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

PATRICK LEONARD,

Petitioner, : Case No. 1:09-cv-056

-vs- : Chief Judge Susan J. Dlott
Magistrate Judge Michael R. Merz

WARDEN, Ohio State Penitentiary,

Respondent. :

AMENDED ORDER GRANTING IN PART AND DENYING IN PART PETITIONER'S MOTION FOR DISCOVERY

On May 28, 2010, the Magistrate Judge entered an Order (Doc. No. 19) granting Petitioner's Motion for Discovery (Doc. No. 18) because it had not been opposed within the time allowed by S. D. Ohio Civ. R. 7.2. On June 9, 2010, the Court agreed to allow Respondent to present objections to discovery by his Renewed Motion for Reconsideration (Doc. No. 22). Petitioner has now filed a Reply in Support (Doc. No. 24).

In support of his claims of ineffective assistance of trial counsel (Grounds for Relief Nineteen, Twenty, and Twenty-One), Petitioner seeks to depose his trial attorneys, William Welsh and Michael Strong.

In support of his claims of ineffective assistance of appellate counsel (Ground for Relief Twenty-Two), Petitioner seeks to depose his direct appeal attorneys, Norman Aubin and Herbert E. Freeman.

In support of his claim of a violation of *Brady v. Maryland*, 373 U.S. 83 (1963)(Ground for

Relief Seventeen), Petitioner seeks the following:

> Any and all files maintained by the Hamilton County Prosecutor's Office and Hamilton County Sheriff's Office relating to the prosecution of Patrick Leonard and the investigation into the death of Dawn Flick, including any reports, witness statements, photographs, etc.;
>
> Any and all files maintained by the Hamilton County Coroner's Office relating to the autopsy of Dawn Flick and investigation into her death, including but not limited to reports, draft reports, test results, photographs, etc.; [and]
>
> Depositions of trial prosecutors Seth S. Tieger, Esq. and Jerome A. Kunkel, Esq. regarding office policies for the disclosure of material to defense counsel, and the disclosures and non-disclosures made in Leonard's case.

(Motion, Doc. No. 18, PageID 621).

In support of his claim that "due to the prosecutor's unregulated discretion in determining who will be charged with a capital crime, Leonard was denied a fair trial, due process and equal protection" (Ground for Relief Eighteen), Petitioner seeks

> To depose Hamilton County prosecutors Seth S. Tieger, Esq. and Jerome A. Kunkel, Esq., seeking their office's policies, procedures, and guidelines regarding who should be charged with capital murder, both before and at the time of Leonard's prosecution, and the decision to charge Leonard with capital murder.
>
> To depose any other person who worked in the Hamilton County Prosecutor's Office at the time of Leonard's prosecution who had or could have had knowledge of that office's policies, procedures, or guidelines, in place at that time, regarding who should be charged with capital murder, or prosecutors' reasons for seeking the death penalty against Patrick Leonard.
>
> To submit interrogatories and requests for production of documents regarding written procedures, policies and guidelines from the Hamilton County Prosecutor's Office with respect to who should be charged with capital murder in Hamilton County, Ohio.

Id..., PageID 622.

In support of his claim "that his constitutional rights were violated by the lack of any adequate system of appellate and proportionality review under Ohio's death penalty scheme" (Ground for Relief Twenty-Three), Petitioner seeks

> Records, statistics and documents submitted pursuant and in compliance with to O.R. C. §2929.021 for all capitally indicted cases from Hamilton County, Ohio before and after the time of Patrick Leonard's prosecution.
>
> Records, statistics and documents submitted pursuant and in compliance with to O.R. C. § 2929.021 for all capitally indicted cases from all counties in Ohio before and after the time of Patrick Leonard's prosecution.

Id..

In support of his claim "that the practice in Ohio of putting to death a person through lethal injection causes massive pain and violates all contemporary standards of decency (Ground for Relief Twenty-Nine), Petitioner seeks "leave to obtain and conduct the discovery that has been done and is further contemplated in *Cooey v. Strickland*, No. 2:04-cv-1156 (S.D. Ohio)."

In his Renewed Motion for Reconsideration, Respondent deals at length with whether Petitioner should be granted an evidentiary hearing in this case. However, Petitioner has not yet requested such a hearing and his motion for a hearing is not due to be filed until sixty days after completion of any discovery.

A habeas petitioner is not entitled to discovery as a matter of course, but only upon a fact-specific showing of good cause and in the Court's exercise of discretion. Rule 6(a), Rules Governing §2254 Cases; *Bracy v. Gramley*, 520 U.S. 899 (1997); *Harris v. Nelson*, 394 U.S. 286, 89 S. Ct. 1082, 22 L. Ed. 2d 281 (1969); *Byrd v. Collins*, 209 F. 3rd 486, 515-16 (6th Cir. 2000). Before determining whether discovery is warranted, the Court must first identify the essential

elements of the claim on which discovery is sought. *Bracy*, citing *United States v. Armstrong*, 517 U.S. 456, 116 S. Ct. 1480, 1488, 134 L. Ed. 2d 687 (1996). The burden of demonstrating the materiality of the information requested is on the moving party. *Stanford v. Parker*, 266 F.3d 442 (6th Cir. 2001), *citing Murphy v. Johnson*, 205 F. 3rd 809, 813-15 (5th Cir. 2000). "Even in a death penalty case, 'bald assertions and conclusory allegations do not provide sufficient ground to warrant requiring the state to respond to discovery or require an evidentiary hearing.'" *Bowling v. Parker*, 344 F.3d 487 (6th Cir. 2003)(*quoting Stanford v. Parker*, 266 F.3d 442, 460 (6th Cir. 2001).

Rule 6 does not "sanction fishing expeditions based on a petitioner's conclusory allegations." *Williams v. Bagley*, 380 F.3d 932, 974, (6th Cir. 2004), *citing Rector v. Johnson*, 120 F.3d 551, 562 (5th Cir. 1997); *see also Stanford v. Parker*, 266 F.3d 442, 460 (6th Cir. 2001). "Conclusory allegations are not enough to warrant discovery under [Rule 6]; the petitioner must set forth specific allegations of fact." *Id.., citing Ward v. Whitley*, 21 F.3d 1355, 1367 (5th Cir. 1994).

Ineffective Assistance of Counsel Claims

Respondent objects to the proposed depositions of trial and direct appeal counsel on the grounds that "trial counsel's preparation can be determined from the existing record." (Renewed Motion, Doc. No. 22, PageID 654). The Court disagrees. In any case where an attorney's ineffectiveness is alleged, the choices the attorney made in pursuing the case may well be material to the claim. Petitioner's request to depose his trial and direct appeal counsel is GRANTED. In making the claim of ineffective assistance of trial counsel and ineffective assistance of appellate counsel, of course, Petitioner has waived protection of the attorney-client privilege as to any discussions he may have had with counsel regarding the claims made in this Court. *In re Lott*, 424

F.3d 446 (6th Cir. 2005); *Tasby v. United States*, 504 F.2d 332 (8th Cir. 1974); *Randall v. United States*, 314 F.2d 800 (10th Cir. 1963); *United States v. Ballard*, 779 F.2d 287 (5th Cir. 1986); *Laughner v. United States*, 373 F.2d 326 (5th Cir. 1967); *Crutchfield v. Wainwright*, 803 F.2d 1103 (11th Cir. 1986).

Brady Claim

Respondent objects to the discovery sought regarding the Brady claim on the ground that Petitioner has only made "broad accusations without any foundation." (Renewed Motion, Doc. No. 22, PageID 655.) Petitioner responds "in his traverse, Leonard makes specific allegations regarding practices in the Hamilton County Prosecutor's Office to warrant granting discovery." (Reply, Doc. No. 24, PageID 660.) Petitioner's counsel neither repeated what those allegations are nor give the Court a reference to the place in the Traverse where they are listed; the Traverse is 338 pages long. As best the Court can tell without a reference, the allegations respecting the *Brady* claim are as follows:

> At the time of Leonard's trial the prosecutors had not received any training in identifying exculpatory evidence. The Hamilton County Prosecutor's Office did not have any guidelines in place for purposes of determining the existence of exculpatory evidence. This lack of training and guidelines, among other factors, has caused the Hamilton County Prosecutors to fail in their constitutionally imposed duty to provide in a timely manner exculpatory evidence to defense counsel.
>
> The Hamilton County Prosecutor's Office has repeatedly failed to abide by its constitutionally imposed duty to provide exculpatory evidence in a timely manner to defense counsel. The federal courts granted relief in a capital case because members of the Hamilton County Prosecutor's Office failed to provide exculpatory evidence to trial counsel. *Jamison v. Collins*, 291 F.3d 380 (6th Cir. 2002). In other cases, federal courts recognized that the Hamilton County Prosecutor's Office committed *Brady* violations, though they denied

relief due to overwhelming evidence of the defendants' guilt. See *Fautenberry v. Mitchell*, 515 F.3d 614, 632 (6th Cir. 2008) (overwhelming evidence of guilt made suppressed evidence insignificant); *O'Hara v. Brigano*, 499 F.3d 492, 502-03 (6th Cir. Ohio 2007) (impeachment evidence was suppressed, but O'Hara could not show prejudice); *Zuern v. Tate*, 336 F.3d 478, 485 (6th Cir. 2003).

In *State v. Kalejs*, 782 N.E.2d 112, 116 (Ohio Ct. App. 2002), the First District Court of Appeals granted the defendant a new trial because of the Hamilton County Prosecutor's Brady violations. Another defendant, James Mills, was granted a new trial based on violations of Brady by a Hamilton County Prosecutor. *State v. Mills*, Case No. B8802581 (Hamilton Ct. C.P. Sept. 26, 2007). And in other cases in which it ultimately denied relief, the Court of Appeals acknowledged that the Prosecutor's Office withheld evidence from the defense that should have been disclosed. *State v. Gumm*, 864 N.E.2d 133, 142 (Ohio Ct. App. 2006); *State v. Wogenstahl*, 2004 Ohio App. LEXIS 5427, 13-14 (Ohio Ct. App., Nov. 12 2004); State v. Carroll, 2003 Ohio App. LEXIS 4759, 12-13 (Ohio Ct. App., Oct. 3, 2003); *State v. Hout*, 2003 Ohio App. LEXIS 4590, 22- 23 (Ohio Ct. App., Sept. 26, 2003). See also *State v. Campa*, 2002 Ohio App. LEXIS 1445 (Ohio Ct. App., March 29, 2002) (The state concedes on appeal that the [Hamilton County] assistant prosecutor committed error in failing to disclose evidence favorable to the defendant).

Several examples, including capital cases pending in the United States District Court for the Southern District of Ohio, highlight this ongoing problem of the Hamilton County Prosecutor's Office to provide defense counsel with exculpatory evidence. In *Cook v. Anderson*, 2007 U.S. Dist. LEXIS 71400, the Petitioner was granted an evidentiary hearing based on his claim that the prosecutors suppressed a number of police reports that impeached the credibility of four eyewitnesses who placed Petitioner near the scene of the abduction or with the victim near where the body was found. Also suppressed was a report of a police officer who testified that he spoke with someone identified as Petitioner who said he was in possession of the murder weapon. Contrary to the testimony, the report noted that the caller did not have the weapon.

Leonard has identified an ongoing systemic problem concerning the disclosure of exculpatory evidence by the Hamilton County Prosecutor's Office. The thirteen cases cited above are not an exhaustive list of the cases in which this Prosecutor's Office has

> wrongfully withheld evidence from the defense. Leonard, in the exercise of due diligence and on reasonable belief, alleges that this demonstration warrants the granting of discovery to demonstrate that the chronic problem continued in the present case.

(Traverse, Doc. No. 17, PageID 485-487.)

The Court finds the allegations in the Traverse do not justify the discovery sought on this claim. Petitioner does not offer any reasonable suspicion that *Brady* material was withheld in this case or what it might be. There is no attempt to relate the particular kinds of *Brady* materials eventually discovered in the cited cases to material that might have been withheld here. There is no attempt to show that particular attorneys found to have withheld *Brady* material in any of the cited case was involved in this case, nor any citation to any practice or policy of the Hamilton County Prosecutor's Office which might have resulted in failure to disclose here. At most, Petitioner alleges that because *Brady* violations have been found in past cases involving that Office, in every future case the Office should be subject to broad discovery to ensure that they have not offended again. Compare the specificity of the allegations in *Bracy v. Gramley*, supra. Petitioner's Motion for Discovery as to his *Brady* claim is denied.

Discriminatory Charging and Prosecutorial Discretion Claim

The gravamen of this claim is found in the Traverse as follows:

> In Ohio, there is no fair and consistent determination of who will be capitally indicted. The determination as to whether one is indicted with a death penalty specification is apparently largely a function of where a defendant is charged, not of the circumstances of the crime and the character of the individual. Furthermore, no independent review of the propriety of the charging decision is conducted. No judicial body considers the appropriateness of the charging decision.

> In effect, Ohio's system is designed so as to permit a prosecuting attorney to sidestep the procedural safeguards of Supreme Court decisions by allowing arbitrary charging decisions that unfairly impinge on defendants' rights before the trial safeguards commence. This denies equal protection and imposes cruel and unusual punishment if the product of intentional discrimination on the basis of an improper classification, or results in arbitrary, and inconsistent imposition of death sentences.

(Traverse, Doc. No. 17, PageID 492.)

Petitioner has adverted to no evidence that he was charged capitally on any unconstitutional discriminatory basis. Instead, the Traverse adverts in a very general way to an oft-noted phenomenon: different county prosecutors in Ohio evidently have different standards for bringing capital charges to the grand jury, resulting in widely variant charging rates in different Ohio counties. But the United States Supreme Court has never held that the existence of prosecutorial discretion – which after all is the rule rather than the exception in the United States – supports an inference of denial of equal protection. *See Zuern v. Tate*, 101 F. Supp. 2d 948 (S.D. Ohio 2000), *rev'd on other grounds*, 336 F.3d 478 (6th Cir. 2003). Petitioner has not met his burden of articulating facts which could be discovered which would support his Eighteenth Ground for Relief and the sought discovery on this Ground is denied.

Proportionality Review

In his Twenty-Third Ground for Relief, Petitioner asserts that Ohio's general practice of proportionality review in death penalty cases and the actual review performed here violated Petition's due process rights because it was not done in accordance the Ohio statutory scheme for that review (See Traverse, Doc. No. 17, PageID 563).

There is no federal constitutional requirement for proportionality review in capital cases. *Pulley v. Harris*, 465 U.S. 37 (1984). Ohio's proportionality review system complies with the dictates of the Due Process Clause. *Williams v. Bagley*, 380 F.3d 932 (6th Cir. 2004), *citing Smith v. Mitchell*, 348 F.3d 177, 214 (6th Cir. 2003); *Wickline v. Mitchell*, 319 F.3d 813, 824 (6th Cir. 2003); *Cooey v. Coyle*, 289 F.3d 882, 928 (6th Cir. 2002); *Buell v. Mitchell*, 274 F.3d 337, 368-69 (6th Cir. 2001); *Coleman v. Mitchell*, 268 F.3d 417, 453 (6th Cir. 2001); *Greer v. Mitchell*, 264 F.3d 663, 691 (6th Cir. 2001); *Byrd v. Collins*, 209 F.3d 486, 539 (6th Cir. 2000). "Since proportionality review is not required by the Constitution, states have great latitude in defining the pool of cases used for comparison." *Buell*, 274 F.3d at 369. And this court has held consistently that, in "limiting proportionality review to other cases already decided by the reviewing court in which the death penalty has been imposed, Ohio has properly acted within the wide latitude it is allowed." *Id.*.; *see also Wickline*, 319 F.3d at 824-25; *Coleman*, 268 F.3d at 453.

Discovery on the Twenty-Third Ground for Relief is denied.

Lethal Injection

In his Twenty-Ninth Ground for Relief, Petitioner asserts that Ohio's method of execution by lethal injection violates his right to be free from cruel and unusual punishment. In support, he seeks "leave to obtain and conduct the discovery that has been done and is further contemplated in *Cooey v. Strickland*, No. 2:04-cv-1156 (S.D. Ohio)."

Respondent opposes this request on the ground that habeas corpus relief is not available to test the constitutionality of lethal injection (Renewed Motion, Doc. No. 22, PageID 657). Petitioner replies that the Sixth Circuit has recently "remanded two habeas cases to the district court for discovery on the petitioners' lethal injection claims," citing *Adams v. Bradshaw*, Case No. 07-3688 (6th Cir. Feb. 13, 2009), and *Jones v. Bradshaw*, Case No. 07-3766 (Jan. 30, 2009)(Reply, Doc. No. 24, PageID 661). These two Orders of the Sixth Circuit are neither reported nor published. In one of them the court remanded for discovery, in the other for "factual development" and legal argument.

It is not clear what precedential value an unreported and unpublished order of the Sixth Circuit should have, but it is a fair inference from these Orders that at least six judges of the Circuit Court were prepared to allow some lethal injection issue to be litigated in habeas corpus. It is also unclear how the lethal injection issue in those cases, whatever it was, is related to whatever that issue might be in this case, since Ohio changed its lethal injection protocol in November-December, 2009. On the other hand, Respondent cites no authority for excluding a lethal injection issue from habeas corpus litigation.

Assuming a cruel and unusual punishment claim or claims relating to lethal injection can be

litigated in habeas corpus, Petitioner has not shown his entitlement to the discovery he seeks on this issue. Petitioner seeks "leave to obtain and conduct the discovery that has been done and is further contemplated in *Cooey v. Strickland*, No. 2:04-cv-1156 (S.D. Ohio)." To the extent this means he wishes to obtain the fruits of discovery conducted in that case or to participate in future discovery in that case, any such request must be made to District Judge Gregory Frost who is presiding over that case. To the extent Petitioner seeks to repeat or duplicate in this case any discovery which has been done or will be done in that case, Petitioner has failed to show its relevance to his claims here. The request for discovery on the lethal injection claims is denied without prejudice to its renewal in the event Petitioner cannot obtain access to the discovery in Cooey and can show a relationship of specific discovery sought to the claim made here.

All discovery granted herein shall be completed by November 30, 2010.

July 19, 2010.

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