

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

WILLIAM G. ZUERN, :
 :
 Petitioner, :
 : Case No. 1:92cv771
 vs. :
 : JUDGE WALTER HERBERT RICE
 ARTHUR TATE, JR., :
 :
 Respondent. :

DECISION AND ENTRY OVERRULING PETITIONER'S OBJECTIONS (DOC. #398) TO REPORT AND RECOMMENDATIONS OF THE MAGISTRATE JUDGE (DOC. #394); DECISION AND ENTRY OVERRULING PETITIONER'S OBJECTIONS (DOC. #408) TO SUPPLEMENTAL REPORT AND RECOMMENDATIONS OF THE MAGISTRATE JUDGE (DOC. #406); DECISION AND ENTRY OVERRULING PETITIONER'S RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT (DOC. #383); JUDGMENT TO ENTER ACCORDINGLY; CERTIFICATE OF APPEALABILITY DENIED; STAY OF EXECUTION ENTERED

This death penalty habeas litigation is before the Court on Petitioner's Rule 60(b) Motion for Relief from Judgment (Doc #383), seeking an order of the Court vacating that portion of its decision denying his Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, on the issue of the ineffective assistance of counsel at the penalty phase of trial. Specifically, Petitioner contends that the ineffective assistance rendered involved trial counsels' failure to investigate

mitigation evidence, instead of deferring to their client's decision to waive the presentation of such evidence without the benefit of such an investigation.

The writer apologizes to the reader for the atypical brevity of this opinion, particularly in light of the gravity of the life and death consequences of the issues involved. The fact that Petitioner is due to be executed on Tuesday, June 8th, the fact that the Sixth Circuit Court of Appeals has vacated this Court's grant of a stay of execution, pending resolution of these issues, and, not least of all, the fact that this matter reached the Court's desk only on June 2nd, have all put a premium on dispatch in the reaching of the proper result, rather than upon reaching the correct resolution of the issues involved and setting forth a lengthy explanation of same.

In reaching its decision, the Court has relied upon relevant portions of the record, including, without limitation, the following: The Petitioner's initial (Doc. #1) and amended Petition for Writ of Habeas Corpus (Doc. #197), this Court's decision granting a Conditional Writ, filed March 30, 2000 (Doc. #339), the materials submitted in support of and in opposition to the Certificate of Appealability, the Sixth Circuit Court of Appeals' opinion reversing this Court's grant of the Conditional Writ, the Petitioner's Motion pursuant to Rule 60(b) (Doc. #383) and the responsive documents thereto, the Magistrate Judge's Initial and Supplemental Report and Recommendations on the Rule 60(b) Motion (Docs. ##394 and 406) and the Objections thereto (Docs. ##398 and 408), and the complete 509 page Transcript of the 4 day Oral and Evidentiary Hearing before the Magistrate Judge on the Merits of the initial and amended Petition (April 15-17 and April 26, 1996). In addition, the Court has reviewed all 10 depositions taken by counsel prior to that hearing and considered as a part of same.

The Petitioner was convicted and sentenced to death by an Ohio state court. After exhausting his state law remedies, he initiated this action, requesting a writ of habeas corpus. After this Court had concluded that the Petitioner was entitled to a conditional writ, on the issue of the state's violation of the rule set forth in Brady v. Maryland, 373 U.S. 83 (1963), the Sixth Circuit reversed, and the Supreme Court denied his request for further review. Zuern v. Tate, 101 F. Supp.2d 948 (S.D.Ohio 2000), reversed, 336 F.3d 478 (6th Cir. 2003), cert. denied, 124 S.Ct. 1456 (2004). Thereafter, on March 5, 2004, the Petitioner filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure, requesting that this Court grant him relief from the judgment it had entered nearly four years earlier. The Court referred that motion to Magistrate Judge Michael Merz, who has issued an Initial and a Supplemental Report and Recommendations (Docs. ##394 and 406), recommending that the Court deny Petitioner relief under Rule 60(b). The Petitioner has objected to both of those judicial filings. See Docs. ##398 and 408. This Court now rules on the Petitioner's Objections.

The Petitioner indicates that his motion presents the issue of whether this Court erroneously denied his Eighteenth Claim for Relief, which he asserts encompasses a claim that his trial counsel rendered ineffective assistance of counsel by failing to investigate the existence of mitigation evidence. Parenthetically, neither Judge Merz in his Initial or Supplemental Report and Recommendations on the Merits (Docs. ##320 and 329), nor this Court in its Decision ruling upon the parties' Objections to those judicial filings (Doc. #339), considered the Petitioner to be relying upon such a contention with his Eighteenth Claim. Although he did give specific examples of alleged ineffective assistance in

his initial and amended petitions, none of the seventeen sub-claims set forth therein alleged that trial counsel had been ineffective by failing to investigate the existence of mitigating evidence for the penalty phase. Neither did Petitioner bring this alleged “misconstruction” to the Court’s attention at any time prior to the filing of the Rule 60(b) motion. Nevertheless, the Court assumes for present purposes that the Petitioner’s Eighteenth Claim was predicated, in part, on trial counsel’s failure to conduct such an investigation.¹

The Petitioner bases the instant motion on Strickland v. Washington, 446 U.S. 668 (1984) and Wiggins v. Smith, 539 U.S. 510 (2003). Wiggins did not announce a new rule of law. On the contrary, that decision merely sets forth or clarifies a specific application of the first prong of Strickland in the context of a claim that trial counsel was ineffective for failing to investigate the existence of mitigation evidence in a death penalty case. It simply does not constitute new law. Therefore, the Court agrees with Judge Merz that the Petitioner’s motion does not constitute a second or successive petition, which this Court could address only after the Sixth Circuit had given him permission to file same. See 28 U.S.C. § 2244. If, however, this Court were to have concluded that Wiggins had announced a new rule of law, it would have held that the Petitioner’s motion was in reality a second or successive petition, for which prior permission from the Sixth Circuit must be obtained.

¹In arguing that his Eighteenth Claim has always, in part, been based upon the contention that trial counsel were ineffective due to their failure to investigate mitigating evidence, Petitioner, in his Objections to the Supplemental Report and Recommendations, cites the testimony of Harry Rienhart. It is unnecessary for the Court to discuss the Petitioner’s argument in that regard or that testimony, since it has assumed for sake of argument that the Eighteenth Claim has always included his current contention.

Additionally, the Petitioner bases his motion on the assertion that this Court misconstrued his Eighteenth Claim. Therefore, he raises an argument that the federal court erred in his habeas proceedings, rather than that the state court committed a federal constitutional error during his trial. That fact also causes the Court to conclude that this is not a second or successive petition. Thus, Petitioner's Rule 60(b) motion is neither a second or successive petition nor the functional equivalent of same.

If, however, as the Petitioner claims, the Magistrate Judge and this Court erred by failing to construe his Eighteenth Claim as being predicated upon the theory that his trial counsel were ineffective as a result of failing to investigate the existence of mitigation evidence, then his motion under Rule 60(b) is nothing more than a substitute for a delayed appeal. It is axiomatic that a motion under Rule 60(b) cannot be used as a substitute for a delayed appeal. See e.g., In re G.A.D., Inc., 340 F.3d 331 (6th Cir. 2003).

However, assuming for sake of argument that the Petitioner's Rule 60(b) motion is not such a substitute for appeal, that motion is nevertheless untimely. The Petitioner states that his motion is filed pursuant to Rule 60(b)(6), which has no time limitation. The Sixth Circuit has repeatedly held that a motion under Rule 60(b)(6) is permissible only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of Rule 60(b). See e.g., Blue Diamond Coal Co. V. Trustees of UMWA Combined Benefit Fund, 249 F.3d 519 (6th Cir.), cert. denied, 534 U.S. 1054 (2001). Herein, the Petitioner's motion is grounded on the theory that this Court erred by failing to construe his Eighteenth Claim as being based on the contention that his trial counsel were ineffective as a

result of failing to investigate the existence of mitigation evidence. In other words, he contends that this Court made a mistake. In Hopper v. Euclid Manor Nursing Home, 867 F.2d 291 (6th Cir. 1989), the Sixth Circuit held that a motion under Rule 60(b), alleging that the District Court had committed error is a “mistake” which must be analyzed under clause (1), rather than under clause (6). A motion under Rule 60(b)(1) must be brought within reasonable time, which cannot exceed one year.² Since the Petitioner filed his motion nearly four years after the Court had entered judgment, it was untimely.

Even if the Court were to assume that the Petitioner’s motion is not a substitute for a delayed appeal and that its comes within the catchall provision, Rule 60(b)(6), and thus is timely filed, the Court would nevertheless overrule that motion on the merits. Under Strickland, a person claiming that his conviction or punishment is unconstitutional, because of the ineffective assistance of the attorney representing him, must demonstrate not only that counsel’s performance was deficient, but also that the deficient performance prejudiced the defense. 466 U.S. at 687. The Strickland Court said that a defendant is prejudiced when “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Id. Wiggins did not alter the two-part test adopted in Strickland; rather, in Wiggins, the Supreme Court applied the first prong of Strickland to a claim of ineffective assistance of counsel which mirrors the manner in which Petitioner now argues his Eighteenth Claim is based, to wit: failure to

²The Sixth Circuit has held that, when the Rule 60(b) motion is predicated upon a claim of error by the District Court, a reasonable time is the time in which a notice of appeal can be filed. Pierce v. United Mine Workers, 770 F.2d 449, 451 (6th Cir. 1985), cert. denied, 474 U.S. 1104 (1986). Herein, the Petitioner had 30 days after judgment had been entered in which to file his notice of appeal.

investigate the existence of mitigating evidence. Assuming, arguendo, that the failure to investigate mitigating evidence does satisfy the first prong of Strickland, as clarified and extended by Wiggins, and that, therefore, trial counsel's performance was deficient, such a conclusion avails Petitioner naught as, simply stated, the Petitioner has not cited, nor has the Court located,³ any evidence which would demonstrate that the result in his trial was unreliable, as a result of his trial counsels' deficient performance.⁴ If such mitigation evidence existed, it was

³During its recent review of the record, the Court has located (on its own) four pieces of evidence, which one might argue constitute mitigation evidence. Considering same individually and in concert does not cause this Court to conclude that the result of Petitioner's trial is unreliable. The first piece of evidence is Harry Reinhart's testimony that the Petitioner had been incarcerated in the Hamilton County Workhouse, which was a dehumanizing facility where people were forced to defecate in buckets. Transcript of April 26, 1996 Hearing (Doc. #248) at 463. The other three pieces of evidence, which come from the Presentence Investigation Report submitted to the state trial court, are that the Defendant had received psychiatric care at Longview State Hospital in 1975 and that he had been committed to Rollmans Psychiatric Institution for diagnosis in 1971, that he had a history of involvement with the Ohio Department of Youth Services for supervision an parole and that he had told the Probation Officer that he had abused every type of controlled substance. Simply stated, the failure to discover and present evidence that the Petitioner had been incarcerated in an institution with dehumanizing conditions and had abused drugs do not cause this Court to conclude that the jury's finding that the state had proved that the aggravating circumstances outweighed mitigating factors was unreliable. Since the jury found that the he had murdered a Deputy Sheriff with prior calculation and design, it is unlikely that they would have found that the state failed to prove that the aggravating circumstances outweighed the mitigating factors, if they had known that the Petitioner was incarcerated in an institution with dehumanizing conditions (there was no evidence that he suffered from such conditions) and had abused drugs. In addition, since there is no evidence concerning either the nature of Petitioner's psychiatric care and any working diagnosis or the nature of his involvement with the Department of Youth Services, those pieces of evidence do not constitute mitigating evidence, the failure of which to discover and introduce would cause the imposition of the death penalty to be unreliable.

⁴The Court notes that to establish prejudice, the Petitioner would not only have to show at a hearing that a proper investigation would have discovered mitigating

incumbent upon the attorneys who represented Petitioner during the hearing before Magistrate Judge Merz to have presented same in that hearing.

In his motion, the Petitioner has requested, as an alternative form of relief, that the Court order a hearing on his Eighteenth Claim, as currently construed by him. He may be seeking such a hearing to introduce evidence of prejudice. However, a hearing is not a possible remedy at this time. If the Petitioner's motion does not raise a second or successive claim, as the Court has concluded, supra, it must be decided on the current record, since he does not contend that he did not have a fair opportunity to advance this claim at his earlier evidentiary hearing before the Magistrate Judge, and, additionally, given that the basis of his Rule 60(b) motion is that this Court failed to rule upon an existing claim. He has already had an evidentiary hearing, and he has failed to adduce evidence that the imposition of the death penalty was unreliable, because trial counsel's failure to investigate the existence of mitigating evidence would have led to the discovery and introduction of same. While the Petitioner might be entitled to a hearing if his Rule 60(b) motion were the functional equivalent of a second or successive petition (for instance, if he contended that Wiggins established a new rule of law), this Court could not entertain that claim until the Sixth Circuit had given him permission to file it. 28 U.S.C. § 2244.

evidence which would have caused the penalty of death to be unreliable, but also that the discovery of such evidence would have caused him to forego his waiver of his right to introduce mitigation evidence, so that the evidence could be introduced in the first instance. Given that the Petitioner did not testify during the hearing before Judge Merz, it would be speculative at best to argue that a proper investigation by trial counsel would have caused him to forego his waiver.

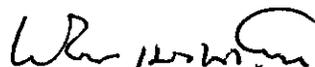
In sum, the Court concludes that the Petitioner's motion is nothing more than a substitute for a delayed appeal which is not cognizable under Rule 60(b); that even if not such a substitute, it is untimely; and that if not such a substitute and timely, it must be denied on the merits. Accordingly, the Court overrules Petitioner's Objections (Docs. ##398 and 408) to the Initial and Supplemental Reports and Recommendations of the Magistrate Judge (Docs. ##394 and 406), and his Rule 60(b) Motion for Relief from Judgment (Doc. #383). Judgment is to enter accordingly.

On Friday June 4, 2004, the Sixth Circuit vacated the stay of execution, which this Court had previously entered herein. An examination of that decision causes this Court to conclude that it was based upon the preliminary premise that Judge Merz had concluded that the Petitioner's motion was nothing more than a second or successive petition (or its functional equivalent), which this Court could not entertain without the Sixth Circuit having granted Petitioner permission to file same. While one might argue that the Sixth Circuit's decision in that regard may have foreclosed this Court from granting a stay, upon ruling on the Petitioner's Objections, this Court would respectfully disagree. While meaning absolutely no disrespect to the Sixth Circuit Court of Appeals, herein, this Court has explained why the Petitioner's motion is not a second or successive one (or the functional equivalent of same). Moreover, the Court, as an alternative holding, has ruled on the merits of Petitioner's Rule 60(b) motion. The Court, therefore, deems it appropriate to enter a stay of execution, to permit the Sixth Circuit to review this Court's Decision herein in light of the complete record, if Petitioner decides to seek appellate review. If such appellate review is to be sought, Petitioner must seek a

Certificate of Appealability and a continuation of this stay, no later than 3:00 p.m., Monday, June 7, 2004. If he fails to do so, this stay will dissolve.

Since reasonable jurists would not find this Court's rejection of Petitioner's Rule 60(b) motion to be debatable or wrong and, furthermore, given that he has failed to make a substantial showing of denial of a constitutional right, the Court denies him a Certificate of Appealability.

June 7, 2004



WALTER HERBERT RICE, JUDGE
UNITED STATES DISTRICT COURT

Copies to:

Counsel of record.