

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

JAMES T. CONWAY, III,

Petitioner,

-vs-

MARC C. HOUK, Warden,

Respondent.

:

Case No. 3:07-cv-345

:

District Judge Timothy S. Black
Magistrate Judge Michael R. Merz

:

**DECISION AND ORDER GRANTING MOTION TO EXPAND SCOPE
OF REPRESENTATION**

This capital habeas corpus case is before the Court on Petitioner's [Second] Renewed Motion to Expand Appointment to allow his habeas counsel to represent him in ongoing state court proceedings to exhaust previously unexhausted claims (Doc. No. 197). The Warden opposes the Motion (Doc. No. 198) and Conway has filed a reply in support (Doc. No. 200). This is a non-dispositive pre-judgment motion within the decisional authority of a Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(A).

Relevant Procedural History

On September 6, 2011, this Court stayed these proceedings pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), to allow Conway to return to state court to exhaust his Third and Fourth Grounds for Relief (Doc. No. 133). In the same Order, the Court denied Conway's request for an evidentiary hearing to present evidence on those claims on the basis of *Cullen v. Pinholster*,

563 U.S. ___, 131 S.Ct. 1388 (2011). The Warden opposed the stay on the basis that these two Grounds for Relief were meritless, but was unwilling to waive the exhaustion defense. Neither party appealed and Conway filed his petition for post-conviction relief in the Franklin County Common Pleas Court on November 1, 2011 (Status Report, Doc. No. 135, PageID 3404).

On November 8, 2011, Conway moved this Court to expand the appointment of his habeas counsel to include the state court proceedings (Doc. No. 136). The Warden opposed the Motion on the basis of *Irick v. Bell*, 636 F.3d 289 (6th Cir. 2011). The Court denied the Motion on that basis, holding:

In *Irick, supra*, the Sixth Circuit held § 3599(e) did not authorize expanding the scope of habeas counsel's appointment to state court proceedings subsequent to the federal habeas appointment if state law provided for appointment of counsel. In *Hill v. Mitchell*, 2009 U.S. Dist. LEXIS 87542 (S.D. Ohio Sept. 4, 2009), cited approvingly in *Irick*, Judge Sargus of this Court held that § 3599(e) did not authorize appointment in an *Atkins* post-conviction proceeding in Ohio under Ohio Revised Code § 2953.21 because Ohio Revised Code § 2953.21(I) required appointment of counsel in such a case. The statute in question is not limited to *Atkins* claims, but applies to post-conviction petitions filed by anyone sentenced to death.

(Decision and Order, Doc. No. 139, PageID 3417.) No appeal was taken of that Order, but on May 21, 2012, Conway filed a renewed motion to expand the scope of representation (Doc. No. 150). He noted that the state trial court had dismissed his post-conviction petition and held at the same time that he was not entitled to appointment of counsel because he no longer had a pending post-conviction petition. *Id.* PageID 4164. This Court again denied appointment “without prejudice to renewal if the Franklin County Court of Appeals does not reverse the denial of appointment of counsel by the Franklin County Common Pleas Court.” (Decision and Order, Doc. No. 161, PageID 4758.)

The Franklin County Court of Appeals affirmed the dismissal of Conway's successive post-conviction petition and expressly held he was not entitled to appointment of counsel for that proceeding, stating:

VII. RIGHT TO COUNSEL

[*P70] In appellant's ninth and final assignment of error, appellant contends that the trial court erred by denying his motion for appointment of counsel in aid of his second petition for post-conviction relief.

[*P71] [R.C. 2953.21\(I\)\(1\)](#) addresses the appointment of counsel in relevant part as follows:

If a person sentenced to death intends to file **a petition under this section**, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel
(Emphasis added.)

[*P72] As the State correctly observes, the mandatory appointment of counsel applies only to a petitioner who files a petition under [Section 2953.21 of the Ohio Revised Code](#). In other words, appointment of counsel is required only in the case of a timely-filed first petition for post-conviction relief. If the General Assembly had intended second or successive petitioners to have the same right to counsel, it would have included a reference to R.C. 2953.21 in [division \(I\)](#), or employed the language "under this chapter," instead of "under this section."

[*P73] Accordingly, appellant's ninth assignment of error is overruled.

State v. Conway, 2013-Ohio-3741, 2013 Ohio App. LEXIS 3864 (10th Dist. Aug. 29, 2013).

Analysis

The proper scope of habeas counsel's appointment is set forth in 18 U.S.C. § 3599(e) which provides:

Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

Conway relies on the interpretation of § 3599(e) in *Harbison v. Bell*, 556 U.S. 180 (2009). While the holding in *Harbison* relates only to state clemency proceedings, the majority in that case also concluded:

Pursuant to § 3599(e)'s provision that counsel may represent her client in "other appropriate motions and procedures," a district court may determine on a case-by-case basis that it is appropriate for federal counsel to exhaust a claim in the course of her federal habeas representation. That is not the same as classifying state habeas proceedings as "available post-conviction process" within the meaning of the statute.

560 U.S. at 190, n. 7. Applying both *Pinholster, supra*, and *Rhines, supra*, this Court determined that it was appropriate for federal counsel to exhaust the Third and Fourth Grounds for Relief in the Ohio courts. *Irick v. Bell*, 636 F.3d 289 (6th Cir. 2011), does not preclude expanding the scope of representation as requested because the Franklin County Court of Appeals has now

decided that appointment of counsel is not provided under Ohio law for post-conviction petitions under Ohio Revised Code § 2953.23. *State v. Conway, supra*. As noted by Petitioner, his request for expansion of the scope of representation is parallel to that recently approved by this Court in *Gapen v. Bobby*, 2013 U.S. Dist. LEXIS 145415 (S. D. Ohio Oct. 8, 2013).

Accordingly, the Motion is GRANTED and the scope of federal habeas counsels' appointment is expanded, effective as of September 6, 2011, to include the completed proceedings in the Franklin County Common Pleas Court and the Franklin County Court of Appeals and any subsequent appeal of the court of appeals' decision to the Ohio Supreme Court. November 22, 2013.

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