

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
The Honorable Richard P. Matsch**

Criminal Action No. 96-CR-68-M

UNITED STATES OF AMERICA,

Plaintiff,

v.

TIMOTHY JAMES McVEIGH,

Defendant.

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
06/04/01
JAMES R. MANSPEAKER,
CLERK

**BRIEF OF THE UNITED STATES
OPPOSING STAY OF EXECUTION**

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I. SUMMARY OF ARGUMENT

This Court should deny a stay of execution. Timothy McVeigh does not, and could not, suggest that he is actually innocent of the charges of which the jury convicted him. He does not, and could not, suggest that the death penalty is unwarranted for his exceptionally aggravated crimes. He does not, and could not, suggest that he has even remotely satisfied the Antiterrorism and Effective Death Penalty Act of 1996, the “central concern” of which is that “the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence.” Calderon v. Thompson, 523 U.S. 538, 558 (1998). Finally, from the roughly 1000 recently produced items, McVeigh has identified nine items that he claims could have been helpful to the defense; nothing in those nine items meets the materiality standard of Brady v. Maryland, 373 U.S. 83 (1963), and its progeny.

Rather than answer for his own proven and admitted murderous conduct, McVeigh would like to put the federal government on trial. No one, much less an “enemy of the Constitution” (as this Court aptly described McVeigh’s codefendant), is entitled to use the federal courts to advance his personal agenda – regardless of whether that agenda is to “promote integrity in the criminal justice system” (as his lawyers characterize it) or to continue a self-declared war against the government. Nor is McVeigh entitled to a stay of execution so his attorneys can continue a post-conviction, publicly-funded investigation that contradicts McVeigh’s own recent admissions that he and Terry Nichols acted alone to cause the Oklahoma City bombing.

II. BACKGROUND

A. Procedural History.

Timothy McVeigh has exhausted his direct and collateral challenges to his conviction and sentence. McVeigh was sentenced to death on August 14, 1997; his convictions and sentence were affirmed unanimously by the Tenth Circuit on September 8, 1998; and the Supreme Court denied certiorari on March 8, 1999. United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998), cert. denied, 526 U.S. 1007 (1999).

In March 2000, McVeigh raised collateral challenges to his conviction and sentence pursuant to 28 U.S.C. § 2255. Last year, this Court denied McVeigh's section 2255 motion. United States v. McVeigh, 118 F. Supp.2d 1137 (D. Co. 2000). McVeigh voluntarily chose not to appeal, and the time for seeking permission to do so has long since passed.

B. Pretrial Discovery.

As this Court has discussed, government disclosure obligations in a criminal case stem from three sources: 1) the Jencks Act requires production of prior “statements” made by prosecution trial witnesses (18 U.S.C. § 3500 and Fed. R. Crim. P. 26.2); 2) Rule 16 requires pretrial production of certain physical evidence, including evidence “material to the preparation of the defendant’s defense” (Fed. R. Crim. P. 16(a)(1)(C)); and 3) the Constitution requires disclosure of *Brady* information. See generally United States v. McVeigh, 954 F. Supp. 1441 (D. Co. 1997); United States v. McVeigh, 923 F. Supp. 1310 (D. Co. 1996). Under Brady, “the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of

a fair trial....” United States v. Bagley, 473 U.S. 667, 675 (1995), quoted in United States v. Nichols, 67 F. Supp.2d 1198, 1202 (D. Co. 1999), aff’d, 242 F.3d 391 (10th Cir. 2000) (Table).

The government in this case agreed to, and did, disclose evidence far beyond that required under the Jencks Act, Rule 16 and Brady. The most notable area in which the prosecution exceeded discovery requirements involved FBI interview reports, which were produced voluntarily pursuant to an “oral agreement” with defense counsel. Doc. 1215 at 2. Pursuant to this oral agreement, the prosecution produced not only formal interview reports known as “FBI-302s” but also less formal interview reports known as “inserts.”

The government, prior to McVeigh’s trial, produced more than 27,000 FBI-302 and insert reports totaling more than 50,000 pages. Most of these reports were not otherwise discoverable. Only a small percentage involved prosecution trial witnesses covered by the Jencks Act. Reports following up thousands of leads that ultimately proved unconnected to the crime also fell outside Brady. Cf. Moore v. Illinois, 408 U.S. 786, 795 (1972) (no Brady violation where “the elusive ‘Slick’ was an early lead the police abandoned when eyewitnesses to the killing and witnesses to Moore’s presence at the Ponderosa were found”).

There was no formalized agreement as to physical evidence but, rather than quibble whether particular items were “material,” the government allowed the defense to review physical items (with certain exceptions, such as agents’ notes) that had been assigned a “1A” “1B” or “1C” number. All told, the prosecution produced more than 13,000 such items, as well as millions of pages of hotel, motel and phone records. The Court recognized that “the

Government has in a number of respects gone beyond the requirements of Rule 16 and ha[s] not taken the position that this is by the book and by the book you don't get it." Tr. 10/3/96 at 428. Even McVeigh's counsel conceded that the government provided more discovery than he was "entitled to receive under strict application of the controlling case and statutory law." Doc. 1918 at 19.

C. Post-Trial Review and Production.

Throughout pretrial, trial, and all post-conviction proceedings, the government believed it had scrupulously honored its generous discovery agreements. On May 8, 2001, when it first learned of additional documents, the prosecution notified defense counsel. The prosecution began producing documents to the defense on May 9, 2001 (the day the documents were first received in the Denver U.S. Attorney's Office) and continued producing them in the following days as soon as they were received.

As explained in the government materials attached to McVeigh's petition (e.g., Exh. 3), the additional documents came to the attention of the FBI's OKBOMB command post in response to two different requests. The first was a December 2000 request from an FBI archivist. On May 11, 2001, after learning that this archivist's request had turned up some documents that were not previously contained in OKBOMB computer databases, the FBI Director ordered that each FBI field office and legal attache (Legat) forward all OKBOMB-related materials to Oklahoma City. The importance and breadth of this directive was emphasized by the FBI's Deputy Director in a May 16, 2001, conference call with Special Agents in Charge (SACs) of all 56 field offices. In response, all remaining materials were

forwarded to Oklahoma City. Each of the 56 SACs and all Legats has signed a certification that: “Pursuant to the directive from the Director’s Office of 5/11/2001 and the all-SAC conference call of 5/16/2001, I hereby certify that ALL investigative materials existing within every component of my Division/Office related to the OKBOMB investigation have been delivered to the Oklahoma City Division.”

The FBI Director’s May 11, 2000, order resulted in voluminous materials, including many nondiscoverable items such as internal FBI teletypes, being sent to Oklahoma City from FBI field offices and headquarters. All told, FBI-Oklahoma City received 220 submissions – 77 boxes, 128 envelopes and 15 folders – from 54 Field Offices, six other FBI components, and seven FBI headquarters entities. The FBI also reviewed the main OKBOMB file and materials warehoused in the Oklahoma City office.

To review these voluminous documents, the FBI assembled a 270-person team that included 133 agents and other personnel brought in from outside Oklahoma. This large team began its OKBOMB file review on May 16, 2001, and worked around the clock to complete review late in the evening on May 23, 2001.

The OKBOMB review team conducted a two-step process to search materials for discoverable evidence not previously produced. The first step involved culling from the materials all potentially discoverable evidence, defined specifically as FBI-302 reports, inserts, and physical evidence assigned a 1A, 1B, or 1C number. The second step involved

searching OKBOMB computer databases and files to determine whether that item of evidence had been produced or made available in pretrial discovery.¹

After Step One review of tens of thousands of documents forwarded from headquarters and the field to Oklahoma City, almost 14,000 documents were potentially discoverable. Each was reviewed under Step Two to determine if it had been produced. A similar two-step process was used for the more than 95,000 documents in the OKBOMB main file in Oklahoma City. The overwhelming majority of documents turned out either to be internal or else duplicative of items produced pretrial. Rather than wait for the review process to conclude, the prosecution provided new discoverable items to the defense as they were identified: the vast majority were disclosed in the initial May 9-10 production; and the remainder were produced on May 15, 18, 23, and 24, 2001. The prosecution also provided CD-ROMs of tape recordings and photographs of physical evidence.

¹ All FBI-302s, inserts and physical evidence with 1A, 1B, or 1C numbers (except for most agents' notes and things like evidence receipts) were sent on for Step Two review. Excluded under Step One were internal government documents and other items not subject to discovery. For example, loose photographs, police reports or fingerprint cards not logged in with a 1A, 1B, or 1C number, were not sent on for Step Two. The FBI also did not search for additional Information Control ("lead") sheets because those documents, unlike 302s and inserts: 1) were not part of any pretrial agreement and are not discoverable under statute or rule; 2) are automatically copied in triplicate, making it less likely that a copy would not have been obtained when they were collected previously; and 3) were determined by the Court not to have been necessary to ensure a fair trial with a reliable result. See United States v. Nichols, 67 F. Supp.2d 1198 (D. Co. 1999), aff'd, 242 F.3d 391 (10th Cir. 2000) (Table).

III. ARGUMENT

A. McVeigh Has Not Satisfied The Requirements For A Stay Of Execution.

It is striking that McVeigh has filed a 40-page stay-of-execution petition that never once mentions the legal standard for such stays. The reason for this omission is obvious: McVeigh cannot satisfy that legal standard.

The Supreme Court has held that a “stay of execution pending disposition of a second or successive habeas petition should be granted only when there are ‘substantial grounds upon which relief may be granted.’” Delo v. Stokes, 495 U.S. 320, 321 (1990) (quoting Barefoot v. Estelle, 463 U.S. 880, 895 (1983)). McVeigh is not entitled to “relief” from his death sentence – under AEDPA and under the Supreme Court’s pre-AEDPA case law – unless there is evidence of “actual innocence.” There is no such evidence.

McVeigh clearly has no claim of actual innocence that would support relief from his death sentence. To the contrary, even he concedes there is no new evidence of actual innocence. See Pet. 30-31 & n.7. The reasons for this concession are obvious.

As the Court recalls, the government proved at trial, among other things, that:

- 1) McVeigh told two close friends the details of how he planned the bombing;
- 2) McVeigh made repeated phone calls in Fall 1994 to other friends and businesses seeking bomb components;
- 3) McVeigh’s fingerprint was on the receipt in Nichols’ house for a ton of ammonium nitrate;
- 4) McVeigh called the Kansas Ryder agency on April 14, 1995;
- 5) McVeigh was positively identified as the “Robert Kling” who reserved the Ryder truck on April 15, 1995, and picked it up on April 17, 1995;
- 6) McVeigh independently was linked to the “Kling” alias by a Chinese food order on April 15, 1995;

- 7) McVeigh was arrested some 75 minutes after the bombing some 78 miles from the Murrah Building;
- 8) McVeigh tried to hide a “Need more TNT” card in the arresting officer’s car;
- 9) McVeigh’s own car contained writings explaining the “value of the attacks today”; and
- 10) McVeigh’s clothes and ear plugs contained explosives residue.

United States v. McVeigh, 153 F.3d 1166, 1176-1179 (10th Cir. 1998), cert. denied, 526 U.S. 1007 (1999). The Tenth Circuit wrote that the “evidence presented at trial that McVeigh carried out the bombing was direct and compelling.” Id. at 1204.

Nothing in the new documents undercuts, or even relates to, the “direct and compelling” evidence of McVeigh’s own guilt. McVeigh claims “the government withheld *Brady* material” (Pet. 2) violated its “obligations under the Due Process Clause” (Pet. 13). McVeigh uses the term “*Brady* material” in a very loose sense and fails to substantiate the claim that nondisclosure violated due process. Strickler v. Greene, 527 U.S. 263, 281 (1999) (explaining that reference is sometimes made to “suppression of so-called ‘*Brady* material’” even though, “strictly speaking, there is never a real ‘*Brady* violation’ unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict”) (emphasis added).²

² McVeigh ultimately identifies only nine of the new documents (totaling little more than 20 pages) that he claims would have helped the defense. We analyze each of these documents in a separate pleading (filed under seal), and attach 53 exhibits to that sealed pleading showing that the same or similar information was disclosed prior to trial. Because the nine new documents relied on by McVeigh are “merely cumulative” of information provided prior to trial, there was no *Brady* violation. United States v. Page, 828 F.2d 1476, 1479-1480 (10th Cir.), cert. denied, 484 U.S. 989 (1987).

McVeigh does not claim the new documents show his own innocence, but rather claims they can help him “demonstrate that there were a number of additional people involved.” Pet. 37. There is nothing in the new documents, however, linking anyone else to the bombing: almost all information in the new documents was disclosed to the defense in other forms provided in pretrial discovery, and the few new details are insignificant. McVeigh rehashes the same type of conspiracy theories, involving many of the same third parties, that he offered repeatedly before his conviction. At trial, McVeigh sought to have Carol Howe testify about the violent tendencies of Elohim City associates, their knowledge of explosives and discussions about bombing an Oklahoma federal building, and Howe’s pre-bombing sighting at Elohim City of two men resembling the John Doe 1 and 2 sketches. This Court excluded the proffered Howe testimony as “not sufficiently relevant to be admissible.” See McVeigh, 153 F.3d at 1188-1192 (quoting ruling).

The Court of Appeals opinion upholding this Court’s exclusion of Howe’s testimony is dispositive of McVeigh’s rehashed, and even more speculative, post-conviction claims that others may have been involved. The Tenth Circuit wrote that a defendant “must show that his proffered evidence on the alleged alternative perpetrator is sufficient, on its own or in combination with other evidence in the record, to show a nexus between the crime charged and the asserted ‘alternative perpetrator.’” 153 F.3d at 1191 (citation omitted). It is “not sufficient,” explained the Court, “for a defendant merely to offer up unsupported speculation that another person may have done the crime.” Id.

The generally cumulative and even more tangential information in the new documents is even less helpful to McVeigh because, unlike the Howe proffer (offered in a futile attempt to point fingers at “alternative” perpetrators), McVeigh’s attorneys now are pointing fingers at “additional” persons. Pet. 37; see Nichols, 2000 WL 1846222 at **4-5 (distinguishing between “alternative” and “additional” conspirators). Thus, McVeigh’s claims not only are factually unsupported but also are legally insufficient.

The new documents also cannot support a claim that McVeigh is “innocent” of the “death penalty.”³ The petition’s speculative finger-pointing suffers from the same “crucial hole in ... logic” identified by the Tenth Circuit in rejecting the Howe proffer as mitigation: McVeigh has not shown any connection (much less one related to the bombing) between himself and these others. McVeigh, 153 F.3d at 1212-1213.

³ The Supreme Court held (pre-AEDPA) that an actual innocence claim may include not only innocence of the offense but also innocence of the death penalty – if the defendant can show that but for the constitutional error, no reasonable juror would have found him eligible for the death penalty. Sawyer v. Whitley, 505 U.S. 333, 348 (1992). This “innocent of the death penalty” exception does not survive AEDPA, which requires a showing that “no reasonable factfinder would have found the movant guilty of the offense.” 28 U.S.C. § 2255 (emphasis added). See Burris v. Parke, 130 F.3d 782, 785 (7th Cir.), cert. denied, 522 U.S. 990 (1997); In re Medina, 109 F.3d 1556, 1565 (11th Cir.), cert. denied, 520 U.S. 1151 (1997); contra Thompson v. Calderon, 151 F.3d 918, 923-924 & n.4 (9th Cir.) (en banc), cert. denied, 524 U.S. 965 (1998). In any event, the Sawyer “innocent of the death penalty” inquiry extends only to the legal “requirements that must be satisfied to impose the death penalty, i.e., the elements of the capital crime and minimum required aggravating factors.” Cade v. Haley, 222 F.3d 1298, 1308 (11th Cir. 2000). At best, McVeigh’s petition can be read to suggest (through speculative leaps of logic) that he might have been able to discover additional conspirators who might have mitigated his role in the offense. Nothing undercuts the jury’s guilt and sentencing phase findings that McVeigh intentionally killed numerous victims in an exceptionally aggravated manner.

McVeigh's suggestions that additional persons may have been involved are also at odds with his own recent public admissions that he and Nichols acted alone to bring about the bombing. For example, in a May 2, 2001, letter in McVeigh's distinctive hand-printing, McVeigh derided his lead trial counsel's continued claims that others were involved in the bombing and declared definitively that there was no "John Doe 2." See "John Doe 2 doesn't exist, McVeigh maintains in letter," *Houston Chronicle*, May 15, 2001, at 1A (publishing McVeigh's May 2, 2001, letter). McVeigh also provided explicit admissions about his primary role in the bombing, in a recent book written with his extensive cooperation that included seven days of in-person interviews, many phone interviews, and numerous letters. See Lou Michel and Dan Herbeck, American Terrorist: Timothy McVeigh and the Oklahoma City Bombing "Source Notes" p. 403 (Regan Books 2001).

McVeigh does not dispute the fact of his recent admissions, but instead simply ignores them. While these post-trial admissions are not part of the original trial evidence, they are properly considered at this procedural juncture. As the Supreme Court has explained, the "emphasis on 'actual innocence' allows the reviewing tribunal also to consider the probative force of evidence that was ... unavailable at trial." Schlup v. Delo, 513 U.S. 298, 327-328 (1995). The only new "probative" evidence comes not from the recently produced documents but from McVeigh's own mouth and hand. That new evidence dramatically underscores rather than undercuts the justness of McVeigh's conviction and sentence.

B. This Court Lacks Jurisdiction To Review McVeigh's Challenges.

1. Only The Tenth Circuit Can Authorize The Filing Of A Second Motion Challenging McVeigh's Conviction Or Sentence, And McVeigh Has No Claim Of Innocence That Could Support Such A Filing.

Timothy McVeigh has unsuccessfully challenged his convictions and sentence at every level of the federal court system, and this Court's October 2000 order denying McVeigh's first collateral challenge has now become final. At this point, McVeigh's judicial remedies are limited, both procedurally and substantively, by the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996).

Procedurally, AEDPA establishes a "gatekeeping" system for second petitions." Felker v. Turpin, 518 U.S. 651, 662 (1996). Such a petition or motion may not be filed in a federal district court unless the "appropriate court of appeals" first "certifie[s]" that it meets the substantive standards for proceeding. 28 U.S.C. § 2255 ¶ 8; see Browning v. United States, 241 F.3d 1262, 1264 (10th Cir. 2001) (en banc) ("As established by AEDPA, the federal courts of appeals play an initial 'gatekeeping' role in granting or denying a prisoner authorization to proceed in district court with a second or successive application....").

Substantively, AEDPA limits second petitions or motions to those based either on a new rule of constitutional law made retroactive by the Supreme Court (something clearly not applicable here) or "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense." 28 U.S.C. § 2255 ¶ 8. "AEDPA's central concern [is] that the merits of concluded criminal proceedings not be

revisited in the absence of a strong showing of actual innocence.” Calderon v. Thompson, 523 U.S. 538, 558 (1998). McVeigh does not even argue, much less make a “strong showing” of, “actual innocence.”

2. There Is No Jurisdictional Basis For Granting Relief And McVeigh Cannot Circumvent AEDPA By Resorting To Other Procedural Devices.

McVeigh, by filing a second collateral challenge without permission from the Tenth Circuit, has flouted AEDPA’s procedural requirements. This Court “lacks subject matter jurisdiction to decide” McVeigh’s petition. United States v. Gallegos, 142 F.3d 1211, 1212 (10th Cir. 1998). While the Court does have authority to transfer the motion to the Tenth Circuit pursuant to 28 U.S.C. § 1631 (see Coleman v. United States, 106 F.3d 339, 341 (10th Cir. 1997)), such a transfer would be futile given McVeigh’s conceded inability to satisfy AEDPA’s substantive standards.

McVeigh suggests that a jurisdictional basis for his claim is provided by the All Writs Act, 28 U.S.C. § 1651. Pet. 1, 30. As the Supreme Court has explained, however, the “express terms of the Act confine the power of [a court] to issuing process ‘in aid of’ its existing statutory jurisdiction; the Act does not enlarge that jurisdiction.” Clinton v. Goldsmith, 526 U.S. 529, 534-535 (1999). Moreover, as even McVeigh’s quotation makes clear, the Act authorizes only those writs that are “agreeable to the usages of law.” Pet. 30 (quoting 28 U.S.C. § 1651). The All Writs Act, therefore, gets McVeigh nowhere.

McVeigh’s reliance on Fed. R. Civ. P. 60(b) gets him no further. As even McVeigh concedes, federal courts have rejected attempts to circumvent the AEDPA limits on filing

second or successive petitions. The leading Supreme Court case explained that prisoners cannot “evade” AEDPA by moving a Court of Appeals to recall its prior mandate. Calderon, 523 U.S. at 553. The Supreme Court wrote that “[i]f the court grants such a motion, its action is subject to AEDPA....” Id. Indeed, the Court held that Courts of Appeals can recall prior habeas mandates on their own initiative only when necessary “to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence.” Id. at 558; see id. at 559 (explaining that “miscarriage of justice exception is concerned with actual as compared to legal innocence” and is a legal “rarity”) (internal quotations omitted). Accord Allen v. Massie, 236 F.3d 1243, 1246 (10th Cir. 2001) (Tenth Circuit “deemed” a capital defendant’s motion to recall a mandate to be “an application to file a second or successive § 2254 petition,” and denied it as well as an “accompanying request for a stay of execution”).

An appellate motion to recall the mandate is the “equivalent” of a district court Fed. R. Civ. P. 60(b) motion. Burris v. Parke, 130 F.3d at 783-784. Accordingly, the Tenth Circuit and other federal courts have refused to allow inmates to avoid AEDPA limits by filing Rule 60(b) motions to reopen prior judgments denying collateral challenges to their convictions. E.g., United States v. Rich, 141 F.3d 550, 551-553 (5th Cir. 1998) (citing cases); Lopez v. Douglas, 141 F.3d 974, 975-976 (10th Cir. 1998).

McVeigh accordingly cannot rely on Rule 60(b). Even apart from the AEDPA limits, moreover, it is clear that McVeigh’s Rule 60(b) motion is directed not at this Court’s ruling on the civil § 2255 motion (which involved challenges to defense trial counsel and was

properly rejected on the merits) but instead seeks to reopen the original criminal conviction. That is an impermissible use of Civil Rule 60(b).

McVeigh, in grasping for a statutory basis for jurisdiction, suggests he may be able to file a habeas petition (28 U.S.C. § 2241), “pursuant to the ‘savings’ provision of 28 U.S.C. § 2255,” if his § 2255 motion proves “inadequate or ineffective to test the legality of his detention.” Pet. 31 & n. 8. This Court, however, is not the proper § 2241 forum. Bradshaw v. Story, 86 F.3d 164, 166 (10th Cir. 1996) (“A petition under 28 U.S.C. § 2241 attacks the execution of a sentence rather than its validity and must be filed in the district where the prisoner is confined”). In any event, McVeigh is entitled to no substantive relief under this savings clause. See, e.g., United States v. Peterman, ___ F.3d ___, 2001 WL 433387 ** (6th Cir. 2001) (savings clause has been limited to defendants who can show “an intervening change in law that establishes their actual innocence”) (citing cases); cf. Carvalho v. Pugh, 177 F.3d 1177, 1179 (10th Cir. 1999) (“the mere fact that Carvalho is precluded from filing a second § 2255 petition does not establish that the remedy in § 2255 is inadequate”).

3. McVeigh Has No Viable “Fraud On Court” Claim.

a. The “Fraud On Court” Claim Fails As A Matter Of Law.

McVeigh, seeking to end run AEDPA, tries to dress up a claimed breach of an oral discovery agreement (one that violated no constitutional right of his) as the only type of claim that even arguably can avoid the “actual innocence” requirement. The Supreme Court in Calderon, while holding that AEDPA requirements cannot be evaded by labels, did note that the case before it was “not a case of fraud upon the court, calling into question the very legitimacy of the judgment.” 523 U.S. at 556 (citing Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944)). It is unclear, given this comment, whether AEDPA limits “fraud on the court” attacks on prior judgments. Fierro v. Johnson, 197 F.3d 147, 151-153 (5th Cir. 1999) (discussing, but not deciding, issue), cert. denied, 530 U.S. 1206 (2000); see also Workman v. Bell, 227 F.3d 331 (6th Cir. 2000) (judgment of equally divided en banc court that defendant had not established fraud on court sufficient to avoid or overcome limits on second and successive habeas petitions), cert. denied, 121 S. Ct. 1194 (2001).

Assuming a second collateral motion may challenge a judgment obtained through fraud on the court, this exception must be applied narrowly so as not to nullify AEDPA and prior Supreme Court law, both of which require a showing of actual innocence. Indeed, even McVeigh concedes he is not entitled to relief under Rule 60(b)(3) but must satisfy “the ‘more stringent’ requirements” outlined in cases such as Hazel-Atlas. Pet. 35 n.9. McVeigh does not even come close to meeting these requirements.

Under McVeigh’s legal theory, a defendant could avoid AEDPA – as well as Brady “materiality” requirements – simply by alleging that discoverable information was withheld “fraudulently.” This not only would nullify AEDPA (by allowing defendants to bring second *Brady* claims not involving actual innocence) but also would negate the Supreme Court’s teaching that Brady applies “irrespective of the good faith or bad faith of the prosecution.” Strickler, 527 U.S. at 280 (quoting Brady v. Maryland, 373 U.S. at 87); cf. United States v. Morrison, 449 U.S. 361, 365 (1981) (“absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate”). Indeed, McVeigh would expand AEDPA and Brady by allowing collateral relief for non-constitutional discovery claims.

To avoid nullifying AEDPA and Brady, “fraud on the court” must mean something other than representations, later shown to be mistaken, that a voluntary discovery agreement has been honored. Controlling case law makes clear that McVeigh’s allegations are legally insufficient. The Tenth Circuit has held that “[f]raud on the court’ is tightly construed because the consequences are severe” and “it runs counter to the strong policy of judicial finality.” Weese v. Schukman, 98 F.3d 542, 553 (10th Cir. 1996). Thus:

Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated will constitute a fraud on the court. Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court.

Id. at 552-553 (internal quotations omitted; emphasis added by the Tenth Circuit in Weese).

McVeigh's fraud on the court claim also runs headlong into Bulloch v. United States, 763 F.2d 1115 (10th Cir. 1995) (en banc), cert. denied, 474 U.S. 1086 (1996). The court there wrote: "It has been held that allegations of nondisclosure in pretrial discovery will not support an action for fraud on the court." Id. at 1121 (citation omitted; emphasis added). The Tenth Circuit went even further in Weese, holding that a losing party's allegations that the prevailing party "made material misrepresentations or omitted information needed to make his answers fully truthful" were legally insufficient. 98 F.3d at 553 ("these allegations, even if true, simply do not rise to the level necessary to constitute 'fraud on the court....'"). McVeigh's paltry allegations are even less weighty than those dismissed in Weese.

The present case bears no resemblance to Hazel-Atlas, cited by the Supreme Court in Calderon, and principally relied on by McVeigh here. There, lawyers for the prevailing party concocted "a deliberately planned and carefully executed scheme to defraud" the court by basing their patent claim on a "spurious letter" that they themselves had written but that they misrepresented as having been prepared by an independent third party. 322 U.S. at 241-246. The Supreme Court held that "[e]very element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments." Id. at 245. It added that "[t]ampering with the administration of justice in the manner indisputably shown here involves more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public...." Id. at 246.

Instead, McVeigh's allegations much more closely resemble those recently held insufficient in United States v. Beggerly, 524 U.S. 38, 46-47 (1998). The Supreme Court

there held that the federal government's "failure to furnish relevant information" to opposing litigants did not support reopening a final judgment under Hazel-Atlas, explaining (id. at 47):

[A]n independent action should be available only to prevent a grave miscarriage of justice. In this case, it should be obvious that respondents' allegations do not nearly approach this demanding standard. Respondents allege only that the United States failed to "thoroughly search its records and make full disclosure to the Court" regarding the Boudreau grant. App. 23. Whether such a claim would succeed under Rule 60(b)(3), we need not now decide; it surely would work no "grave miscarriage of justice," and perhaps no miscarriage of justice at all, to allow the judgment to stand.

b. The "Fraud on Court" Claim Fails As A Matter Of Fact.

McVeigh's claim also fails because he cannot show "intent to defraud." Weese, 98 F.3d at 553 (describing this as "an absolute prerequisite to a finding of fraud on the court"). We do not suggest that a party alleging fraud must prove intent conclusively to proceed further. Fraud must, however, be alleged "with particularity." Fed. R. Civ. P. 9(b).

McVeigh's fraud allegations not only are conclusory but also are illogical. Three critical facts undercut any claim that the government fraudulently breached its discovery obligations: 1) it was the government that voluntarily undertook those discovery obligations by agreeing to produce much more than the law required; 2) it was the government that voluntarily notified the defense, and produced the documents, after learning that the discovery agreement had not been fully honored; and 3) nothing in the documents was material and the vast majority was cumulative.

McVeigh relies on interviews of four disgruntled former FBI agents from the FBI's Oklahoma City Division. See Pet. 12-13. Those agents, with one exception, played

insignificant roles in the OKBOMB investigation, and their criticisms of their former agency are largely conjectural. The one agent who did play a meaningful role in the OKBOMB investigation is quoted in McVeigh's petition as having said: "It's extremely surprising to me that these documents all of a sudden show up. There is no reason for it unless there is negligence." Pet. 12 (emphasis added; quoting former Agent "Jim Vols [sic]"). Even accepting Volz's criticisms, a negligent failure to produce documents is not fraud.

McVeigh asks this Court to presume that every government representation about discovery that proves mistaken is prima facie evidence of fraud. McVeigh's own petition could not survive such a presumption. That petition contains at least two false statements:

1. The petition claims the government has "referenced but not produced" a videotape and that defense "[c]ounsel has requested immediate production of the videotape." Pet. 20. In fact, the videotape was provided to the defense on May 26, 2001: a full five days before the petition was filed.

2. The petition notes "that one recently produced item is a letter dated April 18, 1995 (but not postmarked) in which a mentally disturbed inmate wrote from federal prison in New York: "No good news from here, except the federal building bombing in Oklahoma City. My people do good work...." Pet. 16 (quoting letter). The petition further suggests this letter may actually have been written April 18 (rather than backdated) and deems it significant to show "[a]dvance knowledge of the bombing and participation by more than two individuals." Id. While admitting the government made pretrial production of an FBI-302 interview of this inmate, the petition falsely claims: "Without the contents of the letter itself, counsel could not have recognized its significance." Id. at 17. In fact, and contrary to the petition's claim, the disclosed FBI interview report stated that the inmate's "letter, dated April 18, 1995," contained "specific reference to the April 19th Oklahoma City bombing." FBI-302 Sub-D 4901.

We do not suggest that McVeigh's attorneys, each of whom is highly ethical, made these false statements intentionally. Under the standard they seek to have applied to the government, however, McVeigh's attorneys would be guilty of fraud on the court.

4. McVeigh Is Not Entitled To An Evidentiary Hearing.

McVeigh requests that, in addition to staying his execution, this Court order an evidentiary hearing. Pet. 40. The requested hearing apparently would have the two-fold purpose of determining: 1) “the true facts concerning the manner in which this evidence was withheld”; and 2) “whether other exculpatory evidence continues to be withheld.” Id. at 13.

This Court, in a 1999 decision affirmed last year by the Tenth Circuit, rejected codefendant Nichols’ request for an evidentiary hearing regarding a related lead sheet issue. The Court, after noting the breadth of the this investigation, presciently wrote: “A complete review of every piece of paper generated by the many offices and agents concerned with this matter is an impossible task.” Nichols, 67 F. Supp.2d at 1202.

There is even less basis for granting McVeigh an evidentiary hearing because, unlike Nichols (who had filed a new trial motion pursuant to Fed. R. Crim. P. 33), McVeigh is not seeking any substantive relief and admits he cannot satisfy AEDPA. McVeigh questions why the FBI waited some four months to report the newly discovered documents, and claims the OIG investigation ordered by the Attorney General “does not begin to suffice” to answer this and other questions. Pet. 11-13. McVeigh’s own opinions of the adequacy of the OIG investigation, or of congressional oversight into the matter, are beside the point.

McVeigh extravagantly, but without support, claims “the FBI is still withholding evidence” and “[t]here can be no doubt: The stonewalling continues.” Pet. 20, 30. He bases these claims primarily upon: a) a CBS news interview of former FBI agent Ojeda and an Ojeda interview report subsequently turned over by the government; and b) speculation that the FBI

“should have” investigated several anti-government individuals in Kansas more thoroughly than revealed by interview reports disclosed prior to trial. Neither of these points supports the charge of continued “stonewalling” (a charge that ignores the fact that it was the government which, without prompting from the defense, produced the new materials).

During pretrial discovery, the government provided the defense with several FBI-302 reports of former agent Ojeda, who like many in the FBI’s Oklahoma City Division did peripheral work on this massive case without being part of the core investigative team. On May 30, 2001, the day after the CBS broadcast, the prosecution sent the defense a letter attaching the FBI-302 report that Ojeda appeared to be alluding to in his televised interview. See McVeigh’s 5/31 Supplement (attaching letter and report). As the letter explains: a) the interview was conducted at the specific request of federal prosecutors and FBI case agent handling a different case in the Northern District of Oklahoma; and b) Ojeda (the fired agent now questioning why it was not produced to these defendants) himself used the FBI’s file number for that case rather than the OKBOMB case. Most important, the interview was of an individual who had a close working relationship with the McVeigh defense, and not even McVeigh claims it contains any previously-unknown *Brady* material.

McVeigh, using the Ojeda report as a jumping-off point, has now requested (in a letter faxed to the prosecution late afternoon on Friday, June 1, 2001) that the prosecution produce all statements taken by any law enforcement agency “which reference the Oklahoma City bombing” or indeed which reference “suspects in the Oklahoma City bombing.” The letter, while not defining the term “suspects,” suggests the defense would include scores of persons

with no demonstrable link to the bombing. The breadth of this request is staggering. For example, the letter specifically mentions one person who is alleged in defense declarations to have been involved with (among other things) the Montana Freeman, federal fraud cases in Kansas, and a federal fraud case in Texas. See Defense Exhs. 24, 42. If a complete review of every piece of paper generated in connection with this investigation alone is impossible, as this Court properly held in 1999, then a complete review of every piece of paper in other cases for documents mentioning this case or “suspects” in this case is absurd.

The final “support” offered for a claim that all documents still have not been produced involves several Kansas men. Ten pages of the petition offer the following syllogism: 1) there are several people mentioned in the government’s pretrial discovery whom the defense opines “should have” been investigated thoroughly; 2) “surely,” the FBI must have shared those opinions and “likely” did investigate these people thoroughly; 3) the government has produced “virtually nothing” regarding these people; and, therefore, 4) the FBI must be withholding 302 and insert reports. Pet. 20-30. McVeigh’s rank speculation falls far short of even a prima facie showing of intentional withholding, much less of fraud on the court.

As alleged proof that the government is withholding information about the men, McVeigh cites the trial testimony of Charles Farley (a defense witness in the Nichols trial) and a 1998 post-trial news story revealing that Farley’s testimony could not have been true. Farley, McVeigh notes, testified that he saw several men at Geary Lake with a Ryder truck on April 18, 1995 and identified a picture of Morris Wilson as one of the men. Pet. 21. The government did not cross-examine Farley on his identification of Wilson but McVeigh cites a 1998 news

story reporting that this identification was wrong because (as the government purportedly knew) Wilson was in county jail at the time. Pet. 26. McVeigh claims that the government has not produced discovery information showing Wilson's incarceration.

McVeigh incorrectly assumes that the government agreed to turn its entire investigative file over to the defense. It did not. The government, far exceeding legal requirements, agreed to disclose witness statements embodied in FBI-302 reports and inserts. It produced more than 27,000 of those prior to trial, and has now produced the minority that were not disclosed pretrial. As this Court has explained, however, the government was not required to disclose "all of the information known to it" and or to "deliver [its] entire file to defense counsel." Nichols, 67 F. Supp.2d at 1201, 1202 (internal quotations omitted). There are many ways – such as agent-to-agent communications of the type this Court held in Nichols did not have to be disclosed – in which the government could learn of someone's incarceration. McVeigh has not shown that Wilson's incarceration on April 18, 1995 was *Brady* information or otherwise subject to pretrial discovery requirements.

IV. CONCLUSION

McVeigh concedes, as he must, that he has no claim of actual innocence. To the contrary, McVeigh is undeniably guilty and there is no case in which the death sentence could be more appropriate than this one. There is no jurisdictional or substantive basis for granting the relief requested by McVeigh. Accordingly, this Court should deny a stay of execution.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June 2001, copies of this Brief were served upon: Robert Nigh, Jr., 2817 East 21st Street, Tulsa, OK 74114 (by telecopier and Federal Express); and Nathan Chambers, 1601 Blake Street, Suite 300, Denver, CO 80202 (by hand).

United States Attorney's Office