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

PHILIP RAY WORKMAN,	)	
	)	
Petitioner,	)	
	)	
V.	)	**No. 03-2660-D**
	)	
RICKY BELL, Warden,	)	
RIVERBEND MAXIMUM SECURITY	)	
INSTITUTION,	)	
	)	
Respondent.	)	

ORDER DENYING PETITIONER'S MOTION TO RECONSIDER
AND
ORDER DENYING MOTION TO AMEND

Before the Court are Petitioner's Motion To Reconsider this Court's April 2, 2007, order dismissing-in-part his second-in-time petition for habeas corpus relief and Petitioner's Motion to Amend. For the reasons stated below, the motions are DENIED.

I. BACKGROUND

In the petition, four of the six claims raised by Petitioner appeared to allege constitutional error and misconduct related to his 2001 state *coram nobis* proceedings. In dismissing those claims, the Court reasoned that, because Tennessee's statutory *coram nobis* procedure is tantamount to a state post-conviction or other collateral proceeding, Petitioner's allegations of constitutional error are not cognizable in federal habeas corpus. See, e.g., Alley v. Bell, 307 F.3d 380, 387 (6th Cir. 2002); Miller

v. Francis, 269 F.3d 609, 621 (6th Cir. 2001); Kirby v. Dutton, 794 F.2d 245, 247 (6th Cir. 1986).

The Court also dismissed, as non-cognizable in habeas corpus, Petitioner's claim that Tennessee's protocols and procedures in preparation for his previously scheduled executions violated his rights under the Eighth and Fourteenth Amendments. The Court determined that, as an apparent attack on the conditions of his confinement during the period known as "death watch," Petitioner's claim was not appropriate for habeas corpus. Rather, the Court noted, the claim would only be cognizable as a cause of action under 42 U.S.C. § 1983.

Finally, the Court ordered a response from Respondent as to Petitioner's claim that, in light of certain evidence adduced at the *coram nobis* hearing, there is insufficient evidence supporting his conviction and death sentence. Apparently in response to the Court's order, Respondent has since filed a motion to dismiss the remaining claim.

II. CONSTRUCTION OF THE INSTANT MOTION

Petitioner now seeks reconsideration[1] of the Court's previous order. As noted, the Court construes the motion as a motion to

[1] The Court notes, as a matter of nomenclature, that the Federal Rules of Civil Procedure do not provide for a motion to "reconsider." Rather, Fed. R. Civ. P. 59 provides, in subsection (e), the authority for an aggrieved party to file a motion to alter or amend judgment. Thus, the Court will construe Defendant's motion to "reconsider" as a motion to alter or amend. See Stubblefield v. Truck Stops Corp. of America, 1997 WL 397240 at *2 (6th Cir. 1997). Such a motion to alter or amend may be filed, as in this instance, before the Court's entry of judgment.

alter or amend pursuant to Fed. R. Civ. P. 59. A Rule 59 motion is not an opportunity to re-litigate a case. Sault Ste. Marie Tribe of Chippewa Indians v. Engler, 146 F.3d 367, 374 (6th Cir. 1998). Rather, such a motion should be granted only if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent a manifest injustice. GenCorp, Inc. v. American Intern. Underwriters, 178 F.3d 804, 834 (6th Cir. 1999)(citations omitted).

Under these standards, Petitioner's motion appears viable only to the extent that he asserts the Court has committed clear errors of law in dismissing some of his claims. He maintains that, because Tennessee's statutory *coram nobis* procedure is basically the same as a motion for a new trial and thus merely a continuation of the criminal proceeding itself, errors occurring in Tennessee's *coram nobis* proceedings are cognizable as federal habeas claims. He further contends that his Eighth and Fourteenth Amendment claim about the procedures of Tennessee's "death watch" is cognizable in habeas corpus because he is contending that, in allegedly violating his Eighth and Fourteenth Amendment rights, Tennessee has "forfeit[ed] the right to execute" his sentence of death. He asserts that he is not seeking to have the conditions of "death watch" modified. Instead, he argues, his claim challenges the death sentence itself.

III. ANALYSIS

A. "Reconsideration" of Claims One, Two, Three, and Five

Petitioner first seeks "reconsideration" of that portion of the Court's order dismissing claims one, two, three, and five of the second petition as non-cognizable in habeas corpus. Petitioner is not entitled to relief under Rule 59. His assertion that the Court has erred in concluding that Tennessee's statutory *coram nobis* remedy is post-conviction in nature is clearly without merit. First, Petitioner contends that the Court has misapprehended the nature of Tennessee's *coram nobis* procedure, given the footnoted language from a Supreme Court case, United States v. Morgan, 346 U.S. 502, 506 n.4 (1954), opining that a *coram nobis* petition is "a step in the criminal case." Petitioner's reliance on the dicta set forth in this footnote is curious because United States v. Morgan, of course, was concerned with the role of *coram nobis* in federal criminal law and, moreover, was released at a time when Tennessee did not even recognize *coram nobis* in its criminal law. See Green v. State, 216 S.W.2d 305, 306-307 (Tenn. 1948)(adopting State's assertion that there is no "judicial history that [the writ of error *coram nobis*] has ever been used or allowed in a criminal case"). See also State v. Vasques, __ S.W.3d __, 2007 WL 715459 at *9 (Tenn. Mar. 9, 2007)("It was not until 1955 that the General Assembly made coram nobis relief available in criminal cases . . ."). Thus, whatever Morgan surmises is the character of *coram nobis* in federal criminal cases, it is of little relevance in

assessing the nature of Tennessee's statutory *coram nobis* procedures.

Tennessee's statutory *coram nobis* procedure is very similar to its statutory post-conviction procedures. Both are subject to one-year statutes of limitations. See Tenn. Code Ann. §§ 27-7-103 (*coram nobis*) & 40-30-102(a) (post-conviction). The Sixth Circuit appears to have recognized that claims raised in a motion for *coram nobis* relief in Tennessee can be deemed exhausted for purposes of federal habeas review. See Harbison v. Bell, 408 F.3d 823, 831 (6th Cir. 2005). Furthermore, the Sixth Circuit has suggested that the time during which a properly filed petition for *coram nobis* relief is pending in Tennessee's state courts tolls, just as does a petition for post-conviction relief, the one-year habeas statute of limitations set forth in 28 U.S.C. § 2244(d). See Brady v. Tennessee, 23 Fed.Appx. 534, 535 (6th Cir. 2001). Persons convicted of crimes in Tennessee, having completed direct review, often simultaneously file motions for post-conviction and *coram nobis* relief. Where such motions are filed separately, reviewing courts often consolidate them, conduct hearings on both motions, and rule on both simultaneously. See, e.g., Wiggins v. State, 2005 WL 3059437 (Tenn. Crim. App. Nov. 10, 2005); Jackson v. State, 2002 WL 31757477 (Tenn. Crim. App. Dec. 6, 2002). Further, Tennessee's appellate courts often consolidate appeals of the denial of post-conviction and *coram nobis* relief. See, e.g., Johnson v. State,

2006 WL 721300 (Tenn. Crim. App. Mar. 22, 2006); Jackson, 2002 WL 31757477. Thus, it is apparent that Tennessee's statutory *coram nobis* procedure is essentially another form of collateral post-conviction relief in Tennessee. Indeed, it would make little sense if the due process claims asserted in the petition, though obviously not cognizable as habeas claims had the underlying proceedings been pursuant to Tennessee's post-conviction relief statute, were somehow cognizable because the underlying proceedings were instead pursuant to Tennesseee's *coram nobis* statute.

Moreover, Petitioner's claim that, in Tennessee, *coram nobis* is the equivalent of a new trial motion is, even if true, unavailing. The Sixth Circuit has recently held that matters arising in the course of a motion for new trial are collateral to the actual trial and that, therefore, habeas corpus relief is not available for asserted violations occurring in such proceedings. See Cress v. Palmer, __ F.3d __, 2007 WL 1006928 (6th Cir. April 5, 2007). In Cress, which was decided three days after the Court entered its previous order, the Sixth Circuit was confronted with factual and procedural issues similar to the instant matter. In 1985, Cress was convicted by a Michigan jury of first-degree murder and sentenced to life imprisonment. 2007 WL 1006928 at *1. After his conviction was affirmed and he unsuccessfully sought post-conviction relief in the state court, he filed a petition for federal habeas corpus relief. Id. His habeas petition was

dismissed on the merits, and the Sixth Circuit affirmed in 1992. Id. In 1997, Cress filed a motion for a new trial in state court based on alleged recantations of trial testimony by prosecution witnesses and a purported confession from someone else. Id. The state trial court initially granted the motion for a new trial, but later reversed itself upon reconsidering the matter and taking additional evidence. Id. The Michigan Court of Appeals reversed the trial court, but the Michigan Supreme Court reversed the Court of Appeals and remanded for a hearing on whether the state had destroyed trial evidence in bad faith. Id. After the trial court determined that evidence was not destroyed in bad faith and Cress exhausted his remedies as to that issue, he filed a second federal habeas petition. Id. After a referral, the magistrate "recommended that the petition be summarily dismissed because it was untimely and because it failed to state claims cognizable in habeas corpus." Id. The district court dismissed the petition on its merits, "concluding that none of the claims established a federal constitutional violation." Id. The Sixth Circuit granted a certificate of appealabilty as to Cress's claims about whether the state court improperly analyzed his claim that the prosecution destroyed evidence, whether the state court "'improperly ignored his recantation evidence,'" and whether, in light of "'compelling evidence of his actual innocence and another's guilt,'" his

continued incarceration "'violates due process and constitutes cruel and unusual punishment.'" Id. at *2.

In analyzing the petition, the Sixth Circuit first noted that, because Cress's first habeas petition was filed pre-AEDPA, the Court was required to determine whether the second petition "would have survived under the pre-AEDPA 'abuse of the writ' standard." Id. at *6. The Court concluded that even though the claims set forth in the second petition did not constitute an "abuse of the writ," they were nonetheless not cognizable in federal habeas corpus. Id. at *7. With regard to Cress's claim that the state court improperly denied him the opportunity to present his recantation evidence during his motion for new trial, the Sixth Circuit held that the claim was not cognizable in habeas corpus because it was based on the conduct of a state court in a collateral proceeding. Id. Relying on precedents cited in this Court's previous order, including Kirby and Alley, the Sixth Circuit equated Cress's motion for new trial with other collateral state post-conviction proceedings and reiterated its long-standing bar to habeas relief for due process claims based on asserted errors or irregularities in such proceedings. Id. Thus, it is apparent that, even if Petitioner's characterization of his pursuit of *coram nobis* relief as akin to a motion for new trial is warranted, his due process claims about violations occurring in such proceedings are not cognizable in federal habeas corpus.

Because claims one, two, three, and five of the second petition allege various due process violations concerning the conduct of state officials and the state courts during Petitioner's *coram nobis* proceedings, those claims do not allege a constitutional defect at Petitioner's trial and, hence, are not cognizable in federal habeas corpus review. Accordingly, Petitioner's motion to alter or amend the Court's order finding those claims non-cognizable is DENIED.

B. "Reconsideration" of Claim Six

Petitioner also seeks reconsideration of that portion of the Court's order construing his Eighth and Fourteenth Amendment claim about his treatment during "death watch" as a claim about the conditions of his confinement and, as such, appropriate for a suit pursuant to 42 U.S.C. § 1983 rather than habeas corpus. He now asserts that claim six alleges that, "by repeatedly subjecting him to execution dates and pre-execution procedures, Respondent has shocked the conscience and violated contemporary standards of decency, thus forfeiting the right to execute the sentence under the Eighth and Fourteenth Amendments." Motion to Reconsider, doc. no. 20 at 5. He asserts that his claim is therefore akin to the claim contemplated in language from Lackey v. Texas, 514 U.S. 1045 (1995)(Stevens, J., respecting the denial of certiorari), and Foster v. Florida, 537 U.S. 990 (2002)(Breyer, J., dissenting from denial of certiorari), in which Justices Stevens and Breyer,

respectively, have opined that execution of a death sentence after a prolonged incarceration under the cloud of a death sentence might constitute cruel and unusual punishment.

The factual allegations predicating claim six are, as the Court previously noted, exclusively concerned with Petitioner's treatment during pre-execution preparation procedures. Nowhere in the petition does Petitioner claim that, as suggested in Lackey and Foster, his execution would violate the Constitution merely because of the prolonged period of time during which he has been incarcerated. Although Petitioner cites numerous cases in support of his positions throughout the petition, he does not cite to Lackey or Foster in the petition. A close reading of claim six defeats Petitioner's present attempt to recharacterize his claim. Claim six reads as follows:

> Claim 6: By scheduling Mr. Workman's execution four times, and by repeatedly subjecting him to pre-execution procedures such as those described in paragraphs 40-44, above, the State *has* violated . . . the Eighth Amendment's prohibition against cruel and unusual punishment, and the due process clause of the Fourteenth Amendment.

First Amended Petition For Writ of Habeas Corpus, doc. no. 8 at ¶ 107 (emphasis supplied). As expressed by Justice Breyer in Foster, the argument Petitioner now asserts that claim 6 raises is whether his execution, following the protracted procedural history of this case, "*would* violate the Constitution's prohibition of 'cruel and unusual punishments.'" Foster, 537 U.S. at 990 (emphasis supplied).

Though the distinction in grammar might seem overly semantical, the Court finds it controlling in this instance. Given its plain meaning, the text of claim six refers to factual allegations concerning Petitioner's treatment during "death watch" and asserts that his repeated exposure to those procedures "has" violated the Eighth Amendment. There is nothing suggesting that the length of Petitioner's incarceration before any putative execution violates the Eighth Amendment or that his execution "would" violate the Eighth Amendment based on his prior exposures to "death watch" procedures. There is simply nothing in the claim or the allegations it references about the validity or execution of Petitioner's sentence. Thus, the Court cannot construe Petitioner's original pleading as to claim six as he would have the Court do so now. Both Lackey and Foster were decided well before Petitioner filed his second habeas petition. Had he intended to articulate a claim alleging a constitutional violation pursuant to the cited language in those cases, surely he could have done so with more clarity than what is offered in claim six. Accordingly, Petitioner's motion to alter or amend the Court's order construing claim six as a claim based on the allegedly unconstitutional conditions of his confinement during "death watch" is DENIED.[2]

[2] The Court notes that, as is evident from the posture in which Justices Stevens and Breyer offered their musings on the subject, the Supreme Court has not yet considered the merit of the underlying claim Petitioner now contends he was asserting. The Sixth Circuit has never recognized a habeas corpus claim based on Lackey and Foster. Indeed, it has never even cited to either case or to other cases in which Justice Breyer has similarly reiterated

IV. MOTION TO AMEND

Petitioner has also filed a motion to amend his second-in-time petition. It appears that the requested amendments would add further factual allegations concerning procedural developments since the filing of the first amended petition, see Proposed Second Amended Petition at ¶¶ 100a-100f, and would supplement the text of claim six as follows:

> Claim 6: By scheduling Mr. Workman's execution six times, by repeatedly subjecting him to pre-execution procedures such as those described in paragraphs 40-44, *and by subjecting him to unnecessary mental distress*, the State has violated . . . the Eighth Amendment's prohibition against cruel and unusual punishment, and the due process clause of the Fourteenth Amendment.

Proposed Second Amended Petition at ¶ 107 (emphasis supplied).

While Fed. R. Civ. P. 15's mandate that leave to amend should be freely granted is applicable in habeas cases, leave to amend should not be granted where the requested amendment would be futile. See Coe v. Bell, 161 F.3d 320, 341 (6th Cir. 1998)(quoting Brooks v. Celeste, 39 F.3d 125, 130 (6th Cir. 1994)). See also

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his views about the merits of this purported claim. See Knight v. Florida, 528 U.S. 990 (1999)(Breyer, J., dissenting from the denial of certiorari); Elledge v. Florida, 525 U.S. 944 (1998)(Breyer, J., dissenting from the denial of certiorari). Furthermore, because a true "Lackey claim" is concerned with the duration of confinement prior to execution as a predicate to the alleged Eighth Amendment violation, even assuming that the claim were recognized in this Circuit, Petitioner would likely not be entitled to bring it in a second petition because he could have alleged such a violation during his first round of habeas proceedings. See Allen v. Ornoski, 435 F.3d 946, 957-58 (9th Cir. 2006). Petitioner had already been incarcerated over ten years at the time he filed his first habeas petition. Ultimately, of course, that question would be left to the Sixth Circuit pursuant to 28 U.S.C. § 2244(b)(3)(A), and the Court only notes it here to emphasize the considerable, if not dispositive, hurdles facing claim six had it been properly alleged by Petitioner.

Wiedbrauck v. Lavigne, 174 Fed.Appx. 993, 1000 (6th Cir. 2006)(upholding the denial of leave to amend, despite the district court's abuse of discretion in denying such leave, because the requested amendment would have been futile). The factual allegations Petitioner seeks to add in paragraphs 100a through 100f of the Proposed Second Amended Petition would not affect the Court's analysis of any of the claims raised in the original petition. Likewise, for the reasons given above, claim six is not cognizable in habeas corpus, and the requested amendment to paragraph 107 would not affect the Court's analysis as to that issue. Accordingly, because the requested amendments would plainly be futile, Petitioner's Motion to Amend is DENIED.

V. CONCLUSION

Petitioner's Motion to Reconsider is DENIED. Petitioner's Motion to Amend is DENIED.

IT IS SO ORDERED, this 27th day of April, 2007.

s/Bernice B. Donald
BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE