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

- vs - District Judge Thomas M. Rose
Magistrate Judge Michael R. Merz

WARDEN, Ohio State Penitentiary,

:

Respondent.

SUPPLEMENTAL OPINION; SUPPLEMENTAL REPORT AND RECOMMENDATIONS ON MOTION TO CERTIFY

This capital habeas corpus case is before the Court on Petitioner's Objections (Doc. No. 162) to the Magistrate Judge's Decision and Order of August 22, 2013, denying Petitioner leave to amend, denying a stay pending exhaustion, and recommending the Court decline to certify a question to the Ohio Supreme Court (hereinafter, the "Decision," Doc. No. 160). The Warden has responded to the Objections (Doc. No. 165). With Court permission and without opposition by the Warden, Bays filed a Reply in Support of Objections (Doc. No. 168). District Judge Rose has recommitted the matter for further analysis (Doc. No. 163).

Bays' Motion sought to add two Grounds for Relief:

> **Ground Fourteen:** Richard Bays is mentally retarded, and as a result his execution is barred under *Atkins v. Virginia*, 536 U.S. 304 (2002).
>
> **Ground Fifteen:** Richard Bays was deprived of his constitutional right to the effective assistance of counsel in his post-conviction *Atkins* proceeding.

(Motion, Doc. No. 153-1, PageID 6587-88.)

The Magistrate Judge denied the Motion on the bases that:

(1) Ground Fifteen does not state a claim upon which habeas corpus relief could be granted (Decision, Doc. No. 160, PageID 7433-35).

(2) Both proposed Grounds for Relief are barred by the AEDPA statute of limitations *Id.*, PageID 7435-40.

(3) The dilatory motive of Bays' counsel in waiting nearly five years to move to amend also bars the amendment. *Id.*, PageID 7440-41.

(4) Bays has not proved his "actual innocence of the death penalty" so as to excuse the delay. *Id.*, PageID 7441-42.

(5) Bays' asserted mental incompetence is not an "extraordinary circumstances" sufficient to toll the limitations period. *Id.*, PageID 7442.

The Magistrate Judge also recommended the Warden's procedural default defense to these two claims be found to be premature because the asserted default had not yet been enforced against Bays in the Greene County Common Pleas Court. *Id.* at PageID 7443. Finally, the Magistrate Judge recommended[1] that the question whether the State of Ohio "provides a corrective process for claims of ineffective assistance of post-conviction *Atkins* counsel" not be certified to the Ohio Supreme Court. *Id.* at PageID 7444.

Bays objects to every determination made by the Magistrate Judge except that decision on the procedural default defense would be premature.

[1] The Decision reads "the Court should decline to certify . . . ." Although the caption does not indicate a recommendation is being made on a dispositive motion, the Magistrate Judge made a recommendation rather than a decision on this branch of the Motion because, as a matter of Ohio law, a Magistrate Judge can only certify a question to the Ohio Supreme Court in a case in which he or she is exercising plenary jurisdiction under 28 U.S.C. § 636(c). Ohio S. Ct. R. Prac. 9.03(A).

Failure of Proposed Ground Fifteen to State a Claim for Relief

In his proposed Fifteenth Ground for Relief, Bays asserts he has a constitutional right to the effective assistance of counsel in post-conviction *Atkins* proceedings and he was deprived of that right when his post-conviction *Atkins* counsel voluntarily withdrew his *Atkins* claim.

Atkins was decided June 20, 2002, and held that mental retardation was an absolute bar to execution, overruling *Penry v. Lynaugh*, 492 U.S. 302, 305 (1989). After that date it would be ineffective assistance of capital trial counsel to fail to raise mental retardation as a defense if a defendant had a colorable *Atkins* claim. Bays argues that the same right exists for capital defendants convicted and sentenced before *Atkins* when they present an *Atkins* claim in a post-conviction proceeding in Ohio under *State v. Lott*, 97 Ohio St. 3d 303 (2002).

Bays' sole reliance for the existence of the claimed right is on *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012). There the Tenth Circuit held, as Bays argues, that there is a constitutional right to effective assistance of counsel in *Atkins* proceedings, "a right that stems directly from, and is a necessary corollary to *Atkins*. For that reason we further hold that the right to counsel in *Atkins* proceedings is 'clearly established Federal law, as determined by the Supreme Court of the United States.'" *Id.* at 1185. Neither Bays nor the *Hooks* Court points to any other court which has reached this conclusion.

Moreover, the *Hooks* Court did not deal with the Warden's principal objection, to wit, that even if there is a constitutional right to effective assistance of counsel in a post-conviction *Atkins* proceeding, this Court lacks authority to grant habeas relief on that basis. 28 U.S.C. § 2254(i) expressly provides "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding

arising under section 2254." The *Hooks* Court did not discuss § 2254(i) at all, presumably because it decided that counsel was not ineffective in presenting the *Atkins* claim.[2] Bays has made no argument and presented no authority to the effect that § 2254(i) is unconstitutional. Congress generally has authority to govern the scope of the writ. *Ex parte Bollman,* 8 U.S. 75, 93 (1807)(Marshall, Ch. J.); *Brown v. Allen*, 344 U.S. 443, 499 (1953)(Frankfurter, J.)

In the original Motion, Bays made a conclusory Equal Protection claim which the Decision rejected (Doc. No. 160, PageID 7434-35). In his Objections, Bays argues "[w]hether the Constitution requires Ohio to provide effective *Atkins* counsel is beside the point because Ohio has already extended that right to some Ohio defendants." (Objections, Doc. No. 162, PageID 7460.) Bays' counsel then go on to elaborate the Equal Protection claim at considerable length. *Id.* at PageID 7460-66. The gist of the argument is that if post-*Atkins* defendants with a mental retardation claim have a trial right to effective assistance of counsel in presenting that claim, then it is a denial of equal protection not to give the same right to capital defendants who were convicted before the *Atkins* decision.

The fundamental flaw in this claim is in identifying the right in question. The right to effective assistance of counsel in particular criminal proceedings is granted by the Sixth Amendment to the United States Constitution, not by the State of Ohio. Ohio does not choose which proceedings are covered by that right. The State of Ohio does not discriminate at all between those *Atkins* defendants who presented the issue before or after *Atkins* was decided: if indigent, both are provided with appointed counsel, as was Bays in this case. An Equal Protection violation requires some deliberate intentional action by the State, but Ohio did not

[2] The *Hooks* Court also faced a different procedural situation. Hooks' *Atkins* claim was tried to a jury, whereas in Ohio retroactive *Atkins* claims are, per *Lott, supra*, dealt with in post-conviction proceedings under Ohio Revised Code § 2953.21. As noted in the Decision, this procedure was implicitly approved by the Supreme Court in *Bies v. Bobby*, 556 U.S. 825 (2009).

discriminate against post-conviction *Atkins* claims by directing the Ohio Public Defender not to bring them or to litigate them unprofessionally. There is no "state action" discriminating between these two classes of people and therefore no Equal Protection violation.

Because 28 U.S.C. § 2254(i) expressly prohibits this Court from granting habeas relief for ineffective assistance of counsel in a post-conviction proceeding, Bays should not be permitted to add his proposed Fifteenth Ground for Relief.

Both Proposed Grounds for Relief Are Barred by the Statute of Limitations

Bays' Motion to Amend asserted it was timely because it was made within one year of discovering its factual predicate in the January 28, 2013, Affidavit of Dr. Gale Roid. The Decision rejected this assertion on the grounds that Bays' counsel had not been diligent in discovering it because the issue of Bays' mental retardation had been in the case since before he was tried in 1995 (Doc. No. 160, PageID 7436-39).

Bays objects that somehow the "confidential nature of IQ testing and scoring materials prevented him from discovering the scoring errors in his 2007 test" until another expert Bays had engaged, Dr. McNew, referred Bays to Dr. Roid on November 13, 2012 (Objections, Doc. No. 162, PageID 7469). McNew had first been contacted September 12, 2012, and retained October 1, 2012. *Id.*

In deciding Bays' counsel had not exercised due diligence, the Decision noted that counsel admitted questioning the prior expert evaluations from the initial *Atkins* proceedings (Doc. No. 160, PageID 7437, quoting Reply Memo, Doc. No. 159, PageID 7416). While counsel have shown they acted with some dispatch from the time they hired McNew (October 1, 2012)

until the time they filed the Motion to Amend (May 24, 2013), they have not shown they acted with reasonable dispatch in following up on their original questioning of the prior evaluations during the period from the Notice of Intent (March 6, 2008) to the date the Motion to Amend was filed more than five years later.

The Magistrate Judge also concluded that Bays' failure to raise an *Atkins* claim in these proceedings was not excused by the fact that he was initially represented here by Ruth Tkacz, the same lawyer whose ineffectiveness in the *Atkins* proceeding is being claimed. The Decision found that was so because Melissa Callais ceased to have a potential conflict of interest with Ms. Tkacz when she left the Ohio Public Defender's Office (where she and Ms. Tkacz had been employed together) and joined the Capital Habeas Unit of the Federal Defender's Office on September 29, 2008. Assuming there is a conflict of interest between two attorneys in the same public defender office, it would have ended at that point. "Bays objects to this determination because it would have required a junior attorney to assert a claim of ineffectiveness against lead counsel on the case." (Objections, Doc. No. 162, PageID 7470.) Bays cites no authority for the proposition that a lawyer's duty to zealously protect her client's constitutional rights is excused by the fact this would involve her in a conflict of positions with another lawyer in the case, even "lead" counsel. In any event, any such conflict would have disappeared when Ms. Tkacz withdrew as counsel on July 26, 2010, almost three years before the Motion to Amend was filed (Doc. No. 62).[3]

Bays also objects that the "legal basis" of his claim "has been evolving since last year, when the U.S. Supreme Court issued its decision in *Martinez*" *v. Ryan*, 566 U.S. ___, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (Mar. 20, 2012). If *Martinez* had actually recognized a new constitutional right – which it did not -- and made it retroactively applicable, the time within

[3] Ms. Takacz withdrew for "medical reasons" and has since died.

which to file a pre-existing claim based on *Martinez* would have expired March 20, 2013, more than two months before the instant Motion. Nothing in the AEDPA jurisprudence provides a fourteen-month statute of limitations for claims which are "evolving."

The Amendment Is Also Barred by Bays' Dilatory Motive in Bringing It

The general standard for considering a motion to amend under Fed. R. Civ. P. 15(a) was enunciated by the United States Supreme Court in *Foman v. Davis*, 371 U.S. 178 (1962):

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of any allowance of the amendment, futility of amendment, etc.
> -- the leave sought should, as the rules require, be "freely given."

371 U.S. at 182.

In the Decision the Magistrate Judge found, apart from the statute of limitations bar, that Bays had a dilatory motive in moving to amend which weighed against allowing the amendment (Doc. No. 160, PageID 7440-41). Bays objects that this factual determination was "impermissibly made without receiving evidence relevant to counsel's motive and conduct." (Objections, Doc. No. 162, PageID 7472.)

The facts on which the Magistrate Judge relied are patent on the face of the case record. There is no good reason why the testimony of counsel about motive would be any more persuasive than the circumstantial evidence in the record. Bays had an experienced capital attorney – Ruth Tkacz – who filed an *Atkins* claim on his behalf and litigated it vigorously to the

point of obtaining a reversal from the state court of appeals for appointment of an expert on mental retardation. Having examined the expert's report, Ms. Tkacz voluntarily dismissed Bays' *Atkins* post-conviction proceeding. Then she and another experienced capital attorney, Melissa Callais, filed the Petition here in 2008 without making an *Atkins* claim. More than five years later, after the District Judge had decided the merits of this case, after Ms. Callais/Jackson had withdrawn, and after Ms. Tkacz had died and could no longer be questioned about her professional judgment in dismissing the claim, Bays moved to add these two claims. He now says that after Ms. Barnhart took over the case, she had to spend time familiarizing herself with the case and the four experts involved had to "manage a variety of competing demands on their time," and a new investigator substituted for the old investigator. All of these claims are credible, but they must be viewed against the backdrop of the facts already of record. Counsel ends by stating:

> Mr. Bays's mental-retardation status is not a singular object existing in a vacuum. Understanding it and the way in which he and facts about his life interact with complicated clinical standards and practices, and scientific nuances that require extensive expertise to identify and apply, requires a sensitive and comprehensive approach. This is not something that could, or did, take place overnight. To suggest otherwise is an unfair dismissal of Mr. Bays's dignity as an individual whose Constitutional rights deserve to be heard before the government ends his life.

(Objections, Doc. No. 162, PageID 7474.)

On the afternoon of November 15, 1993, Bays beat 76-tyear-old Charles Weaver to death with a battery charger and/or stabbed him to death with a knife in an attempt to obtain money for drugs. *State v. Bays*, 87 Ohio St. 3d 15 (1999). In the ensuing twenty years, Bays has been represented by a succession of skilled and trained attorneys, all of whom knew his possible mental retardation was an issue. It is no insult to his dignity as a human being to conclude that

he had enough time prior to May 24, 2013, to raise and litigate this claim or to infer from the fact that he wants to "start over" with a new lawyer that he has a dilatory motive in seeking to amend at this late stage.

Bays' Asserted Mental Incompetence Is Not Grounds for Equitable Tolling

In the Reply in Support of the Motion, Bays argued "[t]his Court should also grant equitable tolling of the limitations period based on Bays's mental incompetence. "[A] petitioner's mental incompetence, which prevents the timely filing of a habeas petition, is an extraordinary circumstance that may equitably toll AEDPA's one-year statute of limitations." (Reply, Doc. No. 159, PageID 7423), *citing Ata v. Scutt*, 662 F.3d 736, 742 (6th Cir. 2011).

The Magistrate Judge rejected this argument, noting that Muzaffer Ata, the petitioner in the cited case, was found to have been without counsel during the time he should have filed his habeas petition and the Sixth Circuit found this grounds to excuse his untimely filing (Decision, Doc. No. 160, PageID 7442).

Bays objects that "[n]othing in *Ata* indicates that the absence of counsel is a mandatory prerequisite to equitable tolling based on mental incompetence." (Objections, Doc. No. 162, PageID 7475.) Reading *Ata* as if the absence of counsel were irrelevant makes no sense of the decision. How could the mental incompetence of a litigant who has a competent attorney possibly excuse failure to meet a filing deadline?

Furthermore, *Ata* excuses not filing during a period of mental incompetence, not mental retardation. Muzaffer Ata was a paranoid schizophrenic and suffered from other psychoses. *Ata*, 662 F.3d at 737. There is no suggestion in the *Ata* decision that mental retardation will excuse

missing a filing deadline. In fact, if mental retardation would excuse missing the statute of limitations, then the statute would never run for the mentally retarded because, by hypothesis, it has an onset before age 18 and is a permanent mental condition.

"Actual Innocence"

Bays also relies on the "actual innocence" exception to the statute of limitations recognized by the Supreme Court in *McQuiggin v. Perkins,* 569 U.S. ___, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013). The Magistrate Judge captioned one section of the Decision "Bays Has Not Established That He Is 'Actually Innocent of the Death Penalty.'" (Decision, Doc. No. 160, PageID 7441.) Bays objects if this caption means that the Magistrate Judge has determined the merits of the *Atkins* claim (Objections, Doc. No. 162, PageID 7475-76).

The text of this section of the Decision notes the filing by Bays of a motion to reopen his *Atkins* proceeding in the Greene County Common Pleas Court and this Court's intention not to interfere with that process. The Magistrate Judge did not intend to imply any decision on the merits of the *Atkins* claim except that Bays had not yet shown those merits sufficiently to overcome the statute of limitations defense.

Certification to the Ohio Supreme Court

In the Motion, Bays asked this Court to certify to the Ohio Supreme Court the question whether Ohio provides a corrective process for ineffective assistance of post-conviction *Atkins* counsel (Motion, Doc. No. 153, PageID 6583).

The Magistrate Judge declined to recommend such a certification because (1) to the extent Bays is asserting a federal constitutional claim to effective assistance of counsel in post-conviction *Atkins* proceedings, this Court had already decided that question, and (2) to the extent Bays is asserting a non-federal right to assistance of counsel in such a proceeding, that was not a concern of this Court.

Bays' objection reads in its entirety "[b]ecause all of the Magistrate Judge's reasons for declining to certify a question to the Ohio Supreme Court concerning the cognizability of his *Strickland* claim are subject to objections from Bays, Bays also objects to this determination." (Objections, Doc. No. 162, PageID 7476.) A general objection has the same effect as a failure to file altogether. *Howard v. Sec. of HHS,* 932 F.2d 505, 509 (6th Cir. 1991). The reason is that failure to focus the district court's attention on any specific issues makes the initial reference useless and undermines the purpose of the Magistrate's Act. *Id*. at 509. "A district judge should not have to guess what arguments an objecting party depends on when reviewing a magistrate's report." *Id*., *quoting Lockert v. Faulkner,* 843 F.2d 1015, 1019 (7th Cir. 1988) and citing *Branch v. Martin*, 886 F.2d 1043, 1046 (8th Cir. 1989); and *Goney v. Clark*, 749 F.2d 5, 7 (3rd Cir. 1984).

CONCLUSION

For reasons stated above, the Magistrate Judge adheres to his prior recommendations as set forth in the Decision and Order of August 22, 2013.

November 21, 2013.

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

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(d), this period is extended to seventeen days because this Report is being served by one of the methods of service listed in Fed. R. Civ. P. 5(b)(2)(C), (D), (E), or (F). Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140, 153-55 (1985).