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

JAMES T. CONWAY, III,

Petitioner,

v.

MARC C. HOUK, Warden,

Respondent.

Case No. 2:07-cv-947
JUDGE ALGENON L. MARBLEY
Magistrate Judge Norah McCann King

OPINION AND ORDER

Petitioner, a prisoner sentenced to death by the State of Ohio, has pending before this Court a habeas corpus action pursuant to 28 U.S.C. § 2254. This matter is before the Court on Petitioner's motion to stay filing and consideration of the motion for an evidentiary hearing (ECF No. 59), Petitioner's second motion for discovery (ECF No. 60), Petitioner's unopposed motion to strike (ECF No. 62), Petitioner's motion for leave to file a second motion for discovery (ECF No. 64), Respondent's memorandum in opposition to Petitioner's motion for leave to file a second discovery motion (ECF No. 65), Respondent's opposition to Petitioner's motions to stay and for discovery (ECF No. 66), and Petitioner's reply memorandum in support of his second motion for discovery (ECF No. 68).

I. ECF NOS. 59, 60, 62, 66

The Court recently issued orders conditionally granting Petitioner's motions to expand the record with documents and materials uncovered during the course of discovery permitted by this Court. (ECF Nos. 51, 55). The Court also directed Petitioner to file a motion for an evidentiary hearing. (ECF No. 58). In light of his second motion for discovery, (ECF No. 60), Petitioner requested a stay of the deadline for the filing of a motion for an evidentiary hearing. (ECF No. 59). However, Petitioner has now moved to strike his own motion to stay and second motion for discovery. (ECF No. 62). That motion to strike is unopposed. Petitioner explains that, "[a]fter discussions with counsel for Respondent, it was mutually agreed that both motions should be edited and resubmitted under different titles, [] which Conway is filing concurrently

with this motion." (ECF No. 62, at 1.) For good cause shown, because Respondent does not oppose the motion, and because no prejudice or undue delay are apparent, the Court concludes that Petitioner's motion is well taken.

Petitioner's motion to strike, (ECF No. 62), is **GRANTED**. The Clerk is **DIRECTED** to **STRIKE** Petitioner's motion for leave to stay the filing of his motion for an evidentiary hearing, (ECF No. 59), and Petitioner's second motion for discovery, (ECF No. 60).

II. ECF NO. 63

The Court turns now to Petitioner's motion for an extension of time to file a motion for an evidentiary hearing. (ECF No. 63). Petitioner asks that the date for filing a motion for an evidentiary hearing be extended until after the resolution of his motion for leave to file yet another motion for discovery. Petitioner explains that, should he be granted leave to conduct additional discovery, the expected additional information will be necessary to the Court's consideration of any motion for an evidentiary hearing. (ECF No. 63, at 4). Petitioner represents that Respondent does not oppose the motion for an extension of time, but will oppose any motion for leave to file another motion for discovery. (ECF No. 63, at 3).

For good cause shown, because Respondent does not object, and in the interests of economy of resources, the Court finds Petitioner's motion to be well taken. Petitioner's motion for an extension of time to file a motion for an evidentiary hearing, (ECF No. 63), is **GRANTED**.

III. ECF NO. 64

Petitioner moves for leave to file another motion for discovery, (ECF No. 64),[1] and Respondent opposes the motion, (ECF No. 65). Petitioner filed a reply in support on May 4, 2011. (ECF No. 68). Petitioner explains that he seeks leave to file a motion for discovery because "the first scheduling order appears to contemplate only one discovery motion...." (ECF

[1]The record is somewhat confused by Petitioner's reference in this motion to a "Second Motion for Discovery." Petitioner's actual *Second Motion for Discovery*, (ECF No. 60), was, as noted *supra*, ordered stricken on Petitioner's own motion.

No. 64, at 2). Respondent opposes the motion for leave, arguing that Petitioner "has not shown good cause why, over the Warden's objection, the Court should revert this case to its status of over 700 days ago." (ECF No. 65, at 1).

Respondent bases his opposition primarily on the recent decision of the United States Supreme Court in *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011). "[W]here a state court adjudicated the merits, federal review under 28 U.S.C. §2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." (ECF No. 65, at 3-4 (citing *Pinholster*, 2011 U.S. LEXIS 2616, at *20-27)). Respondent also notes that one of the claims upon which Petitioner seeks new discovery, his fourth ground for relief, was not fairly presented to the state courts. (ECF No. 29, at 35). Although this Court previously denied Respondent's motion to dismiss the claim as procedurally defaulted, pending consideration of any good faith, colorable cause and prejudice arguments that Petitioner might offer, Respondent now contends that the only basis for cause that Petitioner might present – appellate counsel ineffectiveness – has been presented to neither the state courts nor this Court. "[A]nd so," Respondent asserts, "such a claim is unavailable to serve as cause and prejudice to excuse the default." (ECF No. 65, at 5).

According to Petitioner, Respondent misconstrues the holding of *Pinholster;* indeed, Petitioner takes the position that "*Pinholster* supports the substance of some of Petitioner's discovery requests." (ECF No. 68, at 1). First, Petitioner urges the Court to reject Respondent's implicit argument that, if the Court lacks authority to consider evidence to which the state courts were not privy, then the Court necessarily lacks authority to grant any motion for leave to conduct discovery. According to Petitioner, *Pinholster* did not address, much less undermine, federal courts' ability to authorize discovery, to hold evidentiary hearings, and to permit factual development for reasons other than supporting constitutional claims. Petitioner also states his intention, once he develops facts through discovery, to ask this Court to hold these proceedings in abeyance so that he may present those new facts to the state courts. Under those

circumstances, Petitioner reasons, *Pinholster* would not bar this Court's (eventual) consideration of those facts. (ECF No. 68, at 4).

Petitioner also argues that, unlike the petitioner in *Pinholster*, Petitioner received little state court review because of the inadequacies of Ohio's postconviction review process. (*Id*. at 5-11). Specifically, Petitioner contends that Ohio courts do not permit discovery in postconviction proceedings as a matter of course and do not authorize an evidentiary hearing unless petitioners document the need for a hearing. By way of contrast, Petitioner argues, the California courts in *Pinhoster* did not impede Pinholster's ability to develop the factual record; Pinholster therefore entered federal habeas corpus proceedings positioned differently than Petitioner. (*Id*. at 11-12). Furthermore, and noting that *Pinholster* prohibits consideration of new evidence only as to claims that the state courts "adjudicated" on the merits, Petitioner argues that the Ohio courts' rulings on Petitioner's postconviction claims were not "adjudications" for purposes of § 2254(d)(1). (*Id*. at 14-17). Indeed, Petitioner also argues that the decisions of the Ohio courts on Petitioner's postconviction claims were not even reasonable state court decisions.

In *Pinholster*, the Supreme Court granted *certiorari* in order to resolve, *inter alia*, the following question: "whether review under § 2254(d)(1) permits consideration of evidence introduced in an evidentiary hearing before the federal habeas court." 131 S.Ct. 1388, 1398 (2011). The Supreme Court had before it a case in which the lower federal courts had held, based on evidence developed during the federal habeas corpus proceedings, that the California courts' decision rejecting Pinholster's ineffective assistance of counsel claim was contrary to or involved an unreasonable application of clearly established federal law and warranted habeas corpus relief. The Supreme Court reversed that holding, reasoning "that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Id*. Noting that "review under § 2254(d)(1) focuses on what a state court knew and did," the Supreme Court remarked that, "[i]t would be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law

to facts not before the state court." *Id*. at 1399. "[H]old[ing] that evidence introduced in federal court has no bearing on § 2254(d)(1) review," the Supreme Court made clear that, "[i]f a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." *Id*. at 1400.

The United States Court of Appeals for the Sixth Circuit has stated, without further elaboration, that "[o]ur review is, as the Supreme Court recently made clear, 'limited to the record that was before the state court.' " *Bray v. Andrews*, No. 09-4151, 2011 WL 1544740, at *4 (6th Cir. Apr. 26, 2011) (quoting *Pinholster*, 131 S.Ct., at 1398). The Sixth Circuit went on to note that, "[i]f Bray is to 'overcome the limitation of § 2254(d)(1),' she must do so 'on the record that was before the state court.' " *Id*. (quoting *Pinholster*, 131 S.Ct., at 400). In *Trimble v. Bobby*, No. 5:10-cv-149, 2011 WL 1527323 (N.D. Ohio Apr. 19, 2011), the district court addressed the reach of *Pinholster* in the context of a petitioner's motion for conveyance in order to obtain medical tests intended to support his claim of ineffective mitigation-phase assistance of counsel – tests denied the petitioner by the state courts. According to the Northern District of Ohio, "*Pinholster* indicates that the Court cannot now consider the contents of outside discovery in determining if the decision of the state court was an 'unreasonable application of [] clearly established federal law,' so long as the state court ruling was made on the merits." *Trimble*, at *2.

In addressing the evidence that a federal habeas court may consider, *Pinholster* did not, strictly speaking, alter or even speak to the standards governing discovery set forth in Rule 6 of the Rules Governing Section 2254 Cases and *Bracy v. Gramley*, 520 U.S. 899 (1997)(habeas corpus petitioner is entitled to discovery upon showing of good cause). That is reason enough to refrain from invoking *Pinholster*'s restrictions at the discovery phase. In any event, it may turn out that Petitioner never seeks to add to the record information learned through discovery or that the Court may determine, independent of the new evidence and based solely on the evidence before the state court, that the state courts' decisions contravened or unreasonably applied

clearly established federal law or involved an unreasonable determination of the facts before them. There is case law suggesting that, under those circumstances, a federal court may consider additional evidence to determine whether habeas corpus relief should issue. *Skipwith v. McNeil*, No. 09-60361, 2011 WL 1598829, at * (S.D. Fla. Apr. 28, 2011) (concluding on basis of state court record that state court's decision involved unreasonable factual determination based on record and that district court could conduct evidentiary hearing and consider new evidence in determining whether claim was meritorious); *Hearn v. Ryan, et al.*, No. CV 08-448-PHX-MHM, 2011 WL 1526912, at *2 (D. Ariz. Apr. 21, 2011) (holding that where federal court finds, based solely on state court record, that state court's decision was unreasonable, then federal court could hold evidentiary hearing to determine whether claim warrants habeas relief). Finally, as noted *supra*, Petitioner represents that "[w]hen all of the factual development is completed, Petitioner intends to ask the Court to hold these proceedings in abeyance while he returns to state court to exhaust all of the new facts that he identified during the litigation in this court." (ECF No. 68, at 4). *See Rhines v. Weber*, 544 U.S. 269, 277 (2005). Without expressing an opinion on the propriety of such a procedure, the Court notes that, should Petitioner exhaust additional claims based on new facts in the state courts, then *Pinholster* would not preclude this Court's consideration of those facts.

Most courts that strictly applied *Pinholster* were squarely presented with the issue of admissibility of evidence not before the state courts. *See, e.g., Atkins v. Clarke*, No. 10-1870, 2011 WL 1419127, at *1 (1st Cir. Apr. 13, 2011) ("The Supreme Court's new decision in *Cullen v. Pinholster*, No. 09-1088, 2011 WL 1225705 (Apr. 4, 2011), requires that we reject this appeal from a denial of a request for an evidentiary hearing in relation to a petition for habeas corpus."); *see also Jackson v. Kelly*, Nos. 10-1, 10-3, 2011 WL 1534571, at *6 (4th Cir. Apr. 25, 2011) (holding, on appeal from district court's decision granting writ as to penalty-phase claims following an evidentiary hearing, that "[i]n light of *Cullen*'s admonition that our review is limited 'to the record that was before the state court that adjudicated the claim on the merits,'

(citation omitted), we avoid discussion of the evidence taken in the federal evidentiary hearing."); *Carter v. Secretary, Dept. of Corrections*, No. 6:09-cv-468-Orl-31KRS, 2011 WL 1842885, at *1 (M.D. Fla. May 16, 2011) (holding, upon the state's motion to dispense with an evidentiary hearing, that, "[b]ecause claim nine was denied on the merits, this Court concludes, pursuant to *Pinholster*, that an evidentiary hearing is not appropriate."); *U.S. ex rel. Brady v. Hardy*, No. 10 C 2098, 2011 WL 1575662, at *2 (N.D. Ill. Apr. 25, 2011) (holding, upon the state's motion to reconsider the court's decision to hold an evidentiary hearing, that "*Pinholster* requires this Court to vacate its decision to hold an evidentiary hearing on the merits of Brady's ineffective assistance claim involving trial counsel's failure to investigate and call certain exculpatory witnesses...."). This Court is not currently presented with that issue.

Because the filing of a second motion for discovery is restricted by neither the local rules of this Court nor the Federal Rules of Civil Procedure, the Court finds Petitioner's motion for leave to file a second motion for discovery to be well taken. Moreover, the Court concludes that its discretion is better exercised in not foreclosing at this stage the possibility of discovery. Were the Court to permit discovery only after it appears that *Pinholster* would not bar consideration of new evidence, the Court would be adding months of delay to the proceedings, a result that could be avoided by simply permitting discovery that otherwise appears to be warranted under Rule 6. The Court recognizes the downside of its position – namely the possibility that time and money will be expended in the discovery of evidence that this Court might never consider. That is a risk the Court is willing to take. In a death penalty habeas corpus case, the Court prefers to err on the side of gathering too much information rather than too little.

To be clear, however, nothing in this order should be construed as suggesting that Petitioner's discovery requests will be granted, that Petitioner will be entitled to a stay and abeyance under *Rhines v. Weber*, or that *Pinholster* will not preclude expansion of the record or an evidentiary hearing relating to information gleaned through discovery permitted by this Court.

Petitioner's motion for leave to file a second motion for discovery, (ECF No. 64), is

therefore **GRANTED**.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Petitioner's motion for leave to file a second motion for discovery, ECF No. 64. The Clerk is **DIRECTED** to detach the exhibit ECF No. 64-1, attached to Petitioner's motion for leave, ECF No. 64, and file ECF No. 64-1 as "Petitioner's Second Motion for Discovery," under its own docket number and with the date that this order is docketed. Respondent **SHALL HAVE** thirty (30) days to respond to that motion and Petitioner may have fifteen (15) days to reply.

Petitioner's motion to strike, ECF No. 62, is **GRANTED**. The clerk is **DIRECTED** to **STRIKE** Petitioner's motion for leave to stay the filing of his motion for an evidentiary hearing, ECF No. 59, and Petitioner's second motion for discovery, ECF No. 60. Petitioner's motion for an extension of time to file a motion for an evidentiary hearing, ECF No. 63, is **GRANTED**. The Court will establish a briefing schedule relating to any eventual motion for an evidentiary hearing after it resolves Petitioner's second motion for discovery.

IT IS SO ORDERED.

s/ Norah McCann King
NORAH McCANN KING
United States Magistrate Judge

May 26, 2011