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

LARRY GAPEN,

Petitioner, : Case No. 3:08-cv-280

- vs - District Judge Walter Herbert Rice
Magistrate Judge Michael R. Merz

DAVID BOBBY, Warden,

Respondent. :

SUPPLEMENTAL MEMORANDUM ON PETITIONER'S FIRST MOTION FOR DISCOVERY

This capital habeas corpus case is before the Court on Petitioner's Objections (Doc. No. 74) to the Magistrate Judge's Decision and Order (Doc. No. 71) granting in part and denying in part Petitioner's First Motion for Discovery (Doc. No. 51). The Warden has filed a Response to the Objections (Doc. No. 76). The General Order of Reference for the Dayton location of court permits a magistrate judge to reconsider decisions or reports and recommendations when objections are filed.

Petitioner sought the following discovery:

1. Depositions of trial counsel David Greer and Bobby Joe Cox.
2. All records of the Montgomery County Prosecutor's Office and the Montgomery Sheriff's Office relating to the homicides of Martha Madewell, Nathan Marshall, and Jesica Young.
3. Depositions of direct appeal attorneys Robert Lowe, Stephen Ferrell, and Jane Perry.
4. Depositions of all jurors and alternates.

5. Records, statistics, and documents submitted pursuant to Ohio Revised Code § 2929.021 from all Ohio counties, both before and after Petitioner's prosecution.

The Decision and Order from which Petitioner has appealed granted leave to depose attorneys David Greer, Bobby Joe Cox, Robert Lowe, Stephen Ferrell, and Jane Perry on the ineffective assistance of counsel claims. The Magistrate Judge denied discovery of the Sheriff and Prosecutor records because Petitioner had not shown any connection between the ineffective assistance claims and these records, particularly given the breadth of the request ("all records"). The Order also denies depositions of the jurors and alternates and issuance of a subpoena to the Ohio Supreme Court for records under Ohio Revised Code § 2929.021.

Petitioner has appealed on all of the items of discovery denied. The appeal does not stay the appealed order, since discovery is a nondispositive pretrial matter on which the Magistrate Judge is authorized to exercise the discretion conferred on the district court by Habeas Rule 6. *See* S. D. Ohio Civ. R. 72.3.

Because discovery in a habeas case is within the Court's discretion, review of the Decision and Order is for abuse of that discretion. *Snowden v. Connaught Laboratories*, 136 F.R.D. 694, 697 (D. Kan. 1991); *Detection Systems, Inc. v. Pittway Corp.*, 96 F.R.D. 152, 154 (W.D.N.Y. 1982); *Doe v. Marsh,* 899 F. Supp. 933, 934 (N.D.N.Y. 1995); *Commodity Futures Trading Comm'n v. Standard Forex, Inc.*, 882 F. Supp. 40, 42 (E.D.N.Y. 1995); *Bass Public Ltd. Co. v. Promus Cos., Inc*., 868 F. Supp. 615, 619 (S.D.N.Y. 1994); *In re Application for Order for Judicial Assistance in Foreign Proceedings,* 147 F.R.D. 223, 225 (C.D. Cal. 1993); *Schrag v. Dinges,* 144 F.R.D. 121, 123 (D. Kan. 1992).

The three denied items are considered below.

Prosecutor's and Sheriff's Records

Petitioner seeks "All records of the Montgomery County Prosecutor's Office and the Montgomery Sheriff's Office relating to the homicides of Martha Madewell, Nathan Marshall, and Jesica Young." (Motion, Doc. No. 51, PageID 1061.) In the Motion, Petitioner made a very general claim that these records were relevant to his Tenth, Eleventh, and Twelfth Grounds for Relief. *Id.* The Memorandum in Opposition (Doc. No. 63) and the Reply (Doc. No. 69) focused on general arguments about the scope of discovery in habeas cases. It is only in the Objections that Petitioner makes an attempt to relate these records to a Ground for Relief. The assertion in the Objections is that defense counsel ignored "numerous red flags related to mitigation" (Objections, Doc. No. 74, PageID 1336). It is in Ground Twelve A that Gapen asserts he "was denied the effective assistance of counsel when his counsel failed to fully investigate and present mitigating evidence relevant to the overriding issues in his case."

Petitioner's argument is that the prosecutor improperly used a previous incident in which Gapen was arrested for kidnapping "extensively during the trial." *Id.* He asserts "[t]he requested documents surely contain documentation of Gapen's strange behavior, demeanor, and statements around the time he was arrested on the kidnapping charge." *Id.* The attempted connection with ineffective assistance of trial counsel is argued as follows:

> The requested documents are therefore relevant to Gapen's trial counsel IAC claims, because they would demonstrate that counsel unreasonably failed to obtain the documents before trial; that counsel unreasonably failed to investigate available mitigation red flags; that

> counsel unreasonably failed to fully investigate, develop and present available mitigation evidence; and other such allegations related to demonstrating counsel's performance.

Id. The argument is unpersuasive for several reasons. First of all, it is not at all clear that records of the Sheriff and Prosecutor relating to the three homicides in this case would have materials from the prior kidnapping case. Secondly, the request is overbroad: why "all records" instead of "records relating to the prior case"? Petitioner has been granted leave to depose Messrs. Greer and Cox and is free to ask them all relevant questions about their mitigation investigation. If those depositions indicate a need for a narrow document subpoena to either the Prosecutor or the Sheriff, that would be another matter. But at this point Petitioner has not justified an "all records" subpoena to these two public officials. His request amounts to an oft-forbidden "fishing expedition." Rule 6 does not "sanction fishing expeditions based on a petitioner's conclusory allegations." *Williams v. Bagley,* 380 F.3d 932, 974, (6th Cir. 2004), *citing Rector v. Johnson*, 120 F.3d 551, 562 (5th Cir. 1997); *see also Stanford v. Parker*, 266 F.3d 442, 460 (6th Cir. 2001).

Juror Misconduct

The bulk of the Objections focus on the juror misconduct claim, the Fourteenth Ground for Relief.

What is the relevant claim for relief?

The Objections begin by accusing the Magistrate Judge of misconstruing the Fourteenth

Ground for Relief "as merely raising a single claim that a Christian Bible was physically present in the jury room during deliberations. But in fact, Gapen raised several claims involving several different constitutional violations, some of which are structural errors." (Objections, Doc. No. 74, PageID 1327-1328.) Instead of referring to the Petition for these claims, the Objections direct the reader to the Traverse. *Id.*

In the Motion for Discovery, Gapen makes no reference to the Traverse or to there being several different constitutional violations. The **entire text** of this portion of the Motion for Discovery reads:

> **B. Juror Misconduct**
>
> In the Fourteenth Ground for Relief his habeas petition, Gapen alleges that his rights during the trial and sentencing phases of his capital trial under the Sixth, Eighth and Fourteenth Amendments were violated when jurors engaged in several instances of impermissible conduct.
>
> In order to develop these facts, Gapen requests the following discovery:
>
> • Depositions of all members of the jury that tried, convicted and sentenced Larry Gapen, and members who served as alternates.

(Motion, Doc. No. 51, PageID 1062.) In the Reply in support of the Motion, counsel wrote "Gapen has alleged sufficient allegations of misconduct to give reason to believe that he may be able to prevail if the facts are fully developed through discovery." (Doc. No. 69, PageID 1294.) But what are those allegations? Gapen's counsel failed to state in the Reply what they might be, instead referring the Court to "Doc. No. 50, PageID 908-44." Document No. 50 is the 474-page Traverse in this case.

In his Objections, Gapen makes repeated statements of the nature of the alleged juror misconduct and references places in the record where those allegations may be found, including the

Traverse, the First Amended Petition, Appendix Vol. 10 to the Return of Writ, and the Reply Memo. (Objections, Doc. No. 74, PageID 1328.) He then upbraids the Magistrate Judge for disregarding these aspects of his claim. *Id.* However, none of these references or the "aspects" of the claim which are asserted to appear in those references was ever made in the Motion for Discovery. Gapen's counsel appear to have treated the Motion as a mere dress rehearsal for the Objections.[1] That is an unacceptable abuse of the Magistrate Judge's role in this case. A motion for discovery should include all that the petitioner relies on, and not require the Court to search the record for support for the motion or – worse – sandbag the Magistrate Judge into deciding the motion on the basis of what is presented and then appeal on the basis of what was not presented.

What Evidence Supports this Request for Discovery?

Gapen also objects "*[s]econd*, the Magistrate Judge failed to consider crucial allegations supporting these claims, and then based his denial in part on their absence." (Objections, Doc. No.

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[1]

> [W]hile the Magistrate Judge Act, 28 U.S.C. § 631 et seq., permits de novo review by the district court if timely objections are filed, absent compelling reasons, it does not allow parties to raise at the district court stage new arguments or issues that were not presented to the magistrate. See *United States v. Waters*, 158 F.3d 933, 936 (6th Cir. 1998) (citing *Marshall v. Chater*, 75 F.3d 1421, 1426-27 (10th Cir. 1996) ("issues raised for the first time in objections to magistrate judge's report and recommendation are deemed waived")); see also *Cupit v. Whitley*, 28 F.3d 532, 535 (5th Cir. 1994); *Paterson-Leitch Co., Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 840 F.2d 985, 990-91 (1st Cir. 1988); *Anna Ready Mix, Inc. v. N.E. Pierson Constr. Co., Inc.*, 747 F. Supp. 1299, 1302-03 (S.D. Ill. 1990).

Murr v. United States, 200 F.3d 895, 902 (6th Cir. 2000).

74, PageID 1329.)

As to the evidence on this claim, the Magistrate Judge wrote:

> Petitioner says "the scant record evidence currently demonstrates that [Juror] Nedostup had a Bible or Biblical materials in the jury room that he read and studied during breaks in the trial." (Reply, Doc. No. 50, PageID 914.) That evidence is from an Affidavit of Dorian Hall, a mitigation specialist with the Ohio Public Defender's Office who "was present during the conversation with Nedostup" conducted by post-conviction counsel. *Id.* at 910. Juror Nedostup refused to sign an affidavit himself confirming the accuracy of his reported comments. *Id.*

(Decision and Order, Doc. No. 71, PageID 1312.)

The Objections assert the Magistrate Judge should also have considered two additional affidavits from Assistant Ohio Public Defender Kathy Sandford (Objections, Doc. No. 74, PageID 1329.) The Sandford affidavits are referred to (but no record reference is given) in the Reply Memorandum, not for the point that they contain evidence on which this Court should rely in granting discovery, but as proof that the state courts ruled unreasonably in not ordering a hearing under *Remmer v. United States*, 347 U.S. 227 (1954). (*See* Reply Memo, Doc. No. 69, PageID 1296.)

The first Sandford Affidavit is dated September 13, 2002. The sole relevant matter is at ¶ 6 which reads:

> Juror Senter admitted that fellow juror David Nedostup conducted his own outside research on the death penalty and the law, and that juror Nedostup told the other jurors about his research during deliberations.

(Return of Writ, Apx. Vol. 10, at 71.) The admission was made to Gapen's post-conviction counsel, not to Ms. Sandford, but was apparently made in her presence. Mr. Senter refused to sign an affidavit confirming what he had said. *Id.*

The second Sandford Affidavit is dated September 16, 2002, and avers Ms. Sandford participated in a telephone interview of Juror Mark Maguire conducted by post-conviction counsel. The sole relevant matter is at ¶ 7 which reads:

> Juror Maguire confirmed that while the trial was proceeding, juror David Nedostup conducted independent research into the biblical meaning of the death penalty. Mr. Nedostup shared his views with the other jurors. He also read religious texts during side bars when the jury was waiting in another room for the trial to resume.

(Return of Writ, Apx. Vol. 10, at 73.) Mr. Maguire also refused to sign an affidavit confirming what he had said.

In rejecting Gapen's petition for post-conviction relief, Common Pleas Judge Mary Kate Huffman relied in part on the fact that the Hall and Sandford Affidavits were hearsay (Decision, Return of Writ, Apx. Vol. 10, p. 226). That is clearly correct: they were out-of-court statements by Hall and Sandford offered to prove the truth of their content, to wit, statements allegedly made in the presence of Hall and Sandford by these three jurors. Notably, all three jurors refused to sign affidavits confirming the information they allegedly gave to post-conviction counsel.

This Court is not required to credit hearsay testimony, particularly when all three of the underlying declarants refused to confirm under oath what they supposedly said.

What Constitutes Juror Misconduct?

Gapen begins Part C of this section of the Objections by asserting the Magistrate Judge is wrong on the substantive law about what constitutes extrinsic influences on the jury. He begins by citing *Coe v. Bell,* 161 F.3d 320 (6th Cir. 1998) for the proposition that the mere presence of a Bible

in the jury room would constitute an improper extrinsic influence. In that case the Sixth Circuit held an argument by the prosecutor invoking the biblical support for capital punishment did not constitute prosecutorial misconduct. *Id.* at 351.

In *Jones v. Kemp*, 706 F. Supp. 1534 (N.D. Ga. 1989), one of the contrasting cases referred to in Judge Boggs' opinion, the trial judge had expressly permitted the jurors to take a Bible with them into deliberations and, by inference, to consult it. Relief in that capital habeas case was granted on analogy to use of a dictionary by the jury, condemned by Justice Brennan while a state appellate judge in *Palestroni v. Jacobs*, 77 A.2d 183, 10 N.J. Super. 266 (1950). The Georgia Court held "When, as here, a Bible was present in the jury room with the explicit unqualified approval of the court, it has great potential to influence the jury's deliberations." *Id.* at 1599. The other contrasting case cited by Judge Boggs is *State v. Harrington*, 627 S.W. 2d 345 (Tenn. S. Ct. 1981). There the foreman read biblical passages to deliberating jurors which was found to be reversible error. These cases, where use of the Bible in deliberations was approved by the trial judge or read by the foreman, are obviously and importantly different from the situation where a juror carries a Bible with him into deliberations and is seen to have done so by other jurors. As noted in the Decision and Order, this is not materially different from a juror's reading a novel during breaks and being seen to do so by other jurors.

Gapen argues further that even if Juror Nedostup was personally influenced by his reading of the Bible even without citing it to the others, that would justify relief, relying on *Lawson v. Borg*, 60 F. 3d 608 (9th Cir. 1995). Again, Petitioner cites caselaw for propositions it does not support. In *Lawson*, Juror Scott stated during deliberations that he had talked to several people who knew Steve Lawson since the case started - about Steve's personality - and they all said that Steve was

very violent." That is obviously not a case of one juror being personally influenced by extrinsic evidence. It is instead one juror gathering directly-related evidence and then bringing it into the jury room.

Gapen also notes that his allegations are not limited to Juror Nedostup's possession of a Bible, but extend to his consulting the Bible about the propriety of a death sentence and his sharing of his impermissible research with other jurors. However, there is not credible evidence of these allegations. Instead, there is a suggestion of evidence constructed by advocates – a lawyer and a paralegal assigned to represent Gapen – which the sources refused to confirm under oath.

Gapen also seeks to depose the alternate jurors who did not deliberate on the theory that they might have some information relevant to his claims. He says they:

> would have been in a position to identify the materials Nedostup researched during court proceedings, when he conducted his impermissible research in court, and out of court, what he discussed about his in- and out-of-court research findings, when and with whom he discussed his research findings, and other such relevant details.

(Objections, Doc. No. 74, PageID 1333-1334.) There is even less evidentiary support for this discovery than for deposing the jurors who deliberated.

What Evidence Would be Admissible on the Juror Misconduct Claim?

The Objections assert the Magistrate Judge "misinterpreted evidentiary standards" in denying depositions of the jurors and alternates with respect to Ground for Relief Fourteen, sub-claims C and D (Objections, Doc. No. 74, PageID 1334.) Those claims are

> C. Gapen's rights to a fair and individualized sentencing were

> denied when jurors failed to follow the trial court's instructions of law, and thus sentenced Gapen outside the constraints of a properly narrowed death penalty scheme.
>
> D. Gapen's rights to a fair and individualized sentencing were denied when jurors reached the decision to impose the death penalty at the conclusion of the trial phase of Gapen's case and thus refused to consider mitigating evidence offered during the sentencing phase.

(Amended Petition, Doc. No. 31, PageID 287-288.) The ruling denying depositions on these sub-claims is

> With respect to sub-claims C and D of the Fourteenth Ground for Relief, the Court declines to authorize the depositions because none of the resulting evidence would be admissible under Fed. R. Evid. 606. A jury's interpretation and application of the court's instructions is a part of the deliberative process and correctly excluded under Fed. R. Evid. 606(b). *United States v. Tines*, 70 F.3d 891, 898 (6th Cir. 1995). The same rule applies in a habeas case. *Gulertekin v. Tinnelman-Cooper*, 340 F.3d 415 (6th Cir. 2003).

(Decision and Order, Doc. No. 71, PageID 1313.)

Gapen objects:

> [S]ome of the necessary factual development relates to matters that preceded the jury's formal deliberative process and/or occurred outside the jury room and, therefore, are outside the prohibitions imposed by Fed. R. Evid. 606(b). *See Nields v. Bradshaw*, 482 F.3d 442, 460-61 (6th Cir. 2007). Gapen is not seeking the deliberative thoughts of the jurors. Instead, he seeks to demonstrate discoverable facts such as when during the proceedings certain decisions were made; whether Nedostup was categorically unable to consider any mitigation evidence upon Gapen's conviction for murder based on his religious convictions or his impermissible external research; whether external, unadmitted evidence or an external source of law was injected into the jury's deliberations, especially in the absence of counsel; and other such evidence outside Rule 606(b)'s prohibitions or specifically contemplated by Rule 606(b)'s exception.

(Objections, Doc. No. 74, PageID 1334). The logic of this position is completely opaque. How can

one determine **when** a group of people reached a decision without inquiring into their deliberative processes? If Juror Nedostup was properly questioned on voir dire and said he could put aside his religious convictions and consider a life verdict, and Gapen's argument is that he thereafter changed his mind, how can one learn that without inquiring into Juror Nedostup's deliberative process? And although it is not mentioned in the Objections, how can one tell whether a jury followed the instructions without inquiring deeply into their thought processes?

Fed. R. Evid. 606(b) provides:

> **(b) Inquiry into validity of verdict or indictment**. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

Essentially, Gapen's counsel allege the Magistrate Judge has applied Fed. R. Evid. 606(b) prematurely – they assert eventual admissibility is "not the relevant inquiry at this juncture." (Objections, Doc. No. 74, PageID 1334.) For this proposition, they cite first *Simmons v. Simpson*, 2009 U.S. Dist. LEXIS 122388 (W. D. Ky. Feb. 11, 2009)(Whalin, M.J.). Judge Whalin did not hold admissibility was irrelevant in determining discoverability. Instead, he quoted Judge Katz from *Keenan v. Bagley*, 262 F. Supp. 2d 826 (N.D. Ohio 2003), who wrote:

> Although a petitioner is not required to demonstrate that discovery would unquestionably lead to a cognizable claim for relief, "vague and conclusory assertions are not sufficient under Rule 6 and a petitioner may not embark on a fishing expedition intended to

develop claims for which there is no factual basis.

Id. at 829, *quoting Payne v. Bell,* 89 F. Supp. 2d 967 (M.D. Tenn.2000). Judge Katz denied the requested discovery in *Keenan*; Judge Whalin granted it in *Simmons*; but neither even suggests that admissibility is irrelevant to discoverability.

Gapen argues that, instead of considering admissibility, the Court should only consider "whether the discovery sought might lead to *relevant* evidence." (Objections, Doc. No. 74, PageID 1335, *citing Hill v. Anderson*, 2010 U.S. Dist. LEXIS 132468 (N.D. Ohio Dec. 14, 2010)). While Judge Adams allowed the sought discovery over an objection that it was barred by 28 U.S.C. § 2254(e)(2), he did not decide that the only consideration on a habeas discovery motion is whether it might lead to relevant evidence.

Indeed, the Magistrate Judge does not disagree with Petitioner that deposing the jurors may lead to *relevant* evidence of what they considered and whether they understood the instructions. But no court to the Magistrate Judge's knowledge has ever held that potential relevance is the only consideration under the good cause standard of Habeas Rule 6. The *aliunde* rule "is designed to protect the finality of verdicts and to ensure that jurors are insulated from harassment by defeated parties." *Doan v. Brigano*, 237 F.3d 722, 730 (6th Cir. 2001), *quoting State v. Schiebel*, 55 Ohio St. 3d 71, 564 N.E. 2d 54, 61 (1990). The corresponding Federal Rule of Evidence likewise strives to preserve the finality of jury decisions and protect jurors from harassment:

> Let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed * * * in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to

> make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.

McDonald v. Pless, 238 U.S. 264, 267-268 (1915). In declining to allow depositions of the jurors, the Magistrate Judge intends to enforce the policies behind Fed. R. Evid. 606(b), believing that those policies are properly considered when determining whether there is good cause for discovery under Habeas Rule 6.

Proportionality Records

Petitioner's claim for relief on proportionality review is his Twenty-first Ground for Relief:

> Gapen's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were violated when he was convicted and sentenced to death under Ohio's death penalty system which fails to provide an adequate system of appellate and proportionality review in death penalty cases including Gapen's.

(Amended Petition, Doc. No. 31, PageID 290.)

In support of this claim, Gapen seeks to discover records, statistics, and documents submitted pursuant to Ohio Revised Code § 2929.021 from all Ohio counties, both before and after Petitioner's prosecution. The Magistrate Judge reasoned that the intended method of discovery would be a subpoena to the Clerk of the Ohio Supreme Court, the official with whom these records are deposited under § 2929.021, noted that Ohio has a very liberal public records statute, and declined to authorize a subpoena absent a denied public records request from that official, citing Fed. R. Civ. P. 26(b)(2)(C)(1). The Magistrate Judge also held the sought discovery was not material to a claim

on which habeas corpus relief can be granted because there is no clearly established Supreme Court case law requiring the sort of proportionality review claimed in the Amended Petition, Ground for Relief Twenty-One.

As with the juror misconduct discovery, Petitioner begins this section of the Objections (Doc. No. 74, PageID 1338) by claiming the Magistrate Judge construed his claim "too narrowly" and "fail[ed] to acknowledge [a] portion of Gapen's claims." Here, as with the juror misconduct portion of the Objections, Petitioner refers to claims made in the 474-page Traverse, not to claims made in the Amended Petition or even referenced in the Motion for Discovery[2]. It cannot be said strongly enough: a traverse is not an amended or supplemental petition.

Secondly, Petitioner objects that the Magistrate Judge "fails to address Gapen's argument that § 2254(d)'s limitations do not apply and that, consequently, the claim is not limited to consideration in light of clearly established Supreme Court precedent." (Objections, Doc. No. 74, PageID 1338, citing Traverse, Doc. No. 50, PageID 1031-1034)[3]. The argument made in the Traverse is that the Ohio Supreme Court did not "consider the merits of Gapen's claims that his death sentence is the result of Ohio's death penalty scheme being unconstitutionally applied to him in violation of his due process rights [or] ... that his sentence was disproportionate and not the result

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[2]There are no references in the Motion for Discovery to claims in the Traverse. The sole reference to the Traverse in that Motion is "Gapen has raised claims in his habeas petition that require further factual development. In his Traverse (Larry Gapen's Traverse to the Return of Writ, Doc. No.50, PageID 585), Gapen included legal arguments supporting these grounds for relief." (Motion for Discovery, Doc. No. 51, PageID 1060.) The only page reference given – PageID 585 – is to the first page of the 474-page Traverse. Apparently Petitioner's counsel's position is that the Magistrate Judge was obliged to comb through the Traverse, without the benefit of citation, to find claims made there but not made in the Amended Petition.

[3]Of course, the Motion for Discovery neither cites § 2254(d) nor that portion of the 474-page Traverse where this argument is made.

of an appropriately narrowed statutory scheme in violation of the Eighth and Fourteenth Amendment [sic]." *Id.* at PageID 1032-1033.[4]

Gapen's Fourteenth Proposition of Law on direct appeal was

> Ohio's death penalty law is unconstitutional. R.C. 2903.01, 2929.02, 2929.021, 2929.022, 2929.023, 2929.03, 2929.04, and 2929.05 do not meet the prescribed constitutional requirements and are unconstitutional on their face as applied to Larry Gapen. U.S. Const. Amends. V, VI, VIII, XIV; Ohio Const. Art. I, Sections 2, 9, 10, 16. Further, Ohio's death penalty statute violates the United States' obligations under international law.

State v. Gapen, 104 Ohio St. 3d 358, ¶ 197, 819 N.E. 2d 1047 (2004). The Ohio Supreme Court's ruling on the proportionality segment of this Proposition of Law is

> [**P146] Constitutionality. In proposition of law XIV, Gapen attacks the constitutionality of Ohio's death penalty statutes. We also reject this claim. See *State v. Carter* (2000), 89 Ohio St.3d 593, 607, 2000 Ohio 172, 734 N.E.2d 345; *State v. Jenkins* (1984), 15 Ohio St.3d 164, 15 OBR 311, 473 N.E.2d 264, paragraph one of the syllabus .

Id.[5] While this treatment is brief, there can be no doubt that it is on the merits. A state court

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[4] In citing this Court to the purported place in the Ohio Supreme Court's decision which is allegedly unconstitutional, Petitioner cites to "*Gapen I*, 819 N.E. 2d at 1079." (Traverse, Doc. No. 50, PageID 1033.) The decision of the Ohio Supreme Court which is reported at that citation is *Weaver v. Edwin Shaw Hosp.*, 104 Ohio St. 3d 390, 819 N.E. 2d 1079 (2004). Apparently the 474-page Traverse was not cited checked – even as to citations to Petitioner's own case – before it was filed. The Ohio Supreme Court's decision in this case is actually reported at 104 Ohio St. 3d 358, 2004 Ohio 6548, 819 N.E.2d 1047 (2004).

[5] While this treatment is cursory, it is hardly disproportionate to the attention Gapen gave this question. His brief to the Ohio Supreme Court was over 100 pages in length. In support of Proposition of Law XIV, he made twenty-three pages of argument (Appellant's Merit Brief, Gapen Apx. Vol. 8, pp 205-227.) Of that length, about 1.5 pages are devoted to the proportionality argument.

decision can constitute an "adjudication on the merits" entitled to deference under 28 U. S.C. §2254(d)(1) even if the state court does not explicitly refer to the federal claim or to relevant federal case law. In *Harrington v. Richter*, 562 U.S. ___, 2011 U.S. LEXIS 912 (2011), the Supreme Court just last week held:

> By its terms § 2254(d) bars relitigation of any claim "adjudicated on the merits" in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2). There is no text in the statute requiring a statement of reasons. The statute refers only to a "decision," which resulted from an "adjudication." As every Court of Appeals to consider the issue has recognized, determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning. *See Chadwick v. Janecka*, 312 F.3d 597, 605-606 (CA3 2002); *Wright v. Secretary for Dept. of Corrections*, 278 F.3d 1245, 1253-1254 (CA11 2002); *Sellan v. Kuhlman*, 261 F.3d 303, 311-312 (CA2 2001); *Bell v. Jarvis*, 236 F.3d 149, 158-162 (CA4 2000) (en banc); *Harris v. Stovall*, 212 F.3d 940, 943, n. 1 (CA6 2000); *Aycox v. Lytle*, 196 F.3d 1174, 1177-1178 (CA10 1999); *James v. Bowersox*, 187 F.3d 866, 869 (CA8 1999). And as this Court has observed, a state court need not cite or even be aware of our cases under § 2254(d). *Early v. Packer*, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam). Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief. This is so whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a "claim," not a component of one, has been adjudicated.

Id. at *22-23. "This Court now holds and reconfirms that §2254(d) does not require a state court to give reasons before its decisions can be deemed to have been 'adjudicated on the merits.'" *Id.* at *25.

Moreover, Gapen's assertion that the Ohio Supreme Court did not decide his Proposition of

Law XIV on the merits is pure *ipse dixit*. All he says on this point in his Traverse is that the case cited by the Ohio Supreme Court, *State v. Jenkins*, does not actually decide the point for which it is cited. (Traverse, Doc. No. 50, PageID 1033.) The fact that a state supreme court does not give a question extended analysis or cite the state law which the defendant thinks is relevant does not prevent the decision from being on the merits. And because the Ohio Supreme Court's decision on Gapen's Proposition XIV is on the merits ("we reject this claim"), it is entitled to AEDPA deference.

Even without AEDPA deference, Gapen's Twenty-First Ground for Relief is not likely to be successful. The Sixth Circuit has repeatedly rejected the notion that the Constitution requires proportionality review of the sort for which Gapen contends. *See Beuke v. Houk*, 537 F.3d 618 (6th Cir. 2008); *Getsy v. Mitchell*, 495 F.3d 295 (6th Cir. 2007)(*en banc*); *Byrd v. Collins*, 209 F.3d 486 (6th Cir. 2000); *Williams v. Bagley*, 380 F.3d 932 (6th Cir. 2004), *citing Smith v. Mitchell*, 348 F.3d 177, 214 (6th Cir. 2003); *Wickline v. Mitchell*, 319 F.3d 813, 824 (6th Cir. 2003); *Cooey v. Coyle*, 289 F.3d 882, 928 (6th Cir. 2002); *Buell v. Mitchell*, 274 F.3d 337, 368-69 (6th Cir. 2001); *Coleman v. Mitchell*, 268 F.3d 417, 453 (6th Cir. 2001); *Greer v. Mitchell*, 264 F.3d 663, 691 (6th Cir. 2001). There is no harm in pleading this claim to preserve it in the event the Supreme Court should overrule *Pulley v. Harris*, 465 U.S. 37 (1984), but the Court will not grant discovery to pursue a claim on which, under existing precedent, Petitioner cannot prevail.

Application of 28 U.S.C. § 2254(e)(2) to Discovery

Gapen lodges a general objection to the Magistrate Judge's application of 28 U.S.C. § 2254(e)(2) to discovery matters (Objections, Doc. No. 74, PageID 1340-1342.) The Magistrate Judge's discussion of this question was as follows:

> Petitioner argues that Respondent is wrong to conflate the due diligence standard applicable to evidentiary hearings under 28 U.S.C. § 2254(e)(2) with the discovery standard. The Magistrate Judge disagrees. There is no point in gathering evidence through discovery that one cannot present to show one is entitled to habeas relief. To put the point in another way, how can a petitioner use discovered evidence to "demonstrate that he is entitled to relief" if he cannot present it to the habeas court for consideration?
>
> Discovery in a habeas corpus case – indeed, in federal cases generally – is not a disembedded fact gathering process as if to satisfy someone's curiosity. Rather, it is fact gathering with a purpose – presentation of facts in evidence in court. If those facts are of a sort that they cannot be presented in court because one was not diligent in gathering them in the state court, then discovery does not serve its lawful purpose and should not be authorized. *Brown v. Smith*, 551 F.3d 424 (6th Cir. 2008), cited by Petitioner (PageID 1287) is not to the contrary: it does not discuss at all the standard for discovery. Therefore the Court will not allow discovery of facts to the extent Respondent demonstrates that facts thus discovered would be inadmissible under *Keeney*.

(Decision and Order, Doc. No. 71, PageID 1307-1308.)

Petitioner acknowledges that the Sixth Circuit has not decided the question, but suggests this Court can "take guidance from at least three recent opinions from district courts within the Sixth Circuit," (Objections, Doc. No. 74, PageID 1340, *citing Hill v. Anderson*, 2010 U.S. Dist. LEXIS 132468 (N.D. Ohio Dec. 14, 2010); *Johnson v. Bobby*, 2010 U.S. Dist. LEXIS 103351 (S.D. Ohio Sept. 30, 2010); and *Simmons v. Simpson*, 2009 U.S. Dist. LEXIS 122388 (W.D. Ky. Feb. 11, 2009).

Hill v. Anderson, supra, is Judge John Adams' decision on pretrial motions in an Ohio capital habeas case. He held that § 2254(e)(2) applies to motions to expand the record under Habeas Rule 7, following *Holland v. Jackson*, 542 U.S. 649 (2004), but distinguished discovery motions. He wrote:

> The Sixth Circuit has not determined whether § 2254(e)(2) applies to motions for discovery. Although the statute mentions only evidentiary hearings, it has been held applicable to motions for discovery and to expand the record with new evidence that is intended to achieve the same purpose. *Cowans v. Bagley*, 2002 U.S. Dist. LEXIS 21884, 2002 WL 31370475 * 4 (S.D. Ohio Sep. 30, 2002). However, in *Johnson v. Bobby*, 2010 U.S. Dist. LEXIS 103351, 2010 WL 3909234 * 4 (S.D. Ohio Sep. 30, 2010), the court found that a petitioner seeking discovery need not satisfy the stringent requirements established by 28 U.S.C. § 2254(e)(2) that govern the availability of evidentiary hearings in a habeas corpus proceeding. See *Simmons v. Simpson*, 2009 U.S. Dist. LEXIS 122388, 2009 WL 4927679 * 5 (W.D. Ky. Feb. 11, 2009) (petitioner seeking discovery need not satisfy the stringent requirements established by 28 U.S.C. § 2254(e)(2)). Petitioner's discovery Motion does not seek to present new evidence in support of his claims. He has merely asked for leave to conduct discovery that may lead to new evidence. New factual information obtained through discovery may be inserted into the record without an evidentiary hearing. *Cowans*, 2002 U.S. Dist. LEXIS 21884, 2002 WL 3137047 at * 4 (citing *Boyko v. Parke*, 259 F.3d 781, 790 (7th Cir. 2001).
>
> In any event, the Court will not apply the § 2254(e)(2) standard at this time to exclude discovery. Any arguments regarding whether § 2254(e)(2) precludes discovery will be discussed when and if Petitioner seeks to present that new evidence. The Court will be lenient in determining whether to allow additional discovery in capital cases in order to aid appellate review. If the Court finds during the course of this habeas litigation that § 2254(e)(2) applies to discovery, the Court reserves the right to amend its ruling. A reviewing court will then be left with a full record of the materials at issue against which to judge this Court's ruling. Regardless whether the § 2254(e)(2) restrictions have been satisfied, Petitioner must still show good cause to obtain discovery related to his claims on the merits. Therefore, the Court will make its determination whether to

allow discovery on that basis.

Id. at *21-23.

Johnson v. Bobby, supra, is a capital habeas corpus case from this District. In deciding whether § 2254(e)(2) should apply to discovery, Chief Magistrate Judge Kemp wrote:

> Before addressing Petitioner's specific claims and discovery requests, the Court turns first to Respondent's assertion that the restrictions set forth in 28 U.S.C. § 2254(e)(2) limiting a petitioner's right to an evidentiary hearing should limit a petitioner's right to conduct discovery. The Court disagrees.
>
> In *Holland v. Jackson*, 542 U.S. 649, 653, 124 S. Ct. 2736, 159 L. Ed. 2d 683 (2004), the Supreme Court held that the restrictions on factual development set forth in 28 U.S.C. § 2254(e)(2) apply when a petitioner seeks to present new evidence not considered by the state courts, whether he seeks to present that new evidence through an evidentiary hearing or expansion of the record pursuant to Rule 7 of the Rules Governing Section 2254 Cases. This Court is aware of at least one case in which *Holland's* holding was extended to prohibit a discovery request that appeared to be fashioned as "an end run around the restrictions of Rule 7 as interpreted by *Holland v. Jackson*, 542 U.S. 649, 124 S. Ct. 2736, 159 L. Ed. 2d 683 (2004)." *Stallings v. Bagley*, Case No. 505-CV-722, 2007 U.S. Dist. LEXIS 8543, 2007 WL 437888, at * 2 (N.D. Ohio Feb. 6, 2007).
>
> That said, as Respondent himself recognizes, when Congress amended the habeas corpus statutes to include § 2254(e)(2)'s restrictions on evidentiary hearings, Congress left intact Habeas Corpus Rules 6 and 7 governing discovery and expansion of the record. Thus, it appears that whether or to what extent a petitioner may conduct discovery continues to be governed only by Rule 6's "good cause" standard. See, e.g., *Simmons v. Simpson,* No. 3:07-CV-313-S, 2009 U.S. Dist. LEXIS 122388, 2009 WL 4927679, at * 5 (W.D. Ky. Feb. 12, 2009) ("Contrary to the Warden's views, a petitioner seeking discovery need not satisfy the stringent requirements established by 28 U.S.C. § 2254(e)(2) that govern the availability of evidentiary hearings in a habeas corpus proceeding.")
>
> If the foregoing establishes that the restrictions set forth in § 2254(e)(2) apply only when a petitioner seeks to add new facts to the record and have the Court consider those new facts in deciding his

> constitutional claims, then Respondent's argument is premature. At this point, Petitioner has not sought (and may never seek) to present new evidence in support of his claims. At this point, he has asked only for leave to conduct discovery that may lead to new evidence. The Court will address any arguments regarding whether § 2254(e)(2) precludes Petitioner from introducing new evidence in support of his claims when and if he seeks to present that new evidence.

Id. at *8-11.

Finally, in *Simmons v. Simpson, supra*, a Kentucky capital habeas corpus case, Magistrate Judge Whalin wrote:

> Contrary to the Warden's views, a petitioner seeking discovery need not satisfy the stringent requirements established by 28 U.S.C. § 2254(e)(2) that govern the availability of evidentiary hearings in a habeas corpus proceeding. See 17B Charles A. Wright, Arthur R. Miller, Edward H. Cooper & Vikram D. Amar, Federal Practice & Procedure, § 4268.4 (West 2007) ("Although both discovery and an expanded record may be of value at an evidentiary hearing, they are also provided 'in an effort to avoid the need for an evidentiary hearing.'") (citing *Blackledge v. Allison*, 431 U.S. 63, 81, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977)). This view is confirmed by the language of Harris, that alludes to the possibility that discovery may show an evidentiary hearing to be unnecessary. *Harris*, 394 U.S. at 300 ("The court may … authorize such proceedings with respect to development, before or in conjunction with the hearing of the facts….").
>
> It is true that such a view is not unanimously held by all of the federal courts. See *Hodges*, 548 F. Supp.2d at 497-98 (citing *Moen v. Czerniak*, Case No. 02-10-JE, 2004 U.S. Dist. LEXIS 10963, 2004 WL 1293920 at * 1 (D. Oreg. June 10, 2004) ("Discovery under Rule 6 must be considered in light of the provisions of 28 U.S.C. § 2254(e)(2) which limit the scope of federal habeas corpus review to the state court record except [in] certain specified circumstances….").
> Nevertheless, this Court continues to believe that its prior legal reasoning, offered in relation to Petitioner Simmons' motion to expand the record under Rule 7, applies with equal force to Rule 6 and its limited relationship to 28 U.S.C. § 2254(e)(2). (DN 71, pp. 8-20).

Id. at *13-15.

In contrast to the views of Judges Adams, Kemp, and Whalin, this Magistrate Judge has long held that § 2254(e)(2) should be considered when deciding if there is good cause to conduct discovery under Habeas Rule 6. The reason is that Habeas Rule 6, like any other legislation, should be interpreted to carry out its purpose[6].

> The purpose of discovery in any case is ultimately to gather evidence which will be put before the court in deciding the case on the merits. In order to obtain an evidentiary hearing in federal court on a claim on which he has not fully developed the factual basis in state court, a habeas corpus petitioner must show cause and prejudice under *Wainwright v. Sykes*, 433 U.S. 72 (1977). *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). Logically, there is no good reason to gather evidence which one will not be permitted to present because one cannot satisfy the *Keeney* standard. Therefore, if there are items of evidence sought in discovery which could have been obtained and presented during the state court process but were not, a petitioner should make the required *Keeney* showing before being authorized to conduct discovery to obtain the evidence.

Turner v. Hudson, Case No. 2:07-cv-595 (Decision and Order Granting in Part and Denying in Part Petitioner's Motion for Discovery, July 11, 2008). This Magistrate Judge has applied this reasoning to discovery in habeas corpus cases for at least ten years, including the following capital cases:

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[6]In interpreting statutes, courts should

> 1. Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; and then
>
> 2. Interpret the words of the statute immediately in question so as to carry out the purpose as best it can, making sure, however, that it does not give the words either (a) a meaning they will not bear, or (b) a meaning which would violate any established policy of clear statement.

Hart and Sacks, THE LEGAL PROCESS (Eskridge & Frickey ed. 1994), p. 1169.

Campbell v. Bradshaw, 2:05-cv-193 (Decision Granting Discovery, July 1, 2005); *LaMar v. Ishee*, Case No. 1:01-cv-541 (Order, June 30, 2005); *Taylor v. Bradshaw*, Case No. 3:04-cv-154 (Order, Dec. 29, 2004); *Hasan v. Ishee*, Case No. 1:03-cv-288 (Decision and Order, Oct. 16, 2004); *Hanna v. Ishee*, Case No. 1:03-cv-801 (Decision, Sept. 24, 2004); *Issa v. Bradshaw*, Case No. 1:03-cv-280 (Decision, Sept, 4, 2004); *Moore v. Mitchell*, Case No. C-1-00-023 (Decision, Feb. 18, 2004); *Jones v. Bagley*, Case No. C-1-01-564 (Decision, June 22, 2002); *Henness v. Bagley*, Case No. C-2-01-043 (Decision, Feb. 18, 2002); *Fears v. Bagley*, Case No. C-1-01-0183 (Decision, Feb. 18, 2002); *Keene v. Mitchell*, Case No. C-1-00-421 (Decision, Apr. 17, 2001); *Raglin v. Mitchell*, Case No. MC-1-00-015 (Decision, Apr. 9, 2001); *Wogenstahl v. Mitchell*, Case No. C-1-99-843 (Decision, Jan. 15, 2001).

It is true that, when Congress adopted the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214)(the "AEDPA") it did not amend Habeas Rule 6. Some courts and litigants have argued this means the AEDPA should be ignored in interpreting the pre-existing Rule. But AEDPA certainly and dramatically changed the context in which the Habeas Rules are applied and has cabined the district court's discretion to hold evidentiary hearings. Entirely apart from AEDPA, one must answer the question what purpose habeas discovery serves. As noted in the Decision to which objection is made, it cannot be merely to serve curiosity. Rather, it must be to gather evidence to present to the Court. And if the evidence sought to be discovered can never be presented in court – because of § 2254(e)(2) or for some other reason (e.g., deceased witnesses, a privilege bar, etc.) – how can there be good cause to discover that evidence?[7] This

[7]It has been suggested that discovery may disclose that there is no evidence to support a particular claim. But surely a petitioner seeking discovery cannot justify it on the basis that the petitioner expects that there will be no such evidence. If a petitioner has a well-founded belief

Magistrate Judge remains unpersuaded that there can be good cause to discover evidence which cannot be presented in court.

Conclusion

For the foregoing reasons, Petitioner's Objection to the Magistrate Judge's Decision and Order on Discovery should be overruled.

January 24, 2011.

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

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that evidence to support a claim exists but it is known when the discovery is sought that it will not be admissible because it was not sought with appropriate diligence in the state court, what purpose is served by allowing the evidence to be gathered?