

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

JUANE T. KENNEL,

Petitioner,

v.

DAVE DORMIRE,

Respondent.

No. 4:09-CV-407 AGF
ECF

**RESPONSE TO ORDER TO SHOW CAUSE WHY
A WRIT OF HABEAS CORPUS SHOULD NOT BE GRANTED**

Comes now respondent, by and through counsel, and states as follows in response to this Court's order to show cause why a writ of habeas corpus should not be granted.

Statement of Custody and Parties

Named petitioner, Juane T. Kennell, is currently incarcerated at the Jefferson City Correctional Center located in Jefferson City, Missouri, pursuant to the sentence and judgment of the Circuit Court of the City of St. Louis, Missouri. Petitioner was found guilty of first degree murder, first degree assault, armed criminal action and armed criminal action for which he was sentenced to life without parole, fifteen years, life and life imprisonment with the Missouri Department of Corrections. The sentences are arranged so that petitioner is serve a total of life without parole followed by a consecutive life sentence. Petitioner has yet to complete service of these sentences. Named respondent, Dave Dormire, Warden of the Jefferson City Correctional Center, is

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petitioner's custodian and is a proper party respondent. Because petitioner is challenging sentences to be served in the future, Attorney General Chris Koster is also a proper party respondent. 28 U.S.C. §2254, Rule 2(b).

Statement of Exhibits

1. Respondent's Exhibit A is a copy of the trial transcript.
2. Respondent's Exhibit B is a copy of the direct appeal legal file.
3. Respondent's Exhibit C is a copy of the petitioner's brief on direct appeal.
4. Respondent's Exhibit D is a copy of the state's brief on direct appeal.
5. Respondent's Exhibit E is a copy of the opinion of the Missouri Court of Appeals, Eastern District, affirming the conviction and sentence.
6. Respondent's Exhibit F is a copy of the post-conviction appeal legal file.
7. Respondent's Exhibit G is a copy of the transcript of the post-conviction evidentiary hearing.
8. Respondent's Exhibit H is a copy of petitioner's brief on post-conviction appeal.
9. Respondent's Exhibit I is a copy of the state's brief on post-conviction appeal.
10. Respondent's Exhibit J is a copy of the opinion of the Missouri Court of Appeals, Eastern District, affirming the denial of post-conviction relief.
11. Respondent's Exhibit K is a copy of the Exhibit List used on post-conviction appeal.

Statement of Exhaustion

Examination of the instant petition, as well as the above-listed exhibits, indicates that petitioner has exhausted his available state remedies for his present claims within the meaning of 28 U.S.C. §2254(b), (c). If it appears during the course of this habeas litigation that petitioner has different theories to support his present claims, then those claims may not be exhausted. This is also true if petitioner has new grounds which he would like to assert. Consideration in state court and federal court of these claims is procedurally barred. Missouri Supreme Court Rule 29.15(k), (m) (effective January 1, 1988); Byrd v. Armontrout, 686 F. Supp. 743, 753 (E.D. Mo. 1988), aff'd, 880 F.2d 1 (8th Cir. 1989), cert. denied, 110 S.Ct. 1326 (1990). Respondent informs this court and warns petitioner that if he attempts to litigate new claims in a future petition for a writ of habeas corpus, the State of Missouri will vigorously oppose that later litigation as being an abuse of the writ. See, 28 U.S.C. §2254, Rule 9(b).

Respondent is concerned about the implication of footnote one of the decision by the United States Court of Appeals for the Eighth Circuit in Wade v. Armontrout, 798 F.2d 304, 306 n.1 (8th Cir. 1986). Respondent requests that if this Court allows petitioner to amend his petition to include new claims, that respondent be allowed an opportunity to discuss the exhaustion or nonexhaustion of those claims.

Statement of Merits

Petitioner presents two grounds for relief in his first amended petition for writ of habeas corpus. First, petitioner contends that his due process rights were violated because the state did not disclose exculpatory information concerning witness Shockley

and Stewart. See Brady v. Maryland, 373 U.S. 83 (1963). In particular, petitioner contends that the state did not disclose the contents of the transcript of the February 9, 2004 guilty plea (Petitioner's Exhibit 1) for petitioner's use at the January 5, 2004 trial. Relief should be denied for multiple reasons.

First, the claim is subject to procedural default because petitioner did not present it in his motion for new trial (Respondent's Exhibit B, page 82) or in his brief on direct appeal (Respondent's Exhibit C), or in the post-conviction relief motions (Respondent's Exhibit F, pages 3, 28). Petitioner's failure to present the claim to the Missouri state courts constitutes default that precludes state and federal court review. See Sweet v. Delo, 125 F.3d 1144, 1149-50 (8th Cir. 1997). For federal court review of the claim to occur, petitioner must demonstrate good cause and actual prejudice under Murray v. Carrier, 477 U.S. 478 (1986). Petitioner declines to do so in his petition. Federal court review of the claim is barred.

Petitioner does not demonstrate cause for his default. The evidence petitioner presents to support his petition (Petitioner's Exhibit 1 and 2) existed at the time petitioner filed his state post-conviction motion. Petitioner does not articulate good cause for his failure to present the Brady claim to the state court.

Petitioner fails to demonstrate non-disclosure by the state. In response to petitioner's request for discovery (Respondent's Exhibit B, page 15) and motion to compel discovery (Respondent's Exhibit B, pages 17, 20), the state provided discovery long before trial (Respondent's Exhibit B, page 2). Petitioner did not reassert his motion

to compel or otherwise discuss dissatisfaction with discovery at trial (Respondent's Exhibit B, pages 3-4).

Petitioner complains that the state did not "disclose a deal" with Mr. Shockley (First Amended Petition, page 7). But the evidence petitioner presents amply demonstrate that there was no deal. "We have no agreement with the State of Missouri" (Petitioner's Exhibit 1, page 2).

Furthermore, petitioner is unable to demonstrate that the evidence was material. In other words, he does not demonstrate that there is a reasonable probability that but for the failure to disclose, the outcome of the trial would have been different. Petitioner impeached the testimony of both Shockley and Stewart during the course of trial. Shockley was using drugs the night of the murder (Tr. 529). Petitioner impeached Shockley with his previous deposition (Tr. 534, 538, 542-44). Defense counsel adduced that the witness identified petitioner because he "wanted revenge" (Tr. 553). Additionally, the impeachment value of the complained of non-disclosed item is minimal. Shockley identified petitioner at the police station on June 21 and June 26, 1992 (Tr. 524-28). The complained of criminal charge did not arise until later on July 1, 2000 (Petitioner's Exhibit 2). The criminal charge did not affect the witness's identification of petitioner as the culprit.

Similar analysis concerning impeachment and motive can also be done with the other witness, Robert Stewart (Tr. 591). That witness also identified petitioner as the culprit before July 1, 2002 (Tr. 586-90). Petitioner is unable to demonstrate Strickland prejudice or materiality of the alleged non-disclosed information.

Petitioner's second ground for relive is a contention that he received ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984). Petitioner complains that counsel did not interview all of petitioner's alibi witnesses or submit an alibi instruction to the jury (Amended Petition, page 11). The alibi witnesses counsel should have interviewed appeared to be "members of petitioner's family" (First Amendment Petition, page 12). The Rule 29.15 trial court considered petitioner's claim and found it meritless. Petitioner's sister, Hattie Holmes, was eight years old at the time of the crime (Respondent's Exhibit G, page 28). "She has no clear recollection of the precise date in question, and she was unable to account for Kennell's whereabouts the entire time the crime was committed [Respondent's Exhibit G, page 33]. In substance, Hattie Holmes' testimony was duplicative of the testimony of Hattie Bolton [grandmother]. Kennell presented no additional evidence of alibi witness" at the Rule 29.15 evidentiary hearing (Respondent's Exhibit F, page 39). The Rule 29.15 trial court found the testimony of Grandmother and sister was not credible (Respondent's Exhibit G, page 39). And even if the sister's testimony were credible, it would have had no effect on the trial (Respondent's Exhibit F, page 40). The Rule 29.15 trial court found that trial counsel's actions were reasonable and did not result in Strickland prejudice (Respondent's Exhibit F, page 42). This Missouri Court of Appeals affirmed on post-conviction appeal (Respondent's Exhibit J). These determinations are reasonable ones that are entitled to deference under §2254(d). There is support in the record for those findings as articulated by the post-conviction court. Lastly, the decision to seek an alibi instruction is committed to counsel (Respondent's Exhibit F, page 42). Given that the

verdict director requires petitioner's presence at the scene of the crime (Respondent's Exhibit B, page 47), a separate alibi instruction was unnecessary. Petitioner's final ground for relief is meritless.

Conclusion

WHEREFORE, for the reasons herein stated, respondent prays that the Court dismiss the petition without further judicial proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed by using the CM/ECF system; thus, undersigned counsel should receive notice of the filing and the document through the CM/ECF service:

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