F.2d 322 (6th Cir. 1987), the Sixth Circuit cited with approval a Second Circuit analysis in *Daye v. Attorney General,* 696 F.2d 186 (2d Cir. 1982), *after remand,* 712 F.2d 1566 (1983):

> [T]he ways in which a state defendant may fairly present to the state courts the constitutional nature of his claim, even without citing chapter and verse of the Constitution, include (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like factual situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts well within the mainstream of constitutional litigation.

811 F.2d at 326, *quoting* 696 F.2d at 193-94; *accord, Whiting v. Birt*, 395 F.3d 602 (6th Cir. 2005); *McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000). The claim must be "fairly presented" to the state courts in a way which provides them with an opportunity to remedy the asserted constitutional violation. *Levine v. Torvik*, 986 F.2d 1506 (6th Cir. 1993); *Riggins v. McMackin*, 935 F.2d 790 (6th Cir. 1991). Merely using talismanic constitutional phrases like "fair trial" or "due process of law" does not constitute raising a federal constitutional issue. *Franklin v. Rose*, 811 F.2d 322, 326 (6th Cir. 1987); *McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000), *citing Petrucelli v. Coombe*, 735 F.2d 684, 688-89 (2d Cir. 1984). Mere use of the words "due process and a fair trial by an impartial jury" are insufficient. *Slaughter v. Parker*, 450 F.3d 224, 236 (6th Cir. 2006); *Blackmon v. Booker*, 394 F.3d 399, 400 (6th Cir. 2004)(same). "A lawyer need not develop a constitutional argument at length, but he must make one; the words 'due process' are not an argument." *Riggins v. McGinnis*, 50 F.3d 492, 494 (7th Cir. 1995).

If a petitioner's claims in federal habeas rest on different theories than those presented to the state courts, they are procedurally defaulted. *Lorraine v. Coyle*, 291 F.3d 416, 425 (6th Cir. 2002), *citing Wong v. Money*, 142 F.3d 313, 322 (6th Cir. 1998); *Lott v. Coyle*, 261 F.3d 594, 607, 619 (6th Cir. 2001)("relatedness" of a claim will not save it).

To the extent Petitioner's claim in this Court is a constitutional claim – the right to present a defense – that claim was not fairly presented to the state courts and is therefore procedurally defaulted. As noted above, neither Judge Froelich nor Judge Wolff had any reason to understand his court was deciding a federal constitutional claim.

Even if Ground Five were not procedurally defaulted, it would be without merit. 28 U.S.C. § 2254 provides in part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

The state courts, confronted with Dr. Lewinski's testimony, denied Petitioner a new trial and Petitioner claims that violated his right to present a defense. But none of the authority cited by Petitioner compels a State to grant a defendant a second chance to present a defense. This Court can agree hypothetically that if Dr. Lewinski's testimony, held to be competent under Ohio R. Evid. 702, had been proffered at trial and excluded, Petitioner would have a very colorable claim of denial of his right to offer a defense. The Court also agrees with Judge Froelich that Dr. Lewinski's testimony was not available to Petitioner at the time of trial. But it has never been held as a matter of constitutional law that a criminal defendant has a right to a second trial even to present very good evidence. In fact, the Supreme Court's decision this term in *District Attorney for Third Judicial District v. Osborne*, 129 S. Ct. 2308; 174 L. Ed. 2d 38 (2009), that there is no constitutional right to gather DNA evidence which might exonerate a prisoner strongly suggests the Court would not today hold there was a right to a new trial under these circumstances, and to prevail, Petitioner would have had to show the right was clearly established by Supreme Court law at the time the state courts denied the new trial.

Conclusion

Because Judge Froelich found Petitioner diligently sought the evidence he wishes to present,

his Fifth Ground for Relief is not time barred. However, it is procedurally defaulted and fails on the merits. The Clerk will enter judgment dismissing the Petition with prejudice.

August 4, 2009.

s/ **Michael R. Merz**

United States Magistrate Judge