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

JUANE T. KENNELL,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 4:09-CV-00407 AGF
	)	
DAVE DORMIRE,	)	
	)	
Respondent.	)	

SUGGESTIONS IN OPPOSITION TO PETITIONER'S MOTION TO ALTER OR AMEND JUDGMENT

On March 31, 2016, the Court denied Juane Kennell's petition for a writ of habeas corpus (Doc. 155). After this Court permitted Kennell with ample opportunities to develop his *Brady/Giglio* claim through discovery and an evidentiary hearing where the parties called nine witnesses, the Court found the claim was meritless. (Doc. 155 at 31–38). In reaching this determination, this Court considered the entire record and the cumulative effect of any and all of the nondisclosures. (Doc. 155 at 38). Kennell seeks reconsideration of this Court's order. This Court should deny Kennell's motion.

Rule 59(e) motions serve a "limited function of correcting 'manifest errors of law or fact or to present newly discovered evidence.'" *Innovative Home Health Care, Inc. v. P.T.-O.T. Associates of the Black Hills*, 141 F.3d

1284, 1286 (8th Cir. 1998). A Rule 59(e) motion "is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing." *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000); *Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000); *Palmer v. Champion Mortgage*, 465 F.3d 24, 30 (1st Cir. 2006); *see also Jones v. United States*, 2015 WL 5970496, slip op *1 (Mo. W.D. Oct. 13, 2015).

Kennell does not introduce any new evidence unavailable at the time of the court's decision, and does not demonstrate a clear legal error or clear factual error in the Court's judgment. Instead, he seeks to challenge this Court's credibility determinations and repeat the arguments made in his prior pleadings that this Court resolved against him. *Compare* (Docs. 1, 13, 27, 28, 40, 85, 148, 152) *with* (Doc. 155). He cannot relitigate his claims merely because he disagrees with the Court.

This Court's credibility determinations are entitled to deference and supported by the record. *See Singleton v. Lockhart*, 963 F.2d 1315, 1321 (8th Cir. 1992). What Kennell really argues throughout his motion is that he disagrees with the Court's factual findings. But his disagreement does not demonstrate a clear factual error. Although Kennell contends that Shockley never testified that he had been threatened by petitioner or anyone else (Doc. 157 at 4), his conclusory statement is refuted by the record. *See* (Hearing Vol. 1 at 69–71); (Pet. Ex. 3 at 11–12). Kennell also points to a typographical error

where this Court noted, in its recitation of the procedural history, that Kennell filed his amended post-conviction motion in state court on October 27, 2009. (Doc. 155 at 10). Kennell states that the amended motion was filed on January 6, 2005, and this error "could be significant" to this Court's procedural default discussion. (Doc. 157 at 3 n.1). But the state court records reflect that the amended motion was filed on January 3, 2005, not January 6, (Resp. Ex. F at 2, 28), and this error was not material to this Court's procedural default discussion. Although the Court found that the question of default was "not free from doubt" because "certain aspects" of Kennell's claim were known, or could have been known to him when he sought state post-conviction relief, the Court ultimately "accept[ed], for the proposes of this case" that Kennell "had no concrete reason to investigate facts related to any agreement in exchange for [Jeffrey] Shockley's testimony." (Doc. 157 at 31). Thus, he has not shown that any clear errors of fact occurred.

Kennell contends that this Court made a clear legal error because the Court considered prejudice from the "two nondisclosures, in isolation rather than cumulatively" on the question of *Brady* materiality and failed to "properly apply the test for materiality recently articulated in *Wearry*." (Doc. 157 at 4, 11). But the Court reviewed the claim under the legal lens suggested by Kennell and properly found that the complained-of-evidence as a whole did not create a reasonable likelihood that the outcome of the trial

would have been different. (Doc. 155 at 29, 30, 38). This is consistent with Supreme Court precedent. *See Cone v. Bell*, 556 U.S. 449, 469–70 (2009) ("Evidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."); *Smith v. Cain*, 132 S.Ct. 627, 630 (2012) ("A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine confidence in the outcome of the trial.'") (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)), *see also Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (habeas petitioner "must show only that the new evidence is sufficient to 'undermine confidence' in the verdict.") (*quoting to Smith*, 132 S.Ct. at 630).

Kennell also argues that Court made a clear error of law because the Court analysis was "tainted by its erroneous view that there must be some sort of implied or tacit agreement... for a *Brady* violation to occur." (Doc. 157 at 11). But the Court properly analyzed Kennell's claims under the standards announced by the Supreme Court in *Giglio* and *Napue*, as applied by the Supreme Court in *Wearry* and the Court of Appeals for the Eighth Circuit and Sixth Circuit. (Doc. 157 at 29, 32–34). Thus, Kennell has not shown that a clear error of law occurred.

Finally, Kennell urges this Court to reconsider its decision to deny a certificate of appealability on this claim. This Court should decline his request to do so. To support his argument Kennell cites to various cases where various state and federal courts granted relief *Brady*. But those cases are factually distinguishable and Kennell previously urged this Court to find similarities between his case and the cases cited to grant habeas relief. *Cf* (Doc. 148 and 157). In light of the factual record here, Kennell has not shown that reasonable jurists would find this Court's assessment of his constitutional claim debatable or wrong. 28 U.S.C. §2253(c); *See Slack v. McDaniel*, 529 U.S. 473, 484–85 (2000) (setting forth the standard for issuing a certificate of appealability); *Langley v. Norris*, 465F.3d 861, 862–63 (8th Cir. 2006) (same).

CONCLUSION

The Court should deny the motion.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Caroline M. Coulter
CAROLINE M. COULTER
Assistant Attorney General
Missouri Bar No. 60044
P. O. Box 899
Jefferson City, MO 65102
(573) 751-1508
(573) 751-3825 fax

caroline.coulter@ago.mo.gov
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed by using the CM/ECF system. Counsel for petitioner is also an electronic filer and will receive a copy of the foregoing via the CM/ECF System, this 6th day of May 2016.

/s/ Caroline M. Coulter
CAROLINE M. COULTER
Assistant Attorney General