No._____

IN THE

SUPREME COURT OF THE UNITED STATES

ERIC T. TOLEN — PETITIONER,

v.

JEFF NORMAN — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR

THE EIGHT CIRCUIT

SEPARATE APPENDIX FOR

PETITION FOR WRIT OF CERTIORARI

ERIC T. TOLEN, PRO SE
JEFFERSON CITY CORRECTIONAL CENTER
8200 NO MORE VICTIMS ROAD
JEFFERSON CITY, MISSOURI 65101
(573) 751-3224

TABLE OF CONTENTS

ORDERS AND JUDGMENTS OF COURT BELOW

OTHER ESSENTIAL MATERIAL

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-2859

Eric T. Tolen

Appellant

v.

Jeff Norman

Appellee

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:10-cv-02031-RWS)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Gruender did not participate in the consideration or decision of this matter.

March 17, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix 1

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-2859

Eric T. Tolen

Petitioner - Appellant

v.

Jeff Norman

Respondent - Appellee

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:10-cv-02031-RWS)

JUDGMENT

Before COLLOTON, ERICKSON, and KOBES, Circuit Judges.

The motion for leave to file a supplemental application for a certificate of appealability is granted. The motion for leave to proceed *in forma pauperis* is denied. The application for a certificate of appealability has been considered and is denied. The appeal is dismissed.

February 13, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ERIC TOLEN,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 4:10-CV-2031-RWS
	)	
JEFF NORMAN,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

This matter is before me on the Petitioner Eric Tolen's Second Motion to Alter or Amend the Judgment under Fed. R. Civ. P. 59(e). For the reasons set forth below, I will deny the Petitioner's motion.

BACKGROUND

The Petitioner filed his petition for *writ of habeas corpus* on October 26, 2010. [ECF No. 3]. I denied the claim on June 18, 2014. [ECF No. 34]. The petitioner appealed that decision to the Eighth Circuit on July 10, 2014 [ECF No. 36]. The United States Court of Appeals for the Eighth Circuit denied his application for a certificate of appealability [ECF No. 42]. The Petitioner then filed his first motion for relief pursuant to Fed. R. Civ. P. 60(b) on June 16, 2015. [ECF No 67]. I denied the motion in part and dismissed it in part on December 10, 2015 and the petitioner promptly appealed. [ECF Nos. 70 & 71]. The appeal was

dismissed. [ECF No. 78]. On June 18, 2018, the petitioner filed a seconded motion for relief pursuant to Fed. R. Civ. P. 60(b)(6). [ECF No. 84]. I denied the second motion on March 26, 2019. [ECF No. 85]. The petitioner then filed his first motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) on April 8, 2019, which I denied on August 2, 2019. [ECF Nos. 86 & 87].The petitioner now brings a second motion to alter or amend the judgment. [ECF No. 89].

DISCUSSION

Under Fed. R. Civ. P. 59(e), a court may alter or amend a judgment. But the Rule is not a vehicle to relitigate old issues or raise arguments that could have been raised prior to the entry of judgment. C. Wright & A. Miller, 11 Fed. Prac. & Proc. Civ. § 2810.1 (3d ed. 2019). Instead, the Rule serves the "limited function of correcting manifest errors of law or fact or to present newly discovered evidence." Innovative Home Health Care, Inc. v. P.T.-O.T. Assocs. of the Black Hills, 141 F.3d 1284, 1286 (8th Cir. 1998) (internal quotations and citations omitted). "A 'manifest error' is not demonstrated by the disappointment of the losing party. It is the 'wholesale disregard, misapplication, or failure to recognize controlling precedent.'" Oto v. Metro. Life Ins. Co., 224 F.3d 601, 606 (7th Cir. 2000) (internal citations omitted).

In this case, the Petitioner has not demonstrated a manifest error of law or fact. He does not raise any issues that have not already been considered or show a

"wholesale disregard, misapplication, or failure to recognize controlling precedent." Instead the Petitioner relitigates issues already addressed in previous orders. A motion to alter or amend a judgment pursuant to Fed. R. Civ. P. 59(e) is not the appropriate vehicle for this type of challenge.

Accordingly,

IT IS HEREBY ORDERED that Petitioner Eric Tolen's Motion for an altered or amended judgment pursuant to Fed. R. Civ. P. 59(e) is **DENIED**.

IT IS FURTHER ORDERED that a certificate of appealability will not be issued as Petitioner has not made a substantial showing of the denial of a federal constitutional right.

RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE

Dated this 7th day of October 2019.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ERIC TOLEN,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 4:10 CV 2031 RWS
	)	
JEFF NORMAN,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

Petitioner Eric Tolen moves for an altered or amended judgment pursuant to Rule 59(e). I have denied Tolen's two previous Rule 60(b) motions for relief from my judgment denying his petition for habeas corpus. Tolen now seeks an amended judgment of my second order denying Rule 60(b) relief. Tolen argues that his trial counsel was ineffective for failing to raise a Brady claim, and that I conflated two evidentiary issues argued by his trial counsel. Tolen has not shown any manifest error of law or fact that would change the outcome of my order denying his petition. As a result, I will deny his motion for an altered or amended judgment.

BACKGROUND

On November 7, 2008, Tolen was convicted by a jury of thirty-six counts of statutory sodomy and one count of witness tampering, and was sentenced to sixty-five years in prison. Tolen filed a direct appeal to the Missouri Court of

Appeals, which affirmed his conviction and sentence on December 22, 2009. Tolen v. Missouri, 304 S.W.3d 229 (Mo. Ct. App. 2009). The Missouri Supreme Court denied Tolen's application for transfer on March 23, 2010. Tolen filed a petition for writ of certiorari before the United States Supreme Court, which was denied. Tolen v. Missouri, 562 U.S. 861 (2010).

While his case was pending in the trial court, Tolen's lawyers filed four motions concerning two file boxes the prosecutors seized from his car. Tolen argues that these boxes contain exculpatory information that he and his lawyers needed to prepare for trial. On August 21, 2007, Tolen's lawyers filed a motion seeking the return of the two boxes. [No. 86-3]. On October 5, 2007, Tolen's lawyers filed a motion seeking recusal of the St. Louis County Prosecuting Attorney's Office, because it viewed documents allegedly protected by attorney-client privilege. [No. 16-A at 88, 90-91]. On October 29, 2007, Tolen's lawyers filed a motion to suppress the evidence in the seized boxes because they were allegedly privileged. [Id. at 101, 108, 110]. After trial, Tolen's lawyers filed an amended motion for a new trial and Tolen filed a pro se[1] motion for a new trial, both arguing that the court erred in not returning the seized boxes. [Id. at 289-93, 306]. The court denied each of these motions, in part on the basis that the files

[1] Although Tolen's motion states that it is filed "by and through counsel," his signature, and not his attorney's signature, is provided at the end of the document.

contained nothing of evidentiary value and were not protected by attorney-client privilege. Neither Tolen nor his lawyers presented any Brady claims to the trial court. Brady v. Maryland 373, U.S. 83 (1963).

After Tolen exhausted his appeals, he filed a Motion to Vacate, Set Aside, or Correct the Judgment and Sentence under Missouri Supreme Court Rule 29.15. [No. 7-5]. In his motion, Tolen argued at length that the prosecution and court's refusal to return the seized boxes constituted a Brady violation. Id. at 43-47. Tolen did not, however, present any argument that his counsel was ineffective in failing to explicitly raise a Brady violation at trial. Tolen's Rule 29.15 motion was denied by the Missouri Court of Appeals on March 26, 2013. Tolen v. Missouri, No. ED 98414, 2013 WL 1209100 (Mo. Ct. App. 2013).

On October 26, 2010, Tolen filed his petition for habeas relief under 28 U.S.C. § 2254, in the above-captioned case, including his Brady violation claim. [No. 3]. On June 18, 2014, I issued a Memorandum and Order that denied Tolen's habeas petition. [No. 47]. I found that Tolen's Fourth Amendment claims concerning the two boxes described above were barred from review pursuant to Stone v. Powell, 428 U.S. 465 (1976). (Id. at 1-4). I also found that Tolen's Brady claim was procedurally barred due to his failure to raise it on direct appeal, and that Tolen had failed to establish cause and actual prejudice to overcome the procedural default. (Id. at 4-6). The United States Court of

Appeals for the Eighth Circuit denied Tolen's application for certificate of appealability and issued the mandate. [Nos. 61 and 63]. The United States Supreme Court denied Tolen's petition for certiorari on May 18, 2015. [No. 66].

On June 16, 2015, Tolen filed with this Court his First Motion for Relief from Judgment or Order Pursuant to Rule 60(b). [No. 67]. I denied Tolen's First Motion for Relief from Judgment because he presented constitutional claims that were already presented in his habeas petition, constituting successive habeas relief without authorization from the Eighth Circuit Court of Appeals. [No. 70 at 5-6]. The United States Court of Appeals for the Eighth Circuit denied Tolen's application for certificate of appealability and issued the mandate. [Nos. 78 and 80]. The United States Supreme Court denied Tolen's petition for certiorari on October 3, 2016. [No. 83].

On June 18, 2018, Tolen moved a second time for reconsideration of his Brady claim. [No. 84]. He argued that his trial counsel was ineffective for failing to specifically assert a Brady violation claim, and that his post-conviction counsel was ineffective for failing to assert an ineffective assistance of counsel claim on that matter. I denied Tolen's motion, finding that he presented constitutional claims that were not included in his original habeas petition, but that his ineffective assistance of counsel claim was procedurally defaulted. [No. 85]. Tolen did not present this ineffective assistance of counsel claim to the

state court, and he did not show that he had a substantial claim meeting the Martinez v. Ryan, 566 U.S. 1 (2012) exception. Id.

Tolen now moves for an altered or amended judgment of my second order denying his second motion for reconsideration. He argues that I conflated two evidentiary issues argued by his trial counsel when determining whether he had a substantial claim of ineffective assistance of counsel.

LEGAL STANDARD

"Rule 59(e) motions serve the limited function of correcting 'manifest errors of law or fact or to present newly discovered evidence.' " United States v. Metro. St. Louis Sewer Dist., 440 F.3d 930, 933 (8th Cir. 2006) (quoting Innovative Home Health Care v. P. T.-O. T. Assoc. of the Black Hills, 141 F.3d 1284, 1286 (8th Cir.1998)). A litigant cannot use Rule 59(e) motions "to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment." Id. (quoting Innovative Home Health Care, 141 F.3d 1284, 1286). Additionally movant seeking relief under Rule 60(b)(6) is required to show "extraordinary circumstances" justifying the reopening of a final judgment. Ackermann v. United States, 340 U.S. 193, 199 (1950). Such circumstances will rarely occur in the habeas context. Gonzalez v. Crosby, 545 U.S. 524, 535 (2005).

ANALYSIS

Pursuant to Martinez v. Ryan, "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. at 9. To satisfy this exception, the underlying ineffective assistance of counsel claim must be a "substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." Id. As with any ineffective assistance of counsel claim, a petitioner making a Martinez argument must show that counsel's performance fell below an objective standard of reasonableness and that the petitioner was prejudiced as a result of that failure. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). "Judicial scrutiny of counsel's performance must be highly deferential." Id. at 689.

In my second order denying reconsideration pursuant to Rule 60(b), [No. 85], I determined that Tolen failed to demonstrate that he had a substantial claim of ineffective assistance of counsel. As acknowledged by Tolen, his trial counsel raised an objection to the prosecutors' failure to timely return the allegedly exculpatory material. [No. 84 at n.1, 10-12]. I stated that Tolen's trial counsel filed a motion to dismiss eight counts against him that pertained to the two seized boxes. [No. 85, citing n.1 12]. Tolen correctly notes that the motion to dismiss concerned a separate audiotape, not the two seized boxes.

Tolen argues that this difference demonstrates a manifest error of fact that should change my analysis under Martinez. This argument is unsupported by the trial court record. Throughout trial court proceedings, Tolen's counsel extensively litigated the use and return of the seized boxes. Trial counsel filed four motions to 1) return the seized boxes, [No. 86-3], 2) recuse the St. Louis County prosecutor's office for viewing the seized documents, [No. 16-A at 88, 90-91], 3) suppress the seized documents and return them, [Id. at 110], and 4) vacate the first trial and hold a new one, because the seized boxes were not returned in a timely manner. The trial court held hearings on these motions twice. [See Nos. 23-13, 16-A at 18]. As a result, my prior conclusion stands: counsel's extensive litigation concerning the two seized boxes demonstrates that Tolen does not have a substantial ineffective assistance of counsel claim.

As a result, Tolen's ineffective assistance of counsel claim, for failure to make a Brady argument, is procedurally defaulted and does not meet the exception set out in Martinez. I have not made a manifest error of law or fact that warrants granting Tolen's motion for altered or amended judgment.

Accordingly,

IT IS HEREBY ORDERED that Petitioner Eric Tolen's Motion for an altered or amended judgment pursuant to 59(e) is **DENIED**.

IT IS FURTHER ORDERED that a certificate of appealability will not be issued as Petitioner has not made a substantial showing of the denial of a federal constitutional right.

RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE

Dated this 2nd day of August, 2019.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ERIC TOLEN,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 4:10 CV 2031 RWS
	)	
JEFF NORMAN,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

Petitioner Eric Tolen moves a second time under Rule 60(b) for relief from judgment concerning my order denying his § 2255 petition for habeas corpus relief. Tolen argues that his trial counsel was ineffective for failing to make a Brady violation claim and that post-conviction counsel was ineffective for failing to include that underlying ineffective assistance of counsel claim in an amended Missouri Supreme Court Rule 29.15 motion. Tolen's trial counsel appropriately raised a Brady violation claim as a Fourteenth Amendment Due Process violation. As a result, Tolen cannot establish that he has a substantial ineffective assistance of counsel claim, and I must deny his motion for relief from judgment.

BACKGROUND

On November 7, 2008, Tolen was convicted by a jury of thirty-six counts of statutory sodomy and one count of witness tampering, receiving a sentence of

sixty-five years imprisonment. Tolen filed a direct appeal to the Missouri Court of Appeals, which affirmed his conviction and sentence on December 22, 2009. Tolen v. Missouri, 304 S.W.3d 229 (Mo. Ct. App. 2009). The Missouri Supreme Court denied Tolen's application for transfer on March 23, 2010. Tolen filed a petition for writ of certiorari before the United States Supreme Court, which was denied. Tolen v. Missouri, 562 U.S. 861 (2010). Tolen then filed a Motion to Vacate, Set Aside, or Correct the Judgment and Sentence under Missouri Supreme Court Rule 29.15, which was denied by the Missouri Court of Appeals on March 26, 2013. Tolen v. Missouri, No. ED 98414, 2013 WL 1209100 (Mo. Ct. App. 2013).

Tolen argues that, at trial, the prosecutors committed a Brady violation by failing to timely return two boxes and an audiotape that allegedly contained Tolen's "work product" and exculpatory recantations. Tolen's trial counsel raised a Fourteenth Amendment Due Process argument concerning these materials in a motion to dismiss eight counts related to these materials. (See ECF No. 84 at n.1, 10-12). Tolen argues, however, that his trial counsel did not specifically raise a Brady violation, and that his post-conviction, Rule 29.15 counsel failed to include, at his direction, an ineffective assistance of counsel claim pertaining to the underlying Brady violation.

On October 26, 2010, Tolen filed his petition for habeas relief under 28 U.S.C. § 2254, in the above-captioned case, including his Brady violation claim. [No. 3]. On June 18, 2014, I issued a Memorandum and Order that denied Tolen's habeas petition. [No. 47]. I found that Tolen's Fourth Amendment claims concerning the two boxes described above were barred from review pursuant to Stone v. Powell. (Id. at 1-4). I also found that Tolen's Brady claim was procedurally barred due to his failure to raise it in state court, and that Tolen had failed to establish cause and actual prejudice to overcome the procedural default. (Id. at 4-6). The United States Court of Appeals for the Eighth Circuit denied Tolen's application for certificate of appealability and issued the mandate. [Nos. 61 and 63]. The United States Supreme Court denied Tolen's petition for certiorari on May 18, 2015. [No. 66].

On June 16, 2015, Tolen filed with this Court his First Motion for Relief from Judgment or Order Pursuant to Rule 60(b). [No. 67]. I denied Tolen's First Motion for Relief from Judgment because he presented constitutional claims that were already presented in his habeas petition, constituting successive habeas relief without authorization from the Eighth Circuit Court of Appeals. [No. 70 at 5-6]. Additionally, I denied Tolen's request to reconsider his Brady claim under an ineffective assistance of post-conviction counsel theory, because Martinez v. Ryan, 566 U.S. 1 (2012), cannot cure a procedural default in an underlying Brady

claim. Martinez can only cure a procedural default in an underlying ineffective assistance of counsel claim. The United States Court of Appeals for the Eighth Circuit denied Tolen's application for certificate of appealability and issued the mandate. [Nos. 78 and 80]. The United States Supreme Court denied Tolen's petition for certiorari on October 3, 2016. [No. 83].

Tolen now moves a second time for reconsideration of his Brady claim. [No. 84]. He argues that his trial counsel was ineffective for failing to specifically assert a Brady violation claim, and that his post-conviction counsel was ineffective for failing to assert an ineffective assistance of counsel claim on that matter.

LEGAL STANDARD

A court may grant relief under Rule 60(b)(6) for "any other reason that justifies relief" when a motion is made "within a reasonable time." Fed. R. Civ. P. 60(b)(6). "Rule 60(b) authorizes relief in only the most exceptional of cases." Int'l Bhd. of Elec. Workers, Local Union No. 545 v. Hope Elec. Corp., 293 F.3d 409, 415 (8th Cir. 2002). A movant seeking relief under Rule 60(b)(6) is required to show "extraordinary circumstances" justifying the reopening of a final judgment. Ackermann v. United States, 340 U.S. 193, 199 (1950); Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 864 (1988); id., at 873 (Rehnquist, C. J., dissenting) ("This very strict interpretation of Rule 60(b) is essential if the finality

of judgments is to be preserved"). Such circumstances will rarely occur in the habeas context. Gonzalez v. Crosby, 545 U.S. 524, 535 (2005).

Petitioners sometimes request relief under Rule 60(b) when the motion is more properly characterized as a successive § 2254 petition. See, e.g., Boyd v. United States, 304 F.3d 813, 814 (8th Cir. 2002). A state prisoner may file a second or successive motion under § 2254 only after obtaining authorization to do so from the appropriate United States Court of Appeals. 28 U.S.C. § 2244(b)(3). Where a prisoner files a Rule 60(b) motion following the dismissal of a habeas petition, the district court must determine whether the allegations in the Rule 60(b) motion in fact amount to a second or successive collateral attack under 28 U.S.C. § 2254. Boyd, 304 F.3d at 814. If the Rule 60(b) motion "is actually a second or successive habeas petition, the district court should dismiss it for failure to obtain authorization from the Court of Appeals or, in its discretion, may transfer the motion . . . to the Court of Appeals." Id.

A Rule 60(b) motion that merely alleges a defect in the integrity of the habeas proceedings is not a second or successive habeas petition. See Gonzalez, 545 U.S. at 535-36. A Rule 60(b) motion is also not a successive habeas petition if it "merely asserts that a previous ruling which precluded a merits determination was in error -- for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." Id. at 532 n.4. However, a Rule

60(b) motion is a successive petition if it contains 1) an "asserted federal basis for relief" from a judgment of conviction or 2) an attack on the "federal court's previous resolution of the claim on the merits." Id. at 530, 532. "On the merits" refers "to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. § 2254(a) and (d)." Id. at 532 n.4. When a Rule 60(b) motion presents such a claim, it must be treated as a second or successive habeas petition.

ANALYSIS

Tolen claims that his trial counsel was ineffective for failing to specifically make a Brady claim concerning two boxes and an audiotape that allegedly contained Tolen's "work product" and exculpatory recantations. Tolen claims his post-conviction counsel was ineffective for failing to, at Tolen's direction, make an ineffective assistance of counsel claim pertaining to the underlying Brady violation. I have not previously adjudicated Tolen's Brady claim or ineffective assistance of counsel claim on the merits. In my order denying Tolen's habeas petition, I concluded that Tolen's Brady arguments had not been exhausted before the state court. (ECF No. 47 at 6). In my order denying Tolen's first Motion for Relief from Judgment, I concluded that Tolen could not invoke Martinez to establish cause to cure a procedural defect of an underlying Brady claim.(ECF No. 70 at 6). As a result, Tolen's current Rule

60(b) motion does not represent a successive petition, and I may review his claim.

Tolen has procedurally defaulted his ineffective assistance of counsel claim, because he did not present a claim for ineffective assistance of counsel to the state courts. However, under Martinez, "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 566 U.S. at 9. To satisfy this exception, the underlying ineffective assistance of counsel claim must be a "substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." Id. As with any ineffective assistance of counsel claim, a petitioner proceeding under Martinez must show that counsel's performance fell below an objective standard of reasonableness and that the petitioner was prejudiced as a result of that failure. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). "Judicial scrutiny of counsel's performance must be highly deferential." Id. at 689. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 694. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id.

Tolen has not shown that his trial counsel's performance fell below an objective standard of reasonableness nor that "but for counsel's . . . errors, the

result of the proceeding would have been different." Id. As acknowledged by Tolen, his trial counsel raised an objection to the prosecutors' failure to timely return the allegedly exculpatory material. (See ECF No. 84 at n.1, 10-12). Specifically, Tolen's trial counsel filed a motion to dismiss eight counts against him that pertained to the material in the two boxes that were seized from him. (Id. at n.1, 12). Trial counsel filed this motion as a Fourteenth Amendment Due Process violation. The trial court said that it treated this motion as raising a Brady violation, although Tolen argues that there is no record that it was specifically raised as a Brady violation. (ECF No. 84-3 at ¶ 261). Regardless, a Brady claim itself is based on a Fourteenth Amendment Due Process right, Brady v. Maryland, 373 U.S. 83, 87, (1963), and the trial court acknowledged that is considered the matter at trial counsel's request.

As a result, Tolen's arguments do not establish that his trial counsel's conduct fell below an objective standard of reasonableness, nor that had trial counsel acted differently, the result would have been different. Strickland v, 466 U.S. at 687-88, 694. His ineffective assistance of counsel claim is not a "substantial one" and there is no cause for his procedural default. 566 U.S. at 9.

Accordingly,

IT IS HEREBY ORDERED that Petitioner Eric Tolen's Motion for Relief Pursuant to Rule 60(b)(6) [No. 84] is **DENIED**.

IT IS FURTHER ORDERED that a certificate of appealability will not be issued as Petitioner has not made a substantial showing of the denial of a federal constitutional right.

RODNEY W. SIPPEL
UNITED STATES DISTRICT JUDGE

Dated this 26th day of March, 2019.

*2014 U.S. Dist. LEXIS 82794, **

ERIC T. TOLEN, Petitioner, vs. JEFF NORMAN, Respondent.

Case No. 4:10 CV 2031 RWS

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

2014 U.S. Dist. LEXIS 82794

June 18, 2014, Decided
June 18, 2014, Filed

SUBSEQUENT HISTORY: Petition denied by Tolen v. Norman, 2015 U.S. App. LEXIS 2496 (8th Cir. Mo., Feb. 18, 2015)
Motion denied by, in part, Dismissed by, in part, Certificate of appealability denied Tolen v. Norman, 2015 U.S. Dist. LEXIS 165425 (E.D. Mo., Dec. 10, 2015)

PRIOR HISTORY: Tolen v. Norman, 2014 U.S. Dist. LEXIS 85135 (E.D. Mo., Mar. 11, 2014)

CORE TERMS: appealability, certificate, seized, habeas petition, work product, exculpatory, prosecutor, seizure, trunk, procedurally barred, recommendation, breakdown, correctly, deprived, habeas corpus, federal habeas, unconscionable, dispositive, corrective, prisoner, opportunity to litigate, federal claim, evidence obtained, direct appeal, actual prejudice, innocence, exhaust, default, boxes, failure to return

COUNSEL: [*1] Eric T. Tolen, Petitioner, Pro se, Jefferson City, MO USA.

For Jeff Norman, Respondent: Morgan D. Ditch, LEAD ATTORNEY, Stephen D. Hawke, ATTORNEY GENERAL OF MISSOURI, Jefferson City, MO USA.

JUDGES: RODNEY W. SIPPEL, UNITED STATES DISTRICT JUDGE.

OPINION BY: RODNEY W. SIPPEL

OPINION

MEMORANDUM AND ORDER

Petitioner Eric T. Tolen seeks a writ of habeas corpus. I referred this matter to United States Magistrate Judge Nannette A. Baker for a report and recommendation on all dispositive matters pursuant to 28 U.S.C. § 636(b). On March 11, 2014, Judge Baker filed her recommendation that Tolen's habeas petition should be denied.

On March 26, 2014, Tolen filed objections to Judge Baker's Report and Recommendation. In his objections, Tolen largely restates the same arguments he previously advanced in his extensive filings in support of his habeas petition. I have conducted a de novo review of all matters relevant to the objections. After careful consideration, I will adopt and sustain the thorough reasoning of Judge Baker and will deny Tolen's habeas petition.

Discussion

A. Stone v. Powell

Tolen objects to Judge Baker's determination that his Fourth Amendment claims—Grounds 1 through 4—are barred from review pursuant to Stone v. Powell, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976). [*2] In Stone, the United States Supreme Court held that "where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial." Stone, 428 U.S. at 494-495. Tolen argues that Stone does not bar his Fourth Amendment claims because he was not given a full and fair opportunity to litigate his claim in the Missouri courts.

The Eighth Circuit Court of Appeals has set forth a two-part test for determining whether a habeas petitioner has had a full and fair opportunity to litigate his or her Fourth Amendment claims in a state court. "Under this test, a Fourth Amendment claim is Stone-barred, and thus unreviewable by a federal habeas court, unless either the state provided no procedure by which the prisoner could raise his (or her) Fourth Amendment claim, or the prisoner was foreclosed from using that procedure because of an unconscionable breakdown in the system." Willett v. Lockhart, 37 F.3d 1265, 1273 (8th Cir. 1994).

Tolen concedes that Missouri provided a corrective mechanism for presenting his Fourth Amendment [*3] claim, but alleges that an unconscionable breakdown in the system precluded him from using the corrective mechanism. The trial court denied Tolen's motions to suppress evidence seized during searches conducted on April 28, 2007, and August 5, 2007. The Missouri Court of Appeals affirmed the trial courts' decision on direct appeal. State v. Tolen, 304 S.W.3d 229 (Mo. App. 2009). However, Tolen argues that he was precluded from using Missouri's corrective mechanism because (1) the state court decision is not an adjudication on the merits of his Fourth Amendment claims, (2) the state court failed to apply

Appendix 6

any clearly established controlling Supreme Court precedent in adjudicating his Fourth Amendment claims, and (3) the state court opinion is contrary to clearly established Supreme Court precedent.

The determination of whether there has been an "unconscionable breakdown" in a state's procedures does not require a review of the state courts' fact-finding process, or a review of the state courts' application of Fourth Amendment law. Willett, 37 F.3d at 1272. On federal habeas review, the "inquiry focuses on whether [the petitioner] received an opportunity for full and fair litigation of [*4] his claim, not on whether legal or factual error in fact occurred." Chavez v. Weber, 497 F.3d 796, 802 (8th Cir. 2007). Accordingly, Tolen's argument that the Missouri Court of Appeals failed to apply, or erred in applying, clearly established Supreme Court precedent is of no merit.

Tolen argues that the Missouri Court of Appeals completely failed to address his Fourth Amendment claims. Yet, contrary to Tolen's assertion, the Missouri Court of Appeals specifically recognized that Tolen was pursuing his rights under the Fourth Amendment. Tolen, 304 S.W.3d at 232 ("The Fourth Amendment of the U.S. Constitution guarantees individuals the right to be free from unreasonable search and seizure."). The Court then proceeded explain why Tolen's Fourth Amendment claims were properly rejected by the state court. Id. at 232-32. The Missouri Court of Appeals' opinion may not have cited federal precedent, but the analysis was informed by, and based on, Fourth Amendment principles. That is sufficient to trigger the Stone bar. See Willett, 37 F.3d 1265, 1272 (8th Cir. 1994) ("a state court's summary affirmance, a short opinion, or a written opinion that fails to discuss one or more of the issues raised [*5] is not by itself indicative of a breakdown in the state's review mechanism."). While Tolen might have preferred that the Missouri Court of Appeals had used different language to reject his claims, it is not the role of the federal courts to review the state courts' application of Fourth Amendment law.

Judge Baker correctly applied the governing law to the facts of Tolen's case and correctly concluded that he is not entitled to habeas relief. Because the record shows that Tolen received the opportunity to fully and fairly litigate his Fourth Amendment claims in state court, Stone v. Powell prohibits him from doing so now.

B. Brady Claim

Tolen objects to Judge Baker's determination that his Brady claim is procedurally barred. In ground 4 of his petition, Tolen contends that the he is entitled habeas relief because the prosecutor violated its Brady obligation when it did not return exculpatory evidence obtained from the trunk of his car during the search of August 5, 2007. In Brady, the Supreme Court held that due process requires the government to disclose material, exculpatory evidence to the defendant. Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). "There are three components of a true Brady [*6] violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

Respondent argues that Tolen has failed to exhaust his Brady claims because he did not assert such arguments as a ground for appeal in state court. Before a federal court can entertain a claim in a habeas petition, that same claim must have been raised in the prior state court proceeding. 28 U.S.C. § 2254(b)(1)(A). This exhaustion requirement is satisfied if the applicant gave the state courts a "fair opportunity" to apply controlling legal principles to the facts that are relevant to his constitutional claim. Odem v. Hopkins, 192 F.3d 772, 776 (8th Cir. 1999). "Thus, in addition to the recitation of all the facts necessary for the state court's evaluation of the federal claim, the petitioner has to 'fairly present' the 'substance' of his federal claim." Id. at 775.

On direct appeal, Tolen argued that the seizure and retention of the contents of his car's trunk deprived him of his rights [*7] under the Fourth Amendment, his right to due process under the Fifth Amendment, and his right to effective assistance of counsel under the Sixth Amendment. The record shows that on August 5, 2007, the police seized items from the trunk of Tolen's car. In an affidavit in support of his motion for a new trial, Tolen meticulously described the contents of numerous documents seized from his trunk, including but not limited to separate letters of apology and recantations of the sexual allegations made by the purported victims, documents outlining his trial strategy and themes, and additional research and analysis pertaining to trial. Two boxes of documents were eventually returned to Tolen in September 2008, while his trial was still proceeding. Tolen contends that some documents were missing from the boxes and never returned.

In his state appellant brief, Tolen's arguments regarding the seizure of documents, and the prosecutor's failure to return them, focused on the "work product" nature of the documents.[1] Tolen argued that the prosecutor obtained an unfair advantage because they had the benefit of his thought process and analysis contained in the seized work product. Tolen also argued [*8] that he was prejudiced by the trial court's failure to return the documents until the second week of trial because he was deprived of the use of his work product.

FOOTNOTES

1 The following is an excerpt from Tolen's state appellate brief that summarizes his claims regarding the prosecution's refusal to return his documents:

> The Prosecuting Attorney refused to return the files even though she would later assert that noting of evidentiary nature was found in the files and she did not intend to use anything found in the trunk as evidence. This, of course, did not solve the problems presented to the Court because (1) the files had been reviewed at least by the seizing officers and had been in the possession of the police and/or prosecutors from the time of their seizure on August 5, 2007 until they were moved to the Court for an in-camera inspection after October 29, 2007, a period of three months; (2) Appellant and his attorneys had been deprived of the use of his work product and continued to be so deprived throughout the pre-trial proceedings and trial; and (3) there was absolutely no

justifiable reason why these files, which had clearly been unlawfully seized could not have been returned to Appellant [*9] who was their undisputed owner.

Tolen now attempts to recast the arguments he raised in state court as a Brady claim. Tolen is correct that his failure to cite Brady in his state appellate brief is not itself fatal to his habeas petition. See Odem, 192 F.3d at 776 ("The State's contention that Odem's failure to cite to Brady is dispositive in making this issue procedurally barred for failure to exhaust state courts remedies is incorrect."). However, in Odem, the Eighth Circuit held that the petitioner's failure to mention Brady was not dispositive because he did cite to several cases that involve withholding of exculpatory information claims. Id. Here, Tolen failed to bring into focus the contention that the prosecutor withheld exculpatory evidence. The cases that Tolen cited—In re Grand Jury, 138 F.3d 978, 980-983 (3rd Cir. 1998), and United States v. Ary, 518 F.3d 775, 782-785 (10th Cir. 2008)—discuss whether the work product privilege applies to seized documents. Accordingly, Tolen's current Brady claim is distinct from any theory presented to the state courts and is procedurally barred.

A habeas petitioner may overcome this procedural bar by showing a cause for the procedural default in state [*10] court and actual prejudice as a result of the alleged violation of law, or by demonstrating his actual innocence. Storey v. Roper, 603 F.3d 507, 523 (2012). Tolen has not alleged a sufficient cause for his default. Even if Tolen were able to show cause, he would be unable to show actual prejudice. Tolen is also unable to demonstrate a fundamental miscarriage of justice exception, which requires that the petitioner present new reliable evidence that he is innocent. Id. at 524. Tolen has not submitted any new evidence of his actual innocence. Accordingly, I find that Judge Baker correctly applied the law to the facts of Tolen's case and correctly determined that Tolen's Brady claim is procedurally barred.

C. Certificate of Appealability

I have also considered whether to issue a certificate of appealability. To grant a certificate of appealability, a court must find a substantial showing of the denial of a federal constitutional right. See Tiedeman v. Benson, 122 F.3d 518, 522 (8th Cir. 1997). A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings. Cox v. Norris, 133 F.3d 565, 569 (8th Cir. 1997) [*11] (citing Flieger v. Delo, 16 F.3d 878, 882-83 (8th Cir. 1994)). Because Tolen has not made such a showing, I will not issue a certificate of appealability.

Accordingly,

IT IS HEREBY ORDERED that the Report and Recommendation filed on March 11, 2014 [#45] is **SUSTAINED, ADOPTED AND INCORPORATED** herein.

IT IS FURTHER ORDERED that Petitioner Eric T. Tolen's Petition for Writ of Habeas Corpus [#1] is **DENIED.**

IT IS FURTHER ORDERED that the Court will not issue a certificate of appealability. A separate Judgment in accordance with this Memorandum and Order is entered this same date.

/s/ Rodney W. Sippel

RODNEY W. SIPPEL

UNITED STATES DISTRICT JUDGE

Dated this 18th day of June, 2014.

JUDGMENT

In accordance with the Memorandum and Order entered on this same date,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the petition of Eric T. Tolen for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **DENIED.**

IT IS FURTHER ORDERED that as petitioner has not made a substantial showing of a denial of a constitutional right this Court will not issue a certificate of appealability.

/s/ Rodney W. Sippel

RODNEY W. SIPPEL

UNITED STATES DISTRICT JUDGE

Dated this 18th day of June, 2014

Additional material from this filing is available in the Clerk's Office.