

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

ELBRYAN D. NEAL,)	
)	
Petitioner,)	
)	
vs.)	No. CIV-17-596-C
)	
JOE ALLBAUGH, Director,)	
)	
Respondent.)	

MEMORANDUM OPINION AND ORDER

Petitioner filed the present action pursuant to 28 U.S.C. § 2254, challenging the constitutionality of his state court convictions. Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B), the matter was referred to United States Magistrate Judge Gary M. Purcell, who entered a Report and Recommendation (“R&R”) on July 5, 2017. Judge Purcell noted Petitioner appeared to be raising unexhausted claims premised on Brady v. Maryland, 373 U.S. 83 (1963). Because unexhausted claims cannot be pursued, Judge Purcell recommended dismissal of Petitioner’s case. Alternatively, Judge Purcell noted Petitioner could dismiss any unexhausted claims and proceed with his remaining claims. On July 7, 2017, Petitioner filed a Dismissal without prejudice of his unexhausted Brady claims.

Fed. R. Civ. P. 41(a)(1)(A)(i) permits a plaintiff to dismiss his case without court order at any time prior to the filing of an answer or motion for summary judgment; neither has occurred here. Accordingly, Plaintiff’s Brady claims are deemed DISMISSED without prejudice as of the filing of his Motion to Dismiss (Dkt. No. 14). As this resolves

the basis for Judge Purcell's recommendation of dismissal, the Court declines to adopt the R&R (Dkt. No. 13) and DENIES Respondent's Motion to Dismiss (Dkt. No. 8). This matter is re-referred to Judge Purcell under the terms of the May 30, 2017, Order of Referral (Dkt. No. 3).

IT IS SO ORDERED this 11th day of July, 2017.



ROBIN J. CAUTHRON
United States District Judge