UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
(at Lexington)

VIRGINIA S. CAUDILL,	)	
	)	
Petitioner,	)	Civil No. 5: 10-84-DCR
	)	
v.	)	
	)	
JANET CONOVER, Warden,	)	**ORDER**
	)	
Respondent.	)	

*** *** *** ***

This matter is pending for consideration of Petitioner Virginia Caudill's motion to alter or amend the Court's February 3, 2014, Judgment. [Record No. 36] As grounds for relief, Caudill asserts that the Court committed clear legal error when it denied her claims for relief under *Batson v. Kentucky*, 476 U.S. 79 (1986), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Strickland v. Washington*, 466 U.S. 668 (1984). Caudill further contends that the Court was required to "conduct an individualized assessment of each claim when determining whether a [certificate of appealability] should issue." [Record No. 36, p. 15]

"The circumstances under which a district court may grant a Rule 59(e) motion are limited." *Robbins v. Saturn Corp.*, 552 F. App'x 623, 632 (6th Cir. 2013). Specifically, Federal Rule of Civil Procedure 59(e) permits a district court to vacate its judgment only where the moving party demonstrates that such relief is necessitated by: "(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Henderson v. Walled Lake Consol. Schs.*, 469 F.3d 479, 496 (6th Cir. 2006) (internal quotation marks omitted).

Caudill does not assert that the controlling law has changed. Likewise, she does not seek to present newly-discovered evidence. Rather, she contends that all of her twenty-six claims have merit, and that the three claims highlighted in her motion are so plainly meritorious that the Court's denial of them represents a clear error of law. [Record No. 36, p. 2]

With respect to her *Batson* claim, Caudill reiterates the argument that the trial court was constitutionally required to engage in an involved credibility analysis and to articulate the reasons for its determination on the record. [Record No. 36, pp. 3-7] Caudill again argues that *Brady* required the prosecution to provide her counsel with publicly-available information regarding the terms of Cynthia Ellis's plea bargain, and that it is reasonably likely the jury's knowledge that the prosecution in Ellis's case agreed to mention her cooperation during sentencing would have so undermined her credibility that the outcome of Caudill's entire trial would have been different. [Record No. 36, pp. 9-12] Finally, Caudill repeats her argument that her trial counsel was ineffective under *Strickland* because he did not hire and call an expert witness to rebut the prosecution's blood spatter evidence. [Record No. 36, pp. 12-15] In support of each of these arguments under *Batson*, *Brady*, and *Strickland*, Caudill makes the same arguments and relies upon the same cases as a basis for relief that she did in her petition. [Record No. 1, pp. 17-26; pp. 79-82; pp. 82-90]

The Court considered and rejected Caudill's arguments under *Batson*, *Brady*, and *Strickland* at length when it addressed the merits of her petition. [Record No. 34, pp. 26-36; pp. 13-19; pp. 63-68] Caudill's motion under Rule 59(e) offers neither new facts nor new legal arguments which suggest that the Court's resolution of her claims in its Memorandum Opinion and Order was incorrect. Rather, Caudill's motion consists entirely of re-argument. The proper vehicle for such arguments is an appeal, not a motion under Rule 59(e). *United States v.*

LaDeau, 734 F. 3d 561, 572 (6th Cir. 2013) ("a motion to reconsider generally is not a vehicle to reargue a case; it may not be used to raise arguments that could have been raised on initial consideration."); *Whitehead v. Bowen*, 301 F. App'x 484, 488 (6th Cir. 2008); *Sault Ste Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998). Further, Caudill's arguments are not any more convincing now than they were upon initial consideration. Caudill's motion, therefore, will be denied.

Caudill also appears to be attempting to assert a new habeas claim for the first time in her Rule 59(e) motion. As part of her *Batson* argument, Caudill now contends that the trial court's factual determination – that the prosecution did not exercise its peremptory strikes on the basis of race or gender in violation of the Constitution – was clearly erroneous. [Record No. 36, pp. 7-8] However, in Caudill's petition she argued only the trial court's *Batson* determination was procedurally flawed, not that it was substantively unreasonable. [Record No. 1, pp. 17-26] That this claim is being asserted for the first time now is made plain by the fact that neither the arguments she makes in favor of this contention nor the extensive citations she makes to the record in an effort to demonstrate that "the prosecutor's credibility is suspect," [Record No. 36, pp. 5-6, 7-8] can be found anywhere in her briefing before this Court on her *Batson* claim, either in her petition or in her reply. [Record No. 1, pp. 17-26; Record No. 14, pp. 1-4]

The Court's opinion was limited to Caudill's claim of procedural error under *Batson*, the only one she actually made in her petition. [Record No. 34, pp. 26-36] Caudill's claim to the Kentucky Supreme Court was likewise one of procedural, rather than substantive, error. *Id*. at 28-29; Brief for Appellant, *Caudill v. Commonwealth*, 120 S.W.3d 635, 657 (Ky. 2003), 2001 WL 34546226, at *104-107. And Caudill's failure to assert this claim before the Kentucky Supreme Court renders it procedurally defaulted. *Fautenberry v. Mitchell*, 515 F. 3d 614, 628-

29 (6th Cir. 2008). More fundamentally, it cannot provide a basis for relief from the Court's judgment under Rule 59(e) because the Court did not rule upon this newly-asserted claim in its opinion.

Finally, Caudill contends that the Court must "conduct an individualized assessment of each claim when determining whether a COA should issue." [Record No. 36, p. 15 (*citing Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001)] In *Murphy*, the Sixth Circuit decried the district court's denial of a COA before the petitioner had applied for one, and its failure to provide an independent claim-by-claim explanation why it believed that the petitioner had not made a "substantial showing of the denial of a constitutional right" under 28 U.S.C. § 2253(c)(2). *Id*.

As to the former point, the Sixth Circuit later expressly indicated that *Murphy* was wrongly decided as in direct conflict with prior circuit precedent. *Castro v. United States*, 310 F. 3d 900, 901 (6th Cir. 2002) ("a district judge may issue or deny a COA when he rules on a habeas motion.") (*citing Lyons v. Ohio Adult Parole Auth.*, 105 F. 3d 1063, 1072 (6th Cir. 1997), *overruled in part on other grounds by Lindh v. Murphy*, 521 U.S. 320 (1997)). As to the latter point, *Murphy* and *Slack v. McDaniel*, 529 U.S. 473 (2000) unquestionably indicate that the district court must make the ultimate determination whether reasonable jurists would find the court's resolution of the petitioner's claims reasonably debatable, or whether the claims deserve encouragement to proceed further. But this determination need not be made through any particular process or be presented in a particular format. *Cf. Riley v. Motley*, No. 05-313-KKC, 2007 WL 914178, at *1 (E.D. Ky. Mar. 23, 2007).

To the extent further explication is necessary, the Court has carefully reviewed Caudill's briefing of her claims and the Court's analysis of each in its Memorandum Opinion and Order

[Record Nos. 1, 14, 34], and considered each of Caudill's claims under the *Slack* standard. Because the Court denied Caudill's claims on the merits, to be entitled to a certificate of appealability under § 2253(c) on a particular claim, she must demonstrate that reasonable jurists would find the Court's assessment of her claims debatable or wrong. *Slack*, 529 U.S. at 484. Having reviewed Caudill's claims, the Court concludes that reasonable jurists would not find the Court's dismissal of any of petitioner's claims debatable or wrong. The Court therefore properly denied Caudill a certificate of appealability as to her claims. Accordingly, it is hereby

ORDERED that petitioner Virginia Caudill's Motion to Alter and Amend Pursuant to Fed. R. Civ. P. 59(E) [Record No. 36] is **DENIED**.

This 11th day of March, 2014.

Signed By:
Danny C. Reeves DCR
United States District Judge