

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

GAILE K. OWENS,)	
)	
Petitioner,)	
)	
VS.)	No. 00-2765 Todd
)	
EARLINE GUIDA, Warden,)	
)	
Respondent.)	

ORDER DENYING PETITIONER’S MOTION
FOR LEAVE TO CONDUCT DISCOVERY

Petitioner Gaile K. Owens has moved the court to grant her leave to serve the interrogatories and requests for production of documents that are attached to her motion and to serve a subpoena commanding Carolyn Hensley, Petitioner’s sister, to appear at a deposition, pursuant to Rule 6 of the Rules Governing § 2254 Cases. The Respondent has filed a response to the motion. For the reasons set forth below, Petitioner’s motion is DENIED.

A habeas petitioner is not entitled to discovery as a matter of ordinary course. Bracy v. Gramley, 117 S. Ct. 1793, 1796-97 (1997).¹ Because the “broad discovery provisions” of the Federal Rules of Civil Procedure do not apply in habeas proceedings, Harris v. Nelson, 394 U.S. 286 (1969), the Supreme Court promulgated and Congress adopted the Rules

¹ The petition in Bracy was filed before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, Pub L No 104-132, 110 Stat 1214 (1996), which amended 28 U.S.C. § 2254 in several respects. However, the general law pertaining to discovery in habeas cases as stated in Bracy has not been changed.

Governing § 2254 Cases. Bracy, 117 at 1797. Rule 6(a), in particular, provides that discovery may be had only with permission of the court and for good cause shown.² In Harris, the Supreme Court explained:

[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 confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.

394 U.S. at 300. Rule 6 does not “sanction fishing expeditions based on a petitioner’s conclusory allegations.” Bracy, 117 S. Ct. at 1799 (citing Perillo v. Johnson, 79 F.3d 441, 444 (5th Cir. 1996)). Instead, “[a] federal habeas court must allow discovery and an evidentiary hearing only where a factual dispute, if resolved in the petitioner’s favor, would entitle him to relief and the state has not afforded the petitioner a full and fair evidentiary hearing.” Bracy, 117 S. Ct. at 1799 (quoting Ward v. Whitley, 21 F.3d 1355, 1367 (5th Cir. 1994), cert. denied, 513 U.S. 1192 (1995)).

In the present case, Petitioner seeks discovery on the issue of whether her claim of ineffective assistance of counsel during the sentencing phase of her trial was exhausted in the state court. Petitioner contends that the attorney appointed to represent her in the state court post-conviction proceeding attempted to interview Jewell Wilson Kirksey, Petitioner’s brother, about the neglect and abuse that Petitioner was subjected to as a child. In an initial

² Rule 6(a) 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.

visit, Kirksey allegedly confirmed Petitioner's statements about the neglect and abuse. However, according to an affidavit filed by the post-conviction attorney, he was prevented from interviewing Kirksey a second time by Ms. Hensley. Ms. Hensley allegedly instructed Kirksey, who has certain disabilities, to tell Petitioner's attorney that he did not want to talk to him, and Kirksey did so. Petitioner asserts that the actions of Ms. Hensley prevented her post-conviction attorney from obtaining evidence that would have confirmed Petitioner's claim of childhood abuse and neglect, thus impeding efforts to present the ineffective assistance of counsel claim. Petitioner also seeks to discover whether any state actors were involved in Ms. Hensley's "efforts attempting to disrupt" Petitioner's attorney's investigation of this claim.

Petitioner has not shown that she is entitled to conduct discovery because the information sought would not establish cause and prejudice for the asserted procedural default of her ineffective assistance of counsel claim.³ A federal district court may not grant a writ of habeas corpus to a state prisoner who has not exhausted all available remedies in state court. 28 U.S.C. § 2254(b). To exhaust his state remedies, a prisoner must present the state courts with the same factual and legal claims that he presents to the federal court. Anderson v. Harless, 459 U.S. 4, 6 (1982). Nevertheless, claims that have not been fairly or adequately presented to the state courts may be deemed exhausted:

Just as in those cases in which a state prisoner fails to exhaust state remedies,

³ For the purpose of deciding this motion only, the court will assume that Petitioner's claim of ineffective assistance of counsel during her sentencing phase was not fully and fairly presented to the state court.

a habeas petitioner who has failed to meet the state's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance. A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer “available” to him.

Coleman v. Thompson, 501 U.S. 722, 731-32 (1991) (citing Engle v. Isaac, 456 U.S. 107, 125-26 (1982); Teague v. Lane, 489 U.S. 288, 298-99 (1989)). The right to federal review of such procedurally defaulted claims is forfeited unless the prisoner can show cause for the default and actual prejudice attributable thereto.

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman, 501 U.S. at 750; see also Harris v. Reed, 489 U.S. 255, 262 (1989); Murray v. Carrier, 477 U.S. 478, 485-92 (1986); Engle, 456 U.S. at 128-29; Wainwright v. Sykes, 433 U.S. 72 (1977).

Cause that is sufficient to excuse a procedural default must be something that the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.” [Carrier,] 477 U.S. at 488, 106 S. Ct. at 2645.

Coleman, 501 U.S. at 753 (emphasis in original). In order to demonstrate prejudice, a habeas petitioner must show significantly more than plain error. Petitioner must show

“not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial

with error of constitutional dimensions.” [United States v. Frady, [456 U.S. 152,] 170 [(1982)]. Such a showing of pervasive actual prejudice can hardly be thought to constitute anything other than a showing that the prisoner was denied “fundamental fairness” at trial.

Carrier, 477 U.S. at 494.

Although Petitioner contends that Ms. Hensley thwarted Petitioner’s post-conviction attorney’s efforts to interview Kirksey, Petitioner has presented no evidence that the state did not afford her “a full and fair evidentiary hearing,” see Bracy, 117 S. Ct. at 1799, on this issue. There is no evidence that Petitioner subpoenaed Kirksey to testify at the post-conviction hearing or cross-examined Ms. Hensley about her alleged refusal to allow Kirksey to talk to the attorney⁴ or made any other effort during the post-conviction proceedings to develop the information now sought in discovery. See Charles v. Baldwin, 1999 WL 694716 (D. Or.) (Motion for discovery was denied because the petitioner made no showing “that the failure to develop the factual basis of his claim in the state post-conviction proceedings was attributable to some cause other than him or his post-conviction counsel.”) Moreover, there is no allegation of out-of-court misconduct on the part of the prosecution or law enforcement personnel, see Payne v. Bell, 89 F. Supp.2d 967, 971 (W.D. Tenn. 2000), that would excuse Petitioner’s failure to develop this issue during the post-conviction proceedings. Because Petitioner had the opportunity during the state court proceedings to develop the evidence that she now seeks in discovery, she has failed to establish good cause under Rule 6.

⁴ Ms. Hensley was called as a witness by the State during the post-conviction proceedings. See Addendum No. 13.

Consequently, Petitioner's motion to conduct discovery is DENIED.

IT IS SO ORDERED.

JAMES D. TODD
UNITED STATES DISTRICT JUDGE

DATE