

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

PATRICK LEONARD,

Petitioner,

-vs-

WARDEN, Ohio State Penitentiary,

Respondent.

:

Case No. 1:09-cv-056

:

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

:

**SUPPLEMENTAL OPINION IN SUPPORT OF AMENDED ORDER GRANTING IN
PART AND DENYING IN PART PETITIONER’S MOTION FOR DISCOVERY**

This capital habeas corpus case is before the Court on Petitioner’s Objections (Doc. No. 27) and the Warden’s Reply (Doc. No. 28) to the Magistrate Judge’s Amended Order Granting in Part and Denying in Part Petitioner’s Motion for Discovery (“Amended Order,” Doc. No. 25). The General Order of Reference for the Dayton location of court permits a magistrate judge to reconsider decisions or reports and recommendations when objections are filed.

In the Amended Order the Magistrate Judge granted Petitioner discovery from his trial and appellate counsel on his ineffective assistance of counsel claims. Petitioner sought discovery on his *Brady v. Maryland*, discriminatory prosecution, proportionality review, and lethal injection claims, all of which were denied. Discovery on the lethal injection claim was denied without prejudice to renewal on certain conditions. Petitioner has not renewed the request and has not argued for this discovery in his Objections.

Procedural History of the Discovery Motion

The Scheduling Order (Doc. No. 10) required any motion for discovery to be filed within sixty days of the Answer. The Answer was filed, as required by that Order, on November 23, 2009 (Doc. No. 11). This made motions for discovery due on January 22, 2010. After three extensions¹, all agreed to by the Warden's counsel and granted by the Magistrate Judge, Petitioner filed his Motion for Discovery on April 22, 2010. Under S. D. Ohio Civ. R. 7.2, a memorandum in opposition was due May 17, 2010. As of May 28, 2010, no opposition had been filed and the Magistrate Judge made a *pro forma* finding of good cause² and allowed all the requested discovery (Doc. No. 19).

Respondent moved for reconsideration, offering the following reason why no opposition was filed:

Prior to filing his Motion for Discovery, Leonard obtained an extension of time to do so from an attorney - other than the undersigned - in the office of the Attorney General, as the undersigned was out of the office during a "furlough" period whereby as a cost savings measure, the agency requires employees to take ten days unpaid leave in any increments (thus, reducing the yearly pay of the employees by that commensurate amount). Upon returning, undersigned counsel was never made aware that another attorney agreed to the requested extension and the new due dates. While the undersigned was aware of the original deadline for Leonard to file, he thought Leonard's counsel missed the deadline, but he did not raise the issue as he thought he would, in the name of professional

¹Petitioner's counsel recite in the Objections that they obtained "a two-week extension of time . . ." (PageID 681). The docket shows three extensions (Doc. Nos. 13, 14, and 15), totaling three months.

²That is, the Order recites that there is good cause, but there are no specific findings supporting that conclusion.

courtesy, allow Leonard's counsel additional time to file if counsel so chose. Subsequently, when Leonard filed the Motion for Discovery, which arrived via electronic filing, it occurred during another short period when undersigned was again out of the office. Nevertheless, counsel intended to respond to the motion for discovery and had a rough response already drafted and was just waiting to see the motion before finalizing it.

(Renewed Motion to Reconsider, Doc. No. 22, PageID 645.) Respondent argued these facts brought his position within the doctrine of excusable neglect as adumbrated in *Pioneer Inv. Services v. Brunswick Associates*, 507 U.S. 380 (1993). The Magistrate Judge granted reconsideration without making an express finding of excusable neglect and set a briefing schedule for Petitioner to file a reply memorandum (Doc. No. 23). Petitioner did so (Doc. No. 24). After considering it, the Magistrate Judge issued the Amended Order.

Petitioner's General Objections

Petitioner objects first of all that the Magistrate Judge's finding of good cause must stand.

His counsel write:

Here, the Magistrate Judge found good cause. Doc. No. 19, PageID 627. Under the Habeas Rules and Supreme Court precedent, this must be a finding that Leonard presented allegations demonstrating that further factual development may prove that he is entitled to relief. While failure to respond to an opposing party's motion may ordinarily be cause to grant the motion (see Local Rule 7.2(a)(2)), the specific, mandatory showing of good cause needed to obtain discovery in habeas cases constrained the Magistrate Judge's ability to grant the motion. The Magistrate Judge would have been able to authorize discovery only if the good cause standard of Rule 6 had been met. Once the Magistrate Judge granted Leonard's discovery requests, finding good cause, it was clearly erroneous for him to subsequently revoke his own finding.

(Objection, Doc. No. 27, PageID 680.)

The argument seems to be that a finding of good cause for habeas discovery is irrevocable. No authority is cited for that proposition, nor was any objection to reconsideration made in Petitioner's Reply Memorandum. Indeed, the whole tenor of the Reply Memorandum treats reconsideration as within the Magistrate Judge discretion.

As a general matter of law, reconsideration is within the discretion of a federal judicial officer absent a judgment. Under the doctrine of law of the case, findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation. *United States v. Moored*, 38 F3d 1419, 1421 (6th Cir. 1994), citing *United States v. Bell*, 988 F.2d 247, 250 (1st Cir. 1993). But, “[a]t the trial level, the doctrine of the law of the case is little more than a management practice to permit logical progression toward judgment. Prejudgment orders remain interlocutory and can be reconsidered at any time.” 1B Moore's Federal Practice ¶0.404 (1982).

Lest there be any doubt about the reason for reconsideration, the Magistrate Judge now confesses his error in finding good cause in the initial Order Granting Discovery and that finding is REVOKED. There is good cause for discovery in this case only to the extent found in the Amended Order.

Petitioner's counsel also object that the Warden's counsel did not show excusable neglect in moving for reconsideration. Here again the Petitioner made no objection to reconsideration on this basis before the Amended Order was issued and thus has waived that objection. Moreover, the Magistrate Judge finds the facts set forth in the Warden's Renewed Motion, quoted above, constitute excusable neglect. This finding is independent of the confession of error and constitutes an alternative basis for granting reconsideration.

Petitioner's Specific Objections

Petitioner also objects specifically to the Magistrate Judge's denial of discovery on his *Brady v. Maryland*, discriminatory prosecution, and proportionality claims (Objections, Doc. No. 27, PageID 682-685.) The Magistrate Judge believes no additional analysis is needed on these claims beyond what appears in the Amended Order.

No specific objection is made to the ruling on discovery on the lethal injunction claim. A general objection has the same effect as a failure to file altogether. *Howard v. Sec. of HHS*, 932 F.2d 505 (6th Cir. 1991).

August 25, 2010.

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