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

JAMES G. HANNA,

Petitioner, : Case No. 1:03-cv-801

- vs - District Judge Thomas M. Rose
Magistrate Judge Michael R. Merz

MARGARET BAGLEY, Warden

:

Respondent.

SUPPLEMENTAL OPINION ON ORDER DENYING MOTION TO APPOINT NEW COUNSEL; SUBSTITUTE ORDER GRANTING MOTION

This capital habeas corpus case is before the Court on Petitioner's Motion for Appointment of Clemency Counsel (Doc. No. 153). The Magistrate Judge denied the Motion (Doc. No. 154), Petitioner filed Objections (Doc. No. 155), and District Judge Rose has recommitted the Motion for a supplemental opinion on the Motion (Doc. No. 156). This supplemental Opinion responds to the Recommittal Order.

Petitioner raises seven separate objections which are dealt with *seriatim*.

Hanna objects to the Magistrate Judge's publishing his Order in response to Hanna's motion that was filed under seal (Objections, Doc. No. 155, PageID 2894).

On January 22, 2014, Hanna sought and obtained, with the consent of the Warden's counsel, permission to file under seal a proposed budget for clemency proceedings (Doc. No. 152 and notation order granting). Then on February 10, 2014, without permission to do so,

Hanna filed under seal the instant Motion to Appoint New Counsel (Doc. No. 153). Hanna's counsel did not ask that any decision on the Motion be filed under seal, but now objects that the Magistrate Judge's Order was not filed under seal (Objections, Doc. No. 155, PageID 2894-95). In fact, Hanna's counsel asserts it was "clearly erroneous" to do so, although they cite no law to that effect. Their argument is essentially a work product/equal protection argument. If he were not indigent, they say, [h]e would not need court permission to investigate potential legal issues. He would not have to share with his opponent any ideas he will pursue." *Id.* at PageID 2895.

If Criminal Justice Act funds were limitless, there would be no need for the elaborate budgeting process the federal judiciary has adopted for capital habeas cases. Judges would merely say to appointed counsel, "Defend this case and send us your bill." But CJA funds are not limitless and indeed panel attorneys have had to accept delays in payment during the last federal fiscal year, along with historically low hourly rates.

Given budget constraints, we have a budgeting system which seeks to protect counsels' work product. Proposed budgets and resulting budget orders are not only filed under seal, but also *ex parte*. (See, e.g. Doc. Nos. 8, 27. This practice has been followed uniformly in the more than fifty capital habeas corpus cases assigned to this Magistrate Judge over the past nineteen years.) But filing budgets under seal does not imply permission to file a motion to appoint new counsel under seal. As the Sixth Circuit has held:

> While District Courts have the discretion to issue protective orders, that discretion is limited by the careful dictates of Fed. R. Civ. P. 26 and "is circumscribed by a long-established legal tradition" which values public access to court proceedings. *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100, 80 L. Ed. 2d 127, 104 S. Ct. 1595 (1984). Rule 26(c) allows the sealing of court papers only "for good cause shown" to the court that the particular documents justify court-imposed secrecy. In this case, the parties were allowed to adjudicate their own case based upon their own self-

> interest. This is a violation not only of Rule 26(c) but of the principles so painstakingly discussed in *Brown & Williamson.*
> The District Court cannot abdicate its responsibility to oversee the discovery process and to determine whether filings should be made available to the public. It certainly should not turn this function over to the parties, as it did here, allowing them to modify the terms of a court order without even seeking the consent of the court. The protective order in this case allows the parties to control public access to court papers, and it should be vacated or substantially changed.

Procter &Gamble Co.v. Bankers Trust Co., 78 F.3d 219, 227 (6th Cir. 1996). See also Patrick S. Kim, Note, Third Party Modification of Protective Orders Under Rule 26(c), 94 Mich. L. Rev. 854, 854 n.4 (1995) (citing Arthur R. Miller, Confidentiality, Protective Orders, and Public Access to the Courts, 105 Harv. L. Rev. 427 (1991) and *Jepson, Inc. v. Makita Elec. Works*, 30 F.3d 854, 858 (7th Cir. 1994)). If a district court may not "abdicate" to the parties the question whether filed documents are sealed, how much less can a party arrogate to itself the power to file under seal?

Even if a motion has been properly filed under seal, that does not imply an obligation of the Court to rule on the motion under seal and *ex parte*[1]. Hanna points to no law requiring a sealed order to decide even a properly sealed motion.

The Magistrate Judge accepts the need to keep expenses in appointed counsel cases sealed in order to protect a defendant or habeas petitioner's litigation strategy. See, e.g. *In re Boston Herald, Inc.*, 321 F.3d 174 (1st Cir. 2003). But the Order Denying Motion to Appoint New Counsel does not reveal any litigation strategy. The two purposes counsel state for the appointment are the need to conduct a review under *Martinez v. Ryan*, 566 U.S. ___, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (Mar. 20, 2012), and to prepare a clemency petition. Nothing is revealed in the Order about any possible litigation strategy on either of those issues. Since the

[1] In general the position of Hanna's counsel does not distinguish between documents filed under seal and thereby kept from public disclosure and those filed *ex parte*, i.e. without disclosure even to other litigants.

United States Supreme Court has denied certiorari in this case, it will not come as news to anyone, much less opposing counsel, that Hanna's lawyers would be considering a clemency petition in the near future. As to the *Martinez* issue, Hanna's counsel assert that they are under an obligation to conduct such a review (Objections, Doc. No. 155, PageID 2894), so the conducting of such a review is not a matter of strategy, but a matter of fulfilling a professional obligation.

In sum, the Court is under no duty to file under seal decisions on sealed motions and this particular Order does not compromise counsels' work product. This first objection should therefore be overruled.

The Magistrate Judge erroneously labeled as "theory" the premise that procedural default bars claims that were not raised in post-conviction, and Hanna objects.

The Magistrate Judge wrote "Hanna's theory is that '[a]ny claims regarding the ineffective assistance of trial counsel that had been missed by post-conviction counsel were automatically procedurally defaulted' under *Coleman v. Thompson*, 501 U.S. 722 (1991)." (Order, Doc. No. 154, PageID #: 2889.) Hanna objects to the use of the word "theory." (Objections, Doc. No. 155, PageID 2895.) Hanna is correct that his statement of the law at that point in his Motion is a correct statement of established law. The Magistrate Judge did not intend in any way to imply by use of the word "theory" that Hanna's counsel were in any way speculating about the state of the law.

The word "theory" does not in itself imply speculation. "Theory [that] will not work in practice is not sound theory. 'It is theoretically correct but will not work in practice' is a common but erroneous statement. If a theory is 'theoretically correct' it will work; if it will not work, it is

'theoretically incorrect..'" Walter Wheeler Cook, Introduction to Wesley N. Hohfeld, Fundamental Legal Conceptions 21 (1919). See also Immanuel Kant, On the Common Saying: "This May Be True in Theory, But It Does Not Apply in Practice" (1793).

Hanna objects to the Magistrate Judge's finding that the statute of limitations would bar any claim not previously made (Objections, Doc. No. 155, PageID 2895).

Hanna is correct that any limitations decision on a claim possibly resurrected by *Martinez* is premature. The conclusion that the statute of limitations would bar any such claim is *dictum* and is withdrawn.

Hanna objects to the Magistrate Judge's finding that no actual conflict of interest exists in this case (Objections, Doc. No. 155, PageID 2901).

The facts underlying Hanna's claim of conflict of interest are stated in the Motion as follows: Hanna has been represented continuously since his direct appeal of right by attorneys employed by the Ohio Public Defender: Stephen A. Farrell, Kelly L. Culshaw, and Dianne M. Menashe before the Ohio Supreme Court, Susan M. Roche and Kathryn L. Sandford in post-conviction, and in this Court on habeas David Bodiker, Tyson L. Fleming, Ms. Culshaw, Mr. Farrell, Ms. Roche, Timothy Young, Joseph Willhelm, and Rachel Troutman, Ms. Troutman and Mr. Fleming being current counsel of record. Ms. Sandford is currently a supervising attorney in the Ohio Public Defender's Office. Because of this, counsel assert:

> While Sandford would surely not purposely attempt to dissuade any review of her work on Hanna's case, it is simply that her status as a supervisor could subconsciously affect that review if performed by subordinates in the Office of the Ohio Public Defender. Undersigned counsel have worked with Sandford for a

> long time, and because of their respect for her, they would have a difficult time conducting an impartial review of her work.

(Motion, Doc. No. 155, PageID 2887).

The question is whether those facts are sufficient to create an actual conflict of interest sufficient to overcome the Congressional mandate in 18 U.S.C. § 3599 that the same appointed lawyers should represent a death row habeas petitioner all the way through the process.

There is no conflict of interest in the classic sense that any of Hanna's present attorneys has a duty to another client which prevents them from vigorously advocating his position. Nor is there any pecuniary conflict of interest: because public defenders are salaried, the compensation of none of them (Fleming, Troutman, or Sandford) will be affected by the outcome of this case.

The Court agrees that Ms. Sandford herself should not be tasked with reviewing her own prior work for issues of ineffectiveness. A lawyer cannot be expected to raise his or her own ineffectiveness. *State v. Carter*, 36 Ohio Misc. 170 (Mont. Cty CP 1973)(Rice, J.) But the fact that it would be emotionally difficult for attorneys Fleming and Troutman to review Sandford's work because they have "a close personal working relationship" does not create a conflict of interest.

Hanna relies in part on Ohio Rule of Professional Conduct 1.10 which imputes to every lawyer in a firm disqualifications of any other lawyer in the firm arising under Rule 1.7 or Rule 1.9 (Objections, Doc. No. 155, PageID 2901.) Rule 1.7 disqualifies an attorney from representing a client when that representation "will be directly adverse to another current client" or there is a substantial risk that the lawyer's ability to act "will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or the lawyer's own personal interests." Rule 1.9 refers to conflicts with former clients. Neither of these Rules disqualifies Ms. Sandford from reviewing her own prior work and admitting a mistake if she

made one. *A fortiori*, they do not disqualify her colleagues from reviewing her work for mistakes.

Hanna also relies on *Juniper v. Davis*, 737 F.3d 288 (4th Cir. 2013). In that case the same counsel who represented the death row inmate in state habeas also represented him in federal habeas. The federal habeas proceeding was pending when *Martinez* was decided and the Fourth Circuit decided he was entitled to new, independent counsel to review the work done in state court and determine if there was a *Martinez*-based claim. The Fourth Circuit followed its own prior unpublished decision to the same effect in *Gray v. Pearson*, 526 Fed. Appx. 331 (4th Cir. 2013).

The reported decision in *Juniper* does not reveal whether the same attorneys represented the petitioner in both the state court and the federal court, or whether it was different attorneys from the same firm, the Virginia Capital Representation Center. The opinion gives no indication whether different lawyers were involved. Juniper's case was also at an earlier stage than this one; it had not proceeded all the way through the federal appellate process. The Fourth Circuit found irrelevant the presence of a second-chair attorney in the federal proceedings because that attorney was not qualified under 18 U.S.C. § 3599. Here, of course, both Fleming and Troutman are qualified and could be insulated from Sandford in conducting the *Martinez* review. *Juniper*, although not precisely in point, supports Hanna's position. It is, of course, not binding on this Court and no Sixth Circuit precedent has been cited.

In the Court's experience, most members of the capital habeas corpus petitioners' bar have close working relationships with one another, regardless of which "firm" or entity may be employing them at the moment. If reluctance to criticize the work of another attorney with whom one has (or has had) a close working relationship became the basis for disqualification, it

is difficult to calculate the consequences for capital habeas staffing and budgeting, particularly when representation in these cases has become increasingly concentrated in public defender offices.

The Magistrate Judge again concludes Hanna has not proved any actual conflict of interest within the parameters of governing precedent.

Hanna objects to the Magistrate Judges ruling that there was no justification to change counsel for clemency proceedings.

In this section of the Objections, Hanna agrees that continuity of representation is an appropriate consideration under 18 U.S.C. § 3599, but notes the Supreme Court has adopted a broader test – the interests of justice -- in *Martel v. Clair*, 132 S. Ct. 1276, 182 L. Ed. 2d 135 (2012). Specifically the Supreme Court indicated district courts should consider the timeliness of the motion, the adequacy of inquiry into the represented person's complaint, and the asserted cause for that complaint. Here the Motion is timely in the sense that no execution date has been set; the Magistrate Judge takes no position on whether the Motion is timely with respect to the statute of limitations. Petitioner himself has expressed no dissatisfaction with the representation he has received and it is not known whether he personally objects to having the *Martinez* review performed by attorneys who are under the general supervision of Ms. Sandford. Even though there is no actual conflict of interest as found above, however, a reasonable person in Hanna's position might well be uncomfortable in that situation.

Vacation of the Prior Order

Although Hanna's present counsel have not been able to establish an entitlement to a change of counsel, the Magistrate Judge VACATES the Order Denying Motion to Appoint New Counsel and will instead GRANT that Motion for the following reasons:

1. While there is no binding precedent holding that an actual conflict of interest exists in this situation and Hanna's counsel have not persuaded the Magistrate Judge to that effect, other jurists might conclude that a conflict exists. If the Sixth Circuit were to follow the precedent set in *Juniper, supra,* on appeal in this case, that would hardly serve the purpose of judicial economy. It is in the interest of justice to ensure this case can proceed without that risk.

2. The Court has been able to locate highly qualified substitute counsel to undertake this representation and is confident substitute counsel will be able to efficiently focus their review of the file on the issue which current counsel believe remain, to wit, a *Martinez* review and presentation of a clemency argument.

Accordingly, it is hereby ORDERED that Kathleen McGarry be appointed as trial attorney for the Petitioner in this case and that David Doughten also be appointed. Present counsel are ordered to cooperate with Ms. McGarry to transfer files to her. As soon as Ms. McGarry and Mr. Doughten have both entered their appearances, Mr. Fleming and Ms. Troutman will be granted leave to withdraw.

April 3, 2014.

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