Monroe v. Warden Ohio State Penitentiary Doc. 129

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 MOTIONS FOR EVIDENTIARY HEARING AND TO EXPAND THE RECORD

This capital habeas corpus case is before the Court on Petitioner's Objections (Doc. No. 123) to the Magistrate Judge's Decision and Order Denying Petitioner's Motions to Expand the Record and for Evidentiary Hearing (the "New Evidence Decision," Doc. No. 120). 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).

Monroe asserts the New Evidence Decision is clearly erroneous and/or contrary to law (Doc. No. 123 at PageID 7396, 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.*

Monroe's argument that the New Evidence Decision is contrary to law focuses heavily on the decision's citation of *Moore v. Mitchell*, 708 F.3d 760 (6th Cir. 2013), in which the court

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intimated, without deciding, that the Supreme Court's decision in *Cullen v. Pinholster,* 563 U.S. ___, 131 S. Ct. 1388 (2011), used jurisdictional language to describe the bar of hearing new evidence in federal habeas on claims decided on the merits in state court. Monroe emphasizes that *Moore* did not decide the bar was jurisdictional and its language about jurisdiction was dictum (Objections, Doc. No. 123, PageID 7396). Monroe relies heavily on *Allen v. Parker,* 542 Fed. Appx. 435 (6th Cir. 2013), for the proposition that the bar is not jurisdictional.

The Magistrate Judge agrees that the jurisdictional language in *Moore* is indeed dictum, as Judge Boggs made clear in *Allen*. The *Allen* court went on to decide that § 2254(d)(1) is not jurisdictional. But the Allen court went on to hold § 2254(d)(1) is mandatory, even though non-jurisdictional. The court explained:

> Section § 2254(d)(1) is therefore nonjurisdictional.
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> It is important to note that this does not mean that either § 2253(c)(2) or § 2254(d)(1) are not *mandatory*. Indeed, one of the crucial inferences taken from *Gonzalez* is that there is a distinction between a "mandatory" provision and a "jurisdictional" provision. While all jurisdictional provisions are mandatory, not all mandatory provisions are jurisdictional. *See* 132 S. Ct. at 651 ("This Court, moreover, has long rejected the notion that all mandatory prescriptions, however emphatic, are . . . properly typed jurisdictional." (internal quotation marks omitted)). Though not jurisdictional, mandatory provisions must still be followed. *See ibid.* ("If a party timely raises the COA's failure to indicate a constitutional issue, the court of appeals panel *must* address the defect . . . ." (emphasis added)). However, mandatory nonjurisdictional provisions do not strip courts of their ability consider an issue in the same way that mandatary jurisdictional provisions do.
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> While mandatory nonjurisdictional provisions are not categorically unwaivable, this does not mean that they are categorically waivable. Some mandatory provisions, such as AEDPA's one-year

> statute of limitation, are subject to deliberate abandonment by the state. *Wood*, 132 S. Ct. at 1834-35. Others, such as the deferential standard of review under § 2254(d)(1), may not be forfeited or waived. *Brown v. Smith*, 551 F.3d 424, 428 n.2 (6th Cir. 2008); *see also K & T Enters., Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 175 (6th Cir. 1996) (holding that the standard of review is a determination that the court makes for itself). We recently held the evidentiary restricts of *Pinholster* are similarly unwaivable. *Moore*, 708 F.3d at 784.

542 Fed. Appx. at 440-41. *Allen* supports rather than undercuts the Magistrate Judge's denial of an evidentiary hearing.

Monroe also relies on this Court's post-*Pinholster* grant of an expansion of the record in *Hill v. Mitchell*, 2013 U.S. Dist. LEXIS 45919 (S.D. Ohio 2013). However, this Court is bound by *Moore, supra*, as reinforced by *Allen, supra*.[1]

Monroe argues at length that he was diligent in attempting to develop the record in the state courts and was denied any discovery there. He goes so far as to argue that denying him expansion of the record amounts to a suspension of the writ (Objections, Doc. No. 123, PageID 7401). The place for that argument is in the Supreme Court, which has not recognized a state-court-diligence exception to *Pinholster*.

Monroe also relies on *Moore v. Secretary Penn. Dept. of Corrections*, 457 Fed. Appx. 170 (3rd Cir. 2012). That opinion is not binding precedent even in the Third Circuit. See Third Circuit Internal Operating Procedure Rule 5.7. It cannot be relied on by this Court to recognize an exception to *Pinholster* which the Sixth Circuit has not recognized.

[1] The *Hill* decision does not advert to *Moore*.

The Magistrate Judge remains persuaded that Monroe's motions for evidentiary hearing and to expand the record were properly denied under *Pinholster*.

October 6, 2014.

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