IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DENNIS GILLILAND,	)	
	)	
Petitioner,	)	NO. 3:06-0361
	)	JUDGE HAYNES
v.	)	
	)	
GLEN TURNER, Warden,	)	
	)	
Respondent.	)	

M E M O R A N D U M

Petitioner, Dennis Gilliland, filed this action under 28 U.S.C. § 2254, seeking the writ of habeas corpus to set aside his state conviction for felony murder for which his sentence was modified to life imprisonment. The Court appointed the Federal Public Defender to represent Petitioner and an amended petition was filed. (Docket Entry No. 12). In his amended petition, (Docket Entry No. 45), Petitioner asserts the following claims: (1) his actual innocence of the crime; (2) trial counsel's failure to conduct an adequate investigation of his defense, including an independent DNA analysis of the blood found in the victim's truck; (3) his trial counsel's failure to have the prosecution conduct a DNA test for all persons whose blood matched the sample held by the prosecution; and (4) his trial counsel's failure to cross-examine the prosecution's DNA expert to disclose that the DNA results did not match Petitioner's DNA and the expert's explanation of the blood in the victim's truck. Petitioner's amended petition also incorporates by reference claims in the pro se petition for trial counsel's failure to request a jury instruction on alibi; to seek a dismissal of the felony murder charge instead of the premeditated first degree murder charge; and to challenge the jury's viewing Petitioner in handcuffs.

A. Procedural History

Petitioner was convicted by a jury of premeditated first degree murder and felony murder, but the trial court vacated the verdict on the first degree murder conviction. State v. Gilliland, 1998 WL 800191, at *1 (Tenn. Ct. Crim. App. Nov. 19, 1998). The Tennessee Court of Criminal Appeals affirmed the felony murder conviction, but remanded for resentencing. Id. On appeal, the Tennessee Supreme Court affirmed Petitioner's conviction, but concluded that the admission of the Petitioner's prior shooting was error, albeit harmless error. Gilliland v. State, 22 S.W.3d 266 (Tenn. 2000).

Petitioner then filed a post-conviction petition that the trial court denied, and on appeal, the Tennessee Court of Criminal Appeals affirmed. Gilliland v. State, 2003 WL 22703222 (Tenn. Ct. Crim. App. Nov. 14, 2003). The Tennessee Supreme Court denied Petitioner's application for permission to appeal. Id. Petitioner filed another action under Tennessee's DNA Analysis Act that the Tennessee courts rejected. Gilliland v. State, 2008 WL 624931 (Tenn. Ct. Crim. App. March 3, 2008). The latter ruling gives rise to the threshold issue in this action, namely Petitioner's request for discovery and an evidentiary hearing.

B. Discovery

Petitioner seeks discovery for DNA testing of the remaining fluid sample collected in the State's investigation of the underlying murder. Petitioner also seeks documents on the blood that prosecutors subjected to DNA testing. Petitioner argues that Tennessee state courts' ruling precluded this discovery and Petitioner did not have an opportunity to request such discovery, citing Tennessee Supreme Court Rule 28 §§ 6(c)(7), (7)(A). In response, the Respondent argues that Petitioner pursued the DNA testing sought here in state courts that properly rejected

Petitioner's request for DNA testing.

From a review of the state court record, in his second post-conviction action, Petitioner requested DNA testing of the fluid sample in the State's custody. After the trial court's denial of that request, Petitioner argued on appeal that the specimen removed from the victim's vehicle contained a trace amount of DNA from an unidentified individual and this fluid may contain biological evidence to establish the identity of the murderer. In essence, the Petitioner asserts that he is not the perpetrator of this offense and that testing of this sample will prove his actual innocence. The Tennessee appellate court rejected this request and reasoned as follows:

> **First, we must note that the State is correct that such analysis was not requested by the Petitioner in his original petition.** See Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."). **Notwithstanding any possible waiver, the Petitioner's request for further testing must fail.**
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> The Act only permits "the performance of a DNA analysis which compares the [P]etitioner's DNA samples to DNA samples taken from biological specimens gathered at the time of the offense." See Earl David Crawford v. State, No. E2002-02334-CCA-R3 -PC, 2003 WL 21782328, at *3 (Tenn. Ct. Crim. App., Knoxville, Aug. 4, 2003). Thus, **the Act does not permit DNA analysis to be performed upon a third party. "[T]he results of the DNA testing must stand alone."** See Sedley Alley v. State, No. W2004-01204-CCA-R3-PD, 2004 WL 1196095, at *10 (Tenn. Ct. Crim. App., Jackson, May 26, 2004). **The specimens retrieved from the vehicles in this case have already been compared to the Petitioner's and the victim's blood samples. This evidence was available to the Petitioner at the time of trial and was used by the State at trial as evidence of the Petitioner's guilt. See Gilliland, 1998 WL 800191, at *4. Further testing would not resolve any issue not resolved by the previous analysis.**
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> Finally, as the State argues, **identifying the donor of the trace amount of DNA in the victim's vehicle would not exonerate the Petitioner as the perpetrator of the murder of Bobby Bush. The Petitioner seeks DNA testing in order to establish the identity of this third party. Such evidence, however, would at best simply establish that this third party had, at some point in time (but not**

> **necessarily at the time of the crime), had contact with the victim**. See Ayley, 2004 WL 1196095, at *10. On direct appeal, this Court summarized the evidence sufficient to uphold the Petitioner's conviction:
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> Contrary to the assertions of the Petitioner, **the determination of the identity of this unidentified individual will not eliminate him as the perpetrator of this murder. Accordingly, we conclude that the post-conviction court has not abused its discretion in finding that the Petitioner had not established the qualifying criteria for DNA testing and that summary dismissal was appropriate**.

Gilliland, 2008 WL 624931, at **3-4 (emphasis added).

Rule 6(a) of the Rules governing Section 2254 actions provides for discovery under a good cause standard.

> "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."

As stated by the Sixth Circuit in Stanford v. Parker, 266 F.3d 442 (2001), in a habeas action as a general rule:

> Habeas petitioners have no right to automatic discovery. A district court has discretion to grant discovery in a habeas case upon a fact specific showing of good cause under Rule 6. See Bracky v. Gamley, 520 U.S. 899, (1997); Byrd v. Collins, 209 F.3d 486, 515-16 (6th Cir. 2000). . . . The burden of demonstrating the materiality of information requested is on the moving party. See Murphy v. Johnson, 205 F.3d 809, 813-15 (5th Cir. 2000).
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> The district court applied the correct legal standard in light of the evidence and the state court proceedings. The discovery sought by Stanford would not resolve any factual disputes that could entitle him to relief, even if the facts were found in his favor. To the contrary, Stanford's requested discovery, when reviewed in light of the recently examined record, falls more in the category of a fishing expedition. We will not find that a district court erred by denying a fishing expedition masquerading as discovery.

Id. at 460.

Moreover, "[c]onclusory allegations are not enough to warrant discovery under [Rule 6]; the petitioner must set forth specific allegations of fact." Ward v. Whitley, 21 F.3d 1355, 1367 (5th Cir. 1994). In Williams v. Bagley, 380 F.3d 932, (6th 2004), the Sixth Circuit explained that for discovery in a habeas action is permissible "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief."

Discovery must also be considered in the context of 28 U.S.C. § 2254(e)(1) on the presumptive correctness of state court findings.

> Because Petitioner failed to rebut the statutory presumption of correctness that the federal habeas court must award to the factual findings of the state courts, the district court properly concluded that it was required to defer to those factual findings. Furthermore, given this conclusion, we would be hard-pressed to say that the district court abused its discretion in denying further discovery on these issues.

Byrd v. Collins, 209 F.3d 486, 516 (2000). Consideration of Section 2254(e)(2) on failure to develop the state record and the precedents thereunder, discussed infra, are also relevant given that discovery is intended to supplement the state record.

Since 2001, DNA discovery has been available under Tennessee law for post-conviction proceedings, the "Post-Conviction DNA Analysis Act of 2001." Tenn. Code Ann. § 40-30-301 et seq. Under this Act, notwithstanding the provisions of part 1 of this chapter, or any other provision of law governing post-conviction relief to the contrary, **a person convicted of** and sentenced for the commission of first degree murder, second degree murder, aggravated rape, of any of these offenses, **any lesser included offense of these offenses**, or at the direction of the

trial judge, any other offense, **may at any time, file a petition requesting the forensic DNA analysis of any evidence that is in the possession or control of the prosecution, law enforcement, laboratory, or court, and that is related to the investigation or prosecution that resulted in the judgment of conviction and that may contain biological evidence".** Tenn. Code Ann. § 40-30-303 (emphasis added).

Petitioner has not made any showing based upon expert testimony or other evidence challenge the State courts' factual findings on the lack of significance of any further DNA testing. The Court concludes that Petitioner has not presented any reason to challenge these State court findings and that Petitioner's request for discovery should be denied.

C. Evidentiary Hearing

Petitioner's request for an evidentiary hearing is based upon his request for DNA testing and his ineffective assistance of counsel claims. In the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 110 Stat. 1214, Congress redefined the standards for conducting an evidentiary hearing in a habeas action in amending Section 2254 to provide as follows:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that - (A) the claim relies on - (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

In Williams v. Taylor, 529 U.S. 420 (2000), the Supreme Court stated that under Section

2254(e)(2), the initial focus on whether to conduct an evidentiary hearing, is whether the petitioner exercised diligence in developing the state record and that diligence depends, in part, on whether the petitioner or his counsel knew of the matters at issue and failed to pursue the matter in the state courts:

> The question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts. . . . **Diligence for purposes of the opening clause [of Section 2254(e)(2)] depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court**; it does not depend, as the Commonwealth would have it, upon whether those efforts could have been successful.
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> For state courts to have their rightful opportunity to adjudicate federal rights, **the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error. If the prisoner fails to do so, himself or herself contributing to the absence of a full and fair adjudication in state court, § 2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute's other stringent requirements are met. Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.**
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> * * *
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> Given knowledge of the report's existence and potential importance, a diligent attorney would have done more. Counsel's failure to investigate these references in anything but a cursory manner triggers the opening clause of § 2254(e)(2).

Id. at 435, 437, 439-40 (emphasis added).

Independent of § 2254(e)(2), the Court possesses the inherent authority to set an evidentiary hearing in a habeas action. Harries v. Bell, 417 F.3d 631, 635 (6th Cir. 2005); Abdur'Rahman v. Bell, 226 F.3d 696, 705-06 (6th Cir. 2000). "[A] district court does have the inherent authority to order an evidentiary

hearing are absent." Abdur'Rahman, 226 F.3d at 705. Such hearings are set "to settle disputed issues of material fact." Id. at 706. This authority extends to where an inadequate record exists to decide a procedural default controversy. Alcorn v. Smith, 781 F.2d 58, 60 (6th Cir. 1986).

Yet, "[i]f [the court] concludes that the habeas applicant was afforded a full and fair hearing by the state court resulting in reliable findings, [the court] may, and ordinarily should accept the facts as found in the hearing. But [the court] need not. In every case [the court] has the power, constrained only by [its] sound discretion, to receive evidence bearing upon the applicant's constitutional claim." Abdur'Rahman, 226 F.3d at 705 (quoting Townsend v. Sain, 372 U.S. 293, 318 (1963)). Even prior to AEDPA, a habeas petitioner had to show cause for his failure to develop the state record or that "a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing," Keeney v. Tamayo-Reyes, 504 U.S. 1, 11-12 (1992). Moreover, the Supreme Court has stated that: "The state court is the most appropriate forum for resolution of factual issues in the first instance and creating incentives for the deferral of fact-finding to later federal court proceedings can only degrade the accuracy and efficiency of judicial proceedings." Id. at 9. Accord Byrd v. Collins, 209 F.3d 486, 516-17 (6th Cir. 2000) (quoting Keeney).

In a word, the distinction between § 2254(e)(2) and the Court's inherent authority to order an evidentiary hearing is whether "a petitioner is entitled to a hearing [under § 2254(e)(2)] . . . versus whether a district court has the inherent discretion to order a hearing [that] is still intact following Williams." Abdur'Rahman, 226 F.3d. at 706.

Petitioner contends that he was unaware of the evidence that could have been discovered by his counsel and cites the potential of Brady v. Maryland, 373 U.S. 83 (1963) material based

upon the DNA testing. Respondent contends that Petitioner's trial counsel was cross-examined in the state post-conviction proceeding. Other than the request for DNA testing, there is not any showing of any specific proof that was not before the state court on Petitioner's ineffective assistance of counsel claims. Here, Petitioner had a full opportunity to conduct an examination of his trial counsel in the state court. There is not any showing that the State's proof and the state courts' findings about DNA are erroneous. In such circumstances, the Court deems an evidentiary hearing unnecessary.

D. Merits of Petitioner's Claim

1. Review of the State Court Record

In his direct appeal, the Tennessee Court of Criminal Appeals summarized the facts[1] of Petitioner's conviction as follows:

> On July 19, 1995, the defendant asked his mother for gas money. She first offered $10, but the defendant replied he needed more so she gave him $20. The defendant arrived at a local bar called "Daisy Dukes" at approximately 9:30 p.m. that evening. There he joined Ronnie Murphy.
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> After spending approximately three (3) hours in the bar, the defendant and Murphy left. Murphy testified that the defendant encountered Eddie Christy in the parking lot of the bar. The defendant told Christy about a shooting several weeks earlier wherein the defendant fired .20 gauge shotgun slugs at two (2) brothers named Walton. Both brothers were killed. The grand jury declined to indict the defendant, concluding the homicides were justifiable. Murphy testified that the defendant produced a .20 gauge single-shot shotgun from his truck to show Christy. Murphy observed a box of slug ammunition on the front seat of the defendant's truck at that time.
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> The defendant followed Murphy to Murphy's house where Murphy left his truck. They proceeded in the defendant's truck to a convenience store to buy beer,

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[1] State appellate court opinion findings can constitute factual findings in a habeas action, Sumner v. Mata, 449 U.S. 539, 546-47 (1981), and have a statutory presumption of correctness. 28 U.S.C. § 2254(d).

arriving sometime after midnight. There was a discussion as to whether they had enough money to purchase the beer. The beer was ultimately purchased on the credit ticket of the defendant's father.

The defendant and Ronnie Murphy drove to Donnie Murphy's house. Donnie Murphy was not at home. Ronnie Murphy and the defendant went to the basement to play pool and drink beer. Shortly thereafter, Donnie Murphy and the victim, Bobby Bush, arrived at the house.

Donnie and Ronnie Murphy, the defendant, the victim and a person named Michael Heath played pool and drank beer in the basement. Ronnie Murphy and Michael Heath eventually left, leaving the defendant with Donnie Murphy and the victim. The victim began discussing the prior shootings with the defendant. Donnie Murphy testified that the victim did not believe the defendant's statement that he shot the Walton brothers with .20 gauge shotgun slugs from a distance of seventy-five (75) yards. The defendant then retrieved a .20 gauge shotgun from his truck. When the defendant opened the breech, a .20 gauge slug shell was ejected onto the floor.

The victim then pulled from his pocket at least two (2) $100 bills and several other bills, stating that he would bet all of the money that he too would have shot the brothers if faced with the same situation. The defendant looked at the victim's money and stated that he was not impressed. The victim responded that he was not attempting to impress the defendant.

Around 3:20 a.m., the victim said he was going to drive home. Donnie Murphy attempted to dissuade the victim from doing so, as he had consumed numerous beers and had a previous DUI conviction. The victim persisted and departed, stating that he planned to travel home by a route not frequented by the police. The defendant left shortly after the victim, stating he would drive by the victim's house to make sure that he arrived safely. He took a cooler containing the group's remaining beer.

Beverly Sue Heath was a neighbor of the victim. At approximately 4:10 a.m. on the morning in question she saw a vehicle driving down the road in front of her house "throwing sparks" and sounding as if it had a flat tire.

Vera Bush, the victim's mother, testified that she awoke briefly at 3:00 a.m. that morning and noticed her son was not at home. She woke again at 4:45 and noticed her son's wrecked truck parked in an unusual place. The victim had an elaborate method of parking his truck as it did not have an operable reverse gear. The victim was neither in the truck nor the house.

The defendant ran out of gas that morning around 5:30. He approached Oda Lovins' house and asked him for a ride to a gas station. The defendant pumped $5 worth of gas in a can and offered to tip Lovins $10 for his effort. Lovins observed a "fairly good wad of bills" in the defendant's billfold. After fueling his truck from the can, the defendant drove back to the station and purchased gasoline for which he paid $21 in cash.

The defendant then drove to the farm of Bill Freeman. Freeman stated that he had known the defendant for only eighteen (18) months and was not sure why the defendant came by his house that morning. The defendant began talking about the Walton homicides. Later that day Freeman discovered a cooler of beer on his truck, and a farmhand related that he saw a truck similar to the defendant's driving away from the farm.

From the Freeman farm, the defendant proceeded to Green's Market where he purchased a case of beer with $20 cash. He then drove to Clarksville where he ate breakfast at a pancake restaurant and rented a room at the Quality Inn. The defendant paid $44 in cash for the room, rented a movie for $7, and tipped the maid $5 for delivering the movie to the room.

A mail carrier discovered the victim's body lying along a road in rural Houston County around 10:30 that morning. The victim, who had a large sum of currency the previous evening, had only change in his pocket when found.

The defendant's whereabouts for the rest of the day are disputed. The defendant claimed to have visited a riverfront park after leaving the pancake restaurant, then to have traveled back to the "old Lock B bottoms" where he remained until that evening when he presented himself at the Dickson County Sheriff's office. The state presented evidence of the defendant's stay at the Quality Inn in Clarksville.

Lieutenant Randy Starkey with the Dickson County Sheriff's Office testified that he was at the Sheriff's Station No. 2 on the evening of July 20, 1995, when the defendant arrived at the station and engaged him in conversation. Starkey stated that the defendant had been to the station several times as a result of the investigation of the Walton homicides. Thus, when the defendant mentioned drinking beer with the victim at the Murphy residence the previous night, Starkey became interested. He asked the defendant what the defendant knew about the victim. The defendant asked if the victim had gotten into some trouble. Starkey then related the story of the victim being found murdered that morning.

Investigator Ted Tarpley and TBI Agent Steve Watkins testified that they were advised by the victim's family shortly after beginning their investigation that the defendant should be considered as a potential suspect. They soon learned the

defendant was already at the Sheriff's Station No. 2.

The defendant related his version of the previous evening's events to the officers. The defendant neglected to tell the officers about running out of gas, buying beer and renting a motel room that morning. The defendant told the officers he spent the night watching three (3) barges at the river bottoms.FN2 The defendant related that he had only $5 in his possession at that time. The fact that the defendant was carrying a shotgun was discovered in normal conversation. Agent Watkins went to the defendant's truck and seized a breeched, unloaded .20 gauge shotgun. Watkins also noticed that the interior of the truck appeared to have been washed recently. Water was pooled in the floorboard, and the truck appeared cleaner than would be expected after driving on gravel roads. The bed was noticeably dirtier than the rest of the truck.

> FN2. Raymond D. Wilson was the operator on duty at a lock and dam eight (8) miles from the location where the defendant claims to have spent the evening after leaving the Murphy home. Wilson reported no river traffic in the time frame the defendant claimed to have seen the three (3) barges.

During initial questioning of the defendant, Agent Watkins received a telephone call that he should investigate the Liberty Church Cemetery as a source of possible leads in the victim's death. The defendant was asked to remain voluntarily at the station while officers investigated the cemetery. Officer C.J. Butts testified that during this time the defendant walked freely in and out of the station; and, although he was usually accompanied, the defendant did have an opportunity to be alone outside of the station that evening.

Earlier in the day, Liberty Church Cemetery was re-ported to authorities as a site of vandalism. The cemetery is located in Dickson County, a short distance from the victim's residence. Closer inspection revealed a vehicle had driven into the cemetery and knocked over four or five headstones. It was later determined that the victim's truck had knocked the stones over, coming to rest on one of them. A wider set of tracks was also detected at the scene. It was theorized by the state that a larger vehicle pulled the smaller vehicle out of the cemetery. Subsequently, TBI agents were able to show paint on the bumper of the defendant's truck consistent with paint from the victim's truck.

When the officers returned to the station, the defendant was read his rights and his truck was formally seized. The defendant maintained his version of events as previously related to the officers. During questioning, the defendant stated that he had never been inside the victim's truck, nor had the victim been in his. The defendant was arrested for the victim's murder.