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. :

DECISION AND ORDER

This capital habeas corpus case is before the Court on Respondent's Motion to Stay Discovery and for Reconsideration of the Order Granting Discovery (Doc. No. 85) in light of the Supreme Court's decision in *Cullen v. Pinholster*, 563 U.S. ___, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011). The Court temporarily granted the stay to allow briefing (Doc. No. 86) and those memoranda have now been filed (Doc. Nos. 87, 89, 90.)

In an Order filed December 23, 2010, the Magistrate Judge allowed limited depositions of trial counsel David Greer and Bobby Joe Cox on Gapen's claims of ineffective assistance of trial counsel (Grounds Ten, Eleven, and Twelve) (Doc. No. 71). Depositions were also allowed of direct appeal counsel Robert Lowe, Stephen Ferrell, and Jane Perry on Gapen's claims of ineffective assistance of appellate counsel. *Id.*[1] Although this discovery was allowed in December 2010, and

[1] Petitioner's other requested discovery was denied. Petitioner has appealed from that decision (Doc. No. 74) and the appeal remains pending for decision by Judge Rice.

an April 30, 2011, discovery cut-off set, none of the five depositions had been taken as of April 7, 2011, the date the Court temporarily stayed discovery pending briefing on *Cullen's* impact.

The Grounds for Relief on which discovery was allowed are as follows:

Tenth Ground for Relief:

> Gapen was denied the effective assistance of counsel in the voir dire phase of his capital trial, thereby depriving him of his rights to due process and a fair and impartial jury in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution
>
> A. Counsel Failed To Adequately Voir Dire And Strike – For Cause Or Otherwise – A Juror Who Was Biased And Unable To Render A Fair And Impartial Verdict
>
> B. Counsel Failed To Adequately Voir Dire and Strike A Prospective Juror Who Would Automatically Vote For a Sentence of Death

Eleventh Ground for Relief:

> Gapen was denied his Sixth Amendment right to effective assistance of counsel during his capital trial when his trial counsel failed to present evidence that Gapen did not act with prior calculation and design in the murder of Jesica Young.

Twelfth Ground for Relief:

> Gapen was denied the effective assistance of counsel during the penalty phase of his trial in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution
>
> A. Gapen 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
>
> B. Gapen's rights to effective assistance of counsel were violated when counsel failed to object to readmission of all trial phase evidence for the sentencing phase of his capital trial.
>
> C. Gapen's rights to effective assistance of counsel during the sentencing phase of his capital trial were violated when counsel failed to object to the trial court's erroneous instructions to the jury

> allowing the jury to determine what evidence was relevant for consideration and weighing during the death penalty calculus.

Eighteenth Ground for Relief:

> Gapen was denied the effective assistance of appellate counsel on his sole appeal of right to the Supreme Court of Ohio and as such his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were violated.

Respondent now argues that *Cullen* undercuts this Court's allowance of all the discovery permitted in this case in the December Order. First, he argues that *Cullen* requires a district court to decide whether a state court's adjudication of the merits of a claim is contrary to or an objectively unreasonable application of clearly established Supreme Court precedent – the § 2254(d)(1) question – solely on the basis of the record before the state court (Supplemental Memorandum, Doc. No. 87, PageID 1643). The Magistrate Judge concurs in that reading of *Cullen*; the Supreme Court expressly held "that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." 131 S. Ct. at 1398.

But then Respondent attempts to extend *Cullen*:

> In holding that the record under review is limited to the record before the state court, *Pinholster*[2] also necessarily requires the federal court to determine **as a threshold matter**, before permitting the development of new evidence, whether the petitioner has properly presented his claims to the state courts.

(Supplemental Memorandum, Doc. No. 87, PageID 1644, emphasis supplied). This parallels arguments that capital case respondents have made in the past that the Court must decide whether

[2] It is customary for shortened references to Supreme Court decisions to be to the first-named party. *E.g., Brown* as a short reference for *Brown v. Board of Education,* 347 U.S. 483 (1954). The Court has followed that practice in shortening *Cullen v. Pinholster* to *Cullen*.

a claim has been procedurally defaulted before granting discovery. The Court agrees that, as a logical matter, it must decide whether a claim has been procedurally defaulted or whether the state court decision satisfies § 2254(d)(1) before it considers on the merits any newly-acquired evidence on such claims. But logical priority does not dictate temporal priority.

Cullen does not purport to make any change in the habeas discovery practice at all or to dictate any sequence in which decisions in habeas corpus cases must be made. It may well be that, in a given case, the discovery sought and arguably allowable under Habeas Rule 6 and *Bracy v. Gramley*, 520 U.S. 899 (1997), would be so extensive that it would best suit judicial economy to decide the procedural default and/or § 2254(d)(1) issues before deciding whether discovery would be allowed. On the other hand, capital litigation is so protracted that it might serve judicial economy to allow depositions while memories are fresher. Indeed, this Court has had capital cases where trial counsel could not be deposed because they were deceased by the time the issue arose.

On its face, *Cullen* decides a narrow question: what evidence can a federal habeas court consider in deciding the § 2254(d)(1) issue. Petitioner's Memorandum recites all of the possible questions related to evidence in a habeas case which *Cullen* did not decide. Respondent buttresses his attempted logical extensions of *Cullen* by string citing district and circuit court cases since *Cullen* which largely rely on it solely for its core holding.

Petitioner concedes that his Eleventh Ground for Relief was adjudicated on the merits by the state courts (Memorandum, Doc. No. 89, PageID 1655). Accordingly, permission to depose trial counsel as to that Ground for Relief is withdrawn.

Respondent urges that the Twelfth Ground for Relief was also adjudicated on the merits (Memorandum, Doc. No. 87, PageID 1645). Petitioner responds that there was no state court

decision on the prejudice prong of the *Strickland* standard by the state courts (Memorandum, Doc. No. 89, PageID 1656). But the *Strickland* test is conjunctive – a petitioner must show both deficient performance and prejudice. Therefore a state court decision that a habeas petitioner failed to meet either one of the prongs on the merits is a decision on the merits of the whole claim. That is what happened here in the state courts. Accordingly, permission to depose trial counsel on the Twelfth Ground for Relief is withdrawn.

Petitioner's request to depose his appellate counsel is related to his need to show excusing cause and prejudice related to his Tenth and Eighteenth Grounds for Relief. *Cullen* in no way addresses use of discovery, expansion of the record, or evidentiary hearing for this purpose. As the Court has previously held, it is not required to decide procedural default claims prior to authorizing discovery. Therefore the depositions of direct appeal counsel may be taken as previously authorized.

All discovery authorized herein shall be completed by September 1, 2011.

June 10, 2011.

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