

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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HERMAN BENJAMIN FERGUSON,

Petitioner,

-against-

MEMORANDUM AND ORDER
92-CV-4754 (ILG)

ROBERT ABRAMS, Attorney General of
the State of New York; THOMAS COUGHLIN
Commissioner, New York State Department
of Correctional Services; BRIAN FISHER,
Superintendent, Queensboro Correctional
Services,

Respondents.

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GLASSER, United States District Judge:

Petitioner Herman Ferguson filed this petition on July 27, 1992, pursuant to 28 U.S.C. § 2254, requesting that the Court require respondents to provide a record of petitioner's case in the state court, grant discovery, expand the record to include newly discovered evidence and hold an evidentiary hearing. On May 3, 1993 the petition was referred to United States Magistrate Judge A. Simon Chrein for a report and recommendation, familiarity with which is assumed.

Magistrate Judge Chrein required respondents to provide the record of proceedings in the state court and permitted the expansion of the record, but did not permit all of the discovery requested by petitioner and did not convene an evidentiary

hearing.

Magistrate Judge Chrein recommended that the petition be denied. Petitioner raises several objections to that recommendation and challenges the denial of the motions made before Magistrate Judge Chrein. In addition, respondents raise several objections to the report and recommendation. Because no objections are raised to the factual summary contained in the report and recommendation, it is adopted.

A. Procedural Matters

I. Application of AEDPA Amendments

Respondents object to Magistrate Judge Chrein's determination that the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") amending 28 U.S.C. § 2254 should not be applied to this action. The argument raised by respondents – that the new provisions of the AEDPA governing the presumption of correctness and the circumstances requiring an evidentiary hearing should be applied retroactively – has now been addressed and rejected by the United States Supreme Court. Lindh v. Murphy, ___ U.S. ___, 117 S.Ct. 2059 (1997).

In Lindh, the Supreme Court reversed the determination of the United States Circuit Court of Appeals for the Seventh

Circuit that the AEDPA amendments applied to pending cases. Its holding that "the new provisions of chapter 153 generally apply only to cases filed after the Act became effective" applies directly to respondents' argument.

II. Judge Patterson's Opinions

Most of petitioner's claims are based not upon new evidence, but upon remarks made by Judge Patterson in several subsequently reversed decisions requiring the Federal Bureau of Investigation ("FBI") to produce documents in the parallel Freedom of Information Act ("FOIA") litigation.

In Ferguson v. FBI, 774 F. Supp. 815, 819-820 (S.D.N.Y. 1991), *rev'd in part on other grounds*, 957 F.2d 1059 (2d Cir. 1992), Judge Patterson urged the Attorney General to consider exercising his discretion to waive application of various FOIA exemptions to the documents at issue and directed the government's attention to the following items: (1) a portion of the dissent from the decision of the Appellate Division stating that the trial court erred in admitting evidence of an earlier Revolutionary Action Movement ("RAM") assassination list which

included Senator Kennedy,¹ (2) the majority opinion stating that such a list should be admitted because of its relevance to the charge of conspiracy, (3) reports that Howlette testified that Senator Kennedy and President Johnson were assassination targets of petitioner; and (4) the "principles of justice" expressed in Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150, Napue v. Illinois, 360 U.S. 264 (1959), Roviano v. United States, 353 U.S. 53 (1957) and People v. Rosario, 9 N.Y.2d 286, 213 N.Y.S.2d 448 (Ct. App. 1961).

Another opinion issued by Judge Patterson discussed various documents after *in camera* review. That opinion, the validity of which was premised upon an appeal taken from earlier orders of the court, requested that three documents be produced

because of the Court's concern that the prosecutors may not have advised the defendant's counsel of the possibility of exculpatory evidence being available from a witness, and because the failure to mention to the FBI, the agency charged with his protection, that the then president's name was on a potential assassination list raises questions as to the veracity of the testimony evidently adduced at trial.

Ferguson v. FBI, 89 Civ. 5071, 1992 WL 6265, at 2-3 (S.D.N.Y.

¹ The list also included President Johnson.

Jan. 8, 1992), *rev'd on other grounds*, No. 92-6036, slip op. (2d Cir. June 4, 1992). More specifically, Judge Patterson stated that one of the documents "suggests that the prosecution knew of a witness in a position to corroborate Howlette and who would give inconsistent testimony" and that there was "no indication in the record before this Court that the defense was notified as to the identity of the witness." As to the other documents, Judge Patterson commented that they "relate to activities of Howlette which may be relevant to any interview of the aforesaid witness or to a motion based on People v. Collier, 376 N.Y.S.2d 957 (Sup. Ct. 1973)." The opinion concluded with the following remark: "The order is issued at this time because . . . the documents in question might possibly contain evidence or might possibly lead to evidence . . . sufficient to permit him to move for a new trial or for other relief."

Petitioner argues that Magistrate Judge Chrein erred in failing to consider the remarks contained in Judge Patterson's opinions. Petitioner does not, however, cite any authority supporting the claim that factual findings and dicta that are not part of the record that must be accorded a presumption of

correctness in a habeas proceeding, 28 U.S.C. § 2254(d),² are entitled to any deference.

However, even were these remarks considered, their import is unclear. In the first opinion, Judge Patterson merely asked the government to consider "principles of justice" embodied in various opinions of the Supreme Court. In the second opinion, Judge Patterson remarked only that "the documents in question *might possibly* contain evidence or *might possibly* lead to evidence . . . sufficient to permit [petitioner] to move for a new trial or for other relief." He did not, however, conclude that the materials *do*, in fact, contain such evidence.

III. Motion under Rules Governing Section 2254 Cases

Although Magistrate Judge Chrein allowed petitioner to propound interrogatories to or depose the Honorable Thomas Demakos (the lead prosecutor at Ferguson's trial), he did not grant permission for the petitioner to proceed with his other discovery requests. These requests included (1) a request to

² In accordance with the determination that the AEDPA should not be applied retroactively, all references to § 2254 are to this section as it existed prior to amendment.

propound interrogatories to the current District Attorney for Queens County, Richard A. Brown, the other prosecutors involved in Ferguson's trial and the prosecution's two main witnesses against Ferguson, Edward Lee Howlette and Kenneth Egan; and (2) a request to serve a subpoena *duces tecum* on Richard A. Brown and the Federal Bureau of Investigation ("FBI").

Habeas Corpus Rule 6 provides as follows:

A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

As the United States Supreme Court recently noted, "[w]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the courts to provide the necessary facilities and procedures for an adequate inquiry." Bracy v. Gramley, __ U.S. __, 117 S.Ct. 1793 (1997) (quoting Harris v. Nelson, 394 U.S. 286, 300 (1968)).

In support of his argument that "good cause" necessitates discovery, petitioner points to the relevance and materiality of the materials sought. Gibbs Aff., ¶ 49. This

point is not seriously in dispute. However, to obtain discovery in a habeas proceeding, the discovery sought must be more than relevant and material.

Petitioner also provides specific reasons for the discovery requests: (1) the information sought in the interrogatories directed at Brown and the prosecutors involved in Ferguson's trial is material and relevant to "petitioner's claims that the prosecution failed to adhere to established standards of conduct, offered false testimony and suppressed favorable" [sic]; id., ¶49; (2) petitioner believes on the basis of information contained in the FBI and New York City Police Department ("NYCPD") files and the opinions and orders of Ferguson v. FBI, 89 Civ. 5071 (S.D.N.Y.), that one or more of petitioner's co-defendants under the first indictment were agents or informants of the FBI or NYCPD, id., ¶ 50; (3) that the information sought from Howlette and Egan is "material and relevant to petitioner's claims that [they] falsely testified while on the witness stand and that the prosecution knew that their testimony was false," id., ¶ 51; (4) that the information sought from Howlette is "material and relevant to petitioner's claims that the prosecution failed to adhere to established standards of conduct and suppressed evidence to petitioner," id.; (5) that the records

sought from Brown are "material and relevant to each of petitioner's claims," id., ¶ 52; and (6) that the records sought from the FBI "were all are [sic] ordered or referenced in Judge Patterson's September 13, 1991 and January 8, 1992 opinions and orders," id., ¶ 52.

None of these reasons amount to the "specific allegations" evidencing good cause required by the habeas rules. Brown was not in office when Ferguson was tried and convicted and he has no first-hand knowledge of the case. There is no reason to believe that interrogatories of the other prosecutors will uncover information that was not elicited at the deposition of Judge Demakos. Finally, that one of the other defendants in the first indictment was an FBI or NYCPD agent is not important because there is no reason to believe that the informant would testify inconsistently with the witnesses at trial.³

Similarly, there is no reason to believe that Howlette or Egan lied on the stand. In support of his contention that Howlette lied on the stand, petitioner cites to the overruled opinions of Judge Patterson in the parallel FOIA litigation. However, Judge Patterson merely ordered certain documents

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This point is addressed at length at 17-18.

produced because "the prosecutors *may not* have advised the defendant's counsel of the possibility of exculpatory evidence being available from a witness . . ." Ferguson v. Federal Bureau of Investigation, 1992 WL 6265 (S.D.N.Y. 1992) (emphasis added). This statement, although not entirely clear, means no more than that there *may* be additional relevant evidence; as such, it does not give rise to the good cause required under the habeas rules. As far as Egan is concerned, there is no evidence that Egan was untruthful.⁴

For these reasons, this Court denies petitioner's request to conduct further discovery in these proceedings.

IV. Evidentiary Hearing

Petitioner also objects to Magistrate Judge Chrein's determination that he is not entitled to an evidentiary hearing. Petitioner claims that he is entitled to an evidentiary hearing for the following reasons: (1) "the merits of the factual dispute were not resolved in the state hearing"; (2) "there is a substantial allegation of newly discovered evidence"; (3) the state court did not "fully or adequately consider the full scope

⁴ This point is also addressed in detail later. See 16-17.

of petitioner's claims that the government had unlawfully suppressed the names of informants and of prosecutorial misconduct"; and (4) failure to order an evidentiary hearing would result in a "miscarriage of justice." Petitioner's Objections at 34-35. In addition, petitioner argues that his petition involves mixed questions of law and fact that are not entitled to a presumption of correctness and therefore an evidentiary hearing is required. See 28 U.S.C. § 2254(d).

Entitlement to an evidentiary hearing is governed primarily by the Supreme Court decision, Townsend v. Sain, 372 U.S. 293, 313 (1963), as modified by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). See also 28 U.S.C. § 2254(d) (providing circumstances where presumption of correctness is not present). According to Townsend, an evidentiary hearing must be held if

- (1) the merits of the factual dispute were not resolved in the state hearing;
- (2) the state factual determination is not fairly supported by the record as a whole;
- (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing;
- (4) there is a substantial allegation of newly discovered evidence;
- (5) the material facts were not adequately developed at the state-court hearing; or
- (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

372 U.S. at 313. Keeney overrules one of the holdings of Townsend, that an evidentiary hearing must be held whenever "for any reason not attributable to the inexcusable neglect of petitioner, evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing." Pagan v. Keane, 984 F.2d 61, 63-64 (2d. Cir. 1993) (quoting Townsend, 372 U.S. at 317). After Keeney, an evidentiary hearing is required only when "the petitioner can establish cause for his failure to develop an adequate factual record below and prejudice resulting from that failure; it no longer suffices to show merely that he did not deliberately bypass the opportunity to present facts to the state forum." Pagan, 984 F.2d at 64.

The first three claims advanced by the petitioner – the first two of which track the language of the first and fourth of the Townsend factors, respectively – derive from the existence of new materials that were released by the FBI. However, petitioner does not state which of these materials necessitates an evidentiary hearing. Without pointing to specific new evidence that need be presented, it is clear that there is no entitlement to an evidentiary hearing. Instead of referencing new evidence that must be presented during an evidentiary hearing, petitioner merely cites to dicta contained in Judge Patterson's overruled

opinions suggesting that such evidence *may* exist. That alone does not give rise to any requirement that an evidentiary hearing must be held.

As to the claim that the petition contains mixed questions of fact and law, that contention leads only to the conclusion that as to those issues there is no presumption of correctness and does not by itself lead to a conclusion that an evidentiary hearing must be held.

Finally, as to the claim that the determinations of the state court regarding the materiality of evidence withheld by the prosecution and the conduct of the prosecution in withholding evidence were incorrect, because no new evidence is being introduced we adopt Magistrate Judge Chrein's recommendation that no hearing is required. These issues can be determined on the papers submitted by the parties.

Of course, a district court may exercise its discretion to hold an evidentiary hearing irrespective of whether such a hearing is mandated. Pagan, 984 F.2d at 64. In determining whether to exercise such discretion, a court may consider the existence of a factual dispute, the strength of the proffered evidence, the thoroughness of the prior proceedings and the nature of the state court determination. Id.

Here, there is no factual dispute resting on new evidence. Instead, speculations in Judge Patterson's opinions as to new evidence are advanced and portrayed as factual dispute. Pet. Mem. in Support of Motions at 32-43. Because there is no new evidence warranting an evidentiary hearing and the state court proceedings were thorough there is no need for an evidentiary hearing.

B. Substantive Matters

Petitioner raises two objections – each with numerous subparts – to Magistrate Judge Chrein's recommendation that the petition for a writ of habeas corpus be denied: (1) that the Magistrate Judge erred in concluding that the petitioner's conviction should not be vacated because of the prosecution's suppression of evidence favorable to the defense; and (2) that the Magistrate Judge erred in concluding that the petition should not be vacated because of the prosecution's failure to adhere to established standards of conduct. Each of these objections is addressed in turn.

I. Suppression of Evidence

Petitioner first claims that "[t]he FBI and NYCPD

records showed that the petitioner had been singled out for surveillance and harassment by the NYCPD and FBI for several years prior to his arrest not because of any crime that he had committed or was about to commit but rather solely because of his political views and associations" and that "[h]ad the jury been informed of the length, scope and unsavory tactics employed by the NYCPD and the FBI in their investigations of petitioner, more than a substantial probability exists here that they would have rendered a verdict of not guilty." Pet. Obj. at 40. In support of this claim, petitioner cites to two documents purporting to demonstrate this proposition. See Exs. 54 and 62 to December 10, 1990 Affidavit of Joan Gibbs.

These documents do indicate that the NYCPD investigated the Revolutionary Action Movement over a substantial period of time. However, both documents suggest that RAM was investigated because of its advocacy of violent revolution, and not simply its "political" views. In addition, even, assuming *arguendo* that these materials indicate that petitioner was investigated solely for his political views, petitioner has not shown that these documents constitute exculpatory material that must be disclosed

under Brady and its progeny.⁵

Petitioner also argues that these materials should have been turned over because they contain materials that could have been used to impeach the testimony of Egan and Howlette. Id. at 41. In his discussion of Howlette, petitioner claims that exculpatory evidence exists but was not produced, relying on dicta in Judge Patterson's opinions suggesting that other relevant evidence may exist. These remarks do not provide any reason for believing that exculpatory information exists and certainly no basis for granting the petition.

With regard to Egan, petitioner claims that NYCPD records contain evidence that Egan lied when he stated that he had not been involved in undercover investigation and that he had not seen Howlette or Harris before their drive by Wilkins' house. Id. at 41. However, none of the documents cited by petitioner

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Because we hold that the materials in question do not indicate that petitioner was selected for prosecution due to his political views, we do not address respondents' contention that applying a new rule requiring that some threshold be reached for an investigation to commence is barred by Teague v. Lane, 489 U.S. 288 (1989).

indicates that Egan had been involved in any undercover investigation. See Gibbs 1990 Aff., Exs. 13, 18, 22 and 151. Moreover, the state court has already found that Egan was not an undercover agent. State of New York v. Ferguson, Ind. No. 468/68, slip op. (Sup. Ct., August 12, 1991) at 8. That finding is entitled to a presumption of correctness under § 2254(d).

As to whether Egan had seen Howlette and Harris prior to the drive-by, this question was addressed by the state court, and its conclusion – that no evidence shows that Egan perjured himself – is also entitled to a presumption of correctness under § 2254(d). In any event, the reports relied upon by petitioner were not prepared by Egan and reflect the observations of multiple detectives.

Finally, petitioner argues that the prosecution was required to disclose the identity of any informants. However, respondents claim – and petitioner does not deny – that no request was made for disclosure of the identities of any informants. Indeed, petitioner's trial counsel represented that she was aware of the identities of all informants. T.Tr. at 495-596. Where a defendant is aware of the existence of informants but does not attempt to learn their identities, the prosecution

is not obliged to disclose the identity of informants. See United States v. Smart, 448 F.2d 931, 936 (2d Cir. 1971), cert. denied, 405 U.S. 998 (1972). Moreover, unlike the circumstances set forth in United States v. Wilkins, 326 F.2d 135 (2d Cir. 1974), any informant was not a party to the conspiracy involving Howlette, Harris and Ferguson and could not provide evidence relating to that conspiracy. Finally, because there is no reason to believe that the informant has exculpatory testimony, there is no reason to grant the petition on these grounds. See United States v. Vinieris, 595 F. Supp. 88, 91 (S.D.N.Y. 1984) (conclusory statement that undisclosed informant would have provided exculpatory evidence insufficient to show Brady violation).⁶

⁶ We do not address the argument raised by respondents, that the prosecution was not aware of an FBI informant, and therefore cannot have failed to comply with its Brady obligations. Although Ganci v. Berry, 702 F. Supp. 400 (E.D.N.Y. 1988), aff'd, 896 F.2d 543 (2d Cir. 1990), holds that the prosecution cannot be required to disclose evidence held by the FBI of which it is unaware, its holding is limited to those instances where defendant was aware of a parallel federal investigation.

II. Standard of Conduct of Prosecution

Petitioner also claims that the conduct of the prosecution was "so outrageous as to require the vacation of petitioner's conviction on this ground alone." Pet. Obj. at 46. This claim rests on the following allegations: (1) that petitioner was precluded from meaningfully defending himself at trial by the indictment of "all . . . people who could have testified in petitioner's favor under a bogus indictment," *id.* at 46-47; and (2) that the prosecution suppressed NYCPD and FBI records that were not only relevant and material to petitioner's defense, but were also exculpatory. Petitioner also appears to claim that he was unfairly singled out for prosecution because of his political views.

None of these arguments are persuasive. That the government vigorously pursued the second indictment long after petitioner was tried and convicted is undisputed. See Resp. Mem. at 44-45; Pet. Rep. at 21. That alone suffices to dispel the claim that the second indictment was part of some grand scheme to deny petitioner the instruments necessary to defend himself. The other arguments raised by petitioner – that the prosecution did not supply exculpatory and/or impeachment material and that

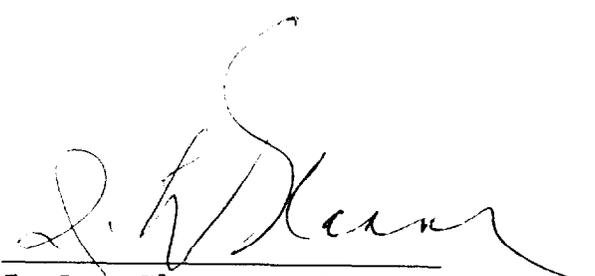
petitioner was singled out for prosecution because of his political views – are discussed above and need not be addressed here.

CONCLUSION

The petition is denied. We do not consider whether Magistrate Judge Chrein erred in addressing petitioner's Rosario claim because the petition is, in any event, denied.

SO ORDERED.

Dated: Brooklyn, New York
May 5, 1998



I. Leo Glasser, U.S.D.J.

Copies of the foregoing Memorandum and Order were this day sent to:

Joan Gibbs
Center for Constitutional Rights
c/o 441A Classon Avenue
Brooklyn, New York 11238

John M. Castellano
Office of the District Attorney, Queens County
125-01 Queens Boulevard
Kew Gardens, NY 11415