IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

JONATHON D. MONROE,

Petitioner, : Case No. 2:07-cv-258

-vs- : District Judge Edmund A. Sargus, Jr.
Magistrate Judge Michael R. Merz

WARDEN, Ohio State Penitentiary,

Respondent. :

SUPPLEMENTAL OPINION ON MOTION FOR DISCOVERY

This capital habeas corpus case is before the Court on Petitioner's Objections (Doc. Nos. 122) to the Magistrate Judge's Decision and Order Denying Petitioner's Second Motion for Discovery (the "Discovery Decision," Doc. No. 119). Respondent has filed a Response to the Objections under Fed. R. Civ. P. 72 (Doc. No. 126) and Judge Sargus has recommitted the matter for supplemental analysis (Doc. No. 124).

Standard of Review

Petitioner asserts both Magistrate Judge Decisions are clearly erroneous and/or contrary to law (Doc. No. 122 at PageID 7387 and Doc. No. 123 at PageID 7396, both citing *United States v. Curtis*, 237 F.3d 598, 603 (6th Cir. 2001). *Curtis* involved a magistrate judge's conducting a preliminary supervised release revocation proceeding under Fed. R. Crim. P. 32.1, but the Sixth Circuit confirmed generally that the standard for review of magistrate judge

decisions on nondispositive motions is "clearly erroneous or contrary to law." *Id.*

A magistrate judge's findings of fact are reviewed under a clearly erroneous standard, but the district court is free to exercise its independent judgment with respect to a magistrate judge's legal conclusions. *Hawkins v. Ohio Bell Tel. Co.*, 93 F.R.D. 547, 551 (S.D. Ohio 1982), *aff'd.* 785 F.2d 308 (6th Cir. 1986); *Brown v. Wesley's Quaker Maid, Inc*., 771 F.2d 952 (6th Cir. 1985). To demonstrate that a conclusion is contrary to law, a party must show the conclusion "contradict[s] or ignore[s] applicable precepts of law, as found in the Constitution, statutes, or case precedent." *Gandee v. Glaser*, 785 F. Supp. 684, 686 (S.D. Ohio 1992)(Kinneary, J.), *quoting Adolph Coors Co. v. Wallace*, 570 F. Supp. 202, 205 (N.D. Cal. 1983).

Whether to allow discovery in a habeas corpus case is an issue committed to the sound discretion of the district court. Rule 6(a), Rules Governing § 2254 Cases; *Bracy v. Gramley*, 520 U.S. 899 (1997); *Harris v. Nelson*, 394 U.S. 286 (1969); *Byrd v. Collins*, 209 F.3d 486, 515-16 (6th Cir. 2000). Because the district court is afforded broad discretion in the resolution of nondispositive discovery disputes and that discretion is exercised by magistrate judge upon proper reference, the court will overrule the magistrate judge's determination only if this discretion is clearly abused. *Snowden v. Connaught Laboratories*, 136 F.R.D. 694, 697 (D. Kan. 1991); *Detection Systems, Inc. v. Pittway Corp.*, 96 F.R.D. 152, 154 (W.D.N.Y. 1982); *Doe v. Marsh*, 899 F. Supp. 933, 934 (N.D.N.Y. 1995); *Commodity Futures Trading Comm'n v. Standard Forex, Inc.*, 882 F. Supp. 40, 42 (E.D.N.Y. 1995); *Bass Public Ltd. Co. v. Promus Cos., Inc*., 868 F. Supp. 615, 619 (S.D.N.Y. 1994); *In re Application for Order for Judicial Assistance in Foreign Proceedings*, 147 F.R.D. 223, 225 (C.D. Cal. 1993); *Schrag v. Dinges*, 144 F.R.D. 121, 123 (D. Kan. 1992).

Second Motion for Discovery

In his Second Motion for Discovery, Monroe sought discovery on four issues. They are considered here seriatim.

The Sequestration Issue

Monroe learned in habeas discovery already conducted that some of the defense witnesses were staying at the same downtown Columbus hotel where the jury was sequestered. From this fact, Monroe hypothesizes that there may have been some contact or that the jury was somehow prejudiced because "of possibly believing that Petitioner's family was following them or attempting to contact them." To pursue this possibility, Monroe sought to depose all the jurors, the trial judge, the judge's bailiff, and the records custodian of the Franklin County Sheriff's Office (Second Motion, Doc. No. 102, PageID 7173). The Magistrate Judge rejected this request as based on pure conjecture (Discovery Decision, Doc. No. 119, PageID 7378).

Monroe objects that his factual basis is not "pure conjecture" because trial attorney Brian Rigg testified "there was an issue" and the trial judge took "immediate action" to prevent any contact (Objections, Doc. No. 122, PageID 7387, citing Rigg Depo., Doc. No. 90, PageID 5726-27).

Rigg testified there was one witness in mitigation other than Monroe himself, Eliza Dillard from West Virginia; Monroe would not permit any other witnesses (Riggs Depo., Doc. No. 90, PageID 5726). The defense got permission to put her up at court expense at a downtown

Columbus hotel near the Common Pleas Courthouse, the hotel "next to the old Claremont Restaurant." *Id.* Rigg testified further:

> I remember there was an issue because the jurors were staying there and they had – and they were sequestered, so we had our client's family stay there, I believe, and they had to either move the jurors or add some extra security or something. I remember that.
>
> Q. Why was that necessary?
>
> A. The court was concerned, or someone – I don't know. But we needed to have some place for them to stay, and we got court authority to pay for their motel room, and we didn't realize the jurors were staying – I think the jurors were there – I'm not sure. There wasn't an issue or anything, but we became aware that they happened to be staying at the same motel, and either we moved the Monroe family or they added extra security or something. I can't remember now.

Id. at 5726-27. Rigg made it clear the arrangements for the Monroe family were made by the mitigation specialist, James Crates, several weeks before trial without any knowledge of where the jury would be sequestered. *Id.* at PageID 5728-29. Asked if there was an "incident," Rigg replied:

> It really wasn't an incident. I just remember Ron [co-counsel] saying something to me or maybe Jim Crates said something to me that the jurors are staying at the Claremont, and there wasn't a problem or anything of that nature. I didn't know where they were staying, the jurors. I knew where the – our mitigation witnesses were staying because, you know, Jim would confer with me, Jim Crates, but it wasn't a problem or anything.

Id. at PageID 5730-31. Rigg had been a bailiff at Common Pleas Court[1] and testified about the usual measures taken during sequestration. *Id.* at PageID 5731-32. Somehow Rigg became

[1] Bailiff to Judge Deshler 1986-88.

aware that the court had become aware of jurors and witnesses being at the same hotel. *Id.* at PageID 5732. He did not believe any record was made about it. *Id.* Asked about the outcome, he said:

> There was no real incident. There was no outcome of it. I know that – I know the sheriff's department became aware of it. They know when they have a jury out in a hotel sequestered, they're on pretty much high alert as to what's going on and who's coming and going from the hotel. And they just – somehow I got word that the jurors were staying at the same hotel. But, again, it's secured – because I've been on jury duty – sequestered jurors before – and I know no one gets on or off an elevator, up and down a stairwell without a uniformed officer standing there.

Id. at PageID 5733.

On this foundation, Monroe has erected a demand to depose all the trial jurors, the trial judge, and the judge's bailiff, and to obtain all the sheriff's office records about the sequestration or extra security matters. But Rigg's testimony does not begin to establish the materiality of the discovery sought.

The first obligation of a habeas petitioner seeking discovery is to relate the sought discovery to the elements of a claim made in the case. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). In neither the Second Motion nor the Objections has Monroe met this obligation. He cites to *Remmer v. United States*, 347 U.S. 227 (1954)(Second Motion, Doc. No. 102, PageID 7173), but there is no *Remmer* claim in the Petition. Presumably he believes that the extensive additional discovery he seeks will disclose a *Remmer* issue or something of that sort, requiring an amendment of the Petition and a remand to state court for exhaustion.

Secondly, Habeas Rule 6 permits discovery "under the Federal Rules of Civil Procedure." One of the principles embodied in those Rules since 1982 is proportionality of discovery to the

needs of the case. That principle is re-emphasized in the proposed amendments approved by the Judicial Conference earlier this month for transmission to the Supreme Court. Fed. R. Civ. P. 26(b)(2)(C)(iii) requires the Court to consider whether:

> **(iii)** the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

The stakes in capital habeas corpus cases are, of course, the highest known to the law. But that factor does not alone outweigh all other considerations. Deposing capital trial jurors many years after their service is very intrusive. Monroe has not shown how deposing them would yield any relevant evidence. His theory appears to be that somehow they were told about extra security and that would have prejudiced them against Monroe. Monroe has not even now alleged sufficient facts to support a *Remmer* hearing. And absent something like *Remmer* allegations, the jurors will not be heard to testify about what "influenced" their decision. Ohio R. Evid. 606(B).[2] There is no "constitutional impediment to enforcing Ohio's *aliunde* rule." *Hoffner v. Bradshaw*, 622 F.3d 487, 501 (6th Cir. 2010), *citing Brown v. Bradshaw*, 531 F.3d 433, 438 (6th Cir. 2008).

Monroe relies on *Michael Williams v. Taylor*, 529 U.S. 420 (2000). In that case the Supreme Court allowed an evidentiary hearing under 28 U.S.C. § 2254(e)(2) as to claims on which the petitioner had been diligent in developing the facts in the state court. *Williams* hardly supports federal discovery where a habeas petitioner has made no effort to show such diligence.[3]

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[2] It is Ohio's *aliunde* rule which is relevant because this issue was not presented to the state courts as yet and *Cullen v. Pinholster*, 563 U.S. ___, 131 S. Ct. 1388 (2011), would prohibit this Court from hearing a *Remmer* claim in the first instance.

[3] And of course *Williams* is pre-*Pinholster*.

In determining whether it is an abuse of discretion to deny this requested discovery, the Court cannot ignore the observations of the Supreme Court in *Rhines v. Weber*, 544 U.S. 269 (2005):

> Though, generally, a prisoner's "principal interest . . . is in obtaining speedy federal relief on his claims," *[Rose v.] Lundy, supra*, at 520, 71 L. Ed. 2d 379, 102 S. Ct. 1198 (plurality opinion), not all petitioners have an incentive to obtain federal relief as quickly as possible. In particular, capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death. Without time limits, petitioners could frustrate AEDPA's goal of finality by dragging out indefinitely their federal habeas review.

Id. at 277-78.

The Complete Record Issue

There is no longer any discovery issue related to how complete or incomplete the state record may be (Objections, Doc. No. 122, PageID 7390-91).

The Video-Recorded Statement Issue

An important state witness against Monroe was Shannon Boyd who gave a statement to the police which was video-recorded. Trial attorney Ronald Janes was permitted to review the recording; attorney Rigg had no recollection of having seen it (Second Motion, Doc. No. 102, PageID 7175, citing deposition testimony). Defense counsel were not given a copy of the recording.

Monroe's theory is that there might be something in that recording which would have permitted Janes or Rigg to more effectively cross-examine Boyd and their failure to do so was ineffective assistance of trial counsel. This theory leads Monroe to ask the Court to "[o]rder Respondent to produce a disc to Petitioner containing the video-taped statement of Killer Bunny[4], aka Shannon Boyd." (Second Motion, Doc. No. 102, PageID 7175.) The sole effort to show relevance to pending claims is the statement "[t]he discovery will lead to evidence relevant to Petitioner's *Strickland v. Washington*, 466 U.S. 668 (1984) claims." *Id.* at PageID 7176. Thus Monroe does not relate the demand to any specific ineffective assistance of trial counsel claim, but just to those claims in general.

The Magistrate Judge declined the request because Monroe had not demonstrated it was material to any claim (Discovery Order, Doc. No. 119, PageID 7379). Monroe objects that he need not show materiality (Objections, Doc. No. 122, PageID 7391).

To the contrary, the Sixth Circuit has held the burden of demonstrating the materiality of the information requested in habeas discovery is on the moving party. *Stanford v. Parker*, 266 F.3d 442, 460 (6th Cir. 2001), *cert. denied*, 537 U.S. 831 (2002), *citing Murphy v. Johnson*, 205 F.3d 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, 512 (6th Cir. 2003), *cert. denied*, 543 U.S. 842 (2004), *quoting Stanford*, 266 F.3d at 460. If Monroe's counsel believe this is an inappropriate "modification of the *Bracy* standard" (Objections, Doc. No. 122, PageID 7391) rather than an appropriate application of it, they must convince the Sixth Circuit of that position.

[4] Counsel will please, as a matter of civility, refrain from referring to Mr. Boyd by this pejorative nickname. The Court is certain counsel would object if the Court would refer to their client in this or other case by opprobrius nicknames.

Counsel argue that "[t]he video tape is known to be within the State's possession, could be produced at virtually no expense and with little effort, and was the subject of extensive discussion in the trial itself." (Objections, Doc. No. 122, PageID 7392.) These points, assuming their truth, do not show materiality. The Magistrate Judge agrees that habeas counsel should have the same ability to evaluate the tape that trial counsel had. However, as opposed to an order from this Court that the custodian of the tape should, at State expense, convert the tape to another medium. Therefore, habeas counsel should request of Franklin County Prosecutor an opportunity to review the tape. If the Prosecutor refuses, the Court will reconsider requiring a copy to be made in a new medium.

The Jail Records Issue

Charles White testified at trial that Monroe confessed to him while they were both incarcerated in the Franklin County Jail. Monroe claims he received ineffective assistance of trial counsel when his trial attorneys did not obtain jail records to verify where the two men were celled.

As the Discovery Order noted, this evidence is sought in relation to Ground for Relief 8(B), a claim presented to the state courts in post-conviction. (Discovery Order, Doc. No. 119, PageID 7376). In the Court's scheduling order of March 28, 2001, a deadline was set for discovery motions and Monroe made his First Motion for discovery within that deadline. *Id.* Monroe was then given over a year to complete discovery. The request for these jail records was not made in the First Motion and the Magistrate Judge denied the request because Monroe had offered no justification for the delay. *Id.* at PageID 7380.

Monroe now says that the trigger to make these records discoverable is trial attorney Janes' deposition testimony that there was no strategic reason not to check these records. That is indeed a step in the logic needed to overcome a possible "strategic decision" response to this particular ineffective assistance of trial counsel claim. But the need to see the records themselves to somehow prove it was ineffective assistance of trial counsel not to get them has been present in the case at least since ineffective assistance of trial counsel in this respect was pleaded. The request should therefore have been made in the First Motion. Counsel have still not offered a plausible reason why the request was not made then.

September 25, 2014.

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