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

RICHARD BAYS,

:

Petitioner, Case No. 3:08-cv-076

: District Judge Thomas M. Rose

-vs- Magistrate Judge Michael R. Merz

WARDEN, Ohio State Penitentiary,

:

Respondent.

DECISION AND ORDER

This capital habeas corpus case is before the Court on Respondent's Motion to Vacate the Pending Evidentiary Hearing and Discovery, to Reconsider Prior Grant of an Evidentiary Hearing an [sic] Discovery, and to Decide Bays' Habeas Appeal on the State Court Record, in Light of *Cullen v. Pinholster*, 563 U.S. ___ (2011) (Doc. No. 94). Petitioner opposes the Motion (Doc. No. 97) and seeks to reconvene the recessed evidentiary hearing to continue the cross-examination of Dr. Barbra Bergman and to present the expert testimony of Dr. Stephen Greenspan (Doc. No. 98).

On September 3, 2010, the Magistrate Judge granted an evidentiary hearing on Petitioner's First, Second, and Sixth Grounds for Relief (Doc. No. 65). Respondent objected (Doc. No. 71), but the District Judge overruled those Objections (Doc. No. 74) and a hearing was conducted on January 20-21, 2011 (Transcripts at Doc. Nos. 91, 92.) The Magistrate Judge permitted Respondent to call Dr. Barbra Bergman, a psychologist, as a rebuttal witness over Petitioner's opposition (Doc. Nos. 82-87). The Magistrate Judge recessed the hearing to permit Petitioner to depose Dr. Bergman.

Before the hearing could be reconvened, Respondent sought reconsideration based on the April 4, 2011, decision of the Supreme Court in *Cullen v. Pinholster*, 563 U.S. ___, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011).

It is undisputed between the parties that Petitioner's First, Second, and Sixth Grounds for Relief were adjudicated on the merits by the Ohio courts. (*See* Warden's Reply, Doc. No. 101, PageID 1380, n. 2.) *Pinholster* clearly holds that with respect to such claims, a federal habeas court must decide the questions presented by 28 U.S.C. § 2254(d)(1) and (2) on the basis of the record before the state courts.

Accepting that holding, Petitioner contends that even if *Pinholster* controls consideration of the evidence gathered in federal habeas, it does not prevent him from developing and presenting that evidence (Petitioner's Opposition, Doc. No. 97, PageID 1245). He argues this position is consistent with Justice Thomas's conclusion that *Pinholster* does not render § 2254(e)(2) meaningless, that a habeas petitioner who can satisfy § 2254(d) and was diligent in the state courts may be eligible for an evidentiary hearing. *Pinholster*, 131 S. Ct. at 1400-1401. Because this Court had already found Petitioner to have been diligent in the state courts, Petitioner reasons he can proceed with his evidentiary hearing despite *Pinholster*. Petitioner does not answer the question why a court would want to take evidence it cannot consider.

Petitioner also argues that he can have an evidentiary hearing to develop new evidence which would disprove "subsidiary" factual determinations made by the state courts. (Petitioner's Opposition, Doc. No. 97, PageID 1245-1247, relying on *Lambert v. Blackwell*, 387 F.3d 210 (3rd Cir. 2004); *Valdez v. Cockrell*, 274 F.3d 941 (5th Cir. 2001); and *Williams v. Beard*, 637 F.3d 195 (3rd Cir. 2011).) Respondent does not reply to this argument.

This Court agrees that the *Lambert* Court's reading of 28 U.S.C. § 2254(e)(1) is at least arguable. How could the presumption of correctness provided in § 2254(e)(1) be overcome by "clear and convincing evidence" unless the petitioner had some forum in which to present that "clear and convincing evidence," assuming such evidence was not already present in the state court record and that the petitioner was not precluded from a hearing by the § 2254(e)(2) due diligence requirement? On the other hand, the distinction between "subsidiary" factual findings and factual "determinations" is also unclear. As the *Lambert* Court acknowledged, "a comprehensive interpretation of AEDPA's factual review scheme has yet to emerge from the federal courts." *Lambert*, 387 F.3d at 235. That observation remains true in 2011 after *Pinholster*.

The Third Circuit adhered to *Lambert* in its *Williams* decision, but that opinion was handed down in March, 2011, before *Pinholster*. At this stage in the development of lower courts' understanding of *Pinholster*, this Court is not certain whether § 2254(e)(1) will be thought by the appellate courts to provide a basis for an evidentiary hearing to "undermine" "subsidiary" state court factual findings. Petitioner here has stated his reliance on *Lambert* hypothetically – not arguing that any particular evidence presented at the evidentiary hearing already held undermines any specific state court finding of fact. (*See* Petitioner's Opposition, Doc. No. 97, PageID 1246.)

Dr. Bergman was presented by the State as a rebuttal witness, presumably to the evidence presented by Petitioner in his case in chief. The Court will not be considering Petitioner's evidence in chief at the evidentiary hearing in deciding the § 2254(d)(1) or (d)(2) issues, so it is unclear why Petitioner now wishes to complete his cross-examination of Dr. Bergman, at least as to those issues. Petitioner has also not even attempted to justify calling Dr. Greenspan on any basis.

Therefore, Respondent's Motion to Vacate is granted and Petitioner's Motion to Reconvene

is denied, subject to reconsideration if Petitioner can demonstrate some purpose for Dr. Bergman's testimony at this stage of the case. The Court will proceed first to decide the § 2254(d)(1) and (d)(2) issues. In accordance with the schedule adopted by the Court initially, it is hereby ORDERED that Petitioner filed his reply/traverse not later than September 7, 2011. If Petitioner relies on the analysis in *Lambert, supra*, to attempt to meet his burden under 28 U.S.C. § 2254(d)(1), he shall do so explicitly in the reply/traverse.

July 6, 2011.

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