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

THOMAS BARTON,

Petitioner, : Case No. 1:09-cv-353

-vs- : District Judge S. Arthur Spiegel
Magistrate Judge Michael R. Merz

WARDEN, Southern Ohio Correctional Facility,

Respondent. :

DECISION AND ORDER

This case is presently pending before Judge Spiegel on Respondent's Appeal (Doc. No. 31) of the Magistrate Judge's Decision and Order granting in part Petitioner's motion for an evidentiary hearing (Doc. No. 29). On April 4, 2011, the United States Supreme Court decided *Cullen v. Pinholster*, 563 U.S. ___, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011), and the Magistrate Judge ordered further briefing on the evidentiary hearing issue in light of *Cullen* (Doc. No. 38). That briefing is now complete (Doc. Nos. 40, 41), particularly because Respondent had called the case to the Court's attention by way of a Notice of Supplemental Authority (Doc. No. 37).

In granting the evidentiary hearing, the Magistrate Judge focused on Petitioner's diligence in developing in state court the evidence he wished to present here, a requirement imposed by *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), and *Michael Williams v. Taylor*, 529 U.S. 420 (2000). Respondent's Appeal also focuses on the diligence question (Doc. No. 31).

Respondent initially asserts that *Cullen* proscribes a federal evidentiary hearing, at least

inferentially, because the Ohio courts decided Barton's ineffective assistance of trial counsel claim on the merits and this Court is therefore limited by 28 U.S.C. § 2254(d)(1) to considering the record that was before the state courts when they made that decision (Notice, Doc. No. 37).

Petitioner responds by conceding that "[t]o satisfy *Cullen* and to justify the evidentiary hearing, Barton must establish that his ineffective-assistance claim was never adjudicated on the merits, as contemplated under § 2254(d), in the state court" (Brief, Doc. No. 40, PageID 2376). He attempts to do just that, relying on *Benge v. Johnson*, 474 F.3d 236 (6th Cir. 2007).

Petitioner asserts "the state court refused to apply the *Strickland* test on either direct appeal or collateral review." (Memorandum, Doc. No. 40, PageID 2377.) On this Court's reading, that is not so. On direct appeal, the court of appeals wrote:

> [*P172] Assignment of Error No. 3:
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> [*P173] "APPELLANT RECEIVED THE INEFFECTIVE ASSISTANCE OF COUNSEL."
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> [*P174] Appellant argues that his trial counsel provided him with constitutionally ineffective assistance of counsel. We disagree with this argument.
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> [*P175] In order to prevail on an ineffective assistance of counsel claim, a criminal defendant must make the two-pronged showing set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674. First, a defendant must show that his counsel's performance was deficient. *Id.* at 687. This requires showing that his counsel's performance "fell below an objective standard of reasonableness." *Id.* at 687-688. Judicial review of counsel's performance must be "highly deferential," and a reviewing court must indulge a strong presumption that counsel's conduct is professionally reasonable and, under the circumstances, might be considered sound trial strategy. *Id.* at 689.
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> [*P176] Second, a defendant must show that his defense counsel's deficient performance prejudiced him. *Id.* at 687. This requires the defendant to "show that there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. A failure to make a sufficient showing on either the "performance" or "prejudice" prong of the *Strickland* standard will doom a defendant's ineffective assistance of counsel claim. See *id*. at 697.

[*P177] Appellant contends that his trial counsel's performance was deficient in three areas. First, appellant argues that his trial counsel erred by not challenging the hypnosis of Henson. We disagree with this argument.

[*P178] As we have indicated in response to appellant's 11<th> assignment of error, there is no showing that Henson's refreshed testimony was any different than what he had told police before he was hypnotized. Moreover, appellant's defense counsel may have deliberately chosen not raise the issue of hypnosis as a matter of trial strategy. As a result, the record fails to show that a hearing on the hypnosis issue was required under *Johnston*, as appellant claims See *id.*, 39 Ohio St.3d at 54, and *Cook*, 65 Ohio St.3d at 520.

[*P179] Second, appellant argues that his counsel's performance was deficient in that it opened the door to evidence of his alleged polygraph deception. We disagree with this argument. Defense counsel's decision to question the officers who investigated this case whether appellant fully cooperated with them was a matter of trial strategy that is entitled to deference. *Strickland*, 466 U.S. at 689.

[*P180] Third, appellant argues that his counsel's performance was deficient in that his counsel failed to raise an objection at trial to: (1) Henson's alleged hearsay testimony regarding what Phelps told him about appellant's involvement in the burglary that led to the killing of his wife, and (2) the admission of the 911 tape. However, we disagree with these arguments for the same reasons we overruled appellant's second and fourth assignments of error. Simply put, an objection to this evidence would have been unsuccessful and, therefore, appellant's defense counsel was not ineffective for failing to object to these matters.

[*P181] Appellant's third assignment of error is overruled.

State v. Barton, 2007 Ohio 1099, 2007 Ohio App. LEXIS 1020 (Ohio App. 12th Dist. Mar. 12, 2007).

On collateral review, Barton claimed he was entitled to an evidentiary hearing on his claim that his counsel was ineffective for failure to cross-examine Gary Henson on the issue of whether his memory had been hypnotically refreshed before trial. The court of appeals held it was not an abuse of discretion to deny a hearing.

> ... because appellant did not demonstrate substantive grounds for relief. There is nothing in the record to support the assertion that the defense was unaware of Henson's hypnosis. Appellant concedes that the state provided defense counsel with the discovery document informing them of the hypnosis. John [sic, should be "Jon"] P. Rion[1], the defense attorney responsible for cross-examining Henson, did not submit an affidavit alleging that he was unaware of Henson's hypnosis. The absence of an affidavit from John [sic] P. Rion does not establish that the defense was unaware of Henson's hypnosis.
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> [*P14] Furthermore, the statement in John H. Rion's affidavit that he "[had] no recollection of receiving information that Gary Henson's testimony may have been influenced by hypnosis" was ambiguous in two respects. First, John H. Rion's statement did not signify that the defense never received word that Henson had been subjected to investigative hypnosis. Rather, he contended that he "had no recollection" of receiving the information. This is clearly different from making the affirmative assertion that he never received the information. Second, John H. Rion's statement that he did not recall being informed that Henson's testimony "may have been influenced by hypnosis" (emphasis added) was vague. In utilizing such wording, John H. Rion was not asserting that he believed Henson's testimony was in fact altered by hypnosis. Instead, his statement offered tenuous conjecture about the effect of Henson's hypnosis in lieu of making an affirmative statement that Henson's testimony was altered by the hypnosis.
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> [*P15] Although appellant's attorneys failed to address the hypnosis issue at trial, appellant was not prejudiced as a result. *See id. See, also, Strickland v. Washington* (1984), 466 U.S. 668, 687-88, 693, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (providing that, in order to prove ineffective assistance of counsel, a defendant must show that

[1]John H. Rion and Jon P. Rion are both respected and prominent criminal defense lawyers in the Dayton, Ohio, area. They are respectively father and son.

> counsel's actions fell below an objective standard of reasonableness and that the defendant was prejudiced as a result). In fact, John H. Rion's affidavit actually accords with the state's position that the hypnosis did not significantly alter Henson's testimony.
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> [*P16] The state maintains that Henson's testimony was not notably altered by the hypnosis, therefore no hearing on its admissibility was required. See *State v. Johnston* (1988), 39 Ohio St.3d 48, 50-51, 529 N.E.2d 898; *State v. Doan*, Clinton App. No. CA2001-09-030, 2002 Ohio 3351, P31. Major John Newsome of the Warren County Sheriff's Office, an investigator working on the cold case murder of appellant's wife, testified in his affidavit that "Henson's testimony at trial concerned only matters recalled prior to hypnosis. Henson's testimony was substantially in conformance with his pre-hypnosis memory." Newsome's testimony, viewed in conjunction with other evidence in the record substantiating appellant's guilt, supports the conclusion that defense counsel's failure to address the hypnosis issue did not prejudice appellant. Therefore, appellant has failed to show that there was a denial or infringement of his constitutional right to counsel so as to warrant an evidentiary hearing on his petition for postconviction relief.

State v. Barton, 2008 Ohio 2736, ¶¶ 13-16, 2008 Ohio App. LEXIS 2312 (Ohio App. 12th Dist. June 9, 2008). Both of these amount to adjudication on the merits of Barton's ineffective assistance of trial counsel claim with the Warren County Court of Appeals directly applying *Strickland* in both instances.

Petitioner's claim that "plain error" review was applied on direct appeal applied to his Eleventh Assignment of Error, not to the Seventh Assignment, which is where ineffective assistance of trial counsel was pled.

Petitioner's claim that he had to satisfy an abuse of discretion standard of review on collateral review is correct, but in this case did not prevent the final decision of the Court of Appeals from being an adjudication on the merits for purposes of 28 U.S.C. § 2254(d)(1). While the standard for review of a trial court denial of evidentiary hearing under Ohio Revised Code § 2953.21 is abuse

of discretion, here the Court of Appeals held there was no abuse of discretion because there was no substantive merit to the underlying claim. There might be closer cases where an Ohio court of appeals found arguable merit in a post-conviction claim but no abuse of discretion, but this is not that case.

Petitioner's reliance on *Benge v. Johnson*, 474 F.3d 236 (6th Cir. 2007), is unavailing because Petitioner's counsel misreads *Benge*. The Ohio Supreme Court did not apply plain error analysis to Benge's ineffective assistance of trial counsel claim, but rather to his claim that the jury should have been instructed on the lesser included offense of voluntary manslaughter. 474 F.3d at 245. The Ohio Supreme Court was not considering an ineffective assistance of trial counsel claim directly, but on the question whether it would excuse Benge's default in not raising the claim in the trial court.

Having concluded that the Ohio courts decided Barton's ineffective assistance of trial counsel claim on the merits, this Court must re-evaluate its granting of an evidentiary hearing in light of *Cullen, supra*.

In *Cullen*, the Supreme Court expressly held "that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." 131 S. Ct. at 1398. That means that any evidence which this Court would have taken at the evidentiary hearing previously granted would have been immaterial to a decision on whether the Ohio courts' decisions on Barton's ineffective assistance of trial counsel claim was contrary to or an unreasonable application of United States Supreme Court precedent on ineffective assistance of counsel.

This Court had previously interpreted §§ 2254(d)(1) and 2254(e)(2) consistently with one another so as to allow a habeas petitioner who had been diligent in attempting to introduce evidence

in the state courts but unsuccessful in doing so an opportunity to introduce that evidence at a hearing in this Court. That position is consistent with the alternative ruling in *Couch v. Booker*, 632 F.3d 241, 245 (6th Cir. 2011)(Sutton, J.), finding no abuse of discretion in granting an evidentiary hearing on a claim adjudicated on the merits in the state courts.[2] But that reading of the two statutes, accepted by Justices Sotomayor and Alito in *Cullen*, was rejected by the majority.

Therefore, the Order (Doc. No. 29) granting an evidentiary hearing is VACATED and Respondent's appeal (Doc. No. 31) is moot. The record in this case is now complete. Counsel shall advise the Court not later than June 20, 2011, whether they desire to file additional briefing on the merits. If so, the Court requests counsel agree, if possible on a briefing schedule.

June 8, 2011.

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

[2] *Couch* was cited by Petitioner has additional authority on appeal of the evidentiary hearing decision to Judge Spiegel. *See* Doc. No. 36.