

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

SIDDIQUE ABDULLAH HASAN,
fka Carlos Sanders

Petitioner,

-vs-

TODD ISHEE, Warden,

Respondent.

:

Case No. 1:03-cv-288

:

Chief Judge Susan J. Dlott
Magistrate Judge Michael R. Merz

:

MEMORANDUM OPINION ON THE IMPACT OF *CULLEN V. PINHOLSTER*

This capital habeas corpus case is pending before Chief Judge Dlott on the Magistrate Judge’s original Report and Recommendations (Doc. No. 81) and Supplemental Report and Recommendations (Doc. No. 119). On April 4, 2011, the same day on which Petitioner filed his Objections (Doc. No. 122) to the Supplemental Report and Recommendations, the United States Supreme Court decided *Cullen v. Pinholster*, 563 U.S. ___, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011). In his Response to the Objections (Doc. No. 123), the Warden relied primarily on *Cullen* and did not oppose Petitioner’s request to brief the impact of that decision, which has now been done (Doc. Nos. 127, 128, 129). This Second Supplemental Report and Recommendations is filed solely to address the impact of *Cullen*.

After considering the arguments of counsel, the Magistrate Judge concludes that *Cullen* does not prohibit an evidentiary hearing on Petitioner’s actual innocence “gateway” argument for

avoiding procedural default. As the Court is aware, the Magistrate Judge's reading of the AEDPA has been more consistent with Justice Sotomayor's dissent (and Justice Alito's concurrence in part of that dissent) than with the majority opinion. That is, the Magistrate Judge has frequently held that evidence added to the record in federal habeas could be considered in determining whether a state court adjudication on the merits of a claim was contrary to or an unreasonable application of clearly established Supreme Court precedent. The Magistrate Judge's denial of an evidentiary hearing in this case was solely on the bases set forth in the two Reports and Recommendations.

This Opinion should not be read or cited as agreeing in any other way with Petitioner's counsel's analysis of *Cullen*.

June 7, 2011.

s/ **Michael R. Merz**
United States Magistrate Judge