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United States District Court, E.D. Pennsylvania.
Mumia ABU-JAMAL, Petitioner,
v.
Martin HORN, Commissioner, Pennsylvania Department of Corrections, et al., Respondents.

No. CIV. A. 99-5089.
Oct. 16, 2001.

MEMORANDUM AND ORDER
WILLIAM H. YOHN, JR., J.

***1** Presently before the court is petitioner's motion to reconsider the court's order dated July 19, 2001 denying Mumia Abu-Jamal's ("petitioner") motion for an order authorizing the deposition of Arnold Beverly, who petitioner claims has confessed to the murder of Officer Faulkner. Petitioner challenges many of the court's conclusions as "preposterous," "inconceivable," and "clearly erroneous." Because petitioner fails to demonstrate a need to correct a clear error of law or to prevent injustice, petitioner's motion for reconsideration will be denied.

In support of his original motion for discovery, petitioner argued that because Beverly had now confessed to the murder, thereby proving petitioner's innocence, petitioner had demonstrated the requisite good cause to depose Beverly. Petitioner also contended that the Beverly declaration provided "circumstantial evidence" supporting claims one and two of his petition for federal habeas relief. The court denied discovery regarding Beverly because petitioner failed to meet the good cause requirement for discovery in a habeas case. Most importantly, the court determined that petitioner's requested discovery did not relate to any claim for relief currently before the court. [FN1] Then, assuming *arguendo* that petitioner ever did seek to add a claim regarding Beverly, the court concluded that discovery nevertheless would not be permitted for three reasons: (1) because petitioner could not meet the requirements for an evidentiary hearing concerning any supposed Beverly claim as set forth in section 2254(e) of the Anti-Terrorism and Effective **Death Penalty** Act of 1996 ("AEDPA"), Pub.L. No. 104-132 § 104, 110 Stat. 1214; (2) because AEDPA's statute of limitations appeared to bar petitioner from now asserting any new claim for relief concerning Beverly; and (3) because any supposed Beverly claim would be procedurally defaulted under AEDPA, thereby precluding a district court from reviewing it.

> FN1. It appears that the parties misapprehend he court's use of the phrases "relates to" and "relates back." To clarify, "relates to" refers to the standard for invoking discovery in a federal habeas action, *i.e.*, the petitioner must show good cause and the requested discovery must *relate to* a constitutional claim currently before the federal habeas court. Conversely, the phrase "relates back" refers to the standard for amending civil pleadings where the proposed amendment is otherwise barred by the statute of limitations, *i.e.*, the statute of limitations will not bar amendment and the amendment is said to *relate back* where "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed.R.Civ.P. 15(c)(2). That being said, in its memorandum and order dated July 19, 2001, the court ruled that the requested discovery concerning Beverly did not "relate to" any claim in Jamal's petition for relief. Because the issue of amending any Beverly claim to the original petition was not before the court at that time, the court did not rule whether any such Beverly claim "relates back" to a claim in the original petition.

I. Standard of Review

"The purpose of a motion for reconsideration is to correct manifest errors or law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir.1985). " 'Because federal courts have a strong interest in the finality of judgments, motions for reconsideration should be granted sparingly.' " *Burger King Corp. v. New England Hood & Duct Cleaning Co.*, No. 98-3610, 2000

WL 133756, *2 (E.D.Pa. Feb.4, 2000) (citation omitted). Accordingly, the standards for granting a motion for reconsideration under Federal Rule of

Civil Procedure 59(e) are considerably high. District courts will grant a motion for reconsideration in any of three situations: (1) the need to correct a clear error of law or to prevent injustice; (2) the availability of new evidence not previously available; and (3) an intervening change of controlling law. *See NL Indus., Inc. v. Commercial Union Ins. Co.*, 65 F.3d 314, 324 n. 8 (3d Cir.1995); *New Chemic, Inc. v. Fine Grinding Corp.*, 948 F.Supp. 17, 18-19 (E.D.Pa.1996). " 'A motion for reconsideration is not to be used as a means to reargue matters already argued and disposed of' or as an attempt to relitigate 'a point of disagreement between the Court and the litigant.' " *Fidtler v. Gillis*, No. CIV. A. 98-6507, 1999 WL 596940, *2 (E.D.Pa. Aug.9, 1999) (citing *Waye v. First Citizen's Nat'l Bank*, 846 F.Supp. 310, 314 n. 3 (M.D.Pa.), *aff'd.* 31 F.3d 1175 (3d Cir.1994)).

II. Discussion

***2** Petitioner sets forth eight separate reasons why the court should grant his motion for reconsideration.[FN2] It is clear that since the court's memorandum and order dated July 19, 2001, there has been no intervening change in controlling law. Petitioner does not attempt to argue as such. Nor does petitioner assert that reconsideration is proper because of the availability of new evidence not previously available. Presumably, then, petitioner maintains that the court's memorandum and order contained numerous clear errors of law and/or resulted in injustice. The court will consider each of petitioner's arguments as presented, in turn.

> FN2. Petitioner's memorandum actually is organized in nine argument sections. The last section, however, merely sets forth the standard of review applicable to a motion for reconsideration. In actuality, each of petitioner's arguments must be presented in accordance with that standard of review. As such, the court interprets petitioner's memorandum as presenting eight arguments in support of his motion for reconsideration.

A. Alleged error because no reasonable jury would have found petitioner guilty beyond a reasonable doubt in the fact of the Beverly confession.

Petitioner asserts that it is "preposterous" for this court to have failed to conclude that had the statements contained in the Beverly declaration been presented at trial, no reasonable juror would have found petitioner guilty beyond a reasonable doubt. Petitioner then expends nearly seventy pages rearguing the very same evidence he already presented to the court in support of his motion for discovery. Although unclear, I assume that petitioner's alleged error argument is referring to the court's alternative analysis that even though no request to amend a claim concerning Beverly to petitioner's original habeas petition had been made, any such claim would be procedurally defaulted. Petitioner's challenge, then, relates to what has been referred to as the narrow gateway exception to the procedural default rule. That is, petitioner's otherwise barred claim may be considered on the merits if he shows "that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). Presumably, petitioner argues that the court misapplied this standard to the facts of his case.

At any rate, petitioner presented this same argument to the court in support of his request to dispose Beverly. The court is very familiar with the evidence in this case and fully considered petitioner's arguments before denying his motion to depose Beverly. The court declines to revisit this issue, and reiterates that motions for reconsideration "are not intended merely to relitigate old matters." *Burger King*, 2000 WL 133756, at *2. Accordingly, petitioner's motion for reconsideration pursuant to this challenge will be denied.

B. Alleged error because "actual innocence" is a free standing habeas claim in a capital case.

Petitioner argues that the court's ruling that *Herrera v. Colins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), precludes a freestanding claim of actual innocence is completely erroneous. Petitioner is incorrect because the court made no such ruling. Specifically, citing *Herrera*, the court noted that a freestanding claim for actual innocence *may* not be the subject of a federal habeas petition. The court then went on to say that even assuming petitioner may bring the Beverly claim, because petitioner is not entitled to a hearing with respect to such a claim, is barred by the statute of limitations from

bringing a supposed Beverly claim, and has procedurally defaulted any such claim, he likewise is not entitled to discovery. As such, the court's opinion clearly was not based upon the Supreme Court ruling in *Herrera*. Indeed, at that point, petitioner had not even made it clear if and how he would attempt to bring a federal habeas claim regarding Beverly, *i.e.*, whether petitioner would seek to append a freestanding claim of actual innocence or use some independent constitutional violation as a vehicle to include the Beverly declaration. Because the court's decision was not predicated on *Herrera*, petitioner's motion for reconsideration pursuant to this allegation of error will be denied.[FN3]

> FN3. Petitioner now has filed a motion to redraft and amend his petition to append, *inter alia*, a freestanding claim of actual innocence based upon the Beverly declaration (Doc. No. 105). The court will address the issue whether a freestanding claim of actual innocence is cognizable on federal habeas review when it considers petitioner's motion to amend.

C. Alleged error because petitioner's independent claim for relief based upon actual innocence cannot be procedurally defaulted.

***3** Petitioner contends that the court erred because an independent claim for habeas relief based upon actual innocence cannot be procedurally defaulted as a matter of law. In support of this argument, petitioner offers the following reasons: (1) because it would violate the Fifth and Fourteenth Amendment requirement that a procedural rule cannot bar a defendant from presenting evidence of his innocence (citing *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)); (2) because it would violate the Eighth Amendment ban on cruel and unusual punishment; and (3) even assuming that an independent claim of actual innocence could be procedurally defaulted, because actual innocence also may be raised under the rubric of the miscarriage of justice exception to the procedural default rule, petitioner's alleged procedural default is excused. Alternatively, petitioner argues that even if such a claim could be procedurally defaulted, because that default flows from petitioner's prior counsel's conflict of interest that resulted in a constructive denial of counsel, any such default should be excused.[FN4]

> FN4. Petitioner also asserts that the court erred because it failed to consider the impact of the conflict of interest by petitioner's former counsel. Then, for nearly twenty pages petitioner re-argues why he believes his former attorneys represented him while under a conflict of interest. Again, the purpose of a motion for reconsideration is not to reargue to the court, especially for countless numbers of pages.

At the outset, I stress that the court's July 19, 2001 discussion did not presume that petitioner would seek to introduce the Beverly information through a freestanding claim of actual innocence, as opposed to via some independent constitutional violation that encompassed the Beverly information. At any rate, because I conclude that none of petitioner's instant reasons is persuasive, petitioner's motion for reconsideration pursuant to this procedural default argument will be denied.

First, petitioner's reliance on *Chambers v. Mississippi* is misplaced. There, the Court considered, *inter alia*, whether the exclusion of three defense witnesses, on the basis that their testimony contained hearsay, violated the defendant's fundamental right to present witnesses in his own defense. *See* *Chambers*, 410 U.S. at 298-302. The Court examined the rationale behind the hearsay rule, *i.e.*, "that untrustworthy evidence should not be presented to triers of fact," determined that the hearsay testimony defendant sought to introduce "bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception [to the hearsay rule] for declarations against interest[,]" and held that the evidentiary "rule may not be applied mechanistically to defeat the ends of justice." *Id.* at 298, 302. Accordingly, the Court concluded that the state court's exclusion of the three witnesses' testimony violated due process. *See* *id.* at 302. Nowhere in the *Chambers* opinion did the Court hold that the Fifth and Fourteenth Amendments require "that no 'procedural rule' bar[s] a defendant from putting on evidence of their [sic] innocence," as petitioner would have it. Mot. for Recons. at 83. As such, petitioner's argument necessarily fails.

Second, because petitioner fails to cite to a single case in support of his Eighth Amendment claim, reconsideration pursuant to this argument likewise will

be denied.

***4** Third, because I have already determined that petitioner fails to meet the *Schlup* actual innocence gateway standard, *see supra*, his argument that his actual innocence claim (assuming one could be brought in the first instance) cannot be procedurally defaulted for the very reason that it alleges "actual innocence" is also rejected. As such, the court need not address whether in general, any claim of actual innocence can ever be procedurally defaulted because by its very nature it satisfies the gateway standard.

Finally, petitioner cannot blame any default on his counsel. In *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991), the defendant argued that there was cause to excuse his procedural default because of attorney error of sufficient magnitude. 501 U.S. at 752. The Supreme Court reiterated that "[a]ttorney ignorance or inadvertence is not 'cause' because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.' " *Id.* at 753 (citation omitted). The Court went on to say that "[s]o long as a defendant is represented by counsel whose performance is not constitutionally ineffective under *Strickland v. Washington*, [466 U.S. 668 (1984)], we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." *Id.* (internal quotations and citation omitted). Thus, unless petitioner can demonstrate that his former attorneys' failure to timely bring the Beverly claim rises to the level of ineffective assistance of counsel, he must bear the responsibility for the procedural default.[FN5]

> FN5. By analogy, in *Williams v. Taylor*, 529 U.S. 420, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000), the Supreme Court interpreted the opening clause of AEDPA § 2254(e)(2) ("If the applicant has failed to develop the factual basis of a claim in State court proceedings ...."), to bar an evidentiary hearing "if there is lack of diligence, or some greater fault, attributable *to the prisoner or the prisoner's counsel*." 529 U.S. at 432 (emphasis added). As such, an evidentiary hearing will be barred if either petitioner or his counsel failed to develop the record in state court. It follows that a procedural default may occur if either petitioner or his counsel failed to exhaust a habeas claim. It is clear from the instant record that petitioner himself was aware of the information contained in the Beverly claim since at least the spring of 1999. *See* Aff. of Rachael Wolkenstein (Doc. No. 103) ¶¶ 33, 49. It is also clear that at least two of petitioner's attorneys (Wolkenstein and Jonathan Piper) desired to submit the new Beverly evidence to court. *See id.* ¶ 34. As such, petitioner cannot now pass the blame for failure to exhaust the Beverly to his former counsel.

Petitioner contends that he can demonstrate ineffective assistance of counsel because his former counsels' "knowing and intentional sabotage" of his case flowed from a conflict of interest which constitutes a "constructive denial of counsel" under *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). *See* Mot. for Recons. at 89. Petitioner is incorrect for two reasons. First, as the Supreme Court in *Coleman* plainly stated "[t]here is no constitutional right to an attorney in state post-conviction proceedings ... Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." 501 U.S. at 752. Here, petitioner claims that his former attorneys, Weinglass and Williams, were representing him while under a conflict of interest when they failed to timely present the Beverly claim to the PCRA court upon their discovery of Beverly's alleged confession to the murder. Clearly, former counsels' failure to present any Beverly claim occurred during petitioner's state post-conviction proceedings. Therefore, petitioner cannot claim ineffective assistance of counsel due to Weinglass and Williams' alleged conflict of interest.

Second, even assuming that petitioner's allegation of ineffective assistance of post-conviction counsel could be a cognizable federal habeas claim, petitioner fails to demonstrate a "constructive denial of counsel" under *Cronic*. To sustain a claim for ineffective assistance of counsel under the Sixth Amendment, a habeas petitioner must show that his counsel's performance was objectively deficient and that this deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In evaluating whether counsel's performance was deficient, "the court must defer to counsel's tactical decisions," avoid "the distorting effects of hindsight" and

give counsel the benefit of a strong presumption of reasonableness. *Id.* at 689; *see also Government of the Virgin Islands v. Weatherwax*, 77 F.3d 1425, 1431 (3d Cir.), *cert. denied*, 519 U.S. 1020, 117 S.Ct. 538, 136 L.Ed.2d 423, (1996). Prejudice is established if "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (quotations omitted).

***5** There are several situations, however, where a petitioner need not prove that he was prejudiced by his counsel's performance. As explained in *Cronic*, the most obvious is complete denial of counsel. The Court went on to say, however, that

> [t]he presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.

Cronic, 466 U.S. at 659-60; *see also United States v. Pungitore*, 15 F.Supp.2d 705, 719 (E.D.Pa.1998). *Cronic* 's rationale is based upon the language of the Sixth Amendment which "requires not merely the presence of counsel for the accused, but 'Assistance,' which is to be 'for his defence' ... If no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated." *Cronic*, 466 U.S. at 654, n. 11 (noting that "[i]n some cases the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided. Clearly, in such cases, the defendant's Sixth Amendment right to 'have Assistance of counsel' is denied"). "To hold otherwise could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel." *Id.* at 654 (citation omitted).

Petitioner argues that *Cronic* controls his case, and presumably, relieves him from proving prejudice because his PCRA counsel represented him while under a conflict of interest. The *Cronic* analysis is applied "sparingly." *Toomey v. Bunnell*, 898 F.2d 741, 744 n. 2 (9th Cir.1990); *see also Childress v. Johnson*, 103 F.3d 1221, 1229 (5 th Cir.1997). It is implicated only in cases where the petitioner alleges that his counsel was "not merely incompetent but inert." *Childress*, 103 F.3d at 1228; *Tippins v. Walker*, 77 F.3d 682, 686 (2d Cir.1996) (defendant was constructively denied counsel when counsel slept through testimony of key witnesses). *Cronic* also applies when counsel fails to "play[ ] a role necessary to ensure that the proceedings are fair" because the Sixth Amendment "guarantees more than just a warm body to stand next to the accused during critical stages of the proceedings." *Patrasso v. Nelson*, 121 F.3d 297, 304 (7th Cir.1997). If the petitioner alleges, on the other hand, that his counsel's performance was deficient, or incompetent, counsel's conduct will be evaluated under the *Strickland* two-part test. *See id.* at 1229; *Scarpa v. Dubois*, 38 F.3d 1, 15 (1st Cir.1994), *cert. denied*, 513 U.S. 1129, 115 S.Ct. 940, 130 L.Ed.2d 885 (1995) (*Strickland* applies to allegations of "maladroit performance" as opposed to "non-performance").

***6** Of most relevance to petitioner's claims, *Cronic* has also been applied when defendant's counsel was operating under an actual conflict of interest. *See Holloway v. Arkansas*, 435 U.S. 475, 489-90, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); *United States v. Gambino*, 788 F.2d 938, 950 (3d Cir.1986); *Government of the Virgin Islands v. Zepp*, 748 F.2d 125, 131 (3d Cir.1984). "The typical conflict of interest cases giving rise to claims of ineffective assistance of counsel involve multiple representation of clients-the conflict exists between the interests of one defendant and the interests of other defendants served by the same attorney." *Zepp*, 748 F.2d at 135. Because the conflict of interest at issue in both the *Holloway* and *Gambino* cases involved the multiple representation of defendants, they are not helpful to petitioner.

Nevertheless, a multiple representation scenario is not the only situation that may give rise to a conflict of interest violative of the Constitution. " '[C]onflicting interests' nonetheless arise out of personal interests of counsel that were 'inconsistent, diverse or otherwise discordant' with those of his client and which affected the exercise of his professional judgment on behalf of his client.' " *Id.* (citation omitted). This conflict of interest, however, must be actual. The Third Circuit has adopted the American Bar Association's definition:

[a]ctual conflict of interest is evidenced if, during the course of the representation, *the defendants interests diverge with respect to a material factual or legal issue or to a course of action.*

***7** *Zepp*, 748 F.2d at 136 (citation omitted) (emphasis in original).

Assuming for the sake of argument that the facts supporting petitioner's claim that his former attorneys represented him while under a conflict of interest are proven true, those facts do not give rise to the level of an *actual* conflict of interest. *Cf. Zepp*, 748 F.2d at 136 ("In circumstances such as these, when defense counsel has independent personal information regarding the facts underlying his client's charges, and faces potential liability for those charges, he has an actual conflict of interest."). On the face of petitioner's allegations, it is not clear that the writing with an eye to publication of a book regarding petitioner's case necessarily caused petitioner's interests to diverge from counsel's. Indeed, it is not even clear the petitioner's former counsel's reasons for not presenting a Beverly claim in state court did not the result from a permissible tactical decision.

For the foregoing reasons, petitioner's motion for reconsideration pursuant to this allegation of error will be denied.

D. Alleged error because petitioner's independent claim for relief based upon actual innocence cannot be barred by the statute of limitations.

Petitioner asserts that the court erred in ruling that because any supposed Beverly claim would be barred by the AEDPA statute of limitations, discovery regarding that claim would not be permitted. In support of this assertion, petitioner argues that his claim of actual innocence relates back to claims one through four of his original petition. Petitioner also contends that AEDPA would be unconstitutional if the statute is interpreted to place a statute of limitations on claims of actual innocence.

Again, I stress that the court's July 19, 2001 discussion did not assume that petitioner would seek to introduce the Beverly information through a freestanding claim of actual innocence. In any event, because petitioner fails to cite to any case law to support his constitutional claim, his motion for reconsideration pursuant to this ground will be denied. Moreover, because petitioner's pending motion to amend a claim of actual innocence to his habeas petition is the more appropriate forum to consider this issue, the question whether a freestanding claim of actual innocence relates back to claims one through four of the original federal habeas petition will be decided in the context of that motion. As such, petitioner's motion for reconsideration pursuant to this allegation of error will be denied. Should the court grant petitioner's motion to amend with respect to his Beverly claim, petitioner may, at that time, again request to depose Beverly.

E. Alleged error because the court mistakenly concluded that the requested discovery regarding Beverly does not relate to any habeas claim before the court.

Petitioner argues that the court erred when it concluded that the requested Beverly discovery did not relate to any claims for relief then before the court. Petitioner asserts that "Beverly's evidence plainly impacts on at least the first four of the petitioner's existing claims for relief in these habeas proceedings." Mot. for Recons. at 117. In support of his request for discovery, petitioner only argued that the Beverly claim related to claims one and two in his petition for relief. The court considered and rejected petitioner's arguments. Accordingly, as to whether any Beverly claim relates to habeas claims one and two, the court declines to revisit this issue, and reiterates that motions for reconsideration "are not intended merely to relitigate old matters." *Burger King*, 2000 WL 133756, at *2.

***8** As to whether any Beverly claim relates to claims three and four in Jamal's petition for relief, a motion for reconsideration is not to be used as a means "to put forward additional arguments which [the movant] could have made but neglected to make before judgment." *McDowell Oil Serv., Inc. v. Interstate Fire & Casualty Co.*, 817 F.Supp. 538, 541 (M.D.Pa.1993) (internal quotations and citations omitted). Consequently, petitioner may not now present these arguments.

At any rate, even assuming that petitioner had properly and timely raised these arguments, the information contained in the Beverly affidavit does not relate to either claim three or four of the habeas petition. Claim three asserts, under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963),

and its progeny, that petitioner's constitutional rights were violated because his confession outside the hospital emergency room was fabricated. In short, petitioner alleges that the prosecutor's misrepresentation of Officer Wakshul's availability to testify on the last day of trial was spoliation of *Brady* evidence because Wakshul's testimony would have shown a biased investigation and prosecution. Petitioner also claims that his conviction was contrived by the prosecution's false pretenses, *i.e.*, that petitioner had confessed. Petitioner now argues that information contained in the Beverly declaration has a devastating impact on this claim because it allegedly proves both that the investigation was corrupt and that petitioner's confession must have been fabricated.

"There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; the evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Even if Beverly's statements were found to be credible, this does not prove that the government possessed and suppressed information that petitioner's confession was fabricated, or that the government itself fabricated petitioner's confession. As such, because petitioner cannot point to specific evidence that would support this *Brady* claim, petitioner has not demonstrated the requisite good cause for discovery.

Claim four presents another violation of *Brady* and its progeny. In this claim, petitioner argues that the state suppressed or destroyed various pieces of physical evidence. Again, the court fails to see how the information contained in Beverly's declaration could prove these assertions to be true. Additionally, Beverly's statements are not relevant to this *Brady* claim, because they do nothing to advance petitioner's theory that the government possessed and suppressed information that it withheld or destroyed any physical evidence. Accordingly, I conclude that the Beverly declaration does not present specific evidence that supports this *Brady* claim. As such, petitioner still fails to show good cause for his request to depose Beverly. Moreover, petitioner's motion for reconsideration pursuant to this ground will be denied.

F. Alleged error because the court failed to adhere to the Supreme Court's observation in *Herrera* which compels the court to authorize discovery.

***9** Petitioner asserts that this court erred in denying petitioner discovery regarding Beverly because the Supreme Court's decision in *Herrera* compels discovery in this case. Petitioner reasons that because the Court "commented unfavorably upon the fact that '[p]etitioner's newly discovered evidence consists of affidavits,' pointing out that, 'motions based solely upon affidavits are disfavored because the affiants' statements are obtained without the benefit of cross-examination and an opportunity to make credibility determinations,' " Mot. for Recons. at 121-22 (citing *Herrera*, 506 U.S. at 417), this court is required to grant petitioner's request to depose Beverly.

Petitioner is incorrect. The plain language of the Supreme Court's *Herrera* opinion does not even come close to "compelling" discovery as petitioner would have it. Moreover, petitioner fails to point out the context in which the Court made the cited statement: nearly ten years after Herrera's conviction for murder, petitioner sought to lodge a second petition for federal habeas relief based upon a claim of actual innocence and supported by four affidavits that the Court found to be untimely presented with no satisfactory explanation given as to why the affiants waited over eight years after Herrera's trial to come forward, conflicting, based upon hearsay (with the exception of one of them), and suspect because they now blamed the murders on a dead man. *See Herrera*, 506 U.S. at 417-18. Therefore, petitioner's motion for reconsideration pursuant to this ground will be denied.

G. Alleged error because an evidentiary hearing regarding Beverly's confession is not barred by AEDPA section 2254(e).

Petitioner submits that the court erred in denying discovery concerning Beverly because the court confused the standard for obtaining discovery with the high standard imposed by AEDPA section § 2254(e) for obtaining an evidentiary hearing regarding the Beverly claim. Petitioner also argues that in any event, petitioner does meet the standard set forth in § 2254(e) because any failure to develop the record was not his fault.

Because each of these arguments were already identically presented to and rejected by the court,

petitioner's motion for reconsideration pursuant to this ground will be denied. " 'A motion for reconsideration is not to be used as a means to reargue matters already argued and disposed of' or as an attempt to relitigate 'a point of disagreement between the Court and the litigant.' " *Fidtler*, 1999 WL 596940 at *2 (citation omitted). Furthermore, in support of his argument that the standard for obtaining discovery is entirely independent of and different from the AEDPA requirements for an evidentiary hearing, petitioner cites no case law binding on this court. Indeed, petitioner cited to these same cases in support of his motion for discovery. While the court considered these cases, it did not find them to be persuasive in light of AEDPA's statutory purpose. The court made clear the reasons for this decision in its July 19, 2001 memorandum and order. Reargument on this point is inappropriate in a motion for reconsideration. Finally, I again stress that petitioner *is* at fault for the failure to develop the factual basis of any Beverly claim in state court. Just as petitioner cannot blame any procedural default regarding the Beverly claim on his attorneys, he likewise may not pass the blame for the incomplete state record regarding any Beverly claim to his attorneys. *See supra* Section II. C.

H. Alleged error because the court misinterpreted the standard for authorizing discovery in a federal habeas proceeding.

***10** Petitioner contends that the court misinterpreted the "good cause" requirement for discovery in a habeas case. Specifically, petitioner submits that a different discovery standard should apply to his request because he is asking to depose his own witness rather than seeking discovery against another party. As such, petitioner argues that the court should consider the particular purpose for which the Beverly deposition is requested and the *de minimus* burden that it will impose on the Commonwealth. Petitioner also asserts that the court should consider the "heightened reliability requirements" imposed in capital cases. Further, petitioner argues that his request to depose Beverly is analogous to a request for a deposition to perpetuate testimony under Fed.R.Civ.P. 27(3). Finally, petitioner reminds the court that to show good cause for discovery, petitioner need not demonstrate that the requested discovery will fully prove any of his habeas claims; rather, petitioner need only show that the requested discovery is relevant to proving such claims.

I conclude that petitioner's motion for reconsideration pursuant to these arguments will be denied. First, petitioner fails to support the argument that his request for discovery should be treated differently than any other petitioner's request for discovery in a federal habeas case. Second, petitioner's Rule 27(3) argument must be rejected as this is the first time petitioner has mentioned it. A motion for reconsideration is not to be used as a means "to put forward additional arguments which [the movant] could have made but neglected to make before judgment." *McDowell*, 817 F.Supp. at 541 (internal quotations and citations omitted). Finally, the court's July 19, 2001 memorandum and order found that any supposed Beverly claim did not relate to claims one and two of the habeas petition; *i.e.*, that the information contained in the Beverly declaration was not relevant to proving those claims. As such, petitioner's argument that the court incorrectly applied the good cause standard for discovery is without merit.

III. Conclusion.

***11** Petitioner fails to understand the court's July 19, 2001 holding: because petitioner's requested discovery regarding Beverly does no relate either to claims one or two of petitioner's original habeas petition (as petitioner had argued), petitioner failed to demonstrate the requisite good cause for discovery. Because both parties had argued the virtues of a supposed claim for relief regarding Beverly, the court addressed them. The core of the court's holding, however, was that because any requested discovery concerning Beverly did not relate to any claims currently before it and because petitioner had not yet even sought to add any supposed Beverly claim, petitioner's request for discovery was improper at that time. Of course, petitioner now has sought to amend a claim of actual innocence based upon information contained in the Beverly declaration to his habeas petition. Should the court permit that amendment, clearly the deposition of Beverly then would relate to a claim before the court. The court, however, will address the propriety of amendment when it considers petitioner's latest motion to amend.

For the foregoing reasons, petitioner's motion for reconsideration of the court July 19, 2001 memorandum and order will be denied.

ORDER

And now, this day of October, 2001, upon con-

sideration of petitioner's motion for reconsideration of the court's July 19, 2001 memorandum and order (Doc. No. 102) and the Commonwealth's response thereto (Doc. No. 107), it is hereby ORDERED that the motion is DENIED. Petitioner's request for leave to file a response to respondents' answer (Doc. No. 109) is also DENIED.

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