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U.S. DISTRICT COURT
DISTRICT OF OREGON
PORTLAND, OREGON

BY KJ

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ELIZABETH DIANE DOWNS,)	
Petitioner,)	
)	Civil No. 96-900-HA
v.)	
)	O R D E R
SONIA HOYT, Superintendent,)	
Oregon Women's Correctional Center,)	
Respondent.)	
)	

HAGGERTY, Judge:

Petitioner was convicted in 1984 of murdering one of her children and assaulting and attempting to murder her other two children. Her amended \$2254 writ of habeas corpus was filed in January 1997. Petitioner's amendments assert six claims: 1., due process violations regarding her right to a fair trial, since the case was tried in Lane County; 2., ineffective assistance of trial counsel; 3., due process/ineffective assistance (regarding denial of her request for a short continuance to accommodate new counsel); 4., prosecutorial misconduct (failure to disclose police

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reports, eliciting unreliable testimony, failure to preserve evidence, improper closing arguments); 5., due process violations regarding petitioner's state appeal; and finally, 6., ineffective assistance of appellate counsel.

The government's responsive brief and motion to deny habeas corpus relief (#25) were filed on 21 April 1997. In June 1997, petitioner moved for an extension for responding to the government's motion to deny habeas corpus relief, and then filed motions for leave to conduct additional discovery and to order production of certain trial transcripts. The government subsequently sought and was granted an extension for responding to petitioner's discovery motions. A hearing was held in court on 15 September 1997 on these motions. The court's rulings follow.

1. PETITIONER'S MOTION TO CONDUCT ADDITIONAL DISCOVERY

Petitioner seeks leave of the court to conduct discovery under Rule 6 of the Rules Governing Section 2254. Petitioner argues that the state has denied access to "any relevant or useful information in this case," on grounds that petitioner has not yet "proven" the allegations asserted in her petition.

The government contends that petitioner is merely attempting to relitigate the state prosecution and the state post-conviction proceedings. Petitioner presented a total of five post-conviction petitions, and the state was granted

summary judgment on a number of the issues raised. A trial was held in 1991 on the remaining issues, and the state court found against petitioner on all grounds except "gun minimum" and restitution, which the state had conceded. The government urges that the court defer to the judgments of the state court and deny the requests for additional discovery.

A. STANDARDS

A federal habeas court generally accepts state court findings of historical fact. 28 U.S.C. § 2254(d). However, the federal court should not accept findings when the state fact-finding procedure was inadequate, the petitioner did not receive a full, fair, and adequate hearing, or the findings are not "fairly supported by the record." 28 U.S.C. § 2254(d)(2), (6), (8).

The federal habeas court provides a de novo review of state court rulings on mixed questions of fact and law and purely legal questions. Swan v. Peterson, 6 F.3d 1373, 1379 (9th Cir. 1993), cert. denied, 115 S. Ct. 479 (1994). Ineffective assistance of counsel is a mixed question of fact and law. Tomlin v. Myers, 30 F.3d 1235, 1237 (9th Cir. 1994).

A state prisoner must exhaust all available state court remedies either on direct appeal or through collateral proceedings before a federal court may consider granting habeas corpus relief. Keeney v. Tamayo-Reyes, 112 S. Ct.

1715, 1720 (1992); Duckworth v. Serrano, 454 U.S. 1, 3 (1981). A prisoner satisfies the exhaustion requirement by "fairly" presenting his or her claims to the highest state court with jurisdiction to consider them. Keeney, 112 S. Ct. at 1720; Picard v. Connor, 404 U.S. 270, 276 (1971). A prisoner fairly presents claims by describing in the state court proceeding both the operative facts and the legal theory on which the claims are based. Anderson v. Hareless, 459 U.S. 4, 6 (1982); Guizar v. Estelle, 843 F.2d 371, 372 (9th Cir. 1988); Tamapua v. Shimoda, 796 F.2d 261, 262 (9th Cir. 1986).

Rule 6 of the Rules Governing §2254 establishes that leave of the court is required for discovery: "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." The Ninth Circuit confirms that the "availability of any discovery during a habeas proceeding is committed to the sound discretion of the district court." Campbell v. Blodgett, 982 F.2d 1356, 1358 (9th Cir. 1993). Prisoners, however, should not be allowed to "use federal discovery for fishing expeditions to investigate mere speculation." Calderon v. United States District Court, N.D. California, 98 F.3d 1101, 1106 (9th Cir. 1996).

ANALYSIS

In Jones v. Wood, 114 F.3d 1002 (9th Cir. 1997), the Ninth Circuit recognized that habeas corpus petitioners are entitled to discovery for good cause shown, regardless of whether an evidentiary hearing is needed. This ruling undermines the government's reliance upon Keeney v. Tamayo-Reyes, 112 S. Ct. 2546 (1991) in its opposition to petitioner. Keeney suggests that a petitioner must show "cause and prejudice" for failing to develop facts at the state level before obtaining a mandatory evidentiary hearing. As petitioner asserts, the rules for discovery are distinguishable from the those governing evidentiary hearings, and allowing discovery to habeas corpus petitioners rests within the sound discretion of the court. That discretion is abused when discovery that is "indispensable to a fair, rounded development of the material facts" is denied. Jones, 114 F.3d at 1009.

Petitioner's requests have been fully considered. The requests granted below are viewed by the court as being indispensable to the development of the material facts in this matter:

1. ALL EVIDENCE ADMITTED OR SOUGHT TO BE ADMITTED AT TRIAL
Petitioner argues that she must have access to *all physical evidence*, to prove the trial attorney's inadequate performance in challenging the state's forensic analysis of that evidence. The government argues that in the absence of any specificity, the request for "all physical evidence" should be denied.

RULING:

Petitioner is entitled to all existing evidence admitted at trial that was subject to forensic analysis, including photographs.

2. FINGERPRINT EVIDENCE
Petitioner next refers to the fingerprint reports, which may bolster her ineffective assistance claim, or support her claim of actual innocence by leading to another perpetrator (adult fingerprints different from petitioner's were found on her automobile).

RULING:

The request for the fingerprint evidence is granted.

3. EVIDENCE LOG
Petitioner argues that the state violated due process in failing to preserve potentially exculpatory evidence, and requests production of the evidence log.

RULING:

The request for the log is granted.

4. DEPOSITIONS OF NEWS DIRECTORS

Petitioner contends that she needs to depose the news directors in Lane County to establish her ineffective assistance of counsel claim regarding the trial counsel's failure to change venue.

RULING:

Petitioner is entitled to take these depositions. See Coleman v. Zant, 708 F.2d 541 (11th Cir. 1983), in which the Eleventh Circuit reversed a district court's refusal to permit depositions of news directors, where such evidence could be indispensable to a fair, rounded development of material facts pertaining to habeas corpus petition alleging due process violations arising from the trial court's denial of a change of venue motion. Here, petitioner did not move for change of venue, but petitioner wishes to establish that the trial attorney's performance in not pursuing a change of venue was deficient to such a degree as to prejudice her. Petitioner shall be permitted to depose the news directors.

5. POLICE NOTES

Petitioner argues that due process was violated when she was denied access to police reports (fingerprints that may have been on cartridges found at the murder scene; notes made from "public contacts" to the Sheriff's Office following publicity of the case), and when the prosecutor failed to preserve such reports. Petitioner says she is required to prove that the evidence at issue was favorable and material, and so must be given access to whatever exists.

RULING:

The state is ordered to turn over any existing notes and reports that were prepared from the calls received by the Sheriff's Office in response to the case's publicity, as well as any other pertinent police notes.

6. DEPOSITION OF TRIAL ATTORNEY JAMES JAGGER
Petitioner alleges there are "a number of unanswered questions" about the trial attorney's representation. The attorney has already been deposed, has submitted an affidavit, and was examined extensively at the post-conviction trial. No new information has been offered warranting further discovery from him.

RULING:

The request for another deposition of James Jagger is denied.

7. DEPOSITION OF CHRISTIE HUGI
Petitioner alleges that there are reasons to believe that the trial testimony of petitioner's daughter Christie (one of the victims in the case) was improperly tainted by repeated interviews and other influences. She did not identify her mother as the shooter until after a "passage of months," during which she was subjected to repeated interviews by Children's Services Division, her attorney, and law enforcement officers. Petitioner says she has not had the chance to test Christie's perceptions or testimony. The issue of requiring Christie's deposition or testimony was litigated in a post-conviction hearing: the state court heard argument, reviewed briefs, and granted a protective order on grounds that there had been an insufficient showing of a need for Christie's deposition. Summary judgment was later granted to the state on the issue of whether Christie was coerced into testifying (although the state offered to provide her for a deposition if summary judgment was denied).

RULING:

No good cause is shown for ordering the deposition of Ms. Hugi. If petitioner seeks to explore potential undue influences that might have affected her trial testimony, such evidence can be derived -- if at all -- from the persons who met with Christie before trial.

8. DEPOSITIONS OF OTHERS

Petitioner seeks to take the depositions of Dr. Carl Peterson (a psychologist who treated Christie after the shooting), Susan Staffel (a worker at Children's Services Division who saw Christie frequently) and Paula Krogdahl (another person who met with Christie repeatedly). Petitioner says these people have never been questioned extensively about the nature of their conversations with Christie, to see if the circumstances of the conversations could have influenced Christie's memory or testimony.

RULING:

These depositions are permitted.

2. PETITIONER'S MOTION FOR ADDITIONAL TRANSCRIPTS

Petitioner supplemented her motion for leave to conduct more discovery with a subsequent motion for "an Order to provide additional sections of transcript." Specifically, she seeks an Order requiring the state to provide the transcript of voir dire and jury selection from her criminal trial. Petitioner refers to Rule 5 of the Rules Governing Section 2254, which requires the state to attach relevant portions of the transcript to its answer to a § 2254 petition, and also provides in part that the court may order "that further portions of the existing transcripts be furnished or that certain portions of the non-transcribed proceedings be transcribed and furnished."

Petitioner argues that the transcript of the voir dire and the jury selection is critical to her briefing of the

"ineffective assistance of counsel" and due process violation claims that assert the pretrial publicity was so extreme that her trial attorney should have sought a change of venue. Her due process claim requires a showing that pretrial publicity prejudiced her -- such prejudice can be presumed when the record "demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime." Harris v. Pulley, 885 F.2d 1354, 1361 (9th Cir. 1988), cert. denied, 493 U.S. 1051 (1990). Actual prejudice is shown if the jurors demonstrated "actual partiality or hostility that cannot be laid aside." Id. at 1363.

The state is ordered to provide the requested transcripts.

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CONCLUSION

Petitioner's motion for leave to conduct additional discovery (doc. #36-1) is granted in part in accordance with this Order. Petitioner's motion for an Order compelling production of additional transcripts (doc. #40-1) is granted. Respondent is ordered to provide discovery in compliance with

this Order. Discovery shall be completed no later than 1 May 1998. Counsel shall submit respective status reports on 27 February 1998 indicating the status of discovery, proposing a final briefing schedule and including a preliminary brief addressing whether an evidentiary hearing should be held in this matter. The court will schedule a status conference following receipt of the 27 February status reports.

IT IS SO ORDERED.

DATED this 6 day of January, 1998.

A handwritten signature in cursive script, reading "Ancer L. Haggerty", is written over a horizontal line.

Ancer L. Haggerty
United States District Judge

HARDY MYERS
ATTORNEY GENERAL

FEB 20 1998



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DAVID SCHUMAN
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
TRIAL DIVISION

February 19, 1998

Wendy R. Willis
Assistant Federal Public Defender
101 S.W. Main Street, Suite 1700
Portland, Oregon 97204

Re: Diane Downs v. Sonia Hoyt
USDC Civil No. 96-900-ST

Dear Wendy:

This is to follow up on our recent conversation about the discovery ordered from Judge Haggerty.

1. The District Attorney has the information indicated in the judge's ruling at page 6, paragraph 1.

2. The Oregon State Police in Salem have the fingerprint information listed in Judge Haggerty's order at page 6, paragraph 2.

3. The Lane County Sheriff's Office has told to me that there is no "evidence log", as listed in Judge Haggerty's order at page 6, paragraph 3.

4. Regarding Judge Haggerty's order at page 7, paragraph 5, the Lane County Sheriff's Office has indicated to me that it still has all the reports that were discovered in the state criminal proceedings. There are no remaining handwritten notes for those reports, because the practice of the office is to replace the handwritten notes with the typed reports once the reports are completed.

In addition, the Sheriff's Office has no existing notes or reports "received by the Sheriff's Office in response to the case's publicity." Any such notes were made exhibits by the Court in the state criminal proceeding, when Judge Foote reviewed those notes to determine what would be turned over to the defense. The Court has told the Lane County Sheriff's Office

PET. EX. 2

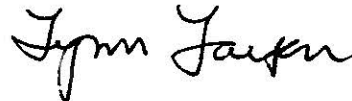
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that those exhibits were destroyed by the Court on August 27, 1987.

5. I have checked on the transcripts of voir dire. Apparently voir dire was reported. However, the court reporter who handled most of the trial is no longer with the Court, but apparently she is in the area somewhere. She is supposed to get back to me on locating the notes and making a transcript. I will keep you posted on that issue.

Please let me know when you would like to review that information that is available. I can make the necessary arrangements.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Lynn David Larsen".

Lynn David Larsen
Assistant Attorney General

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