No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL LEWIS LEE,
PETITIONER,

v.

T.J. WATSON, WARDEN, AND UNITED STATES OF AMERICA,
RESPONDENTS.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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In the

United States Court of Appeals

For the Seventh Circuit

No. 20-2128

DANIEL LEWIS LEE,

Petitioner-Appellant,

v.

T. J. WATSON, Warden, and
UNITED STATES OF AMERICA,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Terre Haute Division.
No. 2:19-CV-00468-JPH-DLP — **James Patrick Hanlon**, *Judge*.

SUBMITTED JULY 9, 2020 — DECIDED JULY 10, 2020

Before SYKES, *Chief Judge*, and EASTERBROOK and BARRETT, *Circuit Judges*.

SYKES, *Chief Judge*. Daniel Lewis Lee and his codefendant, Chevy Kehoe, were members of the Aryan Peoples' Republic (a/k/a Aryan Peoples' Resistance), a white supremacist organization founded for the purpose of establishing an independent nation of white supremacists in the Pacific Northwest. In January 1996 Lee and Kehoe traveled from the

State of Washington to the Arkansas home of William Mueller, a firearms dealer who owned a large collection of guns and ammunition. There they overpowered Mueller and his wife, Nancy, and questioned their eight-year-old daughter Sarah about the location of Mueller's guns, ammunition, and cash. After stealing about $30,000 worth of weapons and $50,000 in cash and coins, Lee and Kehoe shot all three victims with a stun gun, placed plastic bags over their heads, and sealed the bags with duct tape to asphyxiate them. They then taped rocks to the three victims and threw them into the Illinois Bayou. The bodies were discovered six months later in Lake Darnelle near Russellville, Arkansas. *United States v. Lee*, 374 F.3d 637, 642 (8th Cir. 2004).

Lee and Kehoe were indicted in federal court in the Eastern District of Arkansas on three counts of capital murder in aid of racketeering, 18 U.S.C. § 1959(a)(1), and related crimes. In May 1999 they were convicted by a jury in a joint trial, and the district judge scheduled separate penalty phases. *United States v. Lee*, 274 F.3d 485, 488 (8th Cir. 2001). Kehoe's case went first, and the jury returned a verdict of life in prison without release. *Id.* In Lee's sentencing proceeding, prosecutors introduced evidence of his involvement as a teenager in a 1990 murder in Oklahoma. In that earlier homicide, Lee severely beat the victim and forced him down a manhole into a sewer, then gave a knife to his cousin, who repeatedly stabbed the victim and slit his throat. Lee and his cousin were charged with first-degree murder, but Lee's case was resolved with a guilty plea to robbery with a suspended sentence, which the government characterized in its argument to the jury as a "gift" from Oklahoma prosecutors. Also, as relevant here, in cross-examination of Lee's psychological expert, the government elicited testimo-

ny about Lee's future dangerousness—specifically, a psychological test known as the Hare Psychopathy Checklist-Revised, which the government's expert had administered to Lee and yielded a score in the psychopathy range. Lee's jury returned a verdict of death.

The Eighth Circuit affirmed Lee's convictions and death sentence. 374 F.3d 637 (8th Cir. 2004); 274 F.3d 485 (8th Cir. 2001). Lee pursued a full round of collateral review under 28 U.S.C. § 2255 raising multiple grounds, including ineffective assistance of trial counsel. 715 F.3d 215 (8th Cir. 2013). He filed many subsequent requests for collateral relief, but all failed on the merits or for lack of the authorization required by 28 U.S.C. § 2244(b)(3) and § 2255(h). *See, e.g.*, No. 4:97-cr-00243-02-KGB, 2020 WL 3625732 (E.D. Ark. July 2, 2020); No. 4:97-cr-00243-02-KGB, 2020 WL 3618709 (E.D. Ark. July 2, 2020); 960 F.3d 1023 (8th Cir. 2020); No. 19-2432 (8th Cir. Nov. 4, 2019); 792 F.3d 1021 (8th Cir. 2015).

In July 2019 the United States scheduled Lee's execution for December 9, 2019. Two months later he filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241 in the Southern District of Indiana, where he is confined in the Terre Haute federal prison. He requested a stay of execution but later withdrew that request. The district judge nonetheless stayed Lee's execution. We vacated the stay order because § 2255(e) bars a § 2241 petition with a limited exception for claims for which a motion under § 2255 is "inadequate or ineffective to test the validity of" the prisoner's detention; the exception is customarily referred to as the "Savings Clause." Lee's § 2241 petition raised two challenges

to his death sentence: a *Strickland* claim[1] for ineffective assistance of trial counsel during the sentencing phase and a *Brady*/*Napue* claim[2] based on evidence that was supposedly newly discovered. The former claim attacked counsel's failure to adequately object to the government's cross-examination of the defense psychologist regarding the psychopathology test; the latter was premised on a document in the court record in Lee's 1990 Oklahoma murder case that current counsel contends sheds some light on why the case was resolved as a robbery.

In our order vacating the stay, we explained that Lee's likelihood of success on the merits was "slim" because both claims—*Brady* claims alleging suppression of exculpatory evidence and *Strickland* claims alleging ineffective assistance of counsel—are "regularly made and resolved under § 2255," so the remedy by motion cannot be called "inadequate or ineffective" for purposes of the Savings Clause. *Lee v. Watson*, No. 19-3399, 2019 WL 6718924, at *1 (7th Cir. Dec. 6, 2019). We considered and rejected the possibility that Lee's case might satisfy the standard established in *Webster v. Daniels*, which holds that § 2255 may be inadequate or ineffective if the provision for successive collateral attacks in § 2255(h) does not permit a prisoner to present newly discovered evidence that "existed *before* the time of the trial" but was unavailable "despite diligence on the part of the defense." 784 F.3d 1123, 1140 (7th Cir. 2015) (en banc). In *Webster* the newly discovered evidence had a bearing on

[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

[2] *Brady v. Maryland*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264 (1959).

whether the prisoner was "categorically and constitutionally ineligible for the death penalty" under the Supreme Court's decisions in *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 572 U.S. 701 (2014), based on intellectual disability. *Webster*, 784 F.3d at 1125. In our December 6 order, we held that Lee's § 2241 petition was not likely to succeed under *Webster* because the evidence he claims is "newly discovered" was both known to him and publicly available in the court record of his Oklahoma murder case and thus was readily ascertainable with reasonable diligence and not concealed by the prosecution.

Our order vacating the stay had no immediate effect because Lee's sentence was subject to a separate injunction entered in litigation in the district court for the District of Columbia involving a broader challenge to the federal execution protocol. While that litigation proceeded, the district judge in this case denied Lee's § 2241 petition as barred by § 2255(e) for essentially the same reasons we identified in our order vacating the stay. *Lee v. Warden USP Terre Haute*, No. 2:19-cv-00468-JPH-DLP, 2020 WL 1317449 (S.D. Ind. Mar. 20, 2020). A week later the Court of Appeals for the District of Columbia Circuit vacated the district court's injunction. *In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106 (D.C. Cir. 2020). In June Lee's execution date was rescheduled for July 13, 2020. On June 26, 2020, the judge denied Lee's Rule 59 motion to alter or amend the judgment, *Lee*, No. 2:19-cv-00468-JPH-DLP, 2020 WL 3489355 (S.D. Ind. June 26, 2020), and Lee filed his notice of appeal that same day.

On June 29, 2020, the Supreme Court denied certiorari in the *Execution Protocol* case under the name *Bourgeois v. Barr*, No. 19-1348, 2020 WL 3492763. Three days later a panel of this court issued a decision affirming the denial of a § 2241 petition by another death-row prisoner confined at the Terre Haute prison. *Purkey v. United States*, No. 19-3318, 2020 WL 3603779 (7th Cir. July 2, 2020). *Purkey* squarely rejected the arguments Lee raises here. On July 8 Lee moved for leave to file an oversized appellate brief and tendered the brief with the motion, but the brief makes scant mention of *Purkey*. We granted the motion that same day and ordered the government to respond by 5 p.m. Central Time on July 9. It has done so. Oral argument is unnecessary because under *Purkey* and our December 6, 2019 order vacating the stay of execution, Lee's arguments are frivolous.

Purkey holds unambiguously that under *Webster* and earlier circuit precedent,[3] a § 2241 petition may not proceed under the Savings Clause absent "a compelling showing" that it was "impossible" to use § 2255 to cure the defect identified in the § 2241 petition; "[i]t is not enough that proper use of the statute results in a denial of relief." *Id.* at *8. The Savings Clause, we explained, is a "narrow pathway to the general habeas corpus statute," *id.* at *5, and to proceed down that path there must be something "structurally inadequate or ineffective about section 2255 as a vehicle" for the arguments raised in the § 2241 petition, *id.* at *10. That is, "the words 'inadequate or ineffective,' taken in context, must mean something more than unsuccessful." *Id.* at *8.

[3] *See Garza v. Lappin*, 253 F.3d 918 (7th Cir. 2001); *In re Davenport*, 147 F.3d 605 (7th Cir. 1998).

Wesley Purkey filed a § 2241 petition seeking to litigate three new claims of ineffective assistance of counsel; he had raised a Sixth Amendment claim for ineffective assistance of trial counsel in his § 2255 motion, accusing his trial counsel of ineffectiveness "in 17 different particulars" but had not included the grounds raised in the § 2241 petition. *Id.* at *3. Purkey attributed the omission to the ineffectiveness of his postconviction counsel and maintained that "section 2255 is structurally inadequate to test the legality of a conviction and sentence any time a defendant receives ineffective assistance of counsel in his one permitted motion." *Id.* at *7.

We rejected that argument, explaining that "nothing formally prevented [Purkey] from raising each of the three errors" in his § 2255 motion. *Id.* at *8. "[T]he mechanisms of section 2255 gave him an opportunity to complain about ineffective assistance of trial counsel, and he took advantage of that opportunity." *Id.* at *10. In short, "[t]here was nothing structurally inadequate or ineffective about section 2255 as a vehicle to make those arguments." *Id.* Purkey argued for the extension of the *Martinez*/*Trevino* doctrine[4] to the Savings Clause context. *Martinez*/*Trevino* addresses the circumstances under which a state prisoner's claim of ineffective assistance of trial counsel can be raised on federal habeas review under 28 U.S.C. § 2254 despite a procedural default. We have extended the *Martinez*/*Trevino* doctrine to federal prisoners. *Ramirez v. United States*, 799 F.3d 845, 854 (7th Cir. 2015). But in *Purkey* we flatly rejected its application in the Savings Clause context, explaining that the case was governed by

[4] *Martinez v. Ryan*, 566 U.S. 1 (2012); *Trevino v. Thaler*, 569 U.S. 413 (2013).

statute, not federal common law. 2020 WL 3603779, at *11. The "pertinent statute is 29 U.S.C. § 2255(e), a statute that played no part in *Ramirez*." *Id*.

This case is indistinguishable from *Purkey*. Lee raised a claim of ineffective assistance of trial counsel in his § 2255 motion and now seeks to use § 2241 as a vehicle to raise a new argument about trial counsel's ineffectiveness. Under *Purkey* the Savings Clause does not apply; there was nothing structurally inadequate about § 2255 as a vehicle for this argument. Like Wesley Purkey, Lee invokes the *Martinez*/*Trevino* doctrine as interpreted in *Ramirez*. We rejected this argument in *Purkey* and that decision controls here.

Lee's *Brady*/*Napue* claim fares no better. As we explained in our December 6 order, the alleged "newly discovered" evidence on which this claim rests was known to Lee and is contained in the publicly available court record in Lee's 1990 Oklahoma murder case and thus was available with reasonable diligence. Accordingly, the evidence is neither newly discovered under *Webster* nor was suppressed within the meaning of *Brady*. The Savings Clause does not apply; § 2255 was not structurally inadequate or ineffective to raise the *Brady*/*Napue* claim.

In sum, it follows directly from *Purkey* and our earlier decision in this case that Lee's § 2241 petition was properly denied. We therefore affirm the judgment of the district court. We also deny Lee's motion for a stay of execution, filed today, which relies on the same now-rejected merits arguments.

Judgment AFFIRMED; stay motion DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

DANIEL LEWIS LEE,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 2:19-cv-00468-JPH-DLP
	)	
WARDEN USP TERRE HAUTE, et al.	)	
	)	
Respondents.	)	

ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS

Daniel Lewis Lee is a federal prisoner on death row at the United States Penitentiary in Terre Haute, Indiana. He was sentenced to death 20 years ago in the United States District Court for the Eastern District of Arkansas after a jury found him guilty of murdering a gun dealer and the gun dealer's family to steal money and guns. The conviction and sentence were affirmed on direct appeal and multiple requests for post-conviction relief were denied by the United States Court of Appeals for the Eighth Circuit.

Mr. Lee seeks relief from this Court by way of a 28 U.S.C. § 2241 petition. Mr. Lee first argues that his counsel was ineffective during the penalty phase of his trial in violation of his Sixth Amendment rights. Mr. Lee next argues that newly discovered evidence shows that the United States violated his due process rights when it suppressed material evidence and misled the jury regarding the nature of a prior conviction in Oklahoma. This Court stayed Mr. Lee's execution pending resolution of this action, but the Seventh Circuit granted the United States' motion to vacate the stay.

Based on that decision, Mr. Lee's claims cannot proceed in this § 2241 action. The Court thus **denies** the petition for a writ of habeas corpus without reaching the merits of the claims presented.

I.

In its Order staying Mr. Lee's execution, the Court set forth the procedural background of Mr. Lee's conviction and challenges thereto. *See* Dkt. 27 at 2-5. The Court incorporates by reference that background here, including that Mr. Lee previously attempted to raise his current claims in his court of conviction and in the Eighth Circuit.

First, Mr. Lee raised his ineffective assistance claim via a Rule 60(b) motion in his 28 U.S.C. § 2255 proceeding. The District Court denied the motion, and the Eighth Circuit affirmed. *See United States v. Lee*, 2014 WL 1093197 (E.D. Ark. Mar. 18, 2014); *United States v. Lee*, 792 F.3d 1021 (8th Cir. 2015).

Second, Mr. Lee raised his due process claims in another 28 U.S.C. § 2255 proceeding. The District Court denied the motion as an unauthorized second or successive § 2255 motion, and the Eighth Circuit denied a certificate of appealability. *See United States v. Lee*, No. 4:97-cr-00243-KGB, Dkt. 1313 (E.D. Ark.); *Lee v. United States*, No. 19-2432 (8th Cir. Nov. 4, 2019).

II.

Mr. Lee's § 2241 petition raises two claims. First, he argues that trial counsel provided ineffective assistance by failing to use available evidence to challenge the results of the Hare Psychopathy Checklist-Revised ("PCL-R") that was offered by the United States in support of an aggravating factor during the

penalty phase. Dkt. 1 at 11-46. The United States relied upon the PCL-R to demonstrate, among other things, that Mr. Lee presents a risk of future dangerousness. Dkt. 1 at 11-46.

Second, Mr. Lee advances two related due process claims under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1959).[1] The due process claims focus on the degree of Mr. Lee's involvement in the murder of Joseph Wavra in Oklahoma when Mr. Lee was seventeen years old. In support of its position that Mr. Lee presented a risk of future dangerousness and deserved the death penalty, the United States argued that Mr. Lee was responsible for Mr. Wavra's murder. Mr. Lee maintains that the United States violated *Brady* and *Napue* when it suppressed exculpatory evidence regarding Mr. Wavra's murder and presented evidence that created a false impression for why Mr. Lee was not prosecuted for Mr. Wavra's murder. Dkt. 1 at 46-68.

The United States argues that the Court cannot reach the merits of these claims because Mr. Lee cannot raise them in a § 2241 petition. Dkt. 14. Mr. Lee disagrees. In the end, the Court concludes that Mr. Lee's claims cannot proceed in this § 2241 action and thus denies the petition without reaching the merits of the claims presented.

[1] In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. "*Napue* [*v. Illinois*, 360 U.S. 264 (1959)] and *Giglio* hold that a prosecutor may not offer testimony that the prosecutor knows to be false." *Bland v. Hardy*, 672 F.3d 445, 447 (7th Cir. 2012).

Whether Mr. Lee can bring his claims via § 2241 depends on whether he meets the requirements of 28 U.S.C. § 2255(e)—commonly referred to as the Savings Clause. *See Webster v. Daniels*, 784 F.3d 1123, 1135 (7th Cir. 2015) (en banc). The Savings Clause permits claims to proceed in a § 2241 petition if a petitioner can show that "the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). The legal standards governing the Savings Clause determination are set forth in the Court's Order staying Mr. Lee's execution and its recent decision in *Purkey v. United States*, No. 2:19-cv-00414-JPH-DLP (S.D. Ind. Nov. 20, 2019), Dkt. 76 at 8-15. Those legal standards are incorporated here by reference. *See* Dkt. 27 at 9-11; *Purkey*, No. 2:19-cv-00414-JPH-DLP, Dkt. 76 at 8-15.

Here, neither of Mr. Lee's claims meet the Savings Clause. Mr. Lee's ineffective assistance claim is—for purposes of the Savings Clause analysis—essentially identical to a claim addressed in *Purkey*. Like Mr. Lee, Mr. Purkey sought to bring ineffective assistance of trial counsel claims in his § 2241. Mr. Purkey relied on similar legal arguments for why his ineffective assistance claims meet the Savings Clause. Notably, both Mr. Lee and Mr. Purkey take the position that the *Martinez-Trevino* doctrine, as extended in *Ramirez v. United States*, 799 F.3d 845 (7th Cir. 2015),[2] permits them to raise ineffective assistance claims in a § 2241 petition.

[2] *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), establish an opportunity for 28 U.S.C. § 2254 petitioners challenging state court judgments from some states to argue ineffective assistance of post-conviction counsel as cause to excuse procedural default of their ineffective assistance of trial counsel claims. *Ramirez* extended *Martinez* and *Trevino* to

The Court rejected this and other of Mr. Purkey's arguments, concluding that his ineffective assistance claim did not meet the Savings Clause. The Court explained that neither the *Martinez-Trevino* doctrine nor *Ramirez* involve the Savings Clause question, and that *Ramirez* has subsequently been narrowly construed by the Seventh Circuit. *See Purkey*, No. 2:19-cv-00414-JPH-DLP, Dkt. 76 at 21-23. These factors led the Court to conclude that the Seventh Circuit would likely not expand *Ramirez*, thus requiring the Court to decline to do so.

The Court further reasoned that permitting ineffective assistance claims to proceed in § 2241 actions would run counter to both Seventh Circuit precedent and the statutory framework established in § 2255, which sought to steer almost all post-conviction proceedings away from § 2241. *Id.* at 23-27; *see id.* at 27 ("[U]nlike the relatively narrow categories of claims [the Seventh Circuit has] allowed to proceed [in § 2241 petitions], ineffective assistance of trial claims are ubiquitous."). The Seventh Circuit set forth similar reasoning in reversing this Court's Order staying Mr. Lee's execution. *See Lee v. Watson*, 2019 WL 6718924, *1 (7th Cir. Dec. 6, 2019) (stating that Mr. Lee's likelihood of success is "slim" because ineffective assistance claims "are regularly . . . resolved under § 2255"). For this reason and those set forth in *Purkey*, the Court concludes that Mr. Lee's ineffective assistance claim does not meet the Savings Clause and thus cannot proceed in this § 2241 action.

28 U.S.C. § 2255 proceedings, allowing a petitioner to challenge § 2255 counsel's effectiveness in a Rule 60(b) motion. 790 F.3d at 854.

Mr. Lee's due process claims similarly do not meet the Savings Clause. The Court previously concluded that Mr. Lee's due process claims likely meet the Savings Clause. Dkt. 27 at 11-13. Among other things, the Court reasoned that "if Mr. Lee is correct that his [due process] claims rest on newly discovered evidence, he meets the core of the Savings Clause test as described by the Seventh Circuit," as he did not have this evidence during his § 2255 proceedings and thus did not have "'an unobstructed procedural shot at getting his sentence vacated.'" *Id.* at 12 (quoting *In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998)). The Court concluded that Mr. Lee had made a sufficient showing "that there is newly discovered evidence to support his [due process] claims and that there may be additional discoverable evidence to support them."[3] *Id.* at 13.

The Seventh Circuit disagreed, concluding that Mr. Lee's likelihood of meeting the Savings Clause is "slim." *Lee*, 2019 WL 6718924, at *1. The Seventh Circuit reasoned that claims like Mr. Lee's "are regularly made and resolved under § 2255," thus it is unlikely that § 2255 is inadequate or ineffective. *Id.* The Seventh Circuit further noted that *Webster v. Daniels*, 784 F.3d 1123 (7th Cir. 2015) (en banc), held that "§ 2255 may be deemed inadequate or ineffective if the provision for successive collateral attacks in § 2255(h) does not permit a prisoner to present factual developments that could not have been litigated earlier." *Lee*, 2019 WL 6718924, at *1. The Seventh Circuit concluded that the evidence Mr. Lee designates as "newly discovered" is not so within the meaning

[3] The Court emphasized that while it was unclear whether Mr. Lee could ultimately demonstrate that the evidence was "newly discovered", that determination "should be made on a fully developed record." Dkt. 27 at 13.

of *Webster*. Because Mr. Lee was aware of it, the court reasoned, the evidence was not "concealed or unavailable." *Id.*; *see id.* (noting that evidence is not newly discovered under *Webster* "if the defense could have accessed it with due diligence.").

Although the Seventh Circuit's order in *Lee* did not hold that Mr. Lee's due process claims do not meet the Savings Clause, it provided specific reasons why those claims were not likely to succeed. *Id.* This Court therefore reads the Seventh Circuit's decision in *Lee* as having considered and rejected the several reasons cited by this Court for granting the stay.[4] Those reasons—now foreclosed—are the only reasons that could support a conclusion that the Savings Clause is met. Thus, based on the Seventh Circuit's order in *Lee*, the Court concludes that Mr. Lee's due process claims do not meet the Savings Clause and thus cannot proceed in this § 2241 action.

III.

The claims Mr. Lee presents in his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 are barred by the Savings Clause, 28 U.S.C. § 2255(e). His petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 is **denied**, and this action is dismissed with prejudice.

Because the Court has concluded that Mr. Lee's claims are barred by the Savings Clause, his pending motions for oral argument, dkt. [16], to stay this

[4] For example, in its order granting a stay, this Court reasoned that Mr. Lee had shown that discovery might uncover additional evidence to support his position that his due process claims meet the Savings Clause and have merit. *See* Dkt. 27 at 12-13. The Seventh Circuit's decision rejected this premise.

action, dkt. [17], and for discovery, dkt. [18], are **denied**. Final Judgment consistent with this Order shall issue.

SO ORDERED.

Date: 3/20/2020

James Patrick Hanlon
James Patrick Hanlon
United States District Judge
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

DANIEL LEWIS LEE,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 2:19-cv-00468-JPH-DLP
	)	
WARDEN USP TERRE HAUTE, et al.	)	
	)	
Respondents.	)	

ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT

Daniel Lewis Lee filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 challenging his death sentence. This Court entered an order staying Mr. Lee's execution. The Seventh Circuit vacated that order and on remand, this Court denied Mr. Lee's § 2241 petition, holding that his claims are barred by 28 U.S.C. § 2255(e). Mr. Lee filed a Rule 59(e) motion to alter or amend judgment, and the motion is fully briefed. For the reasons that follow, Mr. Lee's motion is denied.[1]

To obtain relief under Rule 59(e), a movant must show "(1) that the court committed a manifest error of law or fact, or (2) that newly discovered evidence precluded entry of judgment." *Blue v. Hartford Life & Acc. Ins. Co.*, 698 F.3d 587, 598 (7th Cir. 2012). Mr. Lee argues that the Court committed manifest errors of law and fact by (1) concluding that his claim for relief was foreclosed by the Seventh Circuit's order vacating the stay; (2) conflating the legal standard for evaluating a motion for a stay of execution with the legal standard for evaluating

[1] The government has reset Mr. Lee's execution date for July 13, 2020. Dkt. 43.

the merits of his petition; (3) denying him the ability to conduct discovery; (4) finding that his ineffective assistance of counsel claim could not proceed under Section 2241; and (5) failing to consider all of his arguments and claims.

Mr. Lee first argues that the Court erred in denying his § 2241 petition without authorizing discovery on the question of whether his *Napue* and *Brady* claims satisfy the § 2255(e) exception outlined in *Webster v. Daniels*, 784 F.3d 1123 (7th Cir. 2015) (en banc). Dkt. 37 at 2–10. He contends that the Court applied the wrong legal standard and misunderstood the Seventh Circuit's order vacating the stay.

To satisfy the § 2255(e) savings clause using the path outlined in *Webster*, a petitioner must proffer newly discovered evidence. 784 F.3d at 1140. Mr. Lee sought to discover allegedly suppressed evidence that would allow him to satisfy § 2255(e), which in turn would enable the Court to consider the merits of his § 2241 petition. Dkt. 37 at 11 ("Mr. Lee has asserted that the Government suppressed—*and continues to suppress*—evidence in its possession showing that it knew the details of the actual resolution of the Oklahoma case and that the details of that resolution contain exculpatory information."). Mr. Lee argues that this Court and the Seventh Circuit missed the point and mistakenly believed his argument to be that the fee petition was the only newly discovered evidence.

But the Court understood Mr. Lee's position. *See* dkt. 27 at 18 (opinion and order staying execution) ("Mr. Lee responds that the information surrounding Mr. Lee's guilty plea to the robbery charge, rather than the fee application, is the *Brady* material. In other words, Mr. Lee says the fee

application is only *evidence of* a *Brady* violation."). The Seventh Circuit similarly considered and rejected Mr. Lee's argument. There is no indication that the panel did not understand or ignored this argument. The Seventh Circuit found that the fee application cannot be considered "newly discovered" evidence under *Webster*. *Lee v. Watson*, 2019 WL 6718924, at *1 (7th Cir. Dec. 6, 2019). *Id.* With due diligence, counsel could have accessed the fee application and used it in Mr. Lee's original § 2255 motion to bring *Brady* and *Napue* claims and to seek the discovery that he now seeks in this § 2241 action. Because the fee application was not concealed or unavailable, Mr. Lee cannot rely on it to satisfy § 2255(e)'s savings clause and litigate a § 2241 action to pursue other evidence that he believes the government to possess, dkt. 37 at 11.

Mr. Lee also takes issue with the Seventh Circuit's application of the due diligence standard, dkt. 37 at 13–15, but this Court is bound by the Seventh Circuit with respect to this legal question. And Mr. Lee has not shown that this Court committed a manifest error in applying the due diligence standard articulated by the Seventh Circuit in assessing whether his evidence was "newly discovered" under *Webster*. *See* dkt. 35 at 7 ("[E]vidence is not newly discovered under *Webster* 'if the defense could have accessed it with due diligence.'" (quoting *Lee*, 2019 WL 6718924, at *1)).

Unlike *Webster*, where new counsel uncovered and identified previously unavailable evidence in the form of records, 784 F.3d at 1132, Mr. Lee argues that there *may* exist some type of previously undisclosed evidence. Because § 2255 gave Mr. Lee a viable route to discovery of the evidence sought by his

petition, he cannot show that § 2255 was "inadequate or ineffective" or that the Court committed manifest error by denying his *Brady* and *Napue* claims on § 2255(e) grounds.

Mr. Lee further argues that the Court committed manifest error when it denied his ineffective assistance of counsel claim. The Seventh Circuit has extended *Martinez v. Ryan*, 566 U.S. 1 (2012), to allow a federal prisoner to argue in a Rule 60(b) motion that § 2255 counsel's ineffectiveness prevented the prisoner from properly litigating trial counsel's effectiveness. *Ramirez v. United States*, 799 F.3d 845, 854 (7th Cir. 2015). But neither the Seventh Circuit nor the Supreme Court has held that a federal prisoner may rely on § 2255 counsel's ineffectiveness to satisfy § 2255(e)'s savings clause. While the Seventh Circuit is now considering that question, *see* dkt. 44-1 (transcripts of oral argument in *Purkey v. United States*, No. 19-3318 (7th Cir.)), under existing law Mr. Lee cannot show manifest error in the Court's holding that § 2255(e) bars his ineffective assistance claim. *Purkey v. United States*, No. 2:19-cv-00414, dkt. 76 (Nov. 20, 2019) (collecting cases where courts considered and rejected the argument that ineffective assistance of trial counsel claims relying on *Martinez-Trevino* meet the Savings Clause).

Mr. Lee's last argument is that the Court erred in not addressing his claim that applying § 2255(e) to bar his § 2241 petition would result in an unconstitutional suspension of the writ of habeas corpus. Dkt. 37 at 18–19. The Seventh Circuit has defined the scope of § 2255(e)'s savings clause to avoid violation of the Constitution's Suspension Clause. *See Worman v. Entzel*, 953

F.3d 1004, 1008 (7th Cir. 2020); *cf. Webster*, 784 F.3d at 1152 (Easterbrook, J., dissenting) (citing *United States v. Hayman*, 342 U.S. 205 (1952)) (noting that "if some application of § 2255 would conflict with the Suspension Clause, a district court could [use § 2255(e)] to proceed under § 2241 without any need to hold § 2255 unconstitutional"). The Court now makes explicit what was implicit in its order denying relief: application of § 2255(e) to bar Mr. Lee's petition does not violate the Suspension Clause.

Because Mr. Lee has failed to show that the Court's order denying relief rests on a manifest error of law or fact, his motion to alter or amend judgment, dkt. [37], is **DENIED**.

SO ORDERED.

Date: 6/26/2020

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

DANIEL LEWIS LEE,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 2:19-cv-00468-JPH-DLP
	)	
WARDEN USP TERRE HAUTE, et al.	)	
	)	
Respondents.	)	

OPINION AND ORDER STAYING EXECUTION OF DANIEL LEWIS LEE

Daniel Lewis Lee is a federal prisoner on death row at the United States Penitentiary in Terre Haute, Indiana. He was sentenced to death 20 years ago in the United States District Court for the Eastern District of Arkansas after a jury found him guilty of murdering a gun dealer and the gun dealer's family to steal money and guns. The conviction and sentence were affirmed on direct appeal. Mr. Lee sought postconviction relief under 28 U.S.C. § 2255 in the district court where he was convicted and sentenced. That request was denied by the district court and the court of appeals affirmed. Mr. Lee filed further § 2255 motions challenging his death sentence in the district court of conviction, but those challenges were denied on procedural grounds.

Mr. Lee now seeks relief from this Court by way of a 28 U.S.C. § 2241 petition alleging ineffective assistance of counsel and newly discovered evidence as the basis for the relief sought. Mr. Lee first argues that his trial counsel was ineffective during the penalty phase of his trial in violation of his Sixth Amendment rights. Mr. Lee next argues that newly discovered evidence shows

that the United States violated his due process rights when it suppressed material evidence and misled the jury regarding the nature of a prior conviction. Mr. Lee seeks a stay of his execution and asks the Court to authorize him to conduct discovery.

Mr. Lee is entitled to a stay of his execution based on his due process claims.[1] While further factual development is needed for the Court to be able to resolve the claims presented in Mr. Lee's petition, he has shown there is a significant possibility that he can bring these claims in a § 2241 action and substantial grounds for the claims. The other factors necessary to obtain a stay also weigh in Mr. Lee's favor. Accordingly, Mr. Lee's execution is stayed until further order of this Court.

I.

The following procedural background focuses on the facts relevant to Mr. Lee's due process claims.[2]

A. The Indictment and Trial

Mr. Lee and his co-defendant Chevie Kehoe were indicted in the United States District Court for the Eastern District of Arkansas. *See United States v. Lee*, No. 4:97-cr-00243-KGB-2 (E.D. Ark. Dec. 12, 1997), Dkt. 1. They were tried

[1] The Court does not address or need to reach whether Mr. Lee's ineffective assistance claim warrants a stay.

[2] A complete recitation of the facts and procedural background can be found in the opinions issued by the United States Court of Appeals for the Eighth Circuit following Mr. Lee's appeals. *See United States v. Lee*, 274 F.3d 485 (8th Cir. 2001) ("*Lee I*"); *United States v. Lee*, 374 F.3d 637 (8th Cir. 2004) ("*Lee II*"); *United States v. Lee*, 715 F.3d 215 (8th Cir. 2013) ("*Lee III*"); *United States v. Lee*, 792 F.3d 1021 (8th Cir. 2015) ("*Lee IV*").

together and, following a two-month trial, the jury found both guilty of capital murder and racketeering. *Lee II*, 374 F.3d at 643. Mr. Lee and Mr. Kehoe each had a separate trial at the penalty phase.

Mr. Kehoe's penalty phase trial was first, and the jury returned a verdict of life in prison without the possibility of release. *Lee I*, 274 F.3d at 488. The United States informed the District Court that, given this decision, it did not intend to continue pursuing the death penalty for Mr. Lee. *Id.* As later explained by the District Judge, "[t]here was no question that Kehoe was the more culpable of the two with regard to the criminal acts charged in the indictment and proved at trial." Dkt. 1-2 at 3. But the Attorney General denied the United States Attorney's request to withdraw the death penalty with respect to Mr. Lee, *Lee I*, 274 F.3d at 488, so Mr. Lee's penalty phase proceeded. The jury found that the United States established four of the five aggravating factors it presented, Dkt. 1-10 at 5-8, and one or more jurors found that Mr. Lee established five of the fourteen mitigating factors he presented, *id.* at 9-10. The jury returned a verdict of death on May 14, 1999. *Lee I*, 274 F.3d at 488.

B. Mr. Lee's Appeals and Collateral Attacks on His Conviction and Sentence

Mr. Lee's conviction and sentence were affirmed on direct appeal. *Lee II*, 374 F.3d at 643. He then filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 in the United States District Court for the Eastern District of Arkansas. That motion was denied, and the Eighth Circuit affirmed. *See Lee III*, 715 F.3d at 217; *United States v. Lee*, 2008 WL 4079315 (E.D. Ark.

Aug. 28, 2008). Mr. Lee's Rule 60(b) motion was also denied, and the Eighth Circuit affirmed that decision as well. *Lee IV*, 792 F.3d at 1022; *United States v. Lee*, 2014 WL 1093197, *5-6 (E.D. Ark. Mar. 18, 2014).

On September 10, 2018, Mr. Lee filed another § 2255 motion in the District Court. *United States v. Lee*, No. 4:97-cr-00243-KGB, Dkt. 1297 (E.D. Ark. Sept. 10, 2018). He argued that newly discovered evidence revealed that his due process rights as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and *Napue v. Illinois*, 360 U.S. 264 (1959) (the "*Brady* and *Napue* claims") were violated during the penalty phase of his trial. These are the claims that Mr. Lee now raises in his § 2241 petition before this Court. Neither claim was raised at the sentencing phase of his trial or in his first § 2255 petition.

On February 26, 2019, the District Court denied the September 2018 § 2255 motion as an unauthorized successive § 2255 motion and denied Mr. Lee a certificate of appealability. *Lee,* No. 4:97-cr-00243-KGB, Dkt. 1313. The District Court held that another § 2255 motion raising material *Brady* claims constitutes a "second or successive" § 2255 motion, and thus Mr. Lee could not proceed without authorization from the Eighth Circuit. *Id.* at 14-17. The parties agree that § 2255(h) does not allow Mr. Lee to obtain this authorization. While Mr. Lee's § 2255 motion was not allowed to proceed, the District Court found that the newly discovered evidence was material, specifically stating that had the evidence been disclosed at trial "it is reasonably likely that . . . the outcome at sentencing would have been different." *Id.* at 14.

On July 25, 2019—while Mr. Lee's request for a certificate of appealability was pending before the Eighth Circuit—the Department of Justice set Mr. Lee's execution date for December 9, 2019. On November 4, 2019, the Eighth Circuit denied Mr. Lee's request for a certificate of appealability. *Lee v. United States*, No. 19-2432 (8th Cir. Nov. 4, 2019). Judge Kelly dissented, arguing that reasonable jurists could disagree regarding whether a material *Brady* claim in a second § 2255 motion qualifies as an impermissible second or successive § 2255 motion. *Id.* at 1-2.

C. Mr. Lee's Petition in this Case

Mr. Lee filed the habeas petition in this case under 28 U.S.C. § 2241 on September 26, 2019. Mr. Lee moved to stay his execution on November 8, 2019, the same day his habeas petition was fully briefed. Mr. Lee's discovery motion—seeking to conduct additional discovery to support both of his claims—remains pending.

II.

This case's procedural posture is unique because Mr. Lee is a plaintiff in a case pending in the United States District Court for the District of Columbia (the "Execution Protocol Litigation"). On November 20, 2019, while the stay request was pending in this case, the United States District Court for the District of Columbia stayed Mr. Lee's execution. *See In the Matter of the Federal Bureau of Prisons' Execution Protocol Cases*, No. 1:19-mc-00145-TSC (D.D.C. Nov. 20,

2019), Dkt. 50, Dkt. 51.[3] Mr. Lee then moved to withdraw his motion to stay his execution in this Court. Dkt. 22.

The United States has appealed the stay entered in the Execution Protocol Litigation. *Id.*, Dkt. 52. The appeal is pending before the United States Court of Appeals for the District of Columbia Circuit. *See In re FBOP Execution Protocol Cases*, No. 19-5322 (D.C. Cir. Nov. 22, 2019). The United States' request to vacate the stay issued in the Execution Protocol Litigation is pending before the United States Supreme Court. *See Barr, et al. v. Roane, et al.*, No. 19A615 (Dec. 2, 2019).

It is not known at this time whether the stay issued by the District Court in the District of Columbia will stand or be vacated. But Mr. Lee's motion for a stay in this case is fully briefed, and considerations of the orderly administration of justice make it appropriate for the Court to rule at this time on Mr. Lee's motion for a stay.

III.

The standards governing preliminary injunctions apply to motions to stay executions in habeas proceedings. *See Williams v. Chrans*, 50 F.3d 1358, 1360 (7th Cir. 1995) ("The law governing stays of death sentences is, in general, the same as that employed in other situations."). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the

[3] The Execution Protocol Litigation is a civil rights action involving Mr. Lee's and several other federal death row inmates' challenges to the federal execution protocol. It has been ongoing since 2005.

balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see Hill v. McDonough*, 547 U.S. 573, 584 (2006). Additionally, the Court must consider "the extent to which the inmate has delayed unnecessarily in bringing the claim." *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004); *see Lambert v. Buss*, 498 F.3d 446, 451 (7th Cir. 2007).

In the death penalty context, a stay is warranted only upon "a showing of a significant possibility of success on the merits." *Hill*, 547 U.S. at 584. When, as here, a habeas petition is not a prisoner's first, a stay of execution "should be granted only when there are 'substantial grounds upon which relief might be granted.'" *Garza v. Lappin*, 253 F.3d 918, 920-21 (7th Cir. 2001) (applying this standard to a § 2241 petition).

A. Mr. Lee has Shown a Significant Possibility of Success on the Merits of his *Brady* and *Napue* Claims

The Court begins with the factual background necessary to understand Mr. Lee's *Brady* and *Napue* claims. The District Court of conviction summarized the background of Mr. Lee's *Brady* and *Napue* claims before ruling that it could not reach the merits:

> To justify a death sentence for Lee when Kehoe had been sentenced to life imprisonment, the Government's penalty-phase case emphasized the future-dangerousness aggravator. The Government argued that Lee's past conduct showed that he was violent and volatile, and that he would present a danger in prison. Focusing on the Wavra murder, the Government introduced evidence showing Lee's role in that crime. Brian Compton, who was at the party when Wavra was killed by John David Patton, testified about Lee's involvement; the transcript of Lee's testimony at John David Patton's Oklahoma preliminary hearing was read aloud; and the responding

> Oklahoma detective and the forensic pathologist described Wavra's wounds and cause of death. The jury heard that, at a social gathering in 1990, Lee, then age seventeen, and his cousin, John David Patton, beat Wavra and forced him down a manhole into a storm sewer; that Patton went down into the manhole with Wavra, while Lee retrieved a plastic bag, rope, and knife that he handed down to Patton; that Patton handed Wavra's clothes up to Lee, who put them in the plastic bag; and that Patton then used the knife to repeatedly stab Wavra and slit his throat. Patton was convicted of first-degree murder in an Oklahoma state court, while Lee pled to deferred adjudication on a robbery charge. Other future-dangerousness evidence included (1) Lee's threatening behavior toward a sheriff's deputy, while he was in jail awaiting trial, and (2) a 1995 Florida conviction for carrying a concealed weapon.
>
> In both opening and closing argument, the Government told the jury that Lee "has an earlier murder under his belt." It argued that, even though Patton "wielded that knife," Lee helped him by giving him the knife and rope. The Government argued Lee knew what he was doing when he gave the knife to Patton, and that he both "legally and morally" had "the blood of Joey Wavra" on his hands. The Government contended the robbery plea offer was a "gift" from the Oklahoma prosecutor and an "incredible deal" – and a missed opportunity for Lee to turn his life around. . . .
>
> Both [the District Judge who presided over Mr. Lee's trial] and the Eighth Circuit recognized the Wavra evidence as an integral piece of the Government's penalty-phase case. In finding that Lee was not unfairly prejudiced by expert testimony and then reinstating the death penalty, the Eighth Circuit noted that, "none of the evidence elicited from Dr. Cunningham was likely to inflame the jury as much as testimony about Lee's involvement in the murder of Joey Wavra, which had been part of the government's case." *Lee*, 274 F.3d at 494. Similarly, in rejecting Lee's argument that his trial lawyers should have done more to investigate the Wavra murder, [the District Court] acknowledged evidence of Lee's participation in that crime was "powerful and likely contributed to or influenced the jury's ultimate decision" in favor of a death sentence. *Lee*, 2008 WL 4079315, at *45.

Lee, No. 4:97-cr-00243-KGB, Dkt. 1313 at 7-9 (citations omitted).

For his *Brady* claim, Mr. Lee contends that the United States suppressed exculpatory evidence regarding the legal proceedings associated with Mr.

Wavra's murder. For his *Napue* claim, he contends that in the penalty phase of his trial the United States created a false impression to the jury regarding his conviction associated with Mr. Wavra's murder. In support of these claims, Mr. Lee presents as evidence, among other things, a fee application from the defense attorney who represented Mr. Lee during the Oklahoma state court proceedings, including the preliminary hearing on the murder charge. The fee application states: "The matter came on for hearing before Judge Hall; District Attorney called witness; hearing held; Court finds crime of Murder I not established by evidence; Court recommends a Dismissal of Murder I charges and State consider refiling on charge of Robbery I." Dkt. 1-13 at 3. Mr. Lee contends the United States withheld evidence that the murder charge was dropped due to a lack of probable cause and falsely told the jury that Mr. Lee was "legally" responsible for Mr. Wavra's murder.

Because Mr. Lee brings his claims in a § 2241 petition, the Court must first determine whether his claims can pass through the Savings Clause and then evaluate whether he has a significant possibility of success on the merits of his *Brady* and *Napue* claims. *Garza*, 253 F.3d at 920 (cautioning courts not to conflate the two questions). Although these inquiries somewhat overlap in this case, they are distinct. *Id.* at 923. The Court addresses each question in turn.

1. Availability of § 2241[4]

[4] The undersigned recently confronted similar issues in *Purkey v. United States*, No. 2:19-cv-00414-JPH-DLP (S.D. Ind. Nov. 20, 2019). *Purkey* also involved a federal death row inmate with an upcoming execution date who sought to raise constitutional claims via § 2241. Ultimately, the Court rejected Mr. Purkey's

"As a general rule, a federal prisoner wishing to collaterally attack his conviction or sentence must do so under § 2255." *Chazen v. Marske*, 938 F.3d 851, 856 (7th Cir. 2019). But Congress created the Savings Clause within § 2255 as a narrow exception to the "general rule" that requires a federal prisoner to bring a collateral attack under § 2255. Determining whether the Savings Clause is met is a "very knotty procedural issue" of "staggering" complexity. *Chazen*, 938 F.3d at 855-56. While it is "hard to identify exactly what [the Savings Clause] requires," *id.* at 863 (Barrett, J., concurring), several guiding principles have emerged from the Seventh Circuit.

Under the Savings Clause, a prisoner can seek a writ of habeas corpus through an action under § 2241 if the prisoner can show "that the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). "Only in rare circumstances" is the Savings Clause met. *Light v. Caraway*, 761 F.3d 809, 812 (7th Cir. 2014) (citations and quotations omitted). Section 2255 is inadequate or ineffective in a specific case only when there is "some kind of structural problem with section 2255." *Webster*, 784 F.3d at 1136. A structural problem requires "something more than a lack of success with a section 2255 motion." *Id.* It must "foreclose[] even one round of effective collateral review, unrelated to the petitioner's own mistakes." *Poe v. LaRiva*, 834 F.3d 770, 773 (7th Cir. 2016) (citation and quotation omitted). At bottom, the Savings Clause is met when a structural problem with § 2255 prevented a federal

arguments, concluding that none of his claims could be brought in a § 2241 petition, and denied his petition. *See id.*, Dkt. 76.

prisoner from having "'a reasonable opportunity [in a prior § 2255 proceeding] to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence.'" *Chazen*, 938 F.3d at 856 (alteration in original) (quoting *In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998)); *see Davenport*, 147 F.3d at 609 (suggesting that § 2255 is inadequate or ineffective if the prisoner did not have "an unobstructed procedural shot at getting his sentence vacated").

There is a significant possibility that Mr. Lee has met this standard. First, in all three circumstances where the Seventh Circuit has found the Savings Clause met—*Davenport*, *Garza*, and *Webster*—it recognized that § 2241 is available to challenge the "fundamental legality" of a sentence, not just a conviction. *See Webster*, 784 F.3d at 1136 (discussing this holding in *Davenport* and *Garza*). Mr. Lee seeks to challenge the fundamental legality of his death sentence.

Second, as in *Webster*, Mr. Lee purports to rely on newly discovered evidence to show that his death sentence is unconstitutional. *Webster* suggests that the structure of § 2255 generally, and the language of the Savings Clause in particular, encompasses such claims, especially since § 2255(h) does not authorize raising such a claim in a second or successive § 2255 motion. *See Webster*, 784 F.3d at 1138. If principles of statutory interpretation alone do not lead to this conclusion, *Webster* instructs that the "next step would be to take into account the fact that a core purpose of habeas corpus is to prevent a custodian from inflicting an unconstitutional sentence," which is what Mr. Lee attempts to show here. *Id.* at 1139.

Third, and most importantly, if Mr. Lee is correct that his *Brady* and *Napue* claims rest on newly discovered evidence, he meets the core of the Savings Clause test as described by the Seventh Circuit. Mr. Lee could not have raised these claims until the evidence was discovered, which he says was not until after his initial § 2255 proceedings had concluded. His initial § 2255 thus did not present him with a "'reasonable opportunity . . . to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence,'" *Chazen*, 938 F.3d at 856 (quoting *Davenport*, 147 F.3d at 609), or "an unobstructed procedural shot at getting his sentence vacated," *Davenport*, 147 F.3d at 609, based on these claims. Moreover, an opportunity to pursue these claims is not available in the District Court of conviction. His attempts to raise his *Brady* and *Napue* claims in that court were already denied on procedural grounds, and § 2255(h) forecloses any further attempts to pursue them there. *See Lee v. United States*, No. 19-2432 (8th Cir. Nov. 4, 2019); *Lee*, No. 4:97-cr-00243-KGB, Dkt. 1313.

Applied to the facts presented in this case, the structure of § 2255 prevents the District Court of conviction from hearing a claim based on newly discovered evidence that the United States suppressed evidence and misled the jury during Mr. Lee's penalty phase. This could result in an unconstitutional death sentence. These considerations constitute the "something more" necessary to meet the Savings Clause. *Webster*, 784 F.3d at 1136.

While the parties vigorously dispute whether the evidence identified by Mr. Lee qualifies as "newly discovered", this only reinforces the need to stay Mr. Lee's

execution and permit additional discovery.[5] At this stage, Mr. Lee has shown there is a significant possibility that there is newly discovered evidence to support his claims and that there may be additional discoverable evidence to support them. Whether Mr. Lee can ultimately prevail by demonstrating that the evidence exists and is newly discovered is a question for another day. But that determination, particularly in a death penalty case, should be made on a fully developed record. *See* Dkt. 14 at 72 (the United States agreeing that "the fee application does not exclude the possibility that the hearing took place as Lee imagines"); *id.* at 77 (the United States acknowledging that "it is not clear whether the [Oklahoma] court made that recommendation [to drop the murder charge] at the request or with the acquiescence of the prosecutors as a part of a negotiated plea disposition").

Granting Mr. Lee limited relief, that is, a stay of execution without ruling on the merits of his petition, is essentially what happened in *Webster*. The Seventh Circuit held that Mr. Webster's claims were not "barred as a matter of law" by the Savings Clause, but it remanded to the District Court for further factual development to determine whether the Savings Clause was met. *Webster*, 784 F.3d at 1145-46 (ordering the District Court to hold a hearing to determine whether certain facts are true that bear on whether the Savings Clause is met).

2. *Brady* and *Napue* Claims

[5] Mr. Lee's motion for discovery is presently pending before the Court. The Court will address this motion by separate order.

The Court turns next to whether there is a significant possibility that Mr. Lee will be able to prevail with his *Brady* and *Napue* claims. Although *Brady* and *Napue* claims are distinct, they are related and thus discussed together. *See Long v. Pfister*, 874 F.3d 544, 549 (7th Cir. 2017) (en banc) ("The *Napue-Giglio* rule is a cousin to the *Brady* doctrine.") The Court begins by setting forth the legal standards governing these claims before discussing whether Mr. Lee has shown a significant possibility that they are meritorious.

The Supreme Court in *Brady* held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87; *see Snow v. Pfister*, 880 F.3d 857, 867 (7th Cir. 2018) ("The failure to disclose [exculpatory] evidence is a violation of the accused's due process rights."). To establish a *Brady* violation, a petitioner must show three things: "first, that the evidence at issue was favorable; second, that the evidence was suppressed; and third, that it was material to his defense." *Socha v. Richardson*, 874 F.3d 983, 987 (7th Cir. 2017).

In *Giglio*, the Supreme Court "made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." 405 U.S. at 153. Relatedly, "*Napue* stands for the proposition that prosecutors may not suborn perjury, and holds that a defendant's due-process rights are violated when the government obtains a conviction through the knowing use of false testimony." *United States v.*

Hilliard, 851 F.3d 768, 782 (7th Cir. 2017); *see Bland v. Hardy*, 672 F.3d 445, 447 (7th Cir. 2012) ("*Napue* and *Giglio* hold that a prosecutor may not offer testimony that the prosecutor knows to be false."). To establish a due-process violation under *Napue*, Mr. Lee must show "'(1) that there was false testimony; (2) that the government knew or should have known it was false; and (3) that there is a likelihood that the false testimony affected the judgment of the jury.'" *United States v. Cardena*, 842 F.3d 959, 976-77 (7th Cir. 2016) (quoting *United States v. Freeman*, 650 F.3d 673, 678 (7th Cir. 2011)). Together, the *Brady* and *Napue* doctrines are "two manifestations of the principle that prosecutors must expose material weaknesses in their positions." *Long*, 874 F.3d at 549.

Mr. Lee asserts that he made two separate *Brady* requests—one shortly after trial counsel was appointed and another after the United States moved to amend its notice of intent to seek a death sentence. The United States does not dispute this and responds that it complied with its obligations under *Brady*.

Mr. Lee argues that the United States violated *Brady* by not disclosing that the Oklahoma judge in the Wavra case found probable cause did not exist to support a murder charge against Mr. Lee. He argues that the United States then violated *Napue* by falsely stating to the jury that Mr. Lee was legally responsible for Mr. Wavra's murder and that his robbery plea was a gift from the Oklahoma prosecutor. Dkt. 1 at 46-64.

Some elements of Mr. Lee's *Brady* and *Napue* claims are readily met while others are not as clear. But at this juncture, Mr. Lee's obligation is not to

conclusively prove-up those claims. It is to show a significant possibility that he can do so.

i. Materiality and Favorability Elements

The District Court of conviction previously found that the *Brady* evidence was material (and thus favorable). *Lee*, No. 4:97-cr-00243-KGB, Dkt. 1313 at 14 ("[A]ssuming that the Oklahoma state court held at a preliminary hearing that the evidence was insufficient to establish probable cause that Lee was guilty of murdering Joey Wavra, that evidence is material. In light of the government's reliance on the Wavra murder during sentencing, it is reasonably likely that, if it had been discovered at trial that the Oklahoma court found the evidence insufficient to establish that Lee was guilty of murder, the outcome at sentencing would have been different."). The Court sees no basis to disagree with that finding at this stage of the proceedings.

As noted above, the Wavra murder was central to the United States' penalty-phase case. And it was at least part of the United States' argument for why Mr. Lee should be sentenced to death even after the jury had sentenced his more culpable co-defendant, Mr. Kehoe, to life. *See, e.g.*, Dkt. 14-6 at 9 (the United States arguing during closing that Mr. Lee's involvement in "the Joey Wavra murder . . . alone illustrates this drastic distinction on several levels between Danny Lee and Chevie Kehoe"); *id.* at 11 (the United States arguing during closing that Mr. Lee "has an earlier murder under his belt," which the jury "should consider in distinguishing Lee from Kehoe because Lee has been

here before"). There is thus a significant possibility Mr. Lee can establish the materiality and favorability elements of his *Brady* claim.

ii. False Evidence that Affected the Judgment of Jury

Mr. Lee has also established a significant possibility that two of the *Napue* elements are met. First, there is a significant possibility that Mr. Lee may be able to show that the United States misled the jury when it stated during the penalty phase that Mr. Lee was "legally" responsible for Mr. Wavra's murder and that his robbery plea was a "gift" from the Oklahoma prosecutor. Dkt. 14-6 at 10 ("I would suggest to you both legally and morally the blood of Joey Wavra's hands is on Danny Lee."); Dkt. 14-2 at 45 ("[Mr. Lee] got a gift in [the Wavra] case from the prosecutors in Oklahoma. They gave him a plea bargain. And this allowed him to get off with just a robbery."). The fee application alone—which suggests that an Oklahoma judge determined that probable cause did not exist to charge Mr. Lee with murder—casts significant doubt on whether these statements were true. Second, for the same reasons the *Brady* materiality element is met, there is a significant possibility that Mr. Lee may be able to show that this narrative affected the judgment of the jury.

iii. Was the Information Suppressed and Did the United States Knowingly Make False Statements

This leaves two intensely disputed issues: whether the United States suppressed information regarding the plea agreement (for the *Brady* claim) and whether the United States knew or should have known that the statements at issue were false (for the *Napue* claim). Beginning with the former, the United

States argues that this element cannot be met because publicly available information is not considered suppressed for purposes of a *Brady* claim, and the fee application was a "publicly-available document [that] was readily available to Lee." Dkt. 14 at 69; *id.* ("Lee's lawyers were well aware that the government intended to introduce evidence about the Wavra murder at Lee's sentencing hearing and easily could have obtained a copy of the fee application.").

Mr. Lee responds that the information surrounding Mr. Lee's guilty plea to the robbery charge, rather than the fee application, is the *Brady* material. In other words, Mr. Lee says the fee application is only *evidence of* a *Brady* violation. *See* Dkt. 15 at 21 ("The Government consulted with detective from the Oklahoma City Police Department who were involved with the [Wavra] case, who interrogated the juvenile Danny Lee, and who testified at the preliminary hearing of . . . David Patton [Mr. Lee's cousin who was convicted of murdering Mr. Wavra]. Mr. Lee alleges that the Government, as part of these or other discussions, must have learned of facts exculpatory to Mr. Lee and failed to disclose them. [Mr. Lee's] claim is that *this* information—*i.e.*, the facts surrounding that plea—constitutes *Brady* material.").

While further factual development is necessary to resolve these issues, Mr. Lee has presented substantial grounds for his claim that the United States suppressed exculpatory information relating to Mr. Lee's robbery plea. The evidence presented thus far demonstrates a significant possibility that Mr. Lee may be able to show that the United States knew that the robbery plea was

offered to Mr. Lee after an Oklahoma judge determined that probable cause to charge Mr. Lee with murder did not exist.

In addition to the fee application from the Oklahoma case file there is evidence that Federal Bureau of Investigation ("FBI") Agents traveled to Oklahoma "to review and obtain all records" regarding Mr. Wavra's murder, and that they reviewed the local prosecutor's file on the Wavra case.[6] *See* Dkt. 18-1; Dkt. 18-2. The United States does not dispute Mr. Lee's contention that none of the information or records gained from this investigation was disclosed to Mr. Lee. Moreover, the United States acknowledges it does not know much about the circumstances surrounding Mr. Lee's plea agreement in the Wavra case. The United States agrees that "the fee application does not exclude the possibility that the hearing took place as Lee imagines"—that is, that the Oklahoma judge found there was no probable cause to charge Mr. Lee with murder. Dkt. 14 at 72. The United States further acknowledges that "it is not clear whether the [Oklahoma] court made that recommendation at the request or with the acquiescence of the prosecutors as a part of a negotiated plea disposition." *Id.* at 77.

The evidence presented by Mr. Lee, particularly when viewed in the context of what the United States admittedly does not know, is sufficient to demonstrate a significant possibility that Mr. Lee may be able to show that the United States

[6] Mr. Lee also points out that one of the Oklahoma detectives who investigated Mr. Wavra's murder testified for the United States during its case-in-chief, Dkt. 14-2 at 51-52, and the United States also consulted with the Oklahoma detective who interrogated Mr. Lee regarding the murder, *id.* at 11-12.

had exculpatory information regarding Mr. Lee's robbery plea, and that it knew or should have known the arguments and statements made at the penalty phase regarding the circumstances surrounding Mr. Lee's plea in the Wavra case were misleading.[7]

While further factual development is necessary for the Court to be able to determine whether Mr. Lee is entitled to habeas relief, he has established substantial grounds for his *Brady* and *Napue* claims. This is sufficient for the immediate remedy he seeks, a stay of execution.

B. Irreparable Harm

The irreparable harm to Mr. Lee is clear: absent a stay, he could be executed on December 9, 2019, before he can fully litigate his *Brady* and *Napue* claims. *See Williams v. Chrans*, 50 F.3d 1358, 1360 (7th Cir. 1995) (holding that "irreparable harm is taken as established in a capital case" because "[t]here can be no doubt that a defendant facing the death penalty at the hands of the state faces irreparable injury"). The United States rightfully concedes that Mr. Lee faces irreparable harm. Dkt. 20 at 3.

C. Balance of Harms

[7] As to the United States' argument that publicly available evidence cannot be suppressed under *Brady*, at best, more information is needed to determine whether the alleged *Brady* information was publicly available at the time. All the United States has offered is that the fee application "is listed on the public docket sheet from the Oklahoma case and contained within the publicly-available court file." Dkt. 14 at 69. Whether or not this alone establishes that the fee application was publicly available at the time of Mr. Lee's trial, it says nothing about whether the other alleged *Brady* material was publicly available.

The Court must next balance the harms to the parties. Again, absent a stay, Mr. Lee could be executed even though there is a significant chance his death sentence was obtained in violation of his constitutional rights. The harm to the United States stems from its "strong interest" in "proceeding with its judgment." *Lambert*, 498 F.3d at 452. A stay will delay this outcome.

When considered in the full context of Mr. Lee's challenges to the constitutionality of his death sentence, the harm to Mr. Lee far outweighs the harm to the United States. Much of the twenty-year delay in proceeding with the judgment is attributable to the United States, which demonstrates that it lacked urgency about proceeding with its judgment against Mr. Lee until very recently.

Since he was sentenced to death in 1999, Mr. Lee has been consistently challenging the constitutionality of his death sentence. During that litigation, both Mr. Lee and the United States requested and received several unopposed extensions of time. Significant delays in resolving this litigation, however, fall solely upon the United States. For example, Mr. Lee petitioned the United States Supreme Court for a writ of certiorari on April 13, 2016, and the United States did not file its response until nearly a year later, having obtained nine extensions of time. *See Lee v. United States*, No. 15-8942. This undermines its position that any additional delay will cause significant harm to its interests.

Similarly, the United States waited eight years—from 2011 to 2019—to adopt a new execution protocol. *See In re the Federal Bureau of Prisons' Execution Protocol Cases*, No. 1:19-mc-00145-TSC, Dkt. 50 at 14. Only after it

announced the new execution protocol and scheduled Mr. Lee's execution has the United States exhibited its current level of urgency to enforce its criminal judgments. This too undermines the notion that additional delay will cause significant harm.

Finally, the United States has not acted with the necessary urgency even in this litigation. Mr. Lee filed this action on September 26, 2019, when his execution date was two-and-a-half months away. Given this, the Court gave each party two weeks to file their respective briefs and warned both parties that the Court did not "anticipate extending these deadlines absent extraordinary circumstances." Dkt. 6 at 1. Nevertheless, the United States requested (over Mr. Lee's objection) a twenty-eight-day extension of time because the attorneys assigned to the matter "had previously-existing responsibilities that prevented them from turning their full attention immediately to this case." Dkt. 10 at 3. Failing to adequately staff this case with counsel that could devote their full attention to it such that Court-ordered deadlines must be extended further undermines the notion that the harm to the United States of additional delay would be significant.

Given that the United States has significantly contributed to delays in scheduling Mr. Lee's execution and resolving Mr. Lee's legal challenges, the Court concludes that the additional delay caused by a stay in Mr. Lee's execution will only minimally harm the United States. Such minimal harm is substantially outweighed by the harm to Mr. Lee should a stay not issue. Accordingly, the balance of harms strongly favors staying Mr. Lee's execution.

D. Public Interest

While the public has an interest in the enforcement of Mr. Lee's criminal judgment, that interest is significantly diminished in this case. Mr. Lee has presented substantial grounds for claims that his death sentence is unconstitutional. The public interest is not served by permitting the execution of Mr. Lee when such potentially meritorious claims have not been evaluated by any court. Furthermore, while not dispositive to the public interest prong of the preliminary injunction test, several family members of the victims, the lead prosecutor, and the District Judge who presided over the trial all oppose Mr. Lee being executed. *See* Dkt. 1-2; Dkt. 17-1; Dkt. 17-2; Dkt. 17-3.

E. Unnecessary Delay

Before staying an execution, the Court must consider "the extent to which the inmate has delayed unnecessarily in bringing the claim." *Nelson*, 541 U.S. at 649-50; *see Lambert*, 498 F.3d at 451. "[T]here is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Nelson*, 541 U.S. at 650.

The United States contends that Mr. Lee could have brought his *Brady* and *Napue* claims in 2014 when he was aware of the fee application forming the basis of those claims. Dkt. 20 at 7. Mr. Lee maintains he has been diligently and constantly litigating his claims in the Eighth Circuit, and he has been specifically litigating his *Brady* and *Napue* claims long before he had an execution date. Dkt. 21 at 1-2.

While it is certainly feasible that Mr. Lee could have raised his *Brady* and *Napue* claims earlier than he did in the Eighth Circuit, when considered in the context of the lengthy procedural history of this case, Mr. Lee has been diligently pursing his claims. Mr. Lee's direct appeal concluded in June 2005. *See Lee v. United States*, 545 U.S. 1141 (2005). His § 2255 proceedings concluded over nine years later, in October 2014. *See Lee v. United States*, 135 S. Ct. 72 (2014). Before the § 2255 proceeding concluded, Mr. Lee had already begun litigating the ineffective assistance claims he raises here by way of a post-judgment motion in his original § 2255 proceeding. That litigation concluded in December 2015. *See United States v. Lee*, 811 F.3d 272 (8th Cir. 2015).

Perhaps most importantly, Mr. Lee raised his *Brady* and *Napue* claims in the District Court of conviction in September 2018, long before July 2019, when his execution date was set. Moreover, he raised them in this § 2241 action before he knew with certainty that he did not have an avenue to raise them via § 2255. His application for a certificate of appealability was pending before the Eighth Circuit when his execution date was announced, and it remained pending when he filed this action.

The foregoing is important context for considering whether Mr. Lee has unnecessarily delayed pursuing his claims. Given that (1) the United States has not executed any federal death row prisoner for 16 years; (2) it did not adopt an execution protocol under which it could execute Mr. Lee for 8 years; (3) during the 20 years since Mr. Lee was sentenced to death he has been almost constantly engaged in litigation regarding the constitutionality of his death sentence; (4) Mr.

Lee began litigating his *Brady* and *Napue* claims in his court of conviction well before his execution date was set; and (5) that litigation remained pending when Mr. Lee's execute date was set and when Mr. Lee brought the instant § 2241 petition in this Court, the Court concludes that Mr. Lee has not unnecessarily delayed in bringing his *Brady* and *Napue* claims such that a stay is unwarranted. This is not a case where an inmate waited until an execution date was set or until the eve of his execution to bring claims that could have been brought much earlier. *Cf. Dunn v. Price*, 139 S. Ct. 1312, 1312 (2019); *Price v. Dunn*, 139 S. Ct. 1533, 1535-40 (2019) (Thomas, J., dissenting); *Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653, 654 (1992) (per curiam).

IV.

For the reasons explained above, Daniel Lewis Lee's execution scheduled for December 9, 2019, is **STAYED**. Mr. Lee has demonstrated substantial grounds upon which to challenge the legality of his execution. Specifically, the structure of § 2255 prevents the District Court of conviction from hearing his claims that are based on newly discovered evidence. Mr. Lee has also demonstrated a significant possibility that he may be able to prevail on those claims by showing that the United States suppressed evidence and misled the jury during his penalty phase. In the end, Mr. Lee may not be able to make this showing. For now, he must have a reasonable opportunity to obtain a reliable judicial determination of these challenges to the fundamental legality of his sentence.

Mr. Lee has also established that the other factors the Court must consider before issuing a stay weigh in his favor. This includes the Court's conclusion that Mr. Lee has not unnecessarily delayed pursuing his claims. He was pursuing these claims well before his execution date was set. There is no concern that Mr. Lee waited to raise his claims on the eve of his execution simply as a delay tactic.

A separate order staying Mr. Lee's execution shall issue. Counsel for the United States are responsible for ensuring that the Warden of the United States Penitentiary in Terre Haute, Indiana, the United States Marshal for this District, and all other officials who would have any involvement in Mr. Lee's execution are notified of this stay and comply with its requirements.

SO ORDERED.

Date: 12/5/2019

James Patrick Hanlon

James Patrick Hanlon
United States District Judge
Southern District of Indiana

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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
Submitted December 6, 2019
Decided December 6, 2019

Before

FRANK H. EASTERBROOK, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

AMY C. BARRETT, *Circuit Judge*

No. 19-3399

DANIEL LEWIS LEE,
Petitioner-Appellant,

v.

T. J. WATSON, Warden, *et al.*,
Respondents-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division.

No. 2:19-cv-00468-JPH-DLP
James Patrick Hanlon, *Judge*.

Order

Daniel Lewis Lee has been convicted of three murders and sentenced to death. His convictions and sentences have been affirmed by the Eighth Circuit, and multiple requests for collateral relief under 28 U.S.C. §2255 have failed on the merits or for lack of the authorization required by 28 U.S.C. §2244(b)(3) and §2255(h). See 274 F.3d 485 (8th Cir. 2001); 374 F.3d 637 (8th Cir. 2004); 715 F.3d 215 (8th Cir. 2013); 792 F.3d 1021 (8th Cir. 2015); No. 19-2432 (8th Cir. Nov. 4, 2019).

In July 2019 the United States scheduled Lee's execution for December 9, 2019. Two months later he filed a petition for a writ of habeas corpus under 28 U.S.C. §2241 in the Southern District of Indiana, where he is confined. He requested a stay of execution but later withdrew that request. Yesterday, notwithstanding the request's withdrawal, a district judge stayed Lee's execution. The judge recognized that §2255(e) forecloses resort to §2241 unless a motion under §2255 is inadequate or ineffective to test the validity of the conviction and sentence. The district judge was not prepared to say that §2255 *is* ineffective to test the validity of Lee's death sentence; instead he wrote that there is a "significant possibility" (slip op. 11) that Lee may be able to meet the standard of §2255(e), that evaluating Lee's arguments will take more time, and that his execution therefore should be deferred.

This decision does not conclude that Lee has satisfied the standards for stays prescribed in *Nken v. Holder*, 556 U.S. 418 (2009). Before receiving a stay, an applicant must make a "strong showing" of probable success on the merits. *Id*. at 434. The prospect of irreparable injury is not itself enough. The district judge did not conclude that Lee is likely to succeed on the merits or that he has a "strong" prospect of doing so. As far as we can see, the likelihood of success is slim. Lee makes two substantive arguments—that he received ineffective assistance of counsel at sentencing and that the prosecutor concealed or suppressed exculpatory or impeaching evidence. Arguments of those kinds are regularly made and resolved under §2255.

Webster v. Daniels, 784 F.3d 1123 (7th Cir. 2015) (en banc), holds that §2255 may be deemed inadequate or ineffective if the provision for successive collateral attacks in §2255(h) does not permit a prisoner to present factual developments that could not have been litigated earlier. The district court stated that there is a "significant possibility" that Lee "may" be able to satisfy the standard of *Webster*, but the court did not conclude that there is a "strong showing" either that *Webster*'s standard has been met or that Lee would be entitled to relief on the merits if the issues he raises were relitigated. Indeed, the judge did not explain why there is even a "significant possibility" that the supposedly newly discovered evidence is in fact newly discovered, as *Webster* uses that phrase. The principal "newly discovered" evidence on which Lee relies is a statement made on the record by a judge decades ago and available from that state court. Indeed, the statement was made in Lee's presence, and although he may not have understood its potential significance that is some distance from the information being concealed or unavailable. See *Webster*, 784 F.3d at 1140

(explaining that evidence is not "newly discovered" if the defense could have accessed it with due diligence); see also *United States v. Shields*, 789 F.3d 733, 746–47 (7th Cir. 2015) (publicly available court records accessible with due diligence are not *Brady* material).

One further observation. The grant of a stay entails equitable as well as legal considerations. Lee did not attempt to use §2241 for more than four years after the Eighth Circuit rejected the last of his contentions, and more than four years after, by his own account, he obtained the evidence that he characterizes as newly discovered. Even after an execution date was set, he waited a further two months to seek a writ of habeas corpus. It is understandable that a district judge, entertaining a request for relief from capital punishment, would want to take a hard look at the matter, a look that may take more time than the impending execution date permits. But someone who waits years before seeking a writ of habeas corpus cannot, by the very act of delay, justify postponement of the execution. See *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004).

The motion to vacate the stay of execution is granted.

89 F.Supp.2d 1017
United States District Court,
E.D. Arkansas,
Western Division.

UNITED STATES of America
v.
Daniel Lewis LEE, a/k/a Daniel Lewis Graham, D.L. Graham, and Danny Lee.

No. LR–CR–97–243(2).
|
March 21, 2000.

Synopsis
Defendant filed motion for a new sentencing phase trial, and to require the Attorney General to follow the Death Penalty Protocol found in the United States Attorney's Manual before exercising her prosecutorial discretion in deciding whether to withdraw or decertify the death penalty notice in this case. The District Court, Eisele, J., held that: (1) Government exceeded the permissible scope of cross-examination in its questioning of defendant's mental health expert and in its examination of its rebuttal witness, and, as a result, irreversibly compromised defendant's rights; (2) defendant had right to enforce compliance with self-imposed and internal procedures found in the Death Penalty Protocol; and (3) Deputy Attorney General did not have the authority under Death Penalty Protocol to make the final decision on the U.S. Attorney's request to decertify the death penalty notice for defendant.

Order in accordance with opinion.

Attorneys and Law Firms

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John T. Lassiter, Hatfield & Lassiter, Little Rock, AR, Cathleen V. Compton, Little Rock, AR, for Defendants.

MEMORANDUM OPINION AND ORDER REGARDING FUTURE DANGEROUSNESS AND THE DEATH PENALTY PROTOCOL

EISELE, District Judge.

There are two matters that are currently pending in Defendant Danny Lee's case. First, Defendant Lee has filed a Motion for a New Sentencing Phase Trial due to the improper introduction of evidence regarding his alleged propensity for future dangerousness. Second, this Court must resolve the issue of whether Defendant Lee has the right to require the Attorney General to follow the Death Penalty Protocol found in the United States Attorney's Manual before exercising her prosecutorial discretion in deciding whether to withdraw or decertify the death penalty notice in this case. Each issue will be considered separately.

FUTURE DANGEROUSNESS

I. Background

Defendant Lee and his co-defendant, Chevie Kehoe, were convicted by a jury of participating in a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c), conspiring to violate the racketeering statute in violation of 18 U.S.C. § 1962(d), and committing three violent acts in aid of racketeering, namely three murders under Arkansas law, in violation of 18 U.S.C. § 1959(a)(1). In separate sentencing hearings, the same jury "recommended" that Defendant Kehoe be sentenced to life without possibility of release for each of the murders and that Defendant Lee be sentenced to death for each of the three murders.

In its notice of intent to seek the death penalty against Defendant Lee, the Government, as required by statute, identified several aggravating factors that it anticipated using at sentencing. For each of the murders, the Government offered the following statutory aggravating factors: 1) that Defendant Lee murdered each victim in expectation of the receipt of anything of pecuniary value; 2) that Defendant Lee murdered each victim after substantial planning and premeditation; and 3) that Defendant Lee intentionally killed or attempted to kill more than one person during a single criminal episode. For the Sarah Powell murder, the Government offered the additional statutory aggravating factor that the victim was particularly vulnerable due to her youth, that being eight years of age. For each of the murders, the Government offered the non-statutory aggravating factor of future dangerousness. It is the last of said factors, future dangerousness, that is the subject of Defendant Lee's motion.

During the pre-trial stages of the case, Defendant Lee retained a mental health expert to assist in his defense in the event a sentencing hearing was necessary. The Government, in turn, requested discovery from the Defendant as to his mental health ***1019** evidence so that it would be able, if necessary, to rebut Defendant Lee's evidence. The Government emphasized in its request:

> The United States will *not* introduce mental health evidence during its case-in-chief in the penalty phase. Instead, the United States would only use this evidence to rebut any mental health evidence introduced by the defendant in his case-in-chief. If the defendant does not introduce the evidence, the United States will not introduce mental health evidence.

Gov't Mot. for Disc. of Mental Health Evid. Re: Def. Lee, Doc. No. 627, at 2 (emphasis in original). At that time, the Government anticipated that Defendant Lee would use his mental health expert to present mitigation evidence as well as to rebut the Government's non-statutory aggravating factor of future dangerousness. The Defendant objected to the requested disclosure.

The Court, following the case of *United States v. Beckford,* 962 F.Supp. 748 (E.D.Va.1997), informed the parties that it was inclined to grant the Government's request. Consequently, the parties submitted to the Court a proposed order, which the Court signed, setting forth a mental health evidence disclosure process much like the procedure followed in *Beckford. See* Order Re: Mental Health Issues–Defendant Lee, Doc. No. 665, dated Mar. 31, 1999. Pursuant to the Order, Defendant Lee was required to submit to an examination by the Government's mental health expert.

As trial preparations continued, Defendant Lee and his mental health expert, Dr. Mark Cunningham, a forensic psychologist, ultimately decided not to attempt to rebut the Government's evidence of future dangerousness. This decision was based at least in part on the fact that pre-trial rulings by United States Magistrate John F. Forster, Jr., prevented Dr. Cunningham from obtaining all the information he felt necessary to complete a proper risk assessment. As a result of said decision, Dr. Cunningham did not perform a risk assessment for future dangerousness of Defendant Lee. However, the Government's expert, Dr. Thomas Ryan, as part of his examination of Defendant Lee, did perform a risk assessment analysis.

During its case-in-chief at Defendant Lee's penalty phase trial, the Government offered four factual instances in support of its claim of future dangerousness. First, by way of the testimony of Randall Yarbrough, Chai Choi, Brian Compton, and Rochelle Ezzi, and the former testimony of the Defendant, the Government presented evidence of Defendant Lee's involvement in the murder of Joseph John Wavra in Oklahoma when the Defendant was age seventeen. Second, through the testimony of Nancy Cummings, the Government presented evidence that Defendant Lee verbally assaulted and threatened a Pulaski County Sheriff's Deputy while incarcerated during the trial of this case. Third, the Government offered into evidence a 1995 Florida conviction record for Defendant Lee for the crime of carrying a concealed weapon. Fourth, the Government presented evidence of Defendant Lee's lack of remorse as evidenced by his statements made to Gloria Kehoe. In sum, the Government's case-in-chief was brief, covering only approximately eighty-two pages of transcript.

The Defendant offered the following mitigating factors in his defense: 1) Defendant Lee's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired, regardless of whether his capacity was so impaired as to constitute a defense to the charge; 2) Defendant Lee was under duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge; 3) Defendant Lee does not have a significant prior criminal record other than his juvenile record; 4) Defendant Lee committed the killing or killings under mental or emotional disturbance; 5) another person equally culpable in the crimes will not be punished by ***1020** death; 6) Defendant Lee was subjected to emotional and physical abuse, abandonment and neglect as a child and was deprived of the parental guidance and protection which he needed; 7) Defendant Lee suffered from neurological impairments that were identified and which could have been treated when he was a child and adolescent; 8) Defendant Lee suffers from brain dysfunction, which has gravely impaired his ability to function in the absence of strong support and guidance; 9) Defendant Lee was introduced to drugs and alcohol while still a child; 10) Defendant Lee needs a structured environment and would likely benefit from the

structure of a prison; 11) Defendant Lee was only 22 years old when the murders were committed; 12) Defendant Lee is a follower and was under the influence of Chevie Kehoe and possibly others at the time of the offense; 13) other persons were involved in this racketeering enterprise and conspiracy who will under the law receive no sentence or substantially less punishment or were not prosecuted; and 14) Mr. Kirby Kehoe was involved in the planning of the 1996 burglary of the Muellers.

Defendant Lee presented exclusively mitigation evidence in his defense; he did not attempt to rebut any of the Government's evidence in support of aggravation. During his defense, Defendant Lee presented the testimony of Dr. Cunningham. Dr. Cunningham offered testimony concerning Defendant Lee's life, concluding with his opinion of the formative factors in Defendant Lee's life. Dr. Cunningham did not offer risk assessment or future dangerousness testimony. He limited his testimony to explaining Defendant Lee's mitigators to the jury.

The Government's cross-examination of Dr. Cunningham was extensive and the subject of much controversy. Finally, the Government offered the testimony of Dr. Ryan in its rebuttal case. Dr. Ryan's testimony is also the subject of dispute.

In his current Motion, Defendant Lee contends that he was deprived of his right to a fair sentencing proceeding in two respects. First, Defendant Lee contends that this Court erred in permitting the Government to go as far as it did during its cross-examination of Dr. Cunningham. In particular, the Defendant asserts that the Government used its cross-examination of Dr. Cunningham to improperly develop *new evidence of risk assessment and future dangerousness* that was neither permitted by the Court's instructions, mentioned in the Government's case-in-chief, nor, reasonably analyzed, covered in the Defendant's direct examination of Dr. Cunningham. Second, Defendant Lee claims that the Court erred in permitting the Government to go beyond the scope of permissible rebuttal by questioning Dr. Ryan about risk assessment and future dangerousness when such matters were not raised by Defendant Lee in his defense, and further, that such evidence of future dangerousness went beyond the limits specifically set forth in the Court's instructions.

II. Discussion

A. Authority to Consider Motion

Before delving into the merits of these two arguments, the Court must first decide if it has the authority to do so upon Defendant Lee's post-conviction motion. Rule 33 of the Federal Rules of Criminal Procedure provides, in relevant part, that "the court may grant a new trial to th[e] defendant if the interests of justice so require." Furthermore, it is clear that "[d]istrict courts have broad discretion in passing upon motions for new trial and such rulings are subject to reversal only for a clear abuse of discretion." *United States v. Saborit,* 967 F.Supp. 1136, 1144 (N.D.Iowa 1997) (citing Eighth Circuit cases).

Likewise, Fed.R.Cr.P. 35(c) provides, in relevant part, that "[t]he court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." Again, such a ruling is left to the sound discretion of the ***1021** trial court. *See United States v. Gruenberg,* 53 F.3d 214, 215 (8th Cir.1995) (considering Rule 35(a) motion); *United States v. Jenkins,* 105 F.3d 411, 411 (8th Cir.1997) (considering Rule 35(b) motion); *see also United States v. Durham,* 178 F.3d 796, 799 (6th Cir.1999) (considering Rule 35(c) motion).

The Government argues that the cited rules of criminal procedure do not apply to a case under the Federal Death Penalty Act of 1994 ("FDPA"). It contends that the trial court has no post-sentencing authority other than to sentence the Defendant as recommended by the jury and that the Defendant's only method to obtain relief is on appeal as provided in section 3595 of the FDPA. Clearly, the Federal Rules of Criminal Procedure do not contemplate a case such as Defendant Lee's because they were drafted long before the FDPA came into existence. That is not to say, however, that Congress, in drafting the FDPA, did not intend for the rules of criminal procedure to apply. As the Fifth Circuit has aptly stated:

> The Federal Rules of Criminal Procedure apply to sentencing hearings; Fed.R.Crim.P. 1 provides, "These rules govern the procedure in all criminal proceedings in the courts of the United States...." Rule 54, Fed.R.Crim.P., excludes certain proceedings, but not sentencing hearings. Section 3593(c) waives rule 32(c)'s presentence report

> requirement, which suggests the negative implication that the Rules of Criminal Procedure usually do apply to sentencing hearings under the FDPA.

United States v. Webster, 162 F.3d 308, 346 (5th Cir.1998), *cert. denied,* 528 U.S. 829, 120 S.Ct. 83, 145 L.Ed.2d 70 (1999). Therefore, this Court has the authority it would have in any other case to grant the Defendant post-sentencing or post-conviction relief.

As a forethought, the Court acknowledges that Defendant Lee's arguments are worthy of extremely careful scrutiny because this is a death penalty case and, as such, Defendant Lee's life is at stake. The court in *United States v. Pena–Gonzalez,* 62 F.Supp.2d 358, 360 (D.P.R.1999), appropriately described decisions in death penalty cases as follows:

> [This decision] entails the unique gravity appropriate for capital cases. Capital punishment is qualitatively different from any other form of criminal penalty we may impose. *Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). With it, we deny the convict any possibility of rehabilitation and order instead his execution, the most irrevocable of sanctions. *Gregg v. Georgia,* 428 U.S. 153, 187, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Its severity demands a heightened need for reliability in the determination that death is the appropriate punishment in a specific case. *Caldwell v. Mississippi,* 472 U.S. 320, 323, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) (citing *Woodson,* 428 U.S. at 305, 96 S.Ct. 2978). We must be, therefore, particularly sensitive to insure that unique safeguards are in place that comport with the constitutional requirements of the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment. *Gregg,* 428 U.S. at 187, 96 S.Ct. 2909.

Furthermore, it has been said that, "[i]n capital proceedings generally, th [e] [Supreme] Court has demanded that factfinding procedures aspire to a heightened standard of reliability. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." *Ford v. Wainwright,* 477 U.S. 399, 411, 106 S.Ct. 2595, 91 L.Ed.2d 335 (Marshall, J., plurality opinion) (citing *Spaziano v. Florida,* 468 U.S. 447, 456, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); *Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976)).

B. Examination of Dr. Cunningham

Turning to the merits, Defendant Lee first argues that the Government exceeded the permissible scope of cross-examination ***1022** in its questioning of Dr. Cunningham. Section 3593 of the FDPA sets forth the procedure for a death penalty sentencing hearing under the act:

> At the sentencing hearing, information may be presented as to any matter relevant to the sentence, including any mitigating or aggravating factor permitted or required to be considered under section 3592.... The defendant may present any information relevant to a mitigating factor. The government may present any information relevant to an aggravating factor for which notice has been provided .... Information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury....

> The government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in the case of imposing a sentence of death. The government shall open the argument. The defendant shall be permitted to reply. The government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the government, and is not satisfied unless the existence of such a factor is established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the existence of such a factor is established by a preponderance of the information.

18 U.S.C. § 3593(c) (Supp.1999).

Rule 611(b) of the Federal Rules of Evidence provides that "[c]ross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." Generally, the scope of cross-examination is limited to matters testified to on direct plus matters bearing upon the credibility of the witness. *United States v. Thomas,* 58 F.3d 1318, 1322 (8th Cir.1995); Fed.R.Evid. 611 advisory committee's note. Furthermore, restriction of the scope of cross-examination is a matter committed to the sound discretion of the trial court. *United States v. Lee,* 743 F.2d 1240, 1249 (8th Cir.1984).

The Court has reviewed Dr. Cunningham's direct testimony in painstaking detail. Dr. Cunningham, in large part, served as a narrator for the events in Defendant Lee's troubled life until he reached the age of seventeen or eighteen. [1] He told the jury about the individuals involved in Defendant Lee's life, how they treated him, what problems they themselves had, and how their actions affected Defendant Lee. Dr. Cunningham also testified about problems Defendant Lee experienced growing up, such as medical problems, problems in school, and substance abuse problems. In sum, Dr. Cunningham's testimony amounts to an attempt to explain to the jury how Defendant Lee's involvement in the crimes for which he was convicted was affected by external factors beyond the Defendant's control. Ultimately, Dr. Cunningham declared that "My opinion is that Danny Lee experienced many traumatic and adverse life experiences that fundamentally shaped him. It shaped him neurologically, psychologically, socially, emotionally and ethically, and that I think contributed to his involvement in this offense." Tr. at 7742.

Admittedly, Dr. Cunningham mentioned that Defendant Lee exhibits anger, acting out, a lack of trust, and rebellious behavior. ***1023** He even stated that persons with histories similar to that of Defendant Lee would be at risk for violence in adulthood. However, Dr. Cunningham was very careful not to offer any opinion on Defendant Lee's future dangerousness. Indeed, as Dr. Cunningham himself stated, "the focus of my evaluation ... was on formative factors that brought [the defendant] to this place and was not specifically oriented toward what is his diagnosis at this time." Tr. at 7744. The Government itself acknowledges that "Dr. Cunningham did not make any diagnosis. Rather, he identified features of Lee's life that made him at risk for a variety of psychological conditions." Gov't Briefre: Alleged Punishment Phase Error Supplemental, Doc. No. 939, at 2 (emphasis omitted).

The Government, on the other hand, focused almost exclusively on future dangerousness in its cross-examination of Dr. Cunningham. The first substantive question posed by the Government to Dr. Cunningham was "Do you have an opinion whether or not Mr. Lee is a dangerous person, a violent person, as he sits here today?" Tr. at 7745. The next substantive question was "During [my] opening statement I said to the jury that Mr. Lee is a violent man. Is that true?" Tr. at 7745. At that point, counsel for Defendant Lee asked to approach and made a motion in limine to exclude any questioning as to risk assessment or future dangerousness: [2]

> MS. COMPTON: Actually I meant to make a motion in limine at the end of my direct examination of Dr. Cunningham. This becomes very important. Dr. Cunningham did not perform a risk assessment on Danny

Lee. He did not come here and testify as to his future dangerousness or lack thereof. Now, admittedly, in the affidavit that he gave to the Court, he said that he might go there. However, we did not do that. And I don't think that Dr. Cunningham is going to be prepared to talk about risk assessment and future dangerousness given the fact that he and I decided not to go into that after [the Magistrate Judge] overruled us on some of the issues that we had asked about and additional tours of the Bureau of Prisons, additional information that Dr. Cunningham was going to need if we were going to do risk assessment and future dangerousness. We are not.

Dr. Cunningham is doing strictly mitigation. I would move in limine to keep the government from going into an area which has not been brought out in direct and which isn't going to be. His assessment is strictly as to mitigation and not as to risk assessment of future dangerousness. We are not prepared to go there.

THE COURT: I gather the report, which I have not seen, does go beyond what you used on direct?

MS. COMPTON: No, sir.

THE COURT: It does not?

MS. COMPTON: We don't do any risk assessment or future dangerousness. It is strictly within mitigation and psychological factors as has been testified to on direct.

THE COURT: Well, he has identified himself as a clinical and forensic psychologist with a Ph.D. degree. He has had an intimate investigation of the Defendant, so I think Mr. Liroff should be able to ask him in his opinion if he is dangerous. Now, he can handle himself. If it's in the area of his expertise and considering what has been revealed about his intimate knowledge of the man, he can inquire. I think the expert is fully capable of explaining why he can't answer certain of these questions.

***1024** MS. COMPTON: All right.

THE COURT: He is in effect making him his own witness, is he not, when he goes out of the realm of what you've questioned him about. He runs somewhat of a risk. But as far as just saying, no, you can't do that, I don't think I'm in a position to do that. It's up to the witness to say I'm not prepared to handle that, or I don't have enough information to do it, or I need more studies or whatever. So I'm going to let him inquire. The witness —at some point I may feel that it's diminishing returns here.

Tr. at 7746–48. [3]

When the Government resumed questioning, it again focused on violence. The following is a complete list of the questions posed by the Government to Dr. Cunningham from the time of the aforementioned bench conference to the Court's recess for the day on Wednesday, May 12, 1999:

BY MR. LIROFF:

Q. Is this man, your client, Mr. Lee, is he a dangerous man? (Tr. at 7748).

Q. Is there a feature of his personality that he is a person who likes violence? (Tr. at 7749).

Q. This is, this offense is isolated in terms of the violence that was displayed? Is that your answer? (Tr. at 7749).

Q. His record is replete with evidence of violence. (Tr. at 7750).

***1025** Q. In terms of the contextual situation, it is across the board. He has committed violence in institutions? (Tr. at 7750).

Q. He has committed violence in institutions against peers? (Tr. at 7750).

Q. I should say that in a more straightforward language. While incarcerated, while in custody, he had assaulted other patients or inmates? (Tr. at 7750).

Q. Are you aware that while incarcerated in this case pending trial he assaulted other inmates? (Tr. at 7750–51).

Q. Doctor, I will get back to that. You answered that you don't recall. He has no understanding or appreciation of the enormity of this situation, does he? (Tr. at 7751).

Q. Did you hear the comment he made a moment ago? (Tr. at 7751, referring to the defendant's having stated "Bullshit" in response to one of Mr. Liroff's questions).

Q. Do you know that's not the first time? (Tr. at 7751).

Q. Do you know that he regularly states pejorative obscene insults to the lawyers in this case? (Tr. at 7751).

Q. Is that a sign of paranoia? (Tr. at 7751).

Q. Let's talk about his violence. He has been violent in institutions against staff? (Tr. at 7752).

Q. And recently there was an attempt or at least an expression of threat of violence against staff? (Tr. at 7752).

Q. This is the type of thing, one aspect, that suggests if incarcerated he will continue to be a threat, present a threat of violence? Yes? (Tr. at 7752).

Q. So what you are saying is we have to see if he actually hurts somebody first to see if he will hurt somebody? (Tr. at 7753).

Q. You've testified, I believe today, that he exercises poor judgment? (Tr. at 7753).

Q. Do you know of a study, scientific study, that says those features go away when you enter a prison? (Tr. at 7753).

Q. Yesterday I used a term "psychopath." The question is, is that a psychological term? (Tr. at 7754).

Q. Do you recognize it? (Tr. at 7754).

Q. And does it come from a test, a psychological instrument prepared by a Dr. Hare? (Tr. at 7754).

In this seven-page section alone, the Government used a form of the word "violence" nine times and was able to elicit from Dr. Cunningham in his responses fifteen mentions of some form of the word "violence." The next morning, the Government continued to elicit testimony from Dr. Cunningham relating to Defendant Lee's violent tendencies:

BY MR. LIROFF:

Q. In the investigation in this case did you learn that during the course of that relationship that Mr. Lee partook of domestic violence as against Jennifer?

A. Yes, I did.

Q. And you learned that Mr. Lee in fact abused her physically when she was pregnant with his child.

A. I heard testimony to that effect, that's correct.

Q. And in fact that there was a point when—have you seen a police report relating to an incident of domestic violence between Jennifer and Mr. Lee?

* * * * * *

Q. Were you aware of an incident where she tore up his photograph of Adolph Hitler and he attacked her and the police had to be called?

A. I heard that described. Yes, I did.

Q. In your review of the records there is [sic] other instances of violence, behavior, violent behavior by Mr. Lee?

A. Yes, there is.

Q. Was there substantial discussion, excuse me, discussion of the fact that Mr. Lee assaulted his sister, his younger sister Carrie?

A. There was a reference to that as well, on a single occasion as I recall.

***1026** Q. Was there, and I'm not sure how accurate it is, I don't know if you were able to ascertain anything about it, but there was also a reference of Mr. Lee assaulting his mother?

* * * * * *

Q. And there was also discussion in the record relating to burglary offenses?

A. That's correct.

Q. That Mr. Lee broke into homes and took things?

A. There was a burglary II charge as I recall.

Q. Several?

A. There's at least a single one and I think there's more than one. I can look at my—

Q. That's fine. Will you agree there's more than one?

A. I believe that's the case.

Q. An arson offense?

A. That's correct.

Q. Threatening a state witness?

A. That's correct.

* * * * * *

Q. And while Mr. Lee is at these facilities he's assaulting other patients or inmates?

A. I don't know if the word assault is usually the case. They talk about discharging him because of violence, they talk about him being aggressive with staff and other patients and making threats or being intimidating. There is not—I'm hesitant to—"assault" has a connotation of a more serious kind of attack or injury. I don't recall a description from the records of an attack that was noted in the detail where they said he did this, he really hurt somebody.

Q. Is it true that in the records they refer to a facility known as D.H.S. and indicate that no, excuse me, that he was placed at Wesleyan, W–E–S–L–E–Y–A–N and while there he instigated an assault involving a staff member?

A. It does indicate that he was—that's correct he was admitted there on February 22, 1989, dismissed on March 10th as being unacceptable to their program because of aggressiveness.

Q. And for example, while he was at St. Anthony's Hospital he couldn't be kept there because they didn't feel that they could treat him because of his aggressive behavior?

A. That's correct.

Q. He's described otherwise as intimidating and harassing other patients?

A. That's correct.

Q. Physically abusive to patients?

A. Again, that's my general recollection. I don't have that particular part of the chart in front of me.

Q. There's a reference that he was picked up on a string of armed robberies?

Tr. at 7777–82.

From there, the Government's questioning of Dr. Cunningham turned to the subject of psychopathy. Through the cross-examination of Dr. Cunningham, the Government was able to define psychopathy and describe the characteristics of a psychopath for the jury. Among the characteristics described were lack of remorse (Tr. at 7805), impulsivity (Tr. at 7805), poor behavioral control (Tr. at 7805), increased incidence of predatory violence (Tr. at 7807), increased risk of violent recidivism (Tr. at 7809), and not being amenable to treatment (Tr. at 7819). Ultimately, the Government, through Dr. Cunningham, advised the jury that Dr. *Ryan* had diagnosed Defendant Lee as a psychopath. Tr. at 7826.

C. Examination of Dr. Ryan

Defendant Lee also raises the issue of whether Dr. Ryan's testimony was proper rebuttal. Prior to Dr. Ryan's testifying, the Court limited the scope of said testimony as follows:

> THE COURT: ... I'm going to grant the Defendant Lee's motion in limine with respect to the issue of psychopathy, the Hare psychopathy test, and any reference to the defendant being a, quote, ***1027** psychopath, unquote, on the basis that such would not be proper rebuttal.

Tr. at 7836. Despite said ruling, the Court is troubled by several aspects of Dr. Ryan's direct testimony because of their focus on Defendant Lee's alleged violent nature.

Q. Did your examination suggest that Mr. Lee was a person who was suspicious?

A. Yes.

Q. Distrustful?

A. Yes.

Q. Angry?

A. Yes.

Q. There was a suggestion by Dr. Cunningham of a particular test you performed called an MMPI and that he talked about an elevated something, and he used the word "paranoia."

A. Yes.

Q. Could you explain what your tests showed in that area?

A. That test is a personality test. In fact, it's the most widely used personality test in the world, and it looks at a variety of personality features. It looks at anxiety, depression,

psychopathic deviancy. It looks at heightened levels of energy, what we call mania. It also looks at someone's level of suspiciousness, and that is called paranoia scale. And he was slightly elevated on the paranoia scale ....

Tr. at 7917–18.

Q. You told us you talked to Mr. Lee about his life. For example, did you ask him how he became involved in the skinhead movement?

A. Yes, I did.

Q. What did he say?

A. He told me that he got involved because he could have sex with a lot of women, drink a lot of beer, and get in a lot of fights.

Q. Did you talk to Mr. Lee about fights?

A. Yes.

Q. It's not so much how much, but did he talk to you about why he fought?

A. Well, he told me that he drank a lot and would get himself in trouble, but that he enjoyed the fighting.

Q. He enjoyed it?

A. Yes. He liked the stimulation.

Q. Did he seem impulsive to you? Mr. Lee.

A. Yes, he did.

Q. Tell me what your thoughts were on that.

A. All right. There was an incident when some lunch trays were coming through, and the guard wouldn't let him have the lunch right away, and he immediately just jumped out of his chair and became extremely angry at the guard, arguing and using profanity as to why he couldn't get his lunch right then and there, and I thought that was a great example of impulsivity.

Tr. at 7919–20.

Q. Did he react to various people that would walk by?

A. Yes. It was striking the way that he reacted differently. For example, I noticed that when black guards and black inmates went by, he had a lot of negative things to say and used a lot of profanity, talking about things that they were doing in jail and that sort of thing that offended him.

On the other hand, when white guards were there, he was friendly as could be. He was waving, smiling. Same thing with other inmates when they were walking by. I thought that was rather striking. It was such a dichotomy.

Tr. at 7925.

D. Impropriety of the Examinations

Upon reflection, the Court sees numerous problems in the Government's cross-examination of Dr. Cunningham and in Dr. Ryan's "rebuttal" testimony. First, with respect to Dr. Cunningham, the Court erred in ever assuming that the Government could properly make Dr. Cunningham its own witness on the subject of Defendant Lee's mental health. *See* Tr. at 7748. The Government had affirmatively ***1028** stated to Defendant Lee and the Court that it would not introduce mental health evidence in its case-in-chief. Thus, the Government was wrong to allow the Court to proceed on the mistaken assumption that, despite such representation, Dr. Cunningham could testify on the Government's behalf "as its witness." Equally, the Court was at fault for not noting that this would violate the representation made by the Government and in not acting promptly to nip the improper tactic in the bud. More important is the fact that Defendant Lee was entitled to notice of the aggravating evidence to be introduced against him so that he could prepare for his mitigation defense. The introduction of such aggravating evidence against Defendant Lee through his own mental health expert during his "defense" was fundamentally unfair in that Defendant Lee had no opportunity to respond thereto.

Second, the Government several times elicited testimony from Dr. Cunningham and Dr. Ryan regarding past bad acts of the Defendant that were not brought out in the Government's case-in-chief or in the direct examination of Dr. Cunningham. Examples include physical abuse of a girlfriend (Tr. at 7777), assault of his sister (Tr. at 7779–80), burglary and arson offenses (Tr. at 7780–81), assaulting inmates and patients at various facilities (Tr. at 7781), becoming violent in the lunch line (Tr. at 7920), and treating blacks differently than whites (Tr. at 7925). The Government even emphasized some of these factual instances to the jury in its closing argument. *See* Tr. at 7960, 7968. These factual instances were, pure and simple, aggravating evidence in support of future dangerousness and should have come in, if at all, in the

Government's case-in-chief. Defendant Lee was entitled to notice that these factual instances would be offered against him as well as an opportunity to defend against them before the jury.[4] However, because the Government introduced them through the "back door," Defendant Lee had no notice or meaningful opportunity to defend.

Third, and perhaps most importantly, the Government's cross-examination of Dr. Cunningham and its presentation of Dr. Ryan as a rebuttal witness focused far too much on Defendant Lee's tendency for violence and his purported diagnosis as a "psychopath." Dr. Cunningham's direct testimony focused exclusively on mitigation evidence. Dr. Cunningham put it best:

> What I was trying to measure is what formative factors shaped him. I wasn't attempting to label just exactly what are we going to call him at this point, a dysthymic disorder, explosive disorder, antisocial personality disorder, is he borderline? I wasn't trying to label him with the conclusion. I was attempting to evaluate what factors were formative in nature, and so I structured my evaluation accordingly. I didn't do a lot of things that I would have done if I was trying to label him out here. I was attempting to look at how do we get here, what happened that brought us to this point.

Tr. at 7829.[5] The Government's questioning of Dr. Cunningham went well beyond the mitigation evidence raised by Dr. Cunningham on direct and ultimately became an expanded encore presentation of the Government's case for future dangerousness. Dr. Ryan's testimony also improperly focused on Defendant Lee's violent character traits. The Court erred in failing to restrain the Government in these respects despite Defendant Lee's insistence that the questioning was improper.[6] ***1029** As a result, Defendant Lee's rights were irreversibly compromised.

The Government argues that, because the defense explored Defendant Lee's violence on direct-examination, it opened the door to additional discussion of the nature of that violence. By analogy, the Government asserts that, if a doctor testifies that a patient is at risk for cancer, cross-examination should be permitted to determine whether the patient has cancer, and if so, how severe it is. If Defendant Lee's violence is the cancer used in the Government's analogy, then the cross-examination at issue was clearly improper. Essentially, the Government in its case-in-chief offered evidence that Defendant Lee has cancer, and it offered factual instances to support that allegation, such as a biopsy that revealed cancerous tissue. In putting on Dr. Cunningham as a mitigation witness, Defendant Lee for all intents and purposes admitted the cancer, but attempted to explain the cancer's presence by showing that it was a result of external factors. It does not follow that, on cross-examination, the Government could inquire into the nature or severity of the cancer. Defendant Lee had admitted to the cancer's presence, and Dr. Cunningham did not go into the nature or severity thereof. Rather, proper cross-examination should have been limited to the methods and techniques used by the doctor in arriving at his conclusions. Admittedly, this did not leave the Government with much room on cross-examination, but the Court must conclude that this was a product of a careful strategy on Defendant Lee's part in choosing to limit Dr. Cunningham's testimony as he did.

The Government's analogy also fails with respect to Dr. Ryan's rebuttal testimony. Dr. Ryan did not look at the same factors in Defendant Lee's life as Dr. Cunningham did. To the contrary, Dr. Ryan's evaluation of Defendant Lee focused almost entirely on risk assessment evidence. Thus, many of the opinions Dr. Ryan had to offer on Defendant Lee were improper rebuttal. As the Court said during the sentencing hearing:

> THE COURT: If they are both looking at the same thing and come up with a different diagnosis, I think you are right, but if one of them is looking at one thing and one of them is looking at something else and says these factors indicate cancer and the other one says these factors indicate pneumonia then the trains miss.

Tr. at 46 (May 13, 1999, Volume 46, under seal).[7]

The Government incorrectly relies on portions of Dr. Cunningham's direct testimony as justification for its cross-examination. It cites the following passage from the doctor's direct testimony as evidence that Dr. Cunningham addressed the issue of remorse, thus opening the door for exploration of that issue on cross-examination:

> Here they are diagnosing him with an intermittent explosive disorder. That means that the person goes along and then has an outburst of anger and rage that's much out of proportion to the stimulus, to the situation that should be causing, then often afterwards feels kind of embarrassed or ashamed or regretful about what happened there.

Tr. at 7730. When placed in context, it is clear that Dr. Cunningham was not referring to his *own* opinion or diagnosis of Defendant Lee but, rather, he was reciting the diagnosis and opinion of some other doctor or expert who had seen the Defendant during his teenage years. The Government did not choose to bring such other experts to testify in its own case, and those experts therefore were not subject to cross-examination. The unfairness is patent.

Turning to the issue of the Government's cross-examination on the subject of psychopathy, it is clear that this evidence was improper. While the psychopath evidence may, to a certain extent, have been ***1030** proper cross-examination as it was an alternate explanation for the Defendant's alleged violence, the presentation of the psychopath evidence turned into future dangerousness and risk assessment evidence, thus going beyond the scope of proper cross-examination.

The Government contends that it was Dr. Cunningham who first raised the issue of psychopathy on direct:

> DR. CUNNINGHAM: For example, if somebody is a *psychopath,* that's down at one end of the continuum. At the other end of the continuum is a borderline personality disorder. Both of them have attachment problems. This guy doesn't attach at all. This one attaches, but in an unstable and tense way. So they are both attachment disorders, different ends of the continuum.

Tr. at 7729 (emphasis added). Here, Dr. Cunningham was reviewing for the jury the Defendant's psychiatric records from the Oneida Baptist Institute when the Defendant was fifteen years old. The records indicated a "rule out of borderline personality disorder." Tr. at 7728. Dr. Cunningham was, in the quoted passage where he mentions a "psychopath," trying to explain a borderline personality disorder to the jury. The doctor did not offer any opinion or diagnosis of Defendant Lee on the subject of borderline personality disorder or psychopathy. It can hardly be said that the doctor's mere mention of the word "psychopath" opened the issue for intense cross-examination by the Government.

Although it did not register to the Court at the time, it now appears that from the outset, the Government intended to use Defendant Lee's mental health evidence as part of its own case for future dangerousness. In opening statements, the Government stated:

> MR. LIROFF: ... The evidence that will be presented in this trial is going to help you understand that Mr. Lee, this man who sits right here in this courtroom, is a violent and dangerous man. He thrives on this stuff. *That is part of his profile.* Even if you sent him to prison for the rest of his life, he will be a threat for a long, long time.
>
> In the end, what the evidence that will be presented will establish is that *Mr. Lee is a psychopath.* I don't mean that in a common term. I do mean that in the medical use.

* * * * * *

> We will prove in this case to you that Mr. Lee, *because of his psychological profile,* who he is and who he will be for years to come, is dangerous and will continue to be dangerous.

Tr. at 7381, 7383 (emphasis added). In questioning Dr. Cunningham, the Government highlighted to the jury that psychopathy is a clear indication of future dangerousness:

> Q. And do you agree with their statement that the Hare psychopathy check list is the single most promising recent development in risk assessment of correctional and

> forensic populations, has been the psychopathy check list revised. Do you agree with that?
>
> * * * * * *
>
> Q. Is it fair to say that the psychopathy check list serves a purpose other than violence assessment, violence risk assessment?

Tr. at 7812.

Introduction of the psychopathy evidence was error because it improperly emphasized Defendant Lee's future dangerousness. Defendant Lee chose neither to perform a risk assessment analysis nor to present rebuttal evidence on the future dangerousness aggravating factor. He was therefore ill-equipped to handle the Government's discussion of psychopathy.[8] ***1031** In failing to restrict the Government's statements and inquires regarding psychopathy more than it did, the Court erred, and, as a result, Defendant Lee did not receive a fair sentencing hearing.

In sum, it is now apparent from the Government's opening statement and the brevity of its own direct case on the issue of future dangerousness that the Government intended from the beginning to make its most compelling showing of future dangerousness through its cross-examination of Dr. Cunningham and its "rebuttal" testimony of Dr. Ryan. Hence, the Court must ask: Would this jury have given Defendant Kehoe life without parole and Defendant Lee the death penalty if: 1) the Government had not used Dr. Cunningham at all, or, 2) if the Government had not been permitted to open up an area on cross-examination that Dr. Cunningham had not addressed during direct-examination? The Court concludes that it is very questionable whether the jury would have given Defendant Lee the death penalty based upon the Government's direct case, a properly confined cross-examination of Dr. Cunningham, and a properly limited rebuttal by the Government.

The Government also clearly exceeded the proper scope of evidence permitted by the Court's instruction on the non-statutory aggravating factor of "future dangerousness." That instruction states:

> The non-statutory aggravating factor alleged by the Government is that Daniel Lewis Lee would be a danger in the future to the lives and safety of other persons, as evidenced by:
>
> (a) his involvement in the murder of Joseph John Wavra on or about July 24, 1990, in Oklahoma City, Oklahoma;
>
> (b) misdemeanor conviction of carrying a concealed in [sic] weapon in Martin County, Florida, on May 3, 1995; and
>
> (c) lack of remorse, as evidenced by his statements made to Gloria Kehoe.
>
> You are not being asked, nor are you permitted, to impose any form of punishment for the activities described above. You are only asked to consider whether the activities described above prove beyond a reasonable doubt that Daniel Lewis Lee would be a danger in the future to the lives and safety of other persons.

Docket No. 815. This instruction specifically limited the evidence the Government was permitted to introduce in support of this aggravating factor.

In its June 22, 1999 brief captioned "Government's Brief Regarding Alleged Punishment Phase Error, Supplemental," the Government notes that the above instruction, as given to the jury in Defendant Lee's penalty phase trial, did not list the threat allegedly made by Defendant Lee against the Pulaski County Deputy Sheriff as an evidentiary basis for supporting the non-statutory aggravator for future dangerousness although the Court had specifically granted the Government's earlier motion to include that threat. The Government is correct in that assertion.

The instructions utilized by the Court were submitted before or during the guilt phase of the trial and were agreed to by the parties. The actual punishment phase instructions were submitted to both the Government and the Defendant immediately before the penalty phase argument, and neither party noted this omission. The Government was permitted to put on evidence of the threat during the penalty phase of the trial. The Government concludes its argument on this point as follows:

> If the jurors had been correctly instructed, they would have been permitted to consider the threat Lee made against the deputy sheriff. Because the instructions prevented the jury from effectively considering the

> threat, the only party disadvantaged by this error, was the Government.

Docket No. 939 at pgs. 4–5. Because the Court permitted evidence of the threat to the deputy sheriff to be introduced and argued, it is likely that the jury took that evidence into consideration in spite of the omission in the instructions. Nevertheless, ***1032** upon retrial, this mistake can be corrected. The main point here, however, is that the accuracy and specificity with which the permitted evidence supporting non-statutory aggravating factors are set forth in the instructions will not prevent unfairness if the Court's evidentiary rulings let in proof that goes beyond the evidence specified.

Accordingly, the Court concludes that it was error to allow the introduction of the aforementioned evidence regarding future dangerousness during the penalty phase of Defendant Lee's trial. The implications of this ruling and its possible interaction with the Court's ruling on the Protocol issue will be discussed at the conclusion of this Order.

DEATH PENALTY PROTOCOL

I. Background

On May 4, 1999, a jury convicted Defendants Chevie Kehoe and Danny Lee of several RICO offenses involving *inter alia* the robbery and murder of the Mueller family in Tilley, Arkansas.[9] Shortly thereafter, separate penalty phase trials were scheduled for the two Defendants. Defendant Kehoe's penalty trial occurred first. On May 10, 1999, immediately before the penalty verdict was returned in Defendant Kehoe's case, the Government announced *in camera* that if the jury sentenced Defendant Kehoe to life imprisonment, it would not pursue the death penalty for Defendant Lee. May 10, 1999 Transcript (under seal) at 3–6,(Docket No. 824). The Government then explained that it would have to contact the Department of Justice ("DOJ") to obtain permission to withdraw or decertify the death penalty notice. *Id.*

Around 10:45 a.m., the jury sentenced Defendant Kehoe to life imprisonment without the possibility of parole. Accordingly, the Government again indicated during a second *in camera* conference that it would contact the DOJ and request permission to decertify or withdraw the death penalty notice for Defendant Lee. May 10, 1999 Transcript (under seal) at 2–7, (Docket No. 825). The Court then asked the Government if it would be able to do so by noon, but the Government requested more time. *Id.* It was then decided that the Court would meet with counsel at 3:00 that afternoon. *Id.*

The parties reconvened in chambers at 3:00 p.m. *Id.* at 7. When the Court asked the United States Attorney, Ms. Paula Casey, whether the Government intended to seek the death penalty for Defendant Lee, she responded, "I've not spoken with the Attorney General, but with the Deputy Attorney General. The Department is not decertifying the death request." *Id.* at 8. The parties then announced that they were ready to proceed with the penalty phase of the trial the following morning. *Id.* Importantly, at no time did the Government ask for additional time to deal with the requested decertification of the death penalty for Defendant Lee. If such request had been made, this Court would naturally have granted it. The penalty phase of Defendant Lee's trial commenced the next ***1033** morning, at the conclusion of which, the jury returned with a verdict of death.

Defendant Lee subsequently asked that the verdict be set aside because the Attorney General failed to follow the Death Penalty Protocol ("Protocol"), which is set forth in § 9–10.000 et seq. of the United States Attorney's Manual ("Manual"). That Protocol requires the Attorney General to make the final decision whether to decertify or withdraw a death penalty notice.[10] The relevant provision of the Protocol provides that:

> Once the Attorney General has authorized the United States Attorney to seek the death penalty, a notice of intention to seek the death penalty filed with the court shall not be withdrawn *unless authorized by the Attorney General* or approved by the United States Attorney as a condition of a plea agreement. If the United States Attorney wishes to withdraw the notice and proceed to trial, the United States Attorney shall Advise the Assistant Attorney General for the Criminal Division of the reason for that request, including the changes in facts or circumstances.
>
> Any request to withdraw a notice shall be reviewed by the Committee [known as the Review Committee on Capital Cases] appointed by the Attorney General, which will make a recommendation to the Attorney General. *The Attorney General shall make the final decision.*

United States Attorney's Manual § 9–10.090 (emphasis added).

In response to Defendant Lee's allegations, Mr. Robert A. De La Cruz, an attorney for the Department of Justice, sent the Court a letter explaining that:

> The United States Attorney was required to seek *the Attorney General's authorization* to withdraw the notice of intent to seek a death penalty. The United States Attorney attempted to do that, after consultation with members of this trial team. The Attorney General was unavailable during the time allotted to the government by the Court, and *Deputy Attorney General Eric Holder decided* not to withdraw the Attorney General's previously-given authority to seek the death penalty. The Attorney General did not authorize the United States Attorney to withdraw the notice of intent to seek the death penalty. Accordingly, the United States was compelled to proceed with the sentencing phase of defendant Lee's trial, and the trial attorneys were under a continuing obligation to represent the interests of the United States, without regard to personal views.

Docket No. 840 at 9–10 (emphasis added).[11] The Government also submitted the affidavit of Mr. Kevin V. DiGregory, who was the member of the Attorney General's Review Committee on Capital Cases that received U.S. Attorney Casey's May 10, 1999, telephone call requesting permission to withdraw the death penalty notice for Defendant Lee. In his affidavit, Mr. DiGregory averred that:

> 4. At the time of Ms. Casey's telephone call to me, Attorney General Janet Reno was attending a meeting at the White House in Washington, D.C. Until such time as Attorney General Reno returned to her office at the Department, she was unavailable to decide the issue posed by United States Attorney ***1034** Casey. Since the Attorney General was not available, *we sought out Deputy Attorney General Eric H. Holder, Jr., as the decision-maker* because I was concerned about affording the decision-maker sufficient time to meet with the Committee, confer with the United States Attorney Casey, and make a decision prior to the 3:00 p.m. CDT deadline.
>
> 5. At approximately 2:30 p.m. EDT[12], the Committee met with Deputy Attorney General Holder and, via telephone, with the United States Attorney Casey. In the course of that meeting, *Deputy Attorney General Holder decided* that the notice of intention to seek the death penalty should not be withdrawn, and that decision was communicated to United States Attorney Casey.

Docket No. 887 (emphasis added).[13]

Defendant Lee then subpoenaed Attorney General Reno and Deputy Attorney General Holder in an effort to further determine what transpired on May 10, 1999, and the Government filed a Motion to Quash those subpoenas. This Court denied the Government's Motion on July 22, 1999. Docket No. 885. In that Order, this Court ruled that the subpoenas were necessary to determine: 1) Attorney General Reno's whereabouts on May 10, 1999; 2) the extent of her knowledge of, or participation in, the Protocol; 3) whether Defendant Lee had an adequate opportunity to be heard; 4) whether a recommendation was in fact made by the Committee; 5) whether the recommendation was conveyed to the individual vested with "final" authority; 6) whether Attorney General Reno was "legally absent" on that date; 7) whether Attorney General Reno specifically authorized Deputy Attorney General Holder to act in her stead in this case; and 8) whether, after the fact, Attorney General Reno reviewed the procedures and the decision of Deputy Attorney General Holder and approved or disapproved of the procedures used and with his ultimate decision to seek the death penalty. *Id.*

After the Order was entered, the Government filed a Petition for a Writ of Mandamus asking the Eighth Circuit to prevent the issuance of the subpoenas. The Eighth Circuit granted the petition because of its decision that Defendant Lee failed to establish "exceptional circumstances" justifying the issuance of subpoenas to high government officials, such as the Attorney General and her Deputy. *See In re United States of America,* 197 F.3d 310 (8th Cir.1999).[14] During oral arguments before the Eighth Circuit, Defendant Lee conceded that in order to prevail on his motion to set aside

the death verdict, he need only establish that: "Reno did not participate in or approve the decision not to withdraw the death notice in this case, that Reno did not know of Casey's request to withdraw the notice, and that *the death penalty protocol was not followed*." *Id.* at 314 (emphasis added). So, in addition to a lack of exceptional circumstances, the Eighth Circuit reasoned that the Reno and Holder subpoenas were unnecessary because "[t]he record as developed at the June 29 hearing and in the DiGregory affidavit contains sufficient evidence *to establish each of these facts,* none of which appears to be disputed by the government." *Id.* (emphasis added).

Accordingly, this Court will now presume that the Protocol, as stated in United States Attorney's Manual § 9–10.090, was in fact violated because Attorney General Reno did not participate in, or approve of, ***1035** Deputy Attorney General Holder's decision not to withdraw the death penalty notice, and further, she did not even know of the U.S. Attorney's request to withdraw the notice at anytime before that decision was made and conveyed to this Court. Furthermore, although Defendant Lee has not been permitted to establish this as a fact (because of the decision by the Eighth Circuit), this Court will assume that the Attorney General could easily have been contacted [15] about this serious issue before 3:00 p.m. on May 10, 1999, and that, in any event, time was not a factor because the parties could have requested and received additional time to accommodate the convenience of Attorney General Reno. Hence, this Court must now resolve the issues of: 1) whether Defendant Lee has a right to enforce compliance with the procedures found in the Protocol before the Attorney General makes the final decision on the U.S. Attorney's request to decertify the death penalty notice in this case; and 2) whether, under the circumstances stated, Deputy Attorney General Holder had authority to act in Attorney General Reno's stead. [16]

II. Discussion

A. Right to Enforce the Protocol

The first issue this Court must resolve is whether Defendant Lee has a right to enforce compliance with the procedures found in Attorney General Reno's Death Penalty Protocol. When considering the Government's petition for mandamus, the Eighth Circuit seemed to surmise, in dicta, that perhaps Defendant Lee had no such right. *See In re United States of America,* 197 F.3d at 315–16. Upon careful consideration, this Court respectfully disagrees. ***1036** The basic premise from which the Eighth Circuit rightfully began its analysis is the *Accardi* doctrine, which, in sum, provides that an administrative agency must follow its own procedural rules if those rules will affect an individual's rights. *See* *Accardi v. Shaughnessy,* 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954). Because the *Accardi* doctrine cases are particularly applicable to the facts at hand, they warrant considerable discussion.

In *Accardi,* section 19(c) of the Immigration Act of 1917 gave the Attorney General discretion to suspend the deportation of an illegal alien if certain criteria were established. *Id.* at 262–633, 74 S.Ct. 499. The Attorney General, however, passed regulations that delegated this discretionary decision to the Board of Immigration Appeals. [17] *Id.* at 266, 74 S.Ct. 499. The respondent, Mr. Accardi, argued that the decision to deport him was invalid because the Board and the Attorney General failed to follow the procedures mandated by those regulations. *Id.* at 266–67, 74 S.Ct. 499. The Supreme Court held that although Mr. Accardi did not have the right to interfere with the Board's or the Attorney General's discretion by questioning their *ultimate and substantive* decision to deport him, he did have a right to require them to follow their self-imposed procedures when making that determination. *Id.* In this respect, the Court explained:

> It is important to emphasize that we are not here reviewing and reversing the manner in which discretion was exercised. If such were the case we would be discussing the evidence in the record supporting or undermining the alien's claim to discretionary relief. Rather, we object to the Board's alleged failure to exercise its own discretion, contrary to valid regulations.
>
> *Id.* at 268, 74 S.Ct. 499. Hence, the Court ruled that if Mr. Accardi could establish that the procedures were in fact violated, he would be entitled to a new deportation hearing. *Id.*

The *Accardi* doctrine was further expanded during the McCarthy era when actions were taken against individuals for their alleged association with the Communist party. For example, in *Service v. Dulles,* 354 U.S. 363, 370, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957), a statute commonly referred to as the "McCarran Rider" gave the Secretary of State "absolute

discretion" to terminate any employee of the Department of State or of the Foreign Service "whenever he shall deem such termination necessary or advisable in the interests of the United States" (quoting Pub.L. No. 82–188, § 103, 65 Stat. 581). The Secretary of State, however, enacted self-imposed regulations that established an elaborate procedure to be followed when deciding whether to terminate an employee for disloyalty. *Id.* at 383–87, 77 S.Ct. 1152. The petitioner, Mr. Service, argued that pursuant to *Accardi,* the Secretary's decision to terminate him was invalid because the Secretary did not follow the procedures mandated by those regulations. *Id.* at 372, 77 S.Ct. 1152. The Supreme Court agreed and gave the following explanation:

> While it is of course true that under the McCarran Rider the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited from doing so, as we have already held, and having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them.

Id. at 388, 77 S.Ct. 1152. Accordingly, the Court invalidated the Secretary's decision to terminate Mr. Service and remanded the case for further consideration. *Id.* at 388–89, 77 S.Ct. 1152.

Over the next six years, the Supreme Court held in other McCarthy era cases that an individual had the right to force an agency to comply with its self-imposed procedural rules or regulations when making ***1037** a substantive and discretionary decision. *See* *Yellin v. United States,* 374 U.S. 109, 83 S.Ct. 1828, 10 L.Ed.2d 778 (1963)(holding that an individual had the right to force the House Committee on Un–American Activities to abide by its own procedural rules during an investigatory hearing); *Vitarelli v. Seaton,* 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959)(holding that, although Congress gave the Secretary of Interior absolute discretion to terminate an employee in the name of national security, the Secretary was nevertheless required to follow its own procedural rules when making such a determination).

Finally, and most relevant here, is the case of *Morton v. Ruiz,* 415 U.S. 199, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974), where the Supreme Court held that the *Accardi* doctrine also applied to procedural rules found in an agency's *internal manual.* In *Morton,* the Bureau of Indian Affairs ("BIA") denied the respondents' request for general assistance benefits because the respondents failed to satisfy a geographic limitation promulgated by the Bureau. *Id.* at 205, 94 S.Ct. 1055. On appeal, the respondents claimed that the geographic regulation was invalid because it was not published in the Federal Register or Code of Federal Regulations as required by the Bureau's "internal-operations brochure." *Id.* at 235–36, 94 S.Ct. 1055. The Supreme Court held that the geographic limitation was invalid, not because of the substance of that regulation, but because the BIA failed to publish it in compliance with their self-imposed rule requiring them to do so. *Id.* In reaching this conclusion, the Court said:

> Where the rights of individuals are affected, *it is incumbent* upon agencies to follow their own procedures. This is so even where the *internal procedures* are possibly *more rigorous* than otherwise would be required.... Before the BIA may extinguish the entitlement of these otherwise eligible beneficiaries, it must comply, at a minimum, with its own *internal procedures.*

Id. at 235, 94 S.Ct. 1055 (internal citations omitted) (emphasis added).

Likewise, the Eighth Circuit has held on numerous occasions that pursuant to the *Accardi* doctrine an agency must follow its self-imposed procedural rules when making discretionary decisions that affect an individual's rights. *See, e.g.,* *Munnelly v. United States Postal Serv.,* 805 F.2d 295, 302 (8th Cir.1986) (acknowledging that the Postal Service had to abide by its self-imposed procedural rules, which were printed in an internal postal manual, when deciding whether to terminate an employee); *Oglala Sioux Tribe v. Andrus,* 603 F.2d 707, 721 (8th Cir.1979) (recognizing that an Indian

tribe must follow its own procedural rules before transferring a superintendent).

From these cases, it is abundantly clear that an individual has the right to force an administrative agency [18] to follow its own procedural rules, even when those rules are contained in an internal manual and are more stringent than the broad authority given to that agency, if the decision made under those rules will affect the individual's rights. In the aforementioned cases, the courts applied this doctrine when the individual rights affected were citizenship, employment, and eligibility for general assistance benefits. In the present case, the right affected is the most fundamental right—the right to life. Hence, this Court concludes that because Defendant Lee's right to life will be affected [19] by the Attorney General's decision ***1038** whether to withdraw or decertify the death penalty notice, he has a right to require the Attorney General to follow her self-imposed procedures found in the Protocol before she makes that substantive decision. This Court wishes to emphasize, as the Supreme Court did in *Accardi,* that this ruling in no way impinges upon the Attorney General's broad discretion to make this *substantive* decision yea or ney, as she alone decides in this case. Although this Court does not have the authority to review, or look behind, the Attorney General's ultimate decision, the aforementioned cases clearly establish that this Court can require her to follow her *procedural* Protocol before making that decision.

In reaching this conclusion, the Court is not unmindful of the Government's assertion that the Attorney General and her U.S. Attorneys are somehow exempt from the *Accardi* doctrine because it is impermissible for a court to impinge upon their broad prosecutorial discretion. As illustrative of this point, the Government points to several Eighth Circuit cases holding that the accused has no right to enforce the Petite Policy, [20] which, similar to the Death Penalty Protocol, is an internal policy found in the U.S. Attorney's Manual. *See, e.g.,* *United States v. Basile,* 109 F.3d 1304, 1308 (8th Cir.1997), *cert. denied,* 522 U.S. 873, 118 S.Ct. 189, 139 L.Ed.2d 128 (1997); *United States v. Lester,* 992 F.2d 174, 176 (8th Cir.1993); *United States v. Moore,* 822 F.2d 35, 38 (8th Cir.1987). However, the Government's argument is flawed because in each of those cases the accused tried to challenge the Government's *ultimate and substantive* decision whether to pursue a successive prosecution instead of the procedures the DOJ followed when making those decisions. In fact, unlike the Death Penalty Protocol, the Petite Policy contains no procedural components.

The Government, however, is correct that other jurisdictions have held that defendants do not have a protected interest in the Death Penalty Protocol. *See* *United States v. Feliciano,* 998 F.Supp. 166 (D.Conn.1998); *United States v. McVeigh,* 944 F.Supp. 1478 (D.Colo.1996); *Nichols v. Reno,* 931 F.Supp. 748 (D.Colo.1996), *aff'd,* 124 F.3d 1376 (1997); *United States v. Boyd,* 931 F.Supp. 968 (D.R.I.1996), *cert. denied,* 528 U.S. 1098, 120 S.Ct. 842, 145 L.Ed.2d 708 (2000); *United States v. Roman,* 931 F.Supp. 960 (D.R.I.1996), *cert. denied,* 528 U.S. 1127, 120 S.Ct. 960, 145 L.Ed.2d 833 (2000); *Walker v. Reno,* 925 F.Supp. 124 (N.D.N.Y.1995). Again, these cases are factually distinguishable from the case at hand.

For instance, in the cases arising out of the bombing of the Oklahoma City federal building, the courts rejected Defendant Nichols' and McVeigh's substantive challenges ***1039** to Attorney General Reno's ultimate decision to seek the death penalty. *McVeigh,* 944 F.Supp. 1478; *Nichols,* 931 F.Supp. 748. Importantly, in those cases the DOJ *had in fact followed the procedures mandated by the Protocol,* and hence such procedural compliance was not an issue. *See* *McVeigh,* 944 F.Supp. at 1483. [21] Likewise in *Feliciano, Boyd,* and *Roman,* the defendants asked the courts to force the Government to disclose the mitigating and aggravating factors provided to the Attorney General's Capital Case Review Committee even though no such procedural rights were found in or mandated by the Protocol. *Feliciano,* 998 F.Supp. 166; *Boyd,* 931 F.Supp. 968; *Roman,* 931 F.Supp. 960. Hence, this Court concludes that these cases have no bearing on its conclusion that Defendant Lee has a right to require the DOJ and the Attorney General to follow their procedural Protocol when making the substantive decision whether or not to seek the death penalty in his case.

Finally, and most persuasive, is the case of *Walker v. Reno,* 925 F.Supp. 124 (N.D.N.Y.1995). In that case, the court concluded, as does this Court, that a defendant does not have a right to challenge the Attorney General's *ultimate and substantive decision* to seek the death penalty. However, the *Walker* court declared, albeit in dicta, that pursuant to

the *Accardi* doctrine, a defendant would have a right to force the DOJ and the Attorney General to follow the *procedural Protocol* found in the DOJ Manual. On this matter, the Court explained:

> In this case, plaintiffs' Complaint contains no allegation that defendant Reno ignored the procedures contained in her Protocol. Indeed, from all appearances defendant Reno scrupulously followed her self-prescribed Protocol procedures. Plaintiff has not alleged, for instance, that the U.S. Attorney sought the death penalty without the prior written authorization of the Attorney General, Protocol at § 9–10.000(A), or failed to submit a prosecution memorandum to the Attorney General, *Id.* at § 9–10.000(A); or that plaintiff's counsel were denied a reasonable opportunity to present matters in opposition to capital punishment to the U.S. Attorney and DOJ, *Id.* § 9–10.000(B), (D); or that the Attorney General failed to appoint a special committee to review all submissions, *Id.* § 9–10.000(D), or failed to receive a recommendation from that committee. *Id. Under the foregoing cases, such allegations might well provide a basis for this Court to set aside defendant Reno's determination and remand the matter to the Attorney General for reconsideration pursuant to the procedures she has prescribed for herself in the Protocol.*

Walker, 925 F.Supp. at 132–33 (emphasis added)(footnotes omitted).

Based on the foregoing analysis, this Court concludes that pursuant to the *Accardi* doctrine, Defendant Lee has a right to require the DOJ and the Attorney General to comply with its self-imposed and internal procedures found in the Death Penalty Protocol before the Attorney General makes the final substantive decision whether to decertify the death penalty notice in his case.

B. Deputy Attorney General Holder's Authority to Act

Hence, this Court must now decide whether the Protocol was in fact violated on May 10, 1999, when the U.S. Attorney submitted her decertification request to the Attorney General's Office. In light of the Eighth Circuit's holding, as explained above, this Court must assume that the Protocol was in fact violated because Attorney General Reno did not participate in, or approve of, Deputy Attorney General Holder's decision not to withdraw the ***1040** death penalty notice, and further, she did not even know of the U.S. Attorney's request to withdraw the notice at anytime before that decision was made and conveyed to this Court. In response to these assumptions, the Government argues that the Protocol was not violated because, under the circumstances of this case, Deputy Attorney General Holder had the authority to act in Attorney General's stead and make the ultimate decision to not withdraw the death penalty notice as to Defendant Lee. This Court disagrees for two reasons.

First, this Court concludes that Deputy Attorney General Holder did not have the authority to make the final decision on the U.S. Attorney's request to decertify the death penalty notice for Defendant Lee because Attorney General Reno was not legally absent. Congress anticipated that there might be some instances where the Deputy Attorney General might need to act on behalf of the Attorney General. Accordingly, Congress passed an act that provides, in relevant part, that: "In case of a vacancy in the office of Attorney General, or of his *absence* or disability, the Deputy Attorney General may exercise all the duties of that office, and for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General." 28 U.S.C. § 508(a) (emphasis added). Likewise, the relevant regulation declares that: "In case of vacancy in the office of the Attorney General, or of his *absence* or disability, the Deputy Attorney General shall, pursuant to 28 U.S.C. § 508(a) perform the functions and duties of and act as the Attorney General." 28 C.F.R. § 0.132(a) (emphasis added). Unfortunately, neither the Act nor the Regulation define the word "absence."

The Government argues that on May 10, 1999, Attorney General Reno was legally absent, as contemplated by the Act and Regulation, because she was a few blocks away attending a conference at the White House. The Court finds this

argument unconvincing because, if accepted, the implication would be that the Deputy Attorney General could act in the Attorney General's stead whenever she was *temporarily away from the office,* such as if she had gone to lunch or left for the evening. Surely such a result would be preposterous, especially, where as here the most fundamental right—the right to life—is at issue and contact with the Attorney General could have been easily established.[22] Furthermore, neither the parties nor this Court could find any cases where the word "absence" has been given such a broad construction. In fact, the only cases applying 28 U.S.C. § 508(a) have involved the Deputy Attorney General's or the Solicitor General's authority to act when the Attorney General *had resigned,* and was not merely temporarily out-of-pocket, as in this case. *See* *United States v. Pellicci,* 504 F.2d 1106 (1st Cir.1974), *cert. denied,* 419 U.S. 1122, 95 S.Ct. 805, 42 L.Ed.2d 821 (1975); *United States v. Halmo,* 386 F.Supp. 593 (E.D.Wis.1974); *United States v. Curreri,* 363 F.Supp. 430 (D.Md.1973). Accordingly, the Court concludes that Deputy Attorney General Holder did not have the authority to act in Attorney General Reno's stead on the theory that she was legally absent as contemplated by either 28 U.S.C. § 508(a) or 28 C.F.R. § 0.132.

Second, the Court concludes that Deputy Attorney General Holder did not have authority to act in Attorney General Reno's stead because the specific language of the Protocol provides that the final decision to decertify a death penalty notice must be made by the Attorney General personally. In support of this conclusion, ***1041** the Court turns to 28 C.F.R. § 0.15(a), which provides that: "The Deputy Attorney General is authorized to exercise all the power and authority of the Attorney General, *unless any such power or authority is required by law to be exercised by the Attorney General personally.*" (Emphasis added.) This same language can also be found in Section 1–2.102 of the U.S. Attorney's Manual. As previously mentioned, the Death Penalty Protocol unequivocally declares that "the *Attorney General* shall make the final decision" whether to decertify a death penalty notice. U.S. Attorney's Manual § 9–10.090 (emphasis added). The Government argues that Section 9–10.090 does not have the force of law as required by 28 C.F.R. § 0.15 and Section 1–2.102. This Court, however, has already held that pursuant to the *Accardi* doctrine, procedural statements found in the U.S. Attorney's Manual have the force of law if they affect an individual's rights. Here, it is clear that the Attorney General mandated by her own Protocol that she alone would make a final determination whether to withdraw a death penalty notice. Hence, Deputy Attorney General Holder had no right to usurp Attorney General Reno's clear reservation of exclusive authority merely because she was temporarily away from her office. Furthermore, it is clear that the Attorney General can revoke any general grant of authority to the Deputy Attorney General, and it appears that Attorney General Reno did exactly that when she promulgated Section 9–10.090, which unequivocally declares that she, personally, will make the final decision on a request to decertify a death penalty notice. So, assuming that before the promulgation of the Protocol the Deputy Attorney General had such general authority, it is clear that the Attorney General removed that general authority when she place the Protocol in effect.

For these reasons, this Court rules that Deputy Attorney General Holder did not have the authority, under the facts of this case, to make the final and substantive decision to deny the U.S. Attorney's request to decertify or withdraw the death penalty notice in Defendant Lee's case. Accordingly, the Court concludes that the Death Penalty Protocol was in fact violated in this case, and that Defendant Lee has a right to require the Attorney General and the DOJ to properly comply with the procedures established in the Protocol before the Attorney General makes the "final decision" to withdraw or not withdraw the death penalty notice. Therefore, the Court sets aside as a nullity Deputy Attorney General Holder's decision and remands the matter to Attorney General Reno for consideration pursuant to the procedures she has prescribed for herself in the Protocol. *See* *Walker,* 925 F.Supp. at 133.

CONSEQUENCES OF COURT'S RULING

The Court must now determine the disposition of this case in light of the rulings entered herein on the future dangerousness and Protocol issues. The Court interprets its ruling on the Protocol issue as requiring the Government to "turn-the-clock-back" to that moment immediately after the Government announced its intention to seek the decertification of the death penalty notice. The Department of Justice and the Attorney General must then fully and properly comply with the procedural terms of the Death Penalty Protocol, to-wit: 1) the request to withdraw the death penalty notice will be reviewed by the Review Committee on Capital Cases; 2) the Committee will make its recommendation to Attorney General Reno; and 3) Attorney General Reno, *herself,* will then make the final decision whether to decertify or withdraw the death penalty notice as to Defendant Lee.

If the Attorney General decides to grant the U.S. Attorney's request to decertify the death penalty notice, this Court will impose the sentence of life without the possibility of release.[23] In contrast, if the ***1042** Attorney General decides not to decertify the death penalty notice, then both of the Court's rulings, i.e., its ruling on the Protocol issue and its ruling that it was error to introduce certain evidence of future dangerousness, will require that Defendant Lee be given a new penalty phase trial. A new jury will have to be selected for this purpose. Furthermore, a new penalty phase trial might require the presentation of most of the evidence introduced during the guilt phase of the trial because Defendant Lee contends that the jury should be made aware of Defendant Kehoe's greater and more culpable role in the RICO crimes which nevertheless resulted in Defendant Kehoe receiving a sentence of life imprisonment without the possibility of release. Of course, elaborate stipulations might shorten the trial to some degree. The Court will determine the specific procedures for conducting a new penalty phase trial if and when the occasion arises.

CONCLUSION

IT IS THEREFORE ORDERED THAT the Department of Justice and the Attorney General be, and they are hereby, ordered to properly review and act upon the U.S. Attorney's request to decertify or withdraw the death penalty notice in Defendant Lee's case in accordance with the procedures mandated by the Death Penalty Protocol before the Attorney General, herself, makes the final decision whether to grant or deny that request.

IT IS THEREFORE FURTHER ORDERED THAT Defendant Lee's Motion for a New Penalty Phase Trial be, and it is, hereby GRANTED. Accordingly, if the Attorney General denies the request to decertify or withdraw the death penalty notice, then the Court will hold a new penalty phase trial for Defendant Lee. If the Attorney General grants the request to decertify or withdraw the death penalty notice, then the Order for a new penalty phase trial will be moot, and the Court will sentence Defendant Lee to life imprisonment without the possibility of release.

All Citations

89 F.Supp.2d 1017

Footnotes

1 Dr. Cunningham was able to testify for others in his narrator role because of section 3593(c)'s relaxed evidentiary standard. *See* *United States v. Jones,* 132 F.3d 232, 241 (5th Cir.1998), *aff'd,* 527 U.S. 373, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999) (stating that sentencing hearing is not governed by traditional evidentiary restraints).

2 The Court believes this motion to be a proper objection by Defendant Lee to improper cross-examination by the Government, contrary to the Government's argument that Defendant Lee did not timely object and therefore had waived any claim of error. In addition, counsel for Defendant Lee later stated, “I was assuming that I had an ongoing objection because of my motion so I didn't stand up and object every time.” Tr. at 7832. The Court responded, “That's true, I understood that. In fact, we talked about that before the evening recess.” Tr. at 7832.

3 This colloquy makes clear the Court's assumptions and reasoning which led it into error. The Court had in mind a common situation with respect to such expert psychological or psychiatric testimony, i.e., where the expert covers, say, two completely separate relevant areas thoroughly in his or her pre-trial examination and analysis of a defendant but, then, because the result of the expert's examination into one of those areas is not favorable to the defendant, the expert attempts to limit his or her testimony solely to the other area which, assumedly, *is* favorable to the defendant. If the expert witness acknowledges on cross-examination that he is thoroughly prepared on both areas, then it has been this Court's practice to permit the Government to develop such information and opinions on cross-examination.

Here, since the Court did not understand clearly just what areas into which Dr. Cunningham had gone in his pretrial studies of Defendant Lee, it opted to let the Government tentatively explore the situation. Therefore, at the very least, the Court should have cut off the examination as soon as it became apparent that the Government was going into areas into which Dr. Cunningham had not qualified himself to render any opinion—the area of future dangerousness.

On February 18, 2000, Defendant Lee submitted (attached to Brief) the affidavit of Dr. Cunningham. It clearly shows the experience and expertise Dr. Cunningham has in the area of "future dangerousness." However, because of the circumstances, it was decided not to examine Defendant Lee and make the other studies necessary in attempt to refute the Government's aggravating factor of future dangerousness. In this connection, the Court's notes paragraph 9 (page 7) of the affidavit, to wit:

> In preparation to individualize the violence risk assessment to Mr. Lee, I requested specific statistical data and procedures, including the rate of assaults among white supremacists in BOP. Mr. Lane Liroff did not provide this and other important data. I additionally requested that I be allowed a tour of several U.S. Penitentiaries and a more detailed tour of ADX Florence, such as had been provided to Dr. Thomas Ryan, the Government's expert in *U.S. v. Danny Lee.* These tours would have allowed me additional specific perspectives regarding confinement, rehabilitation, and treatment programs for Mr. Lee. Mr. Liroff strongly protested these tours in appearing before Judge Forster, asserting that such tours were against BOP policy and would seriously compromise the security of the U.S. Penitentiaries. However, I subsequently discovered correspondence in my files that would seem to dispute Mr. Liroff's representations. This correspondence was from a prior federal capital case (*U.S. v. LaFawn Bobbitt*) where prison tours had been ordered, but could not be accomplished before trial. In this correspondence (attached), Mr. Rick Schott (Attorney, U.S. Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary) detailed that my proposed tour of U.S. Terre Haute would be the same as that afforded the *general public.* In the absence of the requested data, I could not sufficiently and reliably individualize my risk assessment of Mr. Lee.

4 The agreed instructions, indeed, set forth the evidence upon which the Government would rely to establish that "Daniel Lewis Lee would be a danger in the future to the lives and safety of other persons...." *See* pg. 1031, *infra.*

5 *See also* note 3, *supra.*

6 At the conclusion of Dr. Cunningham's testimony, the Court knew it had a made a mistake: "THE COURT: ... First, I am convinced that I probably permitted the Government to go much farther on cross-examination than is proper." Tr. at 7836.

7 *See* note 3, *supra.*

8 As Defendant Lee states in his reply brief, "Had Dr. Cunningham and the defense made the decision to address future dangerousness and risk assessment, Dr. Cunningham would have explained to the jury how the BOP handles violence and violent offenders within its system." Reply Brief, Doc. No. 856, at 3.

9 The Government has maintained throughout the pre-trial, trial and post-trial periods that Chevie Kehoe was the leader of the RICO enterprise and that Danny Lee and others were his subordinates. The proof at trial was consistent with those contentions. In fact, Defendant Lee was implicated in only a few of the numerous RICO acts alleged in the Indictment, and he was acquitted of at least two of the acts in which he was implicated. To be sure, he was found guilty of the RICO acts relating to the robbery and murders of the Mueller family, but even with respect to those crimes, the testimony was that Defendant Lee played a lesser role in their planning and commission. With respect to the murder of Sarah Powell, the principal testimony offered to establish the details of the crime was that of Chevie Kehoe's mother, Gloria Kehoe. Ms. Kehoe testified that she was told by Chevie Kehoe that Danny Lee could not participate in that murder and that he (Chevie Kehoe) had to carry it out alone. Moreover, the proof as a whole left the definite impression that Defendant Kehoe was the orchestrator of the entire RICO operation, and that Defendant Lee served as his subordinate for only a brief portion of the lengthy multi-state conspiracy.

10 Defendant Lee does not contend that the Government failed to follow the Protocol when it initially obtained the Attorney General's permission for seek the death penalty for Defendant Lee.

11 The Court takes strong exception to Mr. De La Cruz's suggestion that it is responsible for the U.S. Attorney's inability to obtain a decision on this most serious issue. At the time, the Court was unaware of the Protocol, and the procedures contained therein for obtaining permission to withdraw a death penalty notice. If the Court had been so advised and a request for an extension of time had been made, this Court would have certainly granted the parties' request in order to permit the Attorney General to personally attend to this most serious matter as provided in that Protocol. Indeed, continuing the penalty phase for a day or two, if necessary, would not have created more than a minor inconvenience.

12 Which would be 1:30 CDT.

13 The Protocol requires that the request to withdraw the death penalty notice "shall be reviewed by" the Review Committee on Capital Cases, and that the Committee "will make a recommendation to the Attorney General." U.S. Attorney's Manual § 9–10.090. Mr. DiGregory's affidavit does not state whether the Committee reviewed the request, or if the Committee made any recommendation thereon to the Attorney General.

14 Defendant Lee has filed a petition for a writ of certiorari asking the United States Supreme Court to review that decision. The Court has decided, with the parties' permission, to go forward with this matter without waiting for the Supreme Court's decision.

15 This Court's conclusion that Attorney General Reno could have been easily contacted is bolstered by a former Committee member's statement that, "[t]he Review Committee operates informally, with no set schedule and with *virtually immediate access to the Attorney General when necessary.*" Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice,* 26 FORDHAM URB. L.J. 347, 421 (1999) (emphasis added).

16 Defendant Lee argues that Congress gave the United States Attorney, and not the Attorney General, the authority to decide whether to seek the death penalty in a particular case. The relevant provision of the Federal Death Penalty Act provides that:

> If, in a case involving an offense described in section 3591, *the attorney for the government* believes that the circumstances of the offense are such that a sentence of death is justified under this chapter, the attorney shall, a reasonable time before the trial or before acceptance by the court of a plea of guilty, sign and file with the court, and serve on the defendant, a notice [to seek the death penalty] ....

18 U.S.C. § 3593(a)(emphasis added). The Act does not define the phrase "attorney for the government," but the Court agrees with the court in *Nichols v. Reno,* 124 F.3d 1376 (10th Cir.1997), as will be explained herein, that the quoted language refers to United States Attorneys.

Generally, the duty to "prosecute for all offenses against the United States" is allocated to the United States Attorneys. 28 U.S.C. § 547(a). However, the same title specifically gives the Attorney General the authority to "*supervise all litigation* to which the United States, an agency, or officer thereof is a party, and *shall direct all United States attorneys,* assistant United States attorneys, and special attorneys appointed under section 543 of this title *in the discharge of their respective duties.*" 28 U.S.C. § 519. The Tenth Circuit has interpreted these three statutory provisions as giving the Attorney General the authority to enact the Protocol which, in turn, gives her, and not the United States Attorneys, the final decision whether to seek the death penalty in a particular case. *See Nichols,* 124 F.3d at 1377 (10th Cir.1997) (affirming the same conclusion reached by the District Court of Colorado in *Nichols v. Reno,* 931 F.Supp. 748, 750 (D.Col.1996)).

The Court agrees with this reasoning, and therefore, rules that Attorney General Reno, and not United States Attorney Casey, has the authority to make the final decision whether to seek the death penalty in Defendant Lee's case. Nevertheless, this is a serious issue since, absent the adoption of the Protocol or some other directive or intervention by the Attorney General, exercise of this responsibility would be vested in the U.S. Attorneys involved and the decision of United States Attorney Casey here would have resulted in the withdrawal of the death penalty notice in Defendant Lee's case.

17 The Board's decision was reviewable by the Attorney General only in certain circumstances listed in 8 C.F.R § 90.12 (1949) and 8 C.F.R. § 6.1(h)(1) (Rev.1952). *Id.* at 266.

18 It is undisputed that the Department of Justice is an executive agency. *See also* *Walker v. Reno,* 925 F.Supp. 124, 126 (N.D.N.Y.1995) (holding that the DOJ is an executive agency).

19 In a law review article written by a former member of the Attorney General's Capital Case Review Committee, the author explains that:

> The U.S. Attorney's recommendation carries great, although not dispositive, weight with the Committee. This is particularly so when the recommendation is *against seeking death* in death-eligible case. Such "no death" recommendations are *almost always accepted,* not just because of the traditional autonomy of the U.S. Attorneys, but also because the U.S. Attorneys generally exercise great care in submitting their recommendations and are presumed to know their local communities, jury pools, judges, and the overall strengths and weakness of their particular case far better than Main Justice personnel.... On the other hand, a recommendation from a U.S. Attorney in favor of seeking the death penalty receives somewhat less deference at Main Justice. Here is where the goal of national uniformity in administering the federal death penalty often outweighs the localized perspective of field offices.

Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role,* 26 FORDHAM URB. L.J. 347, 422–23 (1999) (emphasis added). In light of this proclamation, it is readily apparent that Defendant Lee's right to life was adversely affected by the DOJ's failure to follow its procedural Protocol when considering the U.S. Attorney's recommendation to decertify the death penalty notice in this case.

20 The Petite Policy provides that U.S. Attorneys shall not prosecute any person for allegedly criminal behavior that was an ingredient of a previous state prosecution, unless the subsequent federal prosecution is specifically authorized in advance by the "appropriate Assistant Attorney General." *See* U.S. Attorney's Manual § 9–2.031. The Petite Policy also establishes three substantive criteria the Assistant Attorney General must consider when making that determination. *Id.*

21 Instead, Defendants McVeigh and Nichols claimed that the Attorney General's ultimate and substantive decision to seek the death penalty was invalid because she publicly announced her decision to do so before a suspect was even identified, and that her decision was improperly influenced by President Clinton's public pledge that the death penalty would be sought. *McVeigh,* 944 F.Supp. at 1483; *Nichols,* 931 F.Supp. at 750.

22 Defendant Lee offered to establish this theory through the testimony of Attorney General Reno and Deputy Attorney General Holder. However, because these subpoenas were quashed, no record could be made on the ease with which the Attorney General may have been contacted with regard to such a serious matter. Assuming this is not a matter of judicial notice, the Court must nevertheless assume that the Attorney General could have been easily contacted.

23 The Court heard, reviewed, and otherwise experienced all of the evidence in the guilt phase of the trial. Assuming that it has, under the law, the discretion under such circumstances to impose some other penalty than life without the possibility of release (such as life), the Court would nevertheless impose on Defendant Lee the sentence of life without the possibility of release.

2010 WL 5347174
Only the Westlaw citation is currently available.
United States District Court,
E.D. Arkansas,
Western Division.

UNITED STATES of America, Plaintiff/Respondent
v.
Daniel Lewis LEE, Defendant/Movant.

No. 4:06–CV–1608 GTE.
|
Criminal No. 4:97–CR–243–02 GTE.
|
Dec. 22, 2010.

Attorneys and Law Firms

David A. Ruhnke, Ruhnke & Barrett, Montclair, NJ, for Defendant/Movant.

ORDER DENYING POST–JUDGMENT RELIEF

EISELE, District Judge.

***1** Currently before this Court is Petitioner's Amended Motion to Alter or Amend Judgment pursuant to Fed.R.Civ.P. 59(e) ("Rule 59 motion"). [1] Respondent opposes the motion, contending that it is a successive petition the Eighth Circuit Court of Appeals has not authorized. Alternatively, Respondent contends that the Rule 59 motion, to the extent it is not successive, is completely lacking in merit. The issues presented have been fully briefed. In addition to the Rule 59 motion, the record includes: Respondent's Response; [2] Petitioner's Reply; [3] Petitioner's Motion to Supplement the Record; [4] Affidavit of Petitioner Lee; [5] Respondent's Response to Affidavit; [6] and Petitioner's Notice of Additional Authority. [7]

After carefully considering the issues presented, the Court concludes that Petitioner's motion must be **DENIED.**

I. Rule 59(e) Motion

"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. Metropolitan St. Louis Sewer Dist.,* 440 F.3d 930, 933 (8th Cir.2006) (omitting internal quotation marks and additional citation). "Such motions cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment." *Id.* "A Rule 59(e) motion cannot be used to raise arguments which could, and should, have been made before the trial court entered final judgment." *Bannister v. Armontrout,* 4 F.3d 1434, 1440 (8th Cir.1993) (omitting internal quotations); *see also* *Williams v. Norris,* 461 F.3d 999, 1004 (8th Cir.2006) (citing *Bannister* and observing that its holding is not weakened by the fact that it is a pre-AEDPA case). Finally, in the habeas context, a Rule 59(e) motion is subject to the well established restrictions on filing successive motions for postconviction relief. *United States v. Lambros,* 404 F.3d 1034, 1036, 1037 (8th Cir.2005), cert. denied, 516 U.S. 1135 (2005) (affirming the district court's dismissal of petitioner's Rule 59(e) motion as an effort to file a successive motion for post-conviction relief, observing that motion "sought ultimately to resurrect the denial of his earlier § 2255 motion").

It seems clear, based on existing case law and despite Petitioner's arguments to the contrary, that a district court should examine a Rule 59(e) motion filed in a § 2255 proceeding preliminarily, just as it would a Rule 60(b) motion, to ensure that it is not a successive petition. And it further seems clear that the substance of the allegations contained in the motion, rather than its caption, controls whether such allegations are deemed successive. See, e.g., *United States v. Nelson,* 465 F.3d 1145, 1149 (10th Cir.2006) (collecting cases) ("It is the relief sought, not [petitioner's] pleading's title, that determines whether the pleading is a § 2255 motion.").

II. PETITIONER'S ARGUMENTS

A. Failure to Have Evidentiary Hearing

***2** Petitioner Lee argues that the Court committed legal error when it denied his § 2255 motion without indulging his request for an evidentiary hearing. Lee further contends that such denial raises to the level of a defect in the integrity of the habeas proceeding within the meaning of *Gonzalez v. Crosby,* 545 U.S. 524, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005) [8] and may not therefore be considered successive. [9] Although the issue of whether this should be considered a successive argument is not free from doubt, [10] the Court will

address this argument on the merits as Petitioner contends the Court applied the wrong standard in determining whether an evidentiary hearing was warranted.

An evidentiary hearing is required "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255. It is appropriate to deny § 2255 relief without a hearing if: (1) petitioner's allegations, if accepted as true, would not entitle petitioner to relief; or (2) the allegations cannot be accepted as true because they are contradicted by the record, are inherently incredible, or are conclusions rather than statements of fact. *Delgado v. United States,* 162 F.3d 981, 983 (1998). In *Delgado,* the denial of a hearing was affirmed. Delgado's ineffective assistance claims failed on both the performance and prejudice prongs because he "made no showing of what other witnesses were available, how they would have testified, and why such additional evidence would likely have affected the result." *Id.*

The Court was purposefully lenient in permitting the parties to expand the record as they wished before taking up the merits of Petitioner's motion. The Court permitted Petitioner to conduct any and all discovery that he requested prior to ruling on the § 2255 motion. For example, the Court granted Petitioner's request to conduct mitochondrial DNA testing (mtDNA) on a hair sample. [11] Later, in an Order dated May 15, 2008, the Court sought to clarify the record as to one of Petitioner's ineffective assistance allegations. The Court pointed out that the record was unclear as to whether an alleged tape-recorded interview of Gloria Kehoe existed and directed Petitioner to produce the interview referenced, but not produced. [12] Finally, in an Order dated May 22, 2008, the Court provided Petitioner with "one final opportunity to put before the Court additional legal authority or argument in support of the grounds for relief currently before the Court." [13]

The Court considered the entire record, as expanded, in making its ruling. The Court gave Petitioner the benefit of all allegations of fact, that is, the Court assumed that Petitioner could prove the substance of any factual assertion. The Court did not, however, engage in speculation about what witnesses, if called to testify, might have said. Nor did the Court credit Petitioner's conclusions. Because the Court concluded on the basis of all the submissions that Petitioner had failed to establish any legally cognizable basis for post-conviction relief, it declined to have an evidentiary hearing.

***3** Petitioner Lee raises numerous objections to the Court's failure to provide an evidentiary hearing. Petitioner contends that the Court erroneously grafted an "affidavit requirement" onto the standard for obtaining an evidentiary hearing. The Court agrees with Petitioner that there is no such requirement in the Eighth Circuit. That is, affidavits are one way, but not the only way, that a petitioner may present facts to support a claim that his counsel was constitutionally deficient.

Petitioner's obligation, however, is greater than simply placing the Court on notice of claims alleged to merit post-conviction relief. At the time he filed his petition for § 2255 relief, Petitioner was obligated to "specify all the grounds for relief available to the petitioner ... and state the facts supporting each ground." Rule 2(b) of the Rules Governing Section 2255 Proceedings. "Habeas corpus petitions must meet heightened pleading requirements." *McFarland v. Scott,* 512 U.S. 849, 856, 114 S.Ct. 2568, 129 L.Ed.2d 666 (1994) (citing Rule 2(c) of the Rules Governing Section 2254 Proceedings, which is identical to Rule 2(b) of the Rules Governing Section 2255 Cases); *Mayle v. Felix,* 545 U.S. 644, 655, 125 S.Ct. 2562, 162 L.Ed.2d 582 (2005) (also citing Rule 2(c)).

In the context of his ineffective assistance of counsel claims, Petitioner was obliged to state the facts showing both that his counsel's performance was deficient and explaining how such deficiencies prejudiced his defense. Petitioner failed to adequately present facts sufficient to support his ineffective assistance of counsel claims. For example, Petitioner contended that his trial counsel were ineffective in failing to locate, interview, effectively examine or present a total of 19 witnesses. The Court noted in denying § 2255 relief that Petitioner "failed to include supporting affidavits *or other independent support* " in connection with some of these witnesses. [14] Some of Petitioner's contentions were too vague to raise any issue about either his counsel's performance or prejudice as a result thereof. For example, Petitioner identified Peter Langan as a member of the Aryan Republican Army serving a life sentence in federal prison. Petitioner alleged that "efforts should have been made to locate and interview Mr. Langan who was, throughout most of the period leading up to this trial, incarcerated on federal charges." [15] Petitioner made no effort to explain how Langan possessed information relevant to the charges against him or how such information, if presented at trial, could have altered the outcome. Similarly, with respect to numerous other witnesses, Petitioner merely presented conclusory allegations.

The Court's point was simply that it was incumbent upon Petitioner to provide sufficient information about the alleged substance of any omitted testimony to permit the Court to evaluate both the performance and prejudice prongs of the *Strickland* ineffective assistance standard. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); see also *Williams v. United States,* 452 F.3d 1009, 1012 (8th Cir.2006) (referencing both *Strickland* requirements as necessary to prove ineffective assistance of counsel claims).

***4** In *Paul v. United States,* 534 F.3d 832 (8th Cir.2008), the Eighth Circuit affirmed the district court's denial of a § 2255 petition in a death penalty case. The district court rejected the petitioner's ineffective assistance claims based on trial counsel's failure to call witnesses to bolster his defense, both at the guilt and sentencing phases. The Government in opposing the motion did not offer an affidavit from petitioner's trial counsel. Instead, it defended counsel's competence by observing that counsel had persuaded the jury to find several mitigating factors and proffering its own strategic reasons defense counsel might have declined to call witnesses. The district court denied § 2255 relief without conducting an evidentiary hearing. The Eighth Circuit affirmed the ruling even though the record on appeal was "not developed concerning counsel's contemporaneous rationale for the actions that [petitioner] now challenges." *Id.,* at 837. *Paul* reaffirms that ineffective assistance claims may be resolved without an evidentiary hearing or even an affidavit from trial counsel where "the record shows conclusively that [petitioner] did not suffer prejudice from what he now alleges was deficient performance by counsel." *Id.* at 838.

The Court did not apply an affidavit requirement in considering whether there was a need for an evidentiary hearing. Rather, it applied well established Eighth Circuit law. See, e.g., *Delgado, supra,* 162 F.3d at 983 (no evidentiary hearing necessary for Petitioner who "made no showing of what other witnesses were available, how they would have testified, and why such additional evidence would likely have affected the result.").

Petitioner's contention that the Court "never put Mr. Lee on notice that affidavits or other alternative measures would be considered, or imposed any scheduling order requiring that affidavits be submitted" rings hollow. Petitioner's counsel was on notice of the law and pleading requirements for § 2255 motions. The Court specifically advised that it would determine based on the submissions whether an evidentiary hearing was required.[16] Subsequently, the Court directed Petitioner to produce certain information related to Gloria Kehoe because the Court recognized its potential importance. Finally, before ruling, the Court provided Petitioner with yet another opportunity to submit anything he wished in support of his Petition.

Additionally, Petitioner Lee argues the Court also improperly credited the affidavits proffered by counsel. The Court disagrees. The Government obtained and submitted affidavits from defense counsel.[17] Therein, counsel explained why they elected not to call certain witnesses, described matters that they investigated and provided other insights into trial strategies.[18] The Court evaluated all assertions made by both parties to determine whether there was any need for an evidentiary hearing. The Court did not weigh evidence or make credibility findings. There was no need to do so because Petitioner failed to present any facts which, if true, would have entitled him to relief. Petitioner's obligation was to present facts to demonstrate the need for an evidentiary hearing. He failed to do so. Petitioner failed completely to demonstrate that he suffered any prejudice as a result of his counsel's alleged deficiencies. There simply were no issues of fact that needed to be resolved in order to dispose of his post-conviction motion. Even without reviewing the affidavits proffered by trial counsel, the Court still would have found no need for an evidentiary hearing.

***5** In support of his Rule 59 motion, Petitioner has attached numerous affidavits, presented in 65 pages. Such affidavits are submitted by: (1) a private investigator, Daniel Clark, regarding his investigation into potential witnesses Faron Lovelace and Jeff Brown; (2) Kevin McNally, an attorney, opining on the jury selection strategy used by defense counsel; (3) Dr. Thomas Ryan, disavowing the use of PCL–R[19] for measuring future dangerousness and psychopathy; (4) John Edens, Ph.D., a licensed psychologist, opining on inappropriateness of using PCL–R to predict future dangerousness; (5) a group of 5 experts opining on the inappropriateness of relying on the PCL–R to predict future dangerousness, allegedly filed with a motion in limine seeking to exclude Dr. Ryan's testimony in another federal capital case;[20] and (6) Russell Stetler, an attorney, outlining deficiencies in defense counsel during the sentencing phase and their failure to develop mitigation evidence.

Petitioner offers no explanation for why such affidavits or other supporting information were not provided to the Court before it ruled on his original motion for § 2255 relief. Had they been, the Court might have determined that an evidentiary hearing was required. However, the Court is foreclosed by existing legal principles from considering the information now, absent permission and direction from the Eighth Circuit to do so.

B. Ineffective Assistance of Counsel Standard

The Court rejects Petitioner's argument that it applied the wrong standard in resolving his ineffective assistance of counsel claims. Additionally, the Court finds that all other arguments related to such claims are successive.

Petitioner failed, both in his original petition and his Rule 59(e) petition, to make a sufficient showing that absent counsel's deficient conduct there is "a reasonable probability that at least one juror would have struck a different balance." *Wiggins v. Smith,* 539 U.S. 510, 537, 123 S.Ct. 2527, 156 L.Ed.2d 471(2003)(discussing that prejudice occurred when counsel failed to put into evidence Wiggins' "excruciating life history" during sentencing). Petitioner failed to make a sufficient showing that counsel's actions prejudiced him. He also failed to show what the evidence would have been had counsel completed further investigation or placed certain persons on the witness stand. He failed to show what the testimony would have been, the availability of persons and evidence, or whether the potential witnesses and evidence were credible.

The Court did not apply an incorrect standard. Petitioner simply failed to produce facts sufficient to warrant any relief.

C. Recanted Testimony of Dr. Ryan

The Court comments specifically on Petitioner's arguments related to Dr. Ryan, Although such contentions should, in the Court's view, be deemed successive, they are also lacking in merit.

Petitioner contends that his counsel was ineffective for failing to fully and adequately object to the psychopathy evidence presented during the cross-examination of defense expert Dr. Mark Cunningham. The Government questioned Dr. Cunningham about the fact that Dr. Thomas Ryan, an expert for the prosecution, had concluded that Petitioner was a psychopath based upon his answers to the Hare Psychopathy Checklist–Revised (or PCL–R). Petitioner claims that Dr. Ryan later disavowed the use of the PCL–R in capital cases. Petitioner further claims that "the basis for challenging the use of psychopathy evidence as a valid predictor for further dangerousness existed at least as early as September of 1998" [21]

***6** Lee's original § 2255 Petition included only one sentence referencing this argument. That lone reference appeared in a footnote and read:

> At a hearing, Movant's counsel are prepared to offer evidence that Dr. Ryan, in sworn testimony and affidavits filed after his testimony in this case, has stated that the Hare Psychopathy Checklist is not an appropriate instrument to be utilized in evaluating the future danger of capital defendants and that he no longer stands by such testimony or analysis. [22]

Petitioner now devotes over 25 pages to this argument. [23] Clearly, the theory is much more developed now than the cursory reference made in requesting 2255 relief. Again, Petitioner does not explain why the information he now includes was not included in connection with his original petition. Petitioner's conclusory statement that Dr. Ryan, subsequent to his testimony in this case, stopped using the PCL–R to evaluate future dangerousness was not sufficient to place the Court on notice of the full argument that Petitioner now presents.

However, the claim, even if considered on the merits, is problematic. Dr. Ryan's recently submitted declaration describes how, in the Spring of 2000, he concluded that it was inappropriate to rely on the PCL–R to assess the future dangerousness of capital defendants. The jury returned its verdict of death against Petitioner on May 14, 1999. Petitioner has not explained how counsel could have been expected, almost one year before Dr. Ryan himself rejected the PCL–R as an effective predictor of future conduct, to challenge the scientific underpinnings for his testimony.

III. CONCLUSION

The Court rejects Petitioner's contention that it applied incorrect legal standards or committed error which rises to the level of a defect in the integrity of the federal habeas proceedings. Nor has Petitioner presented anything that would require the Court to revisit a previously asserted claim, such as showing manifest errors of law or fact. The remainder of Petitioner's contentions are successive. They are either reiterations of previous arguments or attempts to introduce new evidence or legal theories which could have been raised prior to the entry of judgment.

The Court is required by the 2009 Amendments to Rule 11(a) of the Rules Governing 2255 Proceedings to "issue or deny a certificate of appealability when it issues a final order adverse to the applicant."[24] After considering the matter, the Court concludes that Petitioner has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c). The Court therefore declines to grant a certificate of appealability.

For the reasons stated above,

IT IS HEREBY ORDERED THAT Petitioner's Rule 59 motion (Doc. 1165) be, and it is hereby, **DENIED.**

IT IS FURTHER ORDERED that Petitioner is hereby denied a certificate of appealability as to all claims for relief.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 5347174

Footnotes

1 Doc. 1165. All references to docket entries ("Doc.# ") refer to filings in this case, Case No. 4:97–CR–00243 (2) GTE.
2 Doc. 1170.
3 Doc. 1172.
4 Doc. 1174.
5 Doc. 1178.
6 Doc. 1181.
7 Doc. 1182.
8 Assuming *Gonzalez* applies to Rule 59(e) motions in § 2255 proceedings, which Petitioner disputes.
9 See Petitioner's Reply, Doc. No. 1172, at 14–16.
10 See, e.g., *In re Lindsey,* 582 F.3d 1173, 1175–76 (10th Cir .2009) (per curiam) (holding that Rule 60(b) challenge that district court erred in denying § 2255 motion without an evidentiary hearing necessarily was an attack on court's analysis of the merits and therefore successive).
11 See Petitioner's motion, Doc. 1118, at 20 ("This Court has recently approved a request by Movant's present counsel to fund mtDNA testing and arrangements are being made" for such testing).
12 Order, Doc. 1154.
13 Order, Doc. 1156.
14 Order denying § 2255 relief, Doc. 1163, at 18 (emphasis added). The Court subsequently stated that Petitioner's failure to provide affidavits was an "arguably fatal" omission. This was probably overstated, but in the context of the entire opinion it was or should have been clear that the Court did not reject Petitioner's contentions without a hearing solely because he failed to include affidavits.
15 Original petition, Doc. 1118, at 14.
16 Order dated February 29, 2008, Doc. 1153.
17 The Government submitted two affidavits, one from an attorney for Petitioner Lee and another from an attorney for co-defendant Chevie Kehoe. See Exhibits C and D to Government's response, doc. 1126.

18 Because of these affidavits, the record in this case is far more developed than in *Paul,* where the Government defended counsel's trial strategy and no affidavits were tendered.

19 The PCL–R refers to the Hare Pscyhopathy Checklist–Revised. "The PCL–R is a 20–item instrument intended to assess traits associated with the construct of psychopathy." See Affidavit of John Edens, at ¶ 5, attached to Rule 59 motion, Doc. No. 1165.

20 Petitioner contends the affidavits were submitted in support of a motion in limine filed in the case of *United States v. Willis Haynes,* No. PJM–98–0520 (D.Md.) On May 24, 2000.

21 Petitioner's Rule 59 motion, Doc. 1165 at 22.

22 Petitioner's Motion, Doc. 1118 at 34, n. 14.

23 Petitioner's Rule 56 motion, Doc. 1165 at 19–45.

24 This rule was not in effect at the time the Court entered Judgment denying Petitioner's § 2255 motion.

792 F.3d 1021
United States Court of Appeals,
Eighth Circuit.

UNITED STATES of America, Plaintiff–Appellee
v.
Daniel Lewis LEE, also known as Daniel Lewis Graham, also known as Danny Lee, also known as D L Graham, Defendant–Appellant.

No. 14–2853.
|
Submitted: April 16, 2015.
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Filed: July 13, 2015.
|
Corrected: Dec. 14, 2015.

Synopsis

Background: Following denial of federal inmate's motion to vacate, set aside, or correct sentence, 2008 WL 4079315, the United States District Court for the Eastern District of Arkansas, J. Leon Holmes, J., 2014 WL 1093197, denied inmate's motion for relief from judgment, and inmate appealed.

The Court of Appeals, Murphy, Circuit Judge, held that inmate's motion was second or successive motion that had to be certified by Court of Appeals.

Affirmed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

***1021** George G. Kouros, AFPD, argued, Chicago, IL (Karl Schwartz, AFPD, Wilmington, DE, Morris H. Moon, AFPD, on the briefs, Houston, TX) for Defendant–Appellant.

John Michael Pellettieri, argued, Washington, DC, for Plaintiff–Appellee.

Before MURPHY, COLLOTON, and KELLY, Circuit Judges.

Opinion

MURPHY, Circuit Judge.

Daniel Lewis Lee appeals the district court's denial of his Rule 60(b) motion seeking relief from the final judgment entered in his 28 U.S.C. § 2255 habeas petition. In his initial habeas petition, Lee had asserted that his trial counsel was ineffective, but he failed to attach any evidence to support that claim. The petition was denied, and Lee subsequently filed a Rule 60(b) motion arguing that his initial habeas counsel had been ineffective for failing to present available evidence. The district court [1] characterized Lee's motion as a second or successive habeas motion ***1022** filed without the required precertification by our court, *see* 28 U.S.C. § 2255(h), and denied it. Lee appeals, and we affirm.

I.

Lee and codefendant Chevie Kehoe, members of a white supremacist group, killed a gun dealer, his wife, and their eight year old daughter during a robbery in January 1996. Lee was convicted on four racketeering charges, including three murders in aid of racketeering, and was sentenced by a jury to death. We affirmed his conviction and sentence. *United States v. Lee,* 374 F.3d 637 (8th Cir.2004).

In 2006, Lee moved for postconviction relief under 28 U.S.C. § 2255. Lee's § 2255 petition alleged that his trial counsel had provided ineffective assistance during the penalty phase by not adequately objecting to testimony by government expert witness Dr. Thomas Ryan, and to Dr. Ryan's report regarding the Hare Psychopathy Check List-Revised. Evidence based on the checklist had been introduced at the penalty phase of Lee's trial and that evidence had indicated he was a "psychopath" and a future danger in prison if he were to receive life imprisonment. A footnote in Lee's habeas petition stated that Dr. Ryan had signed a sworn declaration repudiating his reliance on the Hare checklist, but neither that declaration nor supporting exhibits were attached to the § 2255 petition. The district court [2] denied the § 2255 petition without granting an evidentiary hearing.

After Lee's § 2255 petition was denied, he filed a Rule 59(e) motion for reconsideration in 2008. Attached for the first time were affidavits supporting his ineffective assistance claim. They purport to show that the Hare checklist

was scientifically invalid and unreliable for predicting future dangerousness in prison. Also included was a sworn declaration of Dr. Ryan stating that he should not have relied on the Hare checklist in his expert assessment of another defendant, and indicating that the basis for challenging that evidence had been available in 1998, before Lee's 1999 trial. Although Judge Eisele denied the motion for reconsideration, he commented that had counsel timely presented these affidavits, the court "might have determined that an evidentiary hearing was required." Our court denied Lee's request for a certificate of appealability on whether he had "received ineffective assistance of counsel relating to the submission of aggravating factors to the jury to support his death sentence." *United States v. Lee,* 715 F.3d 215, 221 (8th Cir.2013). We also affirmed the denial of Lee's § 2255 petition. *Id.* at 217.

Lee filed this Rule 60(b) motion in 2013 seeking relief from the judgment in his § 2255 case. He argued that under the Supreme Court decisions in *Trevino v. Thaler,* —— U.S. ——, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013), and *Martinez v. Ryan,* —— U.S. ——, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), he was entitled to challenge the denial of his habeas claim that trial counsel had been ineffective for failing to make an adequate challenge to the use of the Hare checklist at sentencing. The district court decided that it lacked jurisdiction to hear the 60(b) motion because it was a second or successive § 2255 motion filed without appellate authorization, but granted Lee a certificate of appealability on the issue of whether Lee's 60(b) motion was a second or successive habeas petition. Lee now appeals the district court's denial of his Rule 60(b) motion.

***1023** II.

After concluding that Lee's Rule 60(b) motion was a second or successive habeas petition, the district court denied the motion without prejudice because Lee had not obtained the required precertification from our court. Lee now presents the same issue to our court—was his motion a second or successive habeas petition?

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2244(b), imposes three requirements on second or successive habeas petitions. First, any claim "that was presented in a prior application shall be dismissed." *Id.* at § 2244(b)(1). If a claim was not already adjudicated, § 2244(b)(2) requires its dismissal unless it relies on "a new and retroactive rule of constitutional law or new facts showing a high probability of actual innocence." *Gonzalez v. Crosby,* 545 U.S. 524, 530, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005). Finally, before filing a second or successive petition in district court, a habeas applicant must receive an order authorizing it from the court of appeals. *Id.* at § 2244(b)(3). Under the statutory scheme, a second or successive habeas motion filed by someone in federal custody must also "be certified as provided in section 2244 by a panel of the appropriate court of appeals." 28 U.S.C. § 2255(h).

The Supreme Court has decided that AEDPA's procedural requirements for second or successive habeas petitions apply to motions for relief from a judgment filed under Federal Rule of Civil Procedure 60(b). *Gonzalez,* 545 U.S. at 531, 125 S.Ct. 2641. The *Gonzalez* Court explained that Rule 60(b) motions often contain claims which are "in substance a successive habeas petition and should be treated accordingly." 545 U.S. at 530–31, 125 S.Ct. 2641. The Court gave examples of such motions, one being an assertion that owing to excusable neglect "the movant's habeas petition had omitted a claim of constitutional error" and an accompanying request to present the claim. *Id., citing Harris v. United States,* 367 F.3d 74, 80–81 (2d Cir.2004). Another example is a motion attacking a "previous resolution of a claim *on the merits* " 545 U.S. at 532, 125 S.Ct. 2641 (emphasis in original).

A Rule 60(b) motion is not treated as second or successive under AEDPA, however, if it does not raise a merits challenge to the resolution of a claim in a prior habeas proceeding, but instead attacks "some defect in the integrity of the federal habeas proceedings." *Gonzalez,* 545 U.S. at 532–33, 125 S.Ct. 2641. Thus, the Rule 60(b) motion in *Gonzalez* which sought to challenge a statute of limitations ruling which had prevented review of an initial habeas petition, did not require precertification under § 2244(b)(3). *Id.* at 533, 538, 125 S.Ct. 2641. Lee argues that his Rule 60(b) motion was wrongly denied because it sought to remedy a defect in

the initial habeas proceeding caused by counsel's having not adequately raised trial counsel's ineffectiveness.

After consideration, we conclude that Lee's Rule 60(b) motion was correctly denied for lack of precertification since it was seeking to reopen a claim which had been raised in his initial habeas petition and decided by the district court. *See* *Gonzalez,* 545 U.S. at 532, 125 S.Ct. 2641. Lee acknowledges that his counsel made the claim in his initial § 2255 petition, but he points out that counsel had omitted the required evidentiary support to establish prejudice. We have previously interpreted *Gonzalez* to provide that omissions by federal habeas counsel are not procedural defects. In *Ward v. Norris,* 577 F.3d 925, 931 (8th Cir.2009), the appellant had filed a Rule 60(b) motion asserting that he had been incompetent at the time of his earlier ***1024** habeas proceeding. He contended that his incompetency claim concerned a defect in his earlier habeas proceeding rather than a challenge to a merits resolution. *Id.* at 932. Although evidence of the alleged incompetency had been available at that stage, habeas counsel had not moved for a stay. *Id.* at 934. We concluded that "the substance of Ward's motion [wa]s a claim for ineffective assistance of federal habeas counsel, and thus was correctly dismissed by the district court." *Id.* Dismissal was proper given the Supreme Court's teaching that "the movant's own conduct, or his habeas counsel's omissions, ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably." *Id.* at 933, *quoting* *Gonzalez,* 545 U.S. at 532 n. 5, 125 S.Ct. 2641 (internal quotation marks omitted).

None of the cases Lee relies upon would save him from a dismissal. His primary focus is on *Trevino v. Thaler,* —— U.S. ——, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013), and *Martinez v. Ryan,* —— U.S. ——, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), which he argues permitted the district court to have acted on his Rule 60(b) motion. Those cases are inapposite, however, since they involved federal habeas review of state court decisions under § 2254. In *Martinez,* the Supreme Court carved out a "limited qualification" to procedural default, explaining that a procedural default occurs when a state court declines to hear a claim based on a party's failure to comply with state procedural rules. *Id.* at 1316, 1319. A federal habeas court will normally not entertain such defaulted claims on a § 2254 motion, but a default may be overcome if the habeas applicant is able to show cause and prejudice for it. *Id.* at 1316. Under the *Martinez* rule, state collateral counsel's ineffectiveness in failing to raise a viable claim of ineffective assistance by trial counsel can serve as cause to overcome the procedural default. *Id.* at 1315. If the habeas claimant can also show prejudice, the procedural default may be excused and the merits of the trial level ineffectiveness claim may be reached by the habeas court. *Id.* at 1320.

The Court limited its ruling in *Martinez* to state jurisdictions where ineffective assistance claims must be raised on initial collateral proceedings rather than on a direct appeal from a conviction. 132 S.Ct. at 1320. In *Trevino,* the Court expanded this concept to cover state review processes which make it "virtually impossible" to present a claim of improper assistance of trial counsel on direct appeal. 133 S.Ct. at 1915 (internal quotation marks omitted). Our court concluded after *Martinez* that a Rule 60(b) motion seeking relief from a judgment on the grounds that a claim was not reached in an earlier federal habeas due to state court procedural default is not second or successive. *Williams v. Delo,* No. 13–2058 (8th Cir. Sept. 23, 2013).

Lee argues for an extension of *Trevino* and *Martinez* to federal review of claims not adequately raised in an initial § 2255 proceeding. He relies on the concern expressed in *Trevino* that failure to overcome a procedural default in a § 2254 proceeding may deprive a petitioner "of any opportunity at all for review" of a claim for ineffective assistance of trial counsel. *Trevino,* 133 S.Ct. at 1921. According to Lee, his current Rule 60(b) motion alleges a procedural defect in his initial habeas proceeding caused by counsel's ineffectiveness by not attaching important affidavits and other supporting evidence to his § 2255 petition.

These arguments fail. In both *Trevino* and *Martinez,* the habeas petitioners adequately raised their claims of ineffective assistance of trial counsel in their initial federal habeas petitions. *Trevino,* 133 S.Ct. at 1915–16; *Martinez,* 132 S.Ct. at 1314. Here in contrast, Lee's § 2255 motion ***1025** did not have supporting evidence to establish prejudice, but only indicated in a footnote that such evidence

could be provided at a later date. The district court went on to reach and deny Lee's claim on the merits. The subsequent denial of Lee's Rule 59(e) motion did not involve a procedural default of the type discussed in *Trevino* and *Martinez*. Rather, in denying the motion the district court relied upon our circuit rule that "Rule 59(e) motions cannot be used to introduce new evidence ... which could have been offered or raised prior to the entry of judgment," *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 934 (8th Cir.2006). It also denied a certificate of appealability as did our court.

No evidentiary omission by counsel in Lee's first § 2255 petition amounted to a procedural defect in the integrity of his habeas proceeding, *see* *Gonzalez*, 545 U.S. at 532, 125 S.Ct. 2641, and any attempt to relitigate the merits denial of the petition would count as a second or successive petition subject to AEDPA's precertification demands, 28 U.S.C. § 2255(h). For all these reasons, the judgment of the district court is affirmed.

All Citations

792 F.3d 1021

Footnotes

1 The Honorable J. Leon Holmes, United States District Judge for the Eastern District of Arkansas.

2 At that time the case was before the Honorable G. Thomas Eisele, United States District Judge for the Eastern District of Arkansas.

811 F.3d 272
United States Court of Appeals,
Eighth Circuit.

UNITED STATES of America, Appellee
v.
Daniel Lewis LEE, also known as Daniel Lewis Graham, also known as Danny Lee, also known as D L Graham, Appellant.

No. 14–2853.
|
Dec. 14, 2015.

Appeal from U.S. District Court for the Eastern District of Arkansas–Little Rock (4:06–cv–01608–GTE).

Attorneys and Law Firms

George G. Kouros, Asst. Fed. Public Defender, argued, Chicago, IL (Karl Schwartz, Asst. Fed. Public Defender, Wilmington, DE, Morris H. Moon, Asst. Fed. Public Defender, on the briefs, Houston, TX), for appellant.

***273** John Michael Pellettieri, argued, Washington, DC, for appellee.

ORDER

The petition for rehearing by the panel is denied. Judge Kelly dissents from the denial of the petition for rehearing by the panel.

KELLY, Circuit Judge, dissenting from the denial of panel rehearing.

I respectfully dissent from the denial of Lee's petition for rehearing by the panel, because the petition—and the recent Seventh Circuit decision it brings to our attention—provide convincing reasons for us to revisit the issues raised in this case. *See* *Ramirez v. United States,* 799 F.3d 845 (7th Cir.2015). In particular, I think it is appropriate to reconsider whether *Martinez v. Ryan,* —— U.S. ——, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), and *Trevino v. Thaler,* —— U.S. ——, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013), should be limited to petitions for post-conviction relief filed by state prisoners under 28 U.S.C. § 2254, or whether, perhaps under limited circumstances, these two cases may also apply to similar petitions filed by federal prisoners under 28 U.S.C. § 2255.

If *Martinez* and *Trevino* have an animating principle, it is that a prisoner must have at least one opportunity to present a claim that trial counsel was ineffective—and to present it with the assistance of effective counsel. *Martinez* pointed out that "if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse [a] procedural default in a federal habeas proceeding, no court will review the prisoner's claims," 132 S.Ct. at 1316, and *Trevino* reiterated that "failure to consider a lawyer's 'ineffectiveness' during an initial-review collateral proceeding as a potential 'cause' for excusing a procedural default will deprive the defendant of any opportunity at all for review of an ineffective-assistance-of-trial-counsel claim," 133 S.Ct. at 1921. In this case, if one grants that Lee's § 2255 counsel was ineffective in failing to attach the evidence in support of his ineffectiveness claim to his petition, Lee will have completed his journey through the court system without ever having had a chance to present a colorable ineffective assistance of trial counsel claim to a court with the aid of an effective lawyer—which seems to be exactly the problem that *Martinez* and *Trevino* sought to remedy.

Whether the concerns that motivated *Martinez* and *Trevino* apply equally to the post-conviction procedures afforded to federal prisoners is a question worth examining. *See* *Ramirez,* 799 F.3d at 854. Like the state systems that *Trevino* discussed, the federal system also strongly discourages ineffectiveness of trial counsel claims on direct appeal. *See* *Ramirez,* 799 F.3d at 852–53. In our circuit, "[w]e only review ineffective assistance of counsel claims on direct appeal in 'exceptional cases.' " *United States v. Mathison,* 760 F.3d 828, 831 (8th Cir.2014). As a result, the § 2255 motion Lee brought was effectively his first opportunity to bring an ineffective assistance of trial counsel claim. *Martinez* was clear that habeas review for similarly-situated prisoners convicted in state court should not be foreclosed unless the prisoners had the benefit of attorney representation in bringing their ineffectiveness claims, and that representation was effective. *Martinez,* 132 S.Ct. at 1317 ("To present a claim of ineffective assistance at trial in

accordance with the State's procedures, ... a prisoner likely needs an effective attorney."). [1]

***274** How the doctrine outlined in *Martinez* and *Trevino* would apply as a practical matter in the federal context is the next question. Unlike state collateral review proceedings, § 2255 proceedings lack a subsequent layer of review by another judicial system. Lee filed a Rule 60(b) motion, but treating his Rule 60(b) motion as the equivalent of a state prisoner's § 2254 petition potentially implicates the restrictions placed on such motions in the habeas context by the Supreme Court's decision in *Gonzalez v. Crosby. See* 545 U.S. 524, 532 & n. 5, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005). Yet while *Gonzalez* held that a Rule 60(b) motion that is in effect a second or successive habeas petition is subject to the strict requirements of § 2244(b), it also recognized that "Rule 60(b) has an unquestionably valid role to play in habeas cases." *Id.* at 534, 125 S.Ct. 2641. Even post-*Gonzalez,* there remains no bar to filing a Rule 60(b) motion that "attacks ... some defect in the integrity of the federal habeas proceedings." *Id.* at 532, 125 S.Ct. 2641. [2] And *Gonzalez* stated only that a Rule 60(b) movant's "habeas counsel's omissions ... *ordinarily* do [ ] not go to the integrity of the proceedings," *Gonzalez,* 545 U.S. at 532 n. 5, 125 S.Ct. 2641 (emphasis added). It did not hold that they can never do so. Perhaps this limiting language in *Gonzalez,* combined with our long-standing precedent that "Rule 60(b) is to be given a liberal construction so as to do substantial justice and 'to prevent the judgment from becoming a vehicle of injustice,' " *MIF Realty L.P. v. Rochester Assocs.,* 92 F.3d 752, 755–56 (8th Cir.1996), would permit a limited Rule 60(b) motion to reopen an initial-review collateral proceeding: when the Rule 60(b) motion was the prisoner's first opportunity to present an ineffective assistance of trial counsel claim, where the prisoner was otherwise diligent, and where the claim has "some merit." *See Martinez,* 132 S.Ct. at 1318; *see also Ramirez,* 799 F.3d at 851; *Cox v. Horn,* 757 F.3d 113, 123–24 (3d Cir.2014) (holding that Rule 60(b) requires consideration of defendant-specific equitable principles even post-*Gonzalez*). Whether this type of Rule 60(b) motion, post-*Martinez* and *Trevino,* would attack a defect in the federal habeas proceedings' integrity and therefore constitute a "true" Rule 60(b) motion merits a closer look. *Gonzalez,* 545 U.S. at 532, 125 S.Ct. 2641; *see also Ramirez,* 799 F.3d at 850 (finding valid a Rule 60(b) motion based in part on post-conviction counsel's failure to attach documents necessary to support his ineffectiveness of trial counsel claims). [3]

***275** Even if, as our panel opinion holds, *Gonzalez* precludes Lee's Rule 60(b) motion on the particular facts of this case, I question whether we should foreclose application of *Martinez* and *Trevino* to other § 2255 cases where the petitioner may bring a more clearly valid Rule 60(b) motion: for example, cases where the petitioner's counsel entirely abandoned him or her, as opposed to simply omitting necessary evidentiary support when filing the petition as Lee's counsel did. *See Williams v. Delo,* No. 13–2058 (8th Cir. Sept. 23, 2013) (unpublished) (holding that prisoner filed a "true Rule 60(b) motion" and not a successive § 2254 petition when he alleged his post-conviction counsel was ineffective in presenting an ineffectiveness of trial counsel claim); *Mackey v. Hoffman,* 682 F.3d 1247, 1253 (9th Cir.2012) (holding that "when a federal habeas petitioner has been inexcusably and grossly neglected by his counsel in a manner amounting to attorney abandonment in every meaningful sense that has jeopardized the petitioner's appellate rights, a district court may grant relief pursuant to Rule 60(b)(6).").

Lee's case presents a difficult procedural issue, with a potentially meritorious claim of effective assistance of counsel underlying it. Whether a Rule 60(b) motion such as his, filed in the course of § 2255 proceedings, could ever provide a means for bringing meritorious ineffectiveness of counsel claims to the courts' attention for the first time is an important question—one that another court of appeals has answered in the affirmative. *Ramirez,* 799 F.3d at 850–52. I recognize that, in order to succeed in his appeal, Lee would have to prevail on various other issues—like whether the district court abused its discretion in denying his Rule 60(b) motion, and whether his ineffectiveness claim has "some merit." *See Martinez,* 132 S.Ct. at 1318. I do not express a position on these issues here. I merely suggest that by granting Lee's request for rehearing, we could give the issues he raises the consideration I think they warrant.

For these reasons, I respectfully dissent from the denial of the petition for rehearing by the panel.

All Citations

811 F.3d 272 (Mem)

Footnotes

1 It may be even less problematic to excuse procedural defaults in federal post-conviction proceedings, since doing so does not implicate concerns about thwarting the states' interests in the finality of their judicial processes. *Coleman v. Thompson,* 501 U.S. 722, 747–48, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *see also* *United States v. Doe,* 806 F.3d 732, 753 (3d Cir.2015) (noting that § 2255 differs from § 2254 in that "comity and federalism are irrelevant"). In this case, the procedural rule that arguably barred Lee's attempt to bring the evidence omitted from his § 2255 petition to the court's attention was a judicially-created federal one. If we were to excuse it, the only framework of procedural rules we would impinge on is our own, not another sovereign's.

2 As an initial matter, it remains an open question whether *Gonzalez,* which was decided in the context of § 2254 proceedings, applies to the same extent to § 2255. *Gonzalez* itself explicitly stated that it was limiting its consideration only to § 2254, rather than § 2255, cases. *Id.* at 529 n. 3. And while the majority of the courts of appeals have extended *Gonzalez* to the § 2255 context, *see United States v. Arrington,* 763 F.3d 17, 22 (D.C.Cir.2014) (collecting cases), those courts were not considering the narrow application of Rule 60(b) to provide for *Martinez*- and *Trevino*-like remedies.

3 It is true that Ramirez's post-conviction counsel also abandoned him on appeal, causing him to miss the deadline for appealing the denial of his § 2255 motion. *Id.* at 849. But his counsel's evidentiary omission must have been independently sufficient to support the Seventh Circuit's conclusion that his Rule 60(b) motion was valid, because the court did not simply reinstate the appeal of the denial of his § 2255 motion, but instead instructed the district court to reopen the § 2255 proceedings so that he could cure the evidentiary omission. *Id.* at 856.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CAPITAL CASE

UNITED STATES OF AMERICA PLAINTIFF

v. NO. 4:97CR00243-02 JLH

DANIEL LEWIS LEE DEFENDANT

OPINION AND ORDER

Daniel Lewis Lee is a federal death row inmate. In a 1999 trial over which the Honorable G. Thomas Eisele presided, Lee and co-defendant, Chevie Kehoe, were convicted of conspiring to violate and violating the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c)-(d), and of three murders in aid of racketeering in violation of 18 U.S.C. § 1959(a)(1). During the penalty phase, the jury first decided that Kehoe should be sentenced to life imprisonment and then, separately, that Lee should be sentenced to death. The Eighth Circuit affirmed Lee's conviction and sentence. *United States v. Lee*, 374 F.3d 637 (8th Cir. 2004), cert. denied 545 U.S. 1141 (2005).

Lee has now filed a motion to vacate his conviction and sentence under 28 U.S.C. § 2255, or, in the alternative, for relief under Rule 60 of the Federal Rules of Civil Procedure. In his § 2255 motion – his third such motion – Lee contends that newly discovered evidence demonstrates due-process violations under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), as well as *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), and *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). The newly discovered evidence is contained in the declaration of James Wanker (Document #1297-2) and an Oklahoma court record – the fee application for a lawyer who represented Lee in a preliminary hearing before a district judge (Document #1297-4).

At trial, Wanker testified that Lee told him that he had committed murder, describing a crime factually similar to the one at issue. In his present declaration, he says that he did not believe Lee, that he told federal law enforcement agents, as well as the federal prosecutor, that he did not believe Lee, that he was instructed to limit his testimony to what he was asked, and that he was instructed not to give personal opinions. This information was not disclosed to defense counsel.

During the sentencing phase, the United States introduced an Oklahoma court record showing that Lee had been convicted of robbery. A man named Joey Wavra was killed in connection with that robbery, and the Government argued that Lee had committed murder. The fee application, beneath the itemized time records, summarizes the proceeding and states in that summary that the court found the evidence insufficient to support a charge of first-degree murder.

The initial issue is whether Lee's motion is second or successive within the meaning of § 2255(h) and therefore is subject to that provision's requirement of authorization by the circuit. 28 U.S.C. § 2255(h); 28 U.S.C. § 2244(b)(3)(A). It is. Because Lee has not obtained authorization from the Eighth Circuit to file a second or successive § 2255 motion and because he is not entitled to relief under Rule 60, his motion is denied.

I. PROCEDURAL HISTORY

Lee has unsuccessfully pursued both direct and collateral review of his conviction and sentence. After the jury returned a verdict sentencing Lee to death, Judge Eisele granted Lee's motion for a new penalty-phase trial based, in part, on the admission of improper future-dangerousness evidence. *United States v. Lee*, 89 F. Supp. 2d 1017 (E.D. Ark. 2000). Judge Eisele determined that, based on the scope of direct examination and the Court's instructions, the Government improperly cross-examined the defense expert mental-health witness, Dr. Mark Cunningham, about Lee's prior bad acts and psychopathy diagnosis. Judge Eisele referred to

Dr. Cunningham's testimony that Dr. Thomas Ryan, the Government's mental-health expert, used the Hare Psychopathy Checklist-Revised (PCL-R) to determine Lee was a psychopath and therefore presented a propensity for future dangerousness in prison. Judge Eisele also found that the Government's questioning of Dr. Ryan about Lee's violent nature was improper rebuttal. *Id*. at 1027-32. The Circuit reversed and reinstated the death sentence, holding that the testimony did not exceed the permissible scope and that, even if the Government's examination of expert witnesses was improper, Lee was not unfairly prejudiced. *United States v. Lee,* 274 F.3d 485, 494-96 (8th Cir. 2001).

In 2006, Lee filed his first motion to vacate his conviction and sentence under 28 U.S.C. § 2255, raising several grounds for relief: he was denied effective assistance of counsel at various trial stages, including *voir dire*; his death sentence was unconstitutional; his juvenile conviction was erroneously admitted; his trial lawyers were unqualified to represent capital defendants; and there was newly discovered evidence related to a co-defendant, Kirby Kehoe. Document #1118. As part of an actual-innocence argument, Lee made a general, unsupported *Brady* allegation and asked the Government to review its files for any previously undisclosed *Brady* material. In an ineffectiveness sub-claim, Lee challenged his trial lawyers' decision not to seek funding for mtDNA testing of a hair from a cap linked to the murders; Lee proffered a mtDNA report excluding the discovered hair as originating from Lee, Document #1138-2. (The jury heard State Crime Laboratory testing showed the discovered hair was microscopically similar to Lee's. TR 4722.) In another ineffectiveness claim, Lee argued that a properly conducted investigation of his involvement in the 1990 murder of Joseph Wavra – upon which the Government relied to demonstrate Lee's future dangerousness at the penalty phase – would have revealed his actual role, placing his actions in a different light and therefore leading to a different sentence. Judge Eisele denied the post-conviction motion without

a hearing. *United States v. Lee*, 2008 WL 4079315 (E.D. Ark. 2008). He held that the jury's finding of guilt would not have been different if the mtDNA evidence had been introduced because the evidence of guilt was overwhelming. *Id.* at *25. With respect to Lee's role in the Wavra murder, Judge Eisele determined "there is nothing before the Court to indicate that [Lee's] 'true role' in the murders was anything other than portrayed during the sentencing trial." *Id.* at *45. He held that Lee's arguments did not demonstrate that the federal death penalty was unconstitutional. *Id.* at *55-60. Judge Eisele also rejected Lee's ineffectiveness arguments that his trial lawyers should have raised additional objections to Dr. Cunningham's and Dr. Ryan's testimony, and to the introduction of the PCL-R. *Id.* at *46, 47-48. He recognized the Circuit's holding that Lee was not unfairly prejudiced by that evidence. *Id.* at *48. In a Rule 59(e) motion to alter and amend the § 2255 judgment, Lee revisited his ineffectiveness claim related to the psychopathy-diagnosis testimony, arguing the PCL-R has no scientific validity in predicting future dangerousness of capital defendants. Document #1165. For the first time, Lee attached supporting material, including an affidavit submitted by Dr. Ryan in support of a post-conviction motion in a separate federal capital case, stating he no longer believed the PCL-R is a reliable indicator of future dangerousness in prison. Document #1165-4. Denying the Rule 59(e) motion, Judge Eisele found the argument was successive and lacking in merit. *United States v. Lee*, 2010 WL 5347174, *5-6 (E.D. Ark. 2010).

Judge Eisele granted a certificate of appealability on whether the death penalty was constitutionally applied. The Eighth Circuit expanded the certificate to include the question of whether Lee received ineffective assistance based on his trial lawyers' use of race-based peremptory challenges during *voir dire*. The Eighth Circuit then affirmed Judge Eisele's denial of the § 2255 petition and the denial of the Rule 59(e) motion. *United States v. Lee*, 715 F.3d 215 (8th Cir. 2013).

Lee thereafter filed a Rule 60(b) motion to set aside the judgment denying his § 2255 motion. He argued that his habeas lawyers were ineffective for failing to challenge the validity of the PCL-R in predicting future dangerousness. Document #1230. This Court denied the motion without prejudice, finding the Rule 60(b) motion was a second or successive § 2255 motion for which Lee had not obtained the required authorization from the Eighth Circuit. *United States v. Lee*, 2014 WL 1093197 (E.D. Ark. 2014). The Eighth Circuit affirmed. *United States v. Lee*, 792 F.3d 1021 (8th Cir. 2015).

II. EVIDENCE AT TRIAL

Based on the trial record, the Eighth Circuit summarized the events that led to Lee's conviction as follows:

> The evidence presented at trial showed that Lee, Chevie Kehoe (Kehoe), his father Kirby Kehoe, his brother Cheyne Kehoe (Cheyne), and Faron Lovelace participated in a variety of criminal activities to promote and fund a white supremacist organization known as the Aryan Peoples' Republic or the Aryan Peoples' Resistence (APR). Kehoe formed the APR to establish an independent nation of white members of the Christian Identity faith in the Pacific Northwest. He patterned it after an antigovernment, white supremacist organization called the Order.
>
> Lee met Kehoe in 1995, and Kehoe recruited him into the APR. In January 1996, Lee and Kehoe left Spokane, Washington, and traveled to Arkansas where they dressed in police raid clothing and went to the home of William Mueller, a gun dealer near Tilly, Arkansas, who owned a large collection of weapons and ammunition. Kehoe and his father had robbed Mueller in February of 1995, and Kehoe expected to find valuable property at his house. The Muellers were not at home when Lee and Kehoe arrived so they waited. When the Muellers returned, Lee and Kehoe overpowered and incapacitated Mueller and his wife. Then they questioned Nancy Mueller's eight-year-old daughter, Sarah Powell, about where they could find cash, guns, and munitions. After finding $50,000 in cash, guns, and ammunition, they shot the three victims with a stun gun, placed plastic bags over their heads, and sealed the bags with duct tape. They took the victims in Kehoe's vehicle to the Illinois Bayou where they taped rocks onto them and threw them into the bayou. The bodies were discovered in Lake Dardanelle near Russellville, Arkansas, in late June of 1996.

> Kehoe and Lee returned to Spokane with the stolen property around January 14, 1996. Kehoe traveled to several states to sell the Mueller property at gun shows. He and Lee were apprehended by law enforcement in 1997 after some of Mueller's guns had been traced to Kehoe.

Lee, 374 F.3d at 641-42.

Kehoe's mother, Gloria Kehoe, testified that Lee and Kehoe separately confessed the murders to her. She told the jury of the murder details that Kehoe described, and she testified that Lee told her that Kehoe paid him for his participation with $1000 and a rifle. TR 4971-75. Cheyne also testified that Kehoe confessed to him. He said Kehoe gave details of the murders, including Lee's role, and showed him the raid gear that he and Lee had worn. TR 5326-30. Both testified that Kehoe admitted killing the child by himself because Lee refused. TR 4974, 5328.

Lee's and Kehoe's former neighbors, James and Dalvine Wanker, also testified for the Government. On direct examination, James said that in May of 1996 he and his wife moved into an RV park at the Shadows Motel in Spokane, where Lee and Kehoe resided. TR 4078-79. He said that Lee told him in July of 1996 that "when he went down south somebody had . . . f*** with him and so he wrapped them up, taped them, and threw them in the swamp." TR 4081-83. When asked on cross-examination why he did not call the police after hearing Lee's claim, James said he "just kind of blew it off as [Lee] was talking to hear himself talk." TR 4088. Dalvine similarly testified that, in response to her concerns about a new tenant at the Shadows Motel, Lee retrieved a firearm from his trailer and told her that "he wasn't afraid to use it and that when he had gone down south and that some people had f*** with him, and that he had taken care of it." TR 4093.

The Government also presented physical evidence supporting Lee's conviction. Paint samples taken from Kehoe's GMC truck were "consistent, very similar" to metallic blue paint chips found in duct tape removed from the slain bodies. TR 3658-64, 3678-84. The jury heard that an

Idaho storage unit rented by Kehoe contained documents naming the Muellers, as well as paperwork naming Kehoe, or his wife. TR 3479-80, 3610-28. Fibers microscopically similar to the carpet in the Muellers' living room and a hair microscopically similar to William Mueller's were discovered on the Muellers' gun display case in the unit. TR 3489-90, 3646-54. Fingerprints inside and outside display cases matched Kehoe's and Lee's. TR 3483-84, 3489-90, 3707-10.

During Lee's penalty phase, the Government sought to prove five aggravators supporting a death sentence: he murdered the victims with the expectation of receiving something of pecuniary value; he murdered the victims after substantial planning and premeditation; the crime involved the intentional killing of more than one person in a single criminal episode; the risk of future dangerousness; and the crime involved a particularly vulnerable victim based on her youth. Document #1297-11; TR 7373.

To justify a death sentence for Lee when Kehoe had been sentenced to life imprisonment, the Government's penalty-phase case emphasized the future-dangerousness aggravator. The Government argued that Lee's past conduct showed that he was violent and volatile, and that he would present a danger in prison. TR 7378-84, 7956-75. Focusing on the Wavra murder, the Government introduced evidence showing Lee's role in that crime. Brian Compton, who was at the party when Wavra was killed by John David Patton, testified about Lee's involvement, TR 7408-18; the transcript of Lee's testimony at John David Patton's Oklahoma preliminary hearing was read aloud, TR 7418-56; and the responding Oklahoma detective and the forensic pathologist described Wavra's wounds and cause of death, TR 7389-98, 7398-407. The jury heard that, at a social gathering in 1990, Lee, then age seventeen, and his cousin, John David Patton, beat Wavra and forced him down a manhole into a storm sewer; that Patton went down into the manhole with Wavra, while Lee retrieved a plastic bag, rope, and knife that he handed down to Patton; that Patton

handed Wavra's clothes up to Lee, who put them in the plastic bag; and that Patton then used the knife to repeatedly stab Wavra and slit his throat. Patton was convicted of first-degree murder in an Oklahoma state court, while Lee pled to deferred adjudication on a robbery charge. TR 7470. Other future-dangerousness evidence included (1) Lee's threatening behavior toward a sheriff's deputy, while he was in jail awaiting trial, TR 7463-67, and (2) a 1995 Florida conviction for carrying a concealed weapon, TR 7469.

In both opening and closing argument, the Government told the jury that Lee "has an earlier murder under his belt." TR 7964. It argued that, even though Patton "wielded that knife," Lee helped him by giving him the knife and rope. TR 7382. The Government argued Lee knew what he was doing when he gave the knife to Patton, and that he both "legally and morally" had "the blood of Joey Wavra" on his hands. TR 7962-63. The Government contended the robbery plea offer was a "gift" from the Oklahoma prosecutor and an "incredible deal" – and a missed opportunity for Lee to turn his life around. TR 7383, 7963-64. The jury unanimously found the Government had established beyond a reasonable doubt the existence of each aggravating circumstance, except the substantial-planning-and-premeditation aggravator.

Both Judge Eisele and the Eighth Circuit recognized the Wavra evidence as an integral piece of the Government's penalty-phase case. In finding that Lee was not unfairly prejudiced by expert testimony and then reinstating the death penalty, the Eighth Circuit noted that, "none of the evidence elicited from Dr. Cunningham was likely to inflame the jury as much as testimony about Lee's involvement in the murder of Joey Wavra, which had been part of the government's case." *Lee,* 274 F.3d at 494. Similarly, in rejecting Lee's argument that his trial lawyers should have done more to investigate the Wavra murder, Judge Eisele acknowledged evidence of Lee's participation in that

crime was "powerful and likely contributed to or influenced the jury's ultimate decision" in favor of a death sentence. *Lee,* 2008 WL 4079315, at *45.

III. LEE'S CURRENT CLAIMS

Lee contends, first, that the Government suppressed material exculpatory evidence that his lawyers could have used to challenge James Wanker's guilt-phase testimony in violation of *Brady v. Maryland*, *Napue v. Illinois*, and *Giglio v. United States*, and, second, that the Government failed to disclose material exculpatory evidence contradicting the prosecutor's penalty-phase argument about his culpability in the Wavra murder in violation of the same three Supreme Court cases.

First, Lee argues the Government failed to disclose the entirety of Wanker's pretrial interviews and statements – specifically that Wanker told the investigating agents and the prosecuting attorney that he did not believe Lee's claims implicating himself in the Mueller murders. Lee asserts that his lawyers could have used this favorable evidence to challenge Wanker's testimony and that the Government knew or should have known that Wanker's testimony was misleading and failed to correct it. Wanker's guilt-phase testimony was that Lee told him that he had committed murders and described them as factually similar to the Mueller murders. In his present declaration, Wanker says that Lee had a habit of falsely claiming responsibility for criminal acts to make himself seem like a "tough guy." He says that he repeatedly told law enforcement and prosecutors that he did not believe Lee's claims were true. Document #1297-2. Lee proffers copies of the officers' reports that do not include Wanker's statements in which he stated that he doubted the truthfulness of Lee's confession. Document #1297-8, #1297-9. Wanker also says that, before he testified, the Government instructed him to "limit [his] testimony to only what was asked and not to give personal opinions." Document #1297-2. Wanker testified on cross-examination that he did not contemporaneously report Lee's claim to law enforcement because he thought Lee was "talking

to hear himself talk." TR 4088; Document #1297-2. Lee's lead guilt-phase lawyer attests that if he had known about Wanker's interview statements he would have aggressively questioned him further on this point. Document #1297-3. Wanker says that if anyone had asked him about his beliefs at trial he would have testified that he continued to hold that opinion, and that he still did not believe that "[Lee's] story was anything more than just empty bragging." Document #1297-2.

Second, Lee argues the Government suppressed the fact that an Oklahoma state court found at a preliminary hearing that there was insufficient evidence for a first-degree murder charge against him in the Wavra case. He says this evidence contradicts the Government's penalty-phase argument that prosecutors gave him a "gift" by not charging him with murder. TR 7383. Lee contends that, because the Government consulted with Oklahoma law enforcement officials involved in the Wavra case, it must have learned about the judicial finding or the officers' knowledge should be imputed to the Government. He attaches in support an "Application For Attorney Fees" and "Statement of Time Expended" filed by the lawyer who represented him at the preliminary hearing. The unsigned Statement includes this paragraph:

> The matter came on for hearing before Judge Hall; District Attorney called witness; hearing held; Court finds crime of Murder I not established by evidence; Court recommends a Dismissal of Murder I charges and State consider refiling on charge of Robbery I.

Document #1297-4.

IV. WHETHER LEE'S MOTION IS SECOND OR SUCCESSIVE

A "second or successive" § 2255 motion to vacate, correct, or set aside a sentence must be certified by the Circuit to include:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). *See* 28 U.S.C. § 2244(b)(2). Because this motion is not Lee's first-in-time § 2255 motion and because Lee has not obtained the certification required by § 2255(h), the threshold question is whether it is a second or successive application for habeas relief. If so, this Court lacks jurisdiction to consider the motion.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) does not define the term "second or successive." *Crawford v. Minnesota*, 698 F.3d 1086, 1089 (8th Cir. 2012). The United States Supreme Court has recognized the term does not cover all motions "filed second or successively in time." *Panetti v. Quarterman*, 551 U.S. 930, 944, 127 S. Ct. 2842, 2853, 168 L. Ed. 2d 662 (2007). That phrase instead is a "term of art" incorporating the pre-AEDPA abuse-of-the-writ doctrine. *Crawford,* 698 F.3d at 1089 (citing *Slack v. McDaniel*, 529 U.S. 473, 486, 120 S. Ct. 1595, 1605, 146 L. Ed. 2d 542 (2000)). AEDPA codified some of the existing limits on successive petitions and imposed new restrictions. *Felker v. Turpin*, 518 U.S. 651, 664, 116 S. Ct. 2333, 2340, 135 L. Ed. 2d 827 (1996). *See Baranski v. United States*, 880 F.3d 951, 955 (8th Cir. 2018) ("In [AEDPA], Congress imposed stricter limitations on the filing of second and successive § 2255 motions than the abuse-of-the-writ principles . . .").

In *Panetti v. Quarterman*, the Supreme Court held that a claim under *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986), that the defendant is incompetent to be executed, is not subject to the gatekeeping provisions for second or successive applications for habeas relief if the claim is promptly raised when ripe. *Panetti*, 551 U.S. at 945, 127 S. Ct. at 2583. Limiting its holding to *Ford* claims, the Supreme Court recognized that, because a petitioner's mental condition at the time of the scheduled execution is at issue, *Ford* claims are generally not

ripe until after the time for filing an initial habeas petition has passed. *Id.* at 943, 127 S. Ct. at 2852. The Court held that its recognition of this exception did not thwart AEDPA's purposes or allow for abuse of the writ: "We are hesitant to construe a statute, implemented to further the principles of comity, finality, and federalism, in a manner that would require unripe (and, often, factually unsupported) claims to be raised as a mere formality, to the benefit of no party." *Id.* at 947, 127 S. Ct. at 2855.

Citing *Panetti*, Lee argues that his current § 2255 motion similarly cannot be considered second or successive because he was unable to raise his *Brady*[1] claims due to the Government's concealing the supporting evidence. He also argues that in the Eighth Circuit *Brady* claims based on material evidence are not "second or successive" within the meaning of § 2255(h), citing *Crawford v. Minnesota*. In *Crawford,* the Circuit held that a nonmaterial *Brady* claim raised in a second-in-time habeas petition was a second or successive application. 698 F.3d at 1090. The Eighth Circuit recognized that other circuits had held that all second-in-time *Brady* claims are subject to § 2255(h)'s preauthorization requirement but did not reach that issue. "While some courts have concluded that all *Brady* claims in second habeas petitions are second or successive regardless of their materiality, that question is not presented here because in this case there was overwhelming evidence of [guilt]." *Id*.

Lee also cites *United States v. Lopez,* 577 F.3d 1053 (9th Cir. 2009), for the same point. In that case, the Ninth Circuit, like the Eighth Circuit in *Crawford*, limited its holding to nonmaterial *Brady* claims. *Lopez*, 577 F.3d at 1066-67. More recently, the Ninth Circuit has held that all *Brady*

[1] Because the same analysis applies to *Brady* and *Napue/Giglio* claims, Lee's claims are collectively referred to as "*Brady* claims."

claims are subject to § 2255(b)'s preauthorization requirement. *Brown v. Muniz*, 889 F.3d 661, 668, 673 (9th Cir. 2018).

The new guilt-phase evidence upon which Lee relies as a basis for his present motion is that, when Wanker testified about Lee's claims related to the Mueller murders, he continued to hold the opinion that Lee was only posturing. Lee argues Wanker's testimony gave the false impression that, while he initially dismissed Lee's claims as "just talking," he later changed his assessment and felt compelled to come forward as a witness. The parties spar over the significance of Wanker's testimony in light of other guilt-phase evidence. Lee argues the Kehoes were not credible witnesses; he says the Government's timeline does not allow for Kehoe and Lee to murder the victims in Arkansas and then return to Washington; and he challenges fingerprint evidence, contending there were opportunities, other than during the Mueller murders, for Lee's contact with the gun display cases. These are not new arguments; the jury heard related evidence. Lee also points to the mtDNA testing conducted in 2007 in connection with his initial § 2255 motion showing that the hair linked to the crimes was not his. Document #1297-6.

There is no reasonable probability, however, that Wanker's testimony that he continued to be skeptical of Lee's claims would have resulted in a different verdict. The jury heard Wanker testify that he did not call the police when Lee claimed to have committed murder because he believed that Lee was "talking to hear himself talk." His present declaration that at trial he continued to believe that Lee's story was "empty bragging" does not materially change his testimony. Evidence of Wanker's continued opinion is not enough to overcome the overwhelming evidence of Lee's guilt. Thus, as to the Wanker testimony, Lee has not demonstrated that material evidence was withheld by the Government, so that part of his claim is second or successive under

Crawford.[2] 698 F.3d at 1089-90 (citing *Lopez*, 577 F.3d at 1066). Because the alleged due-process violations are not based on material evidence, the gatekeeping provision of § 2255(h) applies to Lee's claim based on the Wanker testimony.

On the other hand, assuming that the Oklahoma state court held at a preliminary hearing that the evidence was insufficient to establish probable cause that Lee was guilty of murdering Joey Wavra,[3] that evidence is material. In light of the government's reliance on the Wavra murder during sentencing, it is reasonably likely that, if it had been disclosed at trial that the Oklahoma court found the evidence insufficient to establish that Lee was guilty of murder, the outcome at sentencing would have been different. Therefore, the Court must address the issue of whether a *Brady* claim based on material evidence is subject to § 2255(b)'s preauthorization requirement.

Every circuit that has addressed this issue has held that a subsequent habeas application asserting a *Brady* violation, whether material or not, is a second or successive motion that requires

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[2] Lee says *Carter v. Kelley*, No. 5:16CV00367-DPM-PSH (E.D. Ark. 2017), is instructive and urges this Court to order factual development on *Brady* materiality. In that case, the magistrate judge recommended dismissal of the petitioner's habeas petition as second or successive without analysis of the law surrounding second-in-time *Brady* claims. *No. 12.* The district court judge declined the recommendation and returned the case for a finding on *Brady* materiality, stating that "[i]f the [petitioner's] claim is material, then his petition *may* not be 'second or successive' within the meaning of AEDPA." *No. 14* (emphasis supplied) (citing *Crawford,* 698 F.3d at 1089-90 and *Lopez*, 577 F.3d at 1066-67). The district court judge thereafter reviewed the magistrate judge's fact findings and adopted the recommendation that the *Brady* claim was nonmaterial and therefore an unauthorized second or successive habeas application. *No. 28.* As in *Crawford,* the district court did not reach the issue of whether all second-in-time *Brady* claims are second or successive habeas applications.

[3] The only evidence presented on this point is the lawyer's cursory statement in his fee application. The Court is assuming that that statement is accurate and that Lee could prove its accuracy at an evidentiary hearing.

authorization by the Circuit.[4] *Blackman v. Davis,* 909 F.3d 772, 778-79 (5th Cir. 2018); *In re Wogenstahl*, 902 F.3d 621, 626-28 (6th Cir. 2018); *Brown*, 889 F.3d at 668-74; *Quezada v. Smith*, 624 F.3d 514, 522 (2d Cir. 2010); *In re Pickard,* 681 F.3d 1201, 1205 (10th Cir. 2012); *Tompkins v. Sec'y, Dep't of Corr*., 557 F.3d 1257, 1259-60 (11th Cir. 2009); *Evans v. Smith*, 220 F.3d 306, 322-25 (4th Cir. 2000). Distinguishing *Panetti*, the circuits have held that, unlike competency-to-be-executed claims, a *Brady* violation occurs at trial or at sentencing and is therefore ripe when the first habeas application is filed; and they have recognized that the statutory scheme governing second or successive petitions accounts for circumstances, such as a *Brady* claim, where new evidence is discovered after the first habeas petition. *In re Wogenstahl*, 902 F.3d at 627-28; *Brown*, 889 F.3d at 668, 672-74; *Tompkins*, 557 F.3d at 1259-60. *See Evans*, 220 F.3d at 323 ("[T]he standards that Congress has established for the filing of second or successive petitions account for precisely the type of situation Evans alleges."). As the Ninth Circuit recently recognized, "whether a claim is ripe under AEDPA turns on whether the factual predicate existed, not whether the petitioner *knew* it existed at the time of his initial habeas petition." *Brown*, 889 F.3d at 674 (emphasis in original) (citing *United States v. Buenrostro*, 638 F.3d 720, 725 (9th Cir. 2011)).

Lee cites *Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009), and *Scott v. United States*, 890 F.3d 1239 (11th Cir. 2018), but those cases are not on point. In *Douglas*, the Tenth Circuit, under the "unique circumstances" presented, treated the *Brady* claim raised in a second habeas petition as a supplement to the related prosecutorial-misconduct claim in the pending habeas application. 560 F.3d at 1187-90. Unlike the *Douglas* petitioner, Lee does not have an open or

[4] While 28 U.S.C. § 2255(h) governs second or successive habeas motions filed pursuant to a federal court judgment, it incorporates by reference § 2244 governing habeas petitions challenging state-court judgments. In *Crawford*, a § 2254 case, the Eighth Circuit interpreted § 2254 as though it were identical to § 2255 when it relied on *Lopez*, which was a § 2255 case.

pending habeas application. Since *Douglas,* the Tenth Circuit has recognized a second-in-time *Brady* claim as second or successive under § 2255(h). *In re Pickard*, 681 F.3d at 1205; *see also Brown*, 889 F.3d at 673 n.10 (distinguishing *Douglas*). In *Scott,* an Eleventh Circuit panel applied *Tompkins* to hold the petitioner's second-in-time § 2255 motion was barred as second or successive, but "urged the Court to take this case *en banc* so we can reconsider *Tompkins*' reasoning." 890 F.3d at 1249-589. The Circuit, however, summarily denied the petition for rehearing *en banc*, with no Eleventh Circuit judge requesting the court be polled. *Scott v. United States*, Nos. 15-1137, 16-11950 (11th Cir. Aug. 16, 2018). *See also Jimenez v. Fla. Dep't of Corr.*, No. 18-15128, 2018 WL 6584113, *3 (11th Cir., Dec. 13, 2018) (following *Tompkins*).

Based on the unanimous authority from the circuits that have decided the issue, as well as the plain language of the statute, the *Brady* claims asserted in Lee's current § 2255 motion constitute a second or successive habeas application that requires authorization from the Eighth Circuit. A *Brady* violation occurs when the evidence is favorable to the accused, that evidence was suppressed by the State, and prejudice ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 1948, 144 L. Ed. 2d 286 (1999). A *Napue/Giglio* violation requires a new trial when the Government solicits or fails to correct false testimony, or makes a misleading argument, that is material. *United States v. Bigeleisen*, 625 F.2d 203, 208-09 (8th Cir. 1980). Because all these components occurred prior to or during Lee's trial, the alleged constitutional violations were ripe when his first habeas motion was filed.

That the circuits are unanimous is not surprising because the habeas statutory scheme expressly provides for cases in which newly discovered evidence is raised in a second or successive application. 28 U.S.C. § 2255(h); 28 U.S.C. § 2244(b)(2). The statute does not except *Brady* claims. Section 2255(h) therefore applies to Lee's claims; he is entitled to file a second or

successive habeas motion only if he receives certification from the Eighth Circuit. Because Lee has not obtained the required authorization, this Court does not have jurisdiction to consider his application for relief.

V. WHETHER LEE IS ENTITLED TO RELIEF UNDER RULE 60

Lee alternatively asks this Court to consider his application as a motion for relief pursuant to Rule 60 of the Federal Rules of Civil Procedure and reopen his first § 2255 proceeding in light of new evidence. Lee's § 2255 motion contends that the Government violated its duties under *Brady*, *Giglio*, and *Napue* at trial; his Rule 60 motion contends that the Government violated its duties during the § 2255 proceedings. *Cf. Pickard*, 681 F.3d at 1205-06.

In evaluating a Rule 60(b) motion, the initial inquiry is whether the allegations amount to a second or successive habeas application under § 2255 or § 2244. *Boyd v. United States*, 304 F.3d 813, 814 (8th Cir. 2002). A Rule 60(b) motion is treated as a second or successive habeas application if it contains a claim, defined as an "'asserted federal basis for relief from a state court's judgment of conviction' or as an attack on the 'federal court's previous resolution of the claim *on the merits*.'" *Ward v. Norris*, 577 F.3d 925, 933 (8th Cir. 2009) (emphasis in original) (quoting *Gonzales v. Crosby,* 545 U.S. 524, 530, 532, 125 S. Ct. 2641, 2647-48, 162 L. Ed. 2d 480 (2005)). The motion is considered under Rule 60(b) when it challenges "'some defect in the integrity of the federal *habeas* proceeding.'" *Id*. Courts have applied this same analysis to Rule 60(d) motions. *See United States v. Robinson*, No. 4:10CR00032-01, 2013 WL 6195749, *1 (E.D. Ark., Nov. 26, 2013).

Lee contends the Government committed "fraud . . . , misrepresentation, or misconduct" in violation of Rule 60(b)(3), or committed "fraud on the court" in violation of Rule 60(d)(3). He says that the Government made misrepresentations in its habeas responsive brief: (1) a footnote, stating

"[a] huge amount of 'discovery' materials were provided," Document #1126 at 45 n.16[5]; and (2) in response to Lee's ineffectiveness claim related to the Wavra murder, statements that the Government was "at a loss to understand that which Lee now argues his trial counsel should have done," and that it was "difficult to imagine" how more investigation would have placed Lee's role in the Wavra murder in a different light. Docket #1126 at 75-76. Lee argues that the Government's misrepresentations impeded the district court from evaluating his habeas claims and therefore created a defect in the integrity of his initial § 2255 proceeding. He argues that his general *Brady* allegation and ineffectiveness claim related to the Wavra murder would have been viable if the Government had disclosed supporting material: Wanker's opinion statements and the finding of the district judge at the preliminary hearing in the Wavra case. The district court denied relief on the ineffectiveness claim and did not address the unsupported *Brady* allegation; a certificate of appealability was not granted on either point. *Lee*, 2008 WL 4079315, at *45; *Lee*, 715 F.3d at 217.

Assuming that Lee has properly asserted a Rule 60 motion as opposed to a second or successive habeas petition, he is not entitled to relief under either Rule 60(b)(3) or (d)(3). A Rule 60(b)(3) motion must be filed no more than a year from the order or judgment that it seeks to set aside. Fed. R. Civ. P. (60)(c)(1). The Court has no authority to extend that deadline. Fed. R. Civ. P. 6(b)(2). As Lee argues, this time limit is not jurisdictional. *Dill v. Gen. Am. Life Ins. Co.*, 525 F.3d 612, 618-19 (8th Cir. 2008). But that means only that the benefit of the time limit may be forfeited if it is not timely raised. *Id*. If the time limit is properly raised, the rules assure that the time limit will be enforced. *Id*. The Government has properly asserted the one-year time limit. This

[5] Lee refers to Footnote 16 as being part of the Government's response to his general, unsupported *Brady* allegation. Document #1118 at 7. Footnote 16, however, was in the response to Lee's ineffectiveness claim challenging his trial lawyers' failure to oppose the Government's motion seeking restrictions on his personal discovery access. Document #1126 at 45, n.16.

Court entered the order denying Lee's first § 2255 petition in 2008. *Lee*, 2008 WL 4079315. Lee's request for relief under Rule 60(b)(3) therefore is untimely.

Lee, moreover, has not demonstrated the "exceptional circumstances" required for relief. *Atkinson v. Prudential Property Co., Inc.*, 43 F.3d 367, 371 (8th Cir. 1994) (quotations omitted). For Rule 60(b)(3) relief, Lee must show by clear and convincing evidence that the Government "engaged in fraud or other misconduct and that this conduct prevented [him] from fully and fairly presenting his case." *Cook v. City of Bella Villa*, 582 F.3d 840, 855 (8th Cir. 2009) (quotations omitted). Lee has not met this burden. While failure to produce evidence requested in discovery may under some circumstances be grounds for vacating a judgment, the moving party must show that the failure was due to misconduct by the party that should have produced the evidence. *Atkinson,* 43 F.3d at 373. Lee has not alleged facts to show that the omission of any evidence during his § 2255 proceeding was due to the Government's misconduct or that the Government intentionally misrepresented any facts. Nor has he demonstrated that any failure to disclose Wanker's opinions or the Oklahoma judicial finding prevented him from fully and fairly litigating his initial § 2255 claim. "This is not a case in which [the Government] withheld information that they alone possessed." *Id.* Lee could have interviewed Wanker before filing his first habeas petition; and the Oklahoma court record upon which he now relies is public information.

Likewise, Lee's allegations do not meet the standard for fraud on the court under Rule 60(d)(3). Fraud on the court is narrowly defined as "fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury." *Superior Seafoods, Inc. v. Tyson Foods, Inc.*, 620 F.3d 873, 878 (8th Cir. 2010) (quoting *United States v. Smiley*, 553 F.3d 1137, 1144-45 (8th Cir. 2009) (quotations omitted)). "A finding of fraud on the court is justified only by the most egregious misconduct directed to the court itself,

such as bribery of a judge or jury or fabrication of evidence by counsel." *Greiner v. City of Champlin*, 152 F.3d 787, 789 (8th Cir. 1998) (quotations omitted). "[I]t is necessary to show a deliberately planned scheme designed to improperly influence the court in its decision." *Heim v. Comm'r of Internal Revenue*, 872 F.2d 245, 249 (8th Cir. 1989). Lee's allegations do not clear this high bar. *See Tyler v. Purkett*, 413 F.3d 696, 700-01 n.7 (8th Cir. 2005) ("Claims that a party did not disclose to a court certain facts allegedly pertinent to the matter before it, however, do not normally constitute fraud on the court.").

CONCLUSION

Daniel Lewis Lee's *Brady* claims in his present motion constitute a second or successive habeas petition under 28 U.S.C. § 2255 for which Eighth Circuit authorization is required. Lee is not entitled to relief under Federal Rule of Civil Procedure 60. Therefore, the motion is denied without prejudice. No certificate of appealability will be issued.

IT IS SO ORDERED this 26th day of February, 2019.

J. Leon Holmes

J. LEON HOLMES
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-2432

Daniel Lewis Lee

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Eastern District of Arkansas - Little Rock
(4:18-cv-00649-JLH)

JUDGMENT

Before COLLOTON, KELLY, and ERICKSON, Circuit Judges.

The application for a certificate of appealability has been considered by the court and is denied.

November 04, 2019

KELLY, Circuit Judge, dissenting.

I would grant a certificate of appealability. I believe jurists of reason could disagree about whether Lee's newly discovered evidence is material for purposes of Brady. See United States v. Kehoe, 310 F.3d 579, 591 (8th Cir. 2002); Martin v. State, 57 S.W.3d 136, 139–40 (Ark. 2001). I also believe jurists of reason could disagree about whether a material Brady claim in a second habeas motion qualifies as a "second or successive motion" subject to the gatekeeping requirements of 28 U.S.C. § 2255(h). See Panetti v. Quarterman, 551 U.S. 930, 942–47 (2007); Scott v. United States, 890 F.3d 1239, 1243 (11th Cir. 2018); Crawford v. Minnesota, 698 F.3d

1086, 1090 (8th Cir. 2012); see also Barefoot v. Estelle, 463 U.S. 880, 893 (1983) (explaining that in a death-penalty case, "the nature of the penalty is a proper consideration" in deciding whether to certify an issue for appeal).

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

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-2351

Daniel Lewis Lee

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Eastern District of Arkansas - Central
(4:18-cv-00649-KGB)

AMENDED JUDGMENT

Before COLLOTON, KELLY and ERICKSON, Circuit Judges.

Lee's motion for stay of execution pending appeal has been considered by the court and is denied. The application for a certificate of appealability and alternative motion for authorization to file a second or successive motion under 28 U.S.C. § 2255 are also denied.

Judge Kelly would grant the motion for stay of execution and the application for a certificate of appealability.

KELLY, Circuit Judge, dissenting.

I would grant Lee's application for a certificate of appealability because I believe jurists of reason could debate whether the district court correctly denied Lee's Rule 60(b) motion. See Miller-El v. Cockrell, 537 U.S. 322, 342 (2003); Slack v. McDaniel, 529 U.S. 473, 483–84 (2000). Lee argued in his Rule 60(b) motion

that misconduct and misrepresentations by the government caused a defect in the integrity of his initial post-conviction proceedings under 28 U.S.C. § 2255. See Fed. R. Civ. P. 60(b)(3), (6). Specifically, Lee alleged the government suppressed evidence that law enforcement conducted a polygraph examination of Paul Humphrey—an individual whom police initially suspected of murdering the Mueller family and who testified favorably for the government at trial. Lee alleged that the polygraph results showed Humphrey was involved in the Mueller murders. Lee argued the government violated its Brady obligations by failing to turn over this evidence prior to trial. He also contended the government made false statements, during both his trial and § 2255 proceedings, that it had provided all relevant Brady material pertaining to Humphrey. The government does not deny it violated its s28 Brady obligations.

Nevertheless, the district court denied Lee's Rule 60(b) motion. Relying on Smith v. Clarke, 458 F.3d 720, 725 (8th Cir. 2006), the court concluded that, to gain relief under Rule 60(b)(3), Lee was required to demonstrate that the government made intentional or deliberate misrepresentations. Jurists of reason could debate whether this decision was correct. Prior to Smith, we explained that a party moving under Rule 60(b)(3) need only "establish that the adverse party engaged in fraud or other misconduct and that this conduct prevented the moving party from fully and fairly presenting its case." E.F. Hutton & Co. v. Berns, 757 F.2d 215, 216–17 (8th Cir. 1985). In my view, Lee has arguably shown the government's alleged Brady violation and misrepresentations prevented him from fully and fairly litigating his initial § 2255 motion. See id.; see also In re Pickard, 681 F.3d 1201, 1204 (10th Cir. 2012) (holding that a "claim of prosecutorial misconduct in the § 2255 proceedings is a proper Rule 60(b) claim"); United States v. Williams, 753 F. App'x 176, 177 (4th Cir. 2019) (same).

It is not obvious that Smith set a different standard for Rule 60(b)(3) relief. But even if it did, jurists of reason could debate whether Lee adequately established that the government made intentional or deliberate misrepresentations during his trial and initial § 2255 proceedings. Lee plausibly contends the government suppressed Humphrey's polygraph results because those results did not fit with its theory of Lee's guilt. These are not Lee's first allegations of government misconduct. Rather, they are part of allegations regarding a broader pattern of the

government repeatedly failing to abide by its Brady obligations and its own policies and procedures, as well as employing tactics at sentencing that even the district court found concerning. I would evaluate Lee's application in light of that pattern and the extraordinary nature of the proceedings against him. See Cornell v. Nix, 119 F.3d 1329, 1332 (8th Cir. 1997) (holding that a Rule 60(b) motion "should be liberally construed when substantial justice will thus be served"); see also Barefoot v. Estelle, 463 U.S. 880, 893 (1983) (explaining that in a death-penalty case, "the nature of the penalty is a proper consideration" in deciding whether to certify an issue for appeal). Viewed in their totality, Lee's allegations show an arguable case of intentional government misconduct and an extraordinary case in which the risk of injustice to Lee and the threat of undermining the public's confidence in the judicial process potentially merit relief. See Buck v. Davis, 137 S. Ct. 759, 777–78 (2017) (discussing Fed. R. Civ. P. 60(b)(6)).

* * *

In 1999, Lee and his co-defendant, Chevie Kehoe, proceeded to trial together on charges of racketeering and murder in aid of racketeering. United States v. Lee, 374 F.3d 637, 641 (8th Cir. 2004). The murder charges stemmed from the brutal killings of William and Nancy Mueller, and Nancy's eight-year-old daughter, Sarah Powell. Id. at 641–42. The government alleged Kehoe led a group of people working to establish a white-supremacist nation in the Pacific Northwest. United States v. Lee, No. 4:97-CR-243-(2) GTW, 2008 WL 4079315, at *2–3 (E.D. Ark. Aug. 28, 2008). Lee was one of Kehoe's "assistants." Id. Or, in the dehumanizing words of the government's closing argument to the jury: "Chevie Kehoe is the leader of this enterprise. . . . Danny Lee is like the faithful dog." Id. at *32. The government's evidence showed that, although Lee had participated in the murder of William and Nancy Mueller, he "would have no part in the killing of Sarah Powell," so Kehoe killed the child himself. Lee, 374 F.3d at 642. As presiding District Judge G. Thomas Eisele put it: "There was no question that Kehoe was the more culpable of the two." DCD 1353 Ex. A.

The jury convicted Kehoe and Lee as charged. Lee, 374 F.3d at 643. The government then sought the death penalty for both defendants before the same jury. Id. Kehoe's penalty phase proceeded first. Recognizing the clear disparity in

culpability between Kehoe and Lee, the government informed the district court and Lee's counsel that "if the jury sentenced Defendant Kehoe to life imprisonment, it would not pursue the death penalty for Defendant Lee." United States v. Lee, 89 F. Supp. 2d 1017, 1032 (E.D. Ark. 2000). The jury ultimately sentenced Kehoe to life without release, and the United States Attorney for the Eastern District of Arkansas requested to withdraw the death notice in Lee's case. Lee, 374 F.3d at 643. But the Deputy Attorney General denied this request. Id. And, despite his being undeniably less culpable than Kehoe, Lee was sentenced to death.

Lee's death sentence is controversial. In the years that followed the jury's verdict, Lee raised numerous concerns with his sentence, including allegations of government misconduct. He asserted that the government improperly introduced evidence during his penalty phase that he had been diagnosed a "psychopath" and thus had an alleged propensity for future dangerousness. Lee, 89 F. Supp. 2d at 1026–27. The prosecution "had affirmatively stated to [Lee] and the [district court] that it would not introduce mental health evidence in its case-in-chief." Id. at 1027–28. However, the government instead introduced damning mental health evidence "through the 'back door.'" Id. at 1028. During its cross-examination of Lee's mitigation expert, the government elicited testimony that its own expert had previously diagnosed Lee as a "psychopath" using a tool called the Hare Psychopathy Checklist-Revised (PCL-R). Id. The government then argued that because Lee is a "psychopath" according to the PCL-R, he posed a grave risk of future dangerousness. This was the thrust of the government's argument for executing Lee. Id.

But, as the district court explained, the government's introduction of "such aggravating evidence against Defendant Lee through his own mental health expert during his 'defense' was fundamentally unfair in that Defendant Lee had no opportunity to respond." Id. The government's "back-door" tactic deprived Lee of the notice to which he was entitled so that he could adequately prepare for his mitigation defense. Id. In the words of presiding Judge Eisele: "The unfairness is patent." Id. at 1029.

More fundamentally, however, Lee has presented evidence that the PCL-R's psychopathy finding was wholly irrelevant to any issue before the jury. The jury

had two options at the penalty phase: it could sentence Lee either to life in prison or to death. Yet the PCL-R has no predictive value with respect to whether a person will be dangerous in an institutional setting like a prison; it predicts only future dangerousness in the community. Indeed, the government's own mental health expert who testified during Lee's penalty phase later disavowed using the PCL-R in capital cases due to its unreliability. United States v. Lee, No. 4:06-cv-1608 GTE, 2010 WL 5347174, at *5–6 (E.D. Ark. Dec. 22, 2010). The district court concluded "it is very questionable whether the jury would have given Defendant Lee the death penalty" had the government not relied on the PCL-R's psychopathy finding. Lee, 89 F. Supp. 2d at 1031. This court has similarly reasoned that "the jury sentenced the two defendants differently" because it believed Kehoe would not be a future danger but that Lee would. United States v. Lee, 715 F.3d 215, 223 (8th Cir. 2013). Therefore, Lee has argued, the government's use of the PCL-R's irrelevant psychopathy finding led directly to his death sentence.

Lee has also alleged that the government misled the jury about his role in a separate murder. During Lee's penalty phase, the government told the jury that Lee, as a juvenile, had murdered someone named Joseph John Wavra in Oklahoma. Lee, 89 F. Supp. 2d at 1031. The only reason Lee was not charged with murder, the government argued, was by the grace of the Oklahoma state prosecutors. United States v. Lee, No. 4:97-cr-243-02 KGB, 2020 WL 3618709, at *5 (E.D. Ark. July 2, 2020). But in fact, a state court judge had dismissed the murder charge for a lack of evidence. Id. Lee later filed a motion to vacate his death sentence, arguing the government had suppressed an Oklahoma state-court document reflecting the true reason he was not charged with murder. See DCD 1313. The district court recognized that, "[i]n light of the government's reliance on the Wavra murder during sentencing, it is reasonably likely that, if it had been disclosed at trial that the Oklahoma court found the evidence insufficient to establish that Lee was guilty of murder, the outcome of the sentencing would have been different." Id. at 14. Despite this, the court ultimately denied Lee's motion as an unauthorized successive habeas application. Id. at 20 (citing 28 U.S.C. §§ 2244(b)(3), 2255(h)).

Lee's execution also raises real concerns about the arbitrary application of the death penalty. Nearly fifty years ago, the Supreme Court halted executions because of the death penalty's arbitrary application. Furman v. Georgia, 408 U.S. 238, 239–

40 (1972). Justice Brennan highlighted the constitutional and moral requirement that the government must not, "without reason, . . . inflict[ ] upon some people a severe punishment that it does not inflict upon others." Id. at 274 (Brennan, J., concurring). Indeed, "the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments." Id. Justice White cautioned against a death-penalty regime where "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." Id. at 313 (White, J., concurring). And Justice Stewart concluded that the Constitution "cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." Id. at 310 (Stewart, J., concurring).

Four years later, the Court allowed executions to proceed, satisfied that newly enacted state statutes would "provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious and arbitrary." Gregg v. Georgia, 428 U.S. 153, 194–95 (1976). Despite Gregg's promise of a rational, balanced, and fair system of executions, Lee's case underscores how the death penalty continues to be arbitrarily applied. Everyone agrees that Kehoe was far more culpable than Lee, yet Kehoe was sentenced to life in prison while Lee was sentenced to death.

Lee's case is extraordinary. The trial judge and the lead prosecutor, as well as members of the victims' family have all expressed their beliefs that it would be unjust to execute Lee. As Judge Eisele noted, "All who review the record will recognize the unequal and disparate roles that Kehoe and Lee played in their horrific crime spree, which Kehoe directed and Lee joined intermittently." DCD 1353 Ex. A. Judge Eisele expressed particular concern about the government's use of the PCL-R psychopathy finding and the role it played in the jury's ultimate verdict, writing "the end result leaves me with the firm conviction that justice was not served." Id. Yet Lee remains on death row.

Dan Stripling, the Assistant United States Attorney who prosecuted Lee's case, finds it "very disturbing the randomness with which defendants are charged, convicted, and sentenced in capital cases. [Lee's] case perfectly illustrates this unexplainable randomness." DCD 1353 Ex. B. "Kehoe is intelligent, appeared

clean cut, and had support of convincing witnesses who genuinely supported him. Lee had none of the benefits. If this was the reason for the jury's decision, life should not be taken because of these disparities." Id.

Kimma Gurel, who is Nancy Mueller's sister and Sarah Powell's aunt, wrote:

> Even though he was the leader, Chevie Kehoe was sentenced to life in prison. However, Daniel Lee got the death sentence. Maybe the jurors based their decision on Daniel Lee's looks; having a swastika neck tattoo and a blind eye made him look pretty scary. Chevie Kehoe was a clean-cut young man with a wife and four kids who would lose their father. **Whatever the reason, it was not fair or just for Daniel Lee to be sentenced to death, and none of the reasons I come up with make me feel any better.**

DCD 1353 Ex. C (emphasis in original).

There is no question that the death penalty is unique in its severity and irrevocability. Gregg, 428 U.S. at 187. With Lee's life at stake, courts must be "particularly sensitive to insure that every safeguard is observed." Id. The sentencing disparity between Kehoe and Lee, along with serious questions about the evidence presented to the jury at both trial and sentencing and the government's course of conduct during Lee's post-conviction proceedings, underscores how denying relief to Lee—who faces execution to carry out a sentence of death—risks severe injustice. At a minimum, the unjust and arbitrary result in the case of United States v. Daniel Lewis Lee threatens to undermine the public's confidence in the judicial process on which we all rely.

I dissent.

July 12, 2020

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

/s/ Michael E. Gans

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,)
1991 SEP 25 A 11:48
Plaintiff,)
vs.) Case No. CF-90-5292
DANIEL LOUIS GRAHAM)
Defendant.)

APPLICATION FOR ATTORNEY FEES

COMES NOW, Kenneth C.Watson, Attorney at Law, and shows to this Court that he was appointed by Judge Susan W. Bragg, Judge of the District Court of Oklahoma County, to represent the defendant, Daniel Louis Graham, in the above- captioned cause.

That on the 2nd, day of October, 1990, the defendant, Daniel Louis Graham was determined by this Court to be an indigent person and counsel was appointed same. Said defendant has been duly defended, and counsel respectfully requests that this Court grant compensation from the Court Fund of Oklahoma County in the amount of $750.00.

WHEREFORE, Kenneth C. Watson, attorney for defendant, prays this Court for an Order directing payment of the sum of $750.00 as and for compensation for appointed counsel in this case.

Respectfully submitted,

Kenneth C. Watson, OBA # 9393
Attorney for Defendant
217 N. Harvey, Suite 100
Oklahoma City, OK 73102
(405) 232-1515

STATEMENT OF TIME EXPENDED

District Court Case No. CRF-90-5292

Date	Service Performed	Time Expended
10-16-90	Conference w/Client	1.5
10-19-90	Preliminary Hearing Announcement	1.0
10-15-90	Conference w/District Attorney	1.0
11-08-90	Conference w/Client & Parent	2.0
12-07-90	Preliminary Hearing Conference	1.5
12-08-90	Conference w/Client	1.0
12-13-90	Preliminary Hearing	6.0
	TOTAL TIME EXPENDED	14.0

The matter came on for hearing before Judge Hall; District Attorney called witness; hearing held; Court finds crime of Murder I not established by evidence; Court reccomends a Dismissal of Murder I charges and State consider refiling on charge of Robbery I.

THE COURT: All right.

MR. LIROFF: The second matter, 1107, is a proof of birth in Santa Ana, California, for Daniel Lewis Lee, with a birthdate of January 31, 1973.

THE COURT: Very well.

MR. LIROFF: The next item, No. 1108, is a judgment and sentence in the District Court of Oklahoma County, the State of Oklahoma, for Daniel Lewis Lee, for the crime of robbery.

THE COURT: All right the Exhibits 1106, -07, and -08 are received by agreement of the parties.

(Government Exhibits 1106, 1107, 1108 received in evidence.)

MR. LIROFF: And the last exhibit, Your Honor, is 1109, which is a conviction for John Patton in the State of Oklahoma for the crime of first degree murder.

THE COURT: Conviction of John Patton, all right. It will be received also.

(Government Exhibit 1109 received in evidence.)

MR. LIROFF: One last stipulation, Your Honor. And the stipulation is that the -- I'll wait for Ms. Compton.

(Off-the-record discussion between Ms. Compton and Mr. Lassiter.)

MR. LIROFF: Whenever you're ready.

MS. COMPTON: I'm sorry?

wield that knife. I'm not suggesting to you that he did. But does any of us not know that by taking the knife and giving it to him what he was doing? I would suggest to you both legally and morally the blood of Joey Wavra's hands is on Danny Lee.

One important aspect of this is this. When this happened, Lee got this incredible, this incredible deal, this plea bargain in the end, pled guilty to a robbery. How many of you, how many of you in your life have thought back. Some of you are younger. Some of us are older. And sometimes in the middle of the night you sit back and you think about things that you've done, places you've been, self-confession time.

Sometimes I think about a junior high school dance that I was too afraid to walk across the dance floor and ask a particular girl to dance. I think about that, and that's silly. But that's, that's a small thing to illustrate the point I'm trying to make. What I'm trying to talk about is sometimes we think about forks in the road where we've been. We've gone right. We didn't go left. Then you think back, and you think, my God, should I have gone left? When we were kids we used to call it a do over. This is the one aspect of the Joey Wavra murder that I want to talk to you about. Usually you commit a murder, and you get sent away for a very long time. And you don't get an opportunity for a do over. It's done. You made a horrible mistake, and you can't do anything about it. And you can't say, Gee, I wish I hadn't done that so

I could get back on my life and have an opportunity to make amends. Danny Lee got a do over. He got the opportunity to say, my God, what have I done? Look where all this led me. He had the opportunity to say, I made a mistake, but I got an opportunity to turn myself around. And that's incredibly monumental.

It is rare for a murderer like Danny Lee to stand before a jury who is about to determine his death penalty, who has an earlier murder under his belt, who has a prior victim's blood on his hands. You know the expression. Fool me once, shame on you. Fool me twice, shame on me. And that's the first aspect of this Wavra murder that I think is terribly important and I think you should consider in distinguishing Lee from Kehoe because Lee has been here before. Lee has stood in the court of justice. Lee has had the opportunity to regret, and Lee has had that opportunity to change his ways.

The other aspect of the Wavra murder that's of absolute importance is because it communicates to you, and it says to you something about that aggravating factor of future dangerousness. I'm plugging that back into the law, so when you are back at that scale, that's one of the places you put it.

Now, let me shift gears for just a moment. I want to talk about some of these mitigating factors. The mitigating factors are things that the defense thinks they've proven. Your job is

Fifth Amendment, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment, United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

28 U.S.C. § 2255

§ 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

> **(1)** the date on which the judgment of conviction becomes final;
>
> **(2)** the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United

States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2241

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

> **(1)** He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> **(2)** He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> **(3)** He is in custody in violation of the Constitution or laws or treaties of the United States; or
>
> **(4)** He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or
>
> **(5)** It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by

the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Rule 60. Relief from a Judgment or Order

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. §1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.