

No. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2018

Richard Bays,

Applicant-Petitioner,

v.

Warden, Chillicothe Correctional Institution,

Respondent.

On Application for a Certificate of Appealability
The United States Court of Appeals for the Sixth Circuit

**APPENDIX TO APPLICATION TO EXPAND THE
CERTIFICATE OF APPEALABILITY**

EXHIBIT A

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

RICHARD BAYS,	:	Case No. 3:08-cv-76
	:	
Petitioner,	:	Judge Thomas M. Rose
	:	
v.	:	
	:	
WARDEN, Ohio State Penitentiary,	:	
	:	
Respondent.	:	

**ENTRY AND ORDER OVERRULING OBJECTIONS (DOCS. 267, 270);
ADOPTING SUBSTITUTED REPORT AND RECOMMENDATIONS
(DOC. 265) AND SUPPLEMENT TO SUBSTITUTED REPORT AND
RECOMMENDATIONS (DOC. 269); DISMISSING GROUNDS FOR
RELIEF SIXTEEN, SEVENTEEN, EIGHTEEN AND NINETEEN PLEADED
IN THE SECOND AMENDED PETITION; AND TERMINATING CASE**

This case is before the Court on the Objections (Docs. 267, 270) filed by Petitioner Richard Bays (“Petitioner”) to the Magistrate Judge’s Substituted Report and Recommendations (“Report”) (Doc. 265) and Supplement to Substituted Report and Recommendations (Doc. 270) (“Supplement”). In the Report and Supplement, Magistrate Judge Michael R. Merz recommended that the Court dismiss Grounds for Relief Sixteen, Seventeen, Eighteen and Nineteen pleaded in Petitioner’s Second Amended and Supplemental Petition for a Writ of Habeas Corpus (“Second Amended Petition”) (Doc. 247) for failure to state a claim upon which relief may be granted in habeas corpus.

As required by 28 U.S.C. § 636(b) and Federal Rule of Civil Procedure 72(b), the Court made a *de novo* review of the record in this case. Upon said review, the Court finds that Petitioner's Objections (Docs. 267, 270) are not well-taken and are hereby **OVERRULED**. The Court **ADOPTS** the Report (Doc. 265) and Supplement (Doc. 270) in their entirety and, accordingly, rules as follows:

- (1) The Warden's Motion to Dismiss (Doc. 250) is **GRANTED**;
- (2) Petitioner's Sixteenth, Seventeenth, Eighteenth and Nineteenth Grounds for Relief are **DISMISSED** without prejudice to their consideration in *In re: Ohio Execution Protocol Litig.*, Case No. 2:11-cv-1016;
- (3) Petitioner is **GRANTED** a certificate of appealability on his Fifth Ground for Relief as already ordered (Doc. 148) and as to his Sixteenth, Seventeenth, Eighteenth and Nineteenth Grounds for Relief;
- (4) Petitioner is **DENIED** a certificate of appealability as to his Fourteenth and Fifteenth Grounds for Relief, as reasonable jurists would not disagree with the denial of those Grounds; and
- (5) The Clerk is directed to enter final judgment and **TERMINATE** this case on the Court's docket.

DONE and **ORDERED** in Dayton, Ohio, this Friday, December 29, 2017.

s/Thomas M. Rose

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE

EXHIBIT B

No. 18-3101

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Aug 28, 2018

DEBORAH S. HUNT, Clerk

RICHARD BAYS,)
)
Petitioner-Appellant,)
)
v.) O R D E R
)
WARDEN, CHILLICOTHE CORRECTIONAL)
INSTITUTION,)
)
Respondent-Appellee.)

Before: GIBBONS, KETHLEDGE, and DONALD, Circuit Judges.

Richard Bays, an Ohio prisoner under sentence of death, appeals from a district court judgment dismissing his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The case is now pending before this court for review of Bays's application for an expanded certificate of appealability (COA).

After Bays waived his right to a jury trial, a three-judge panel convicted Bays of aggravated murder and aggravated robbery. The panel subsequently sentenced Bays to death for the aggravated murder conviction, plus twenty-five years of imprisonment for the aggravated robbery conviction. On appeal, the Ohio Supreme Court affirmed his convictions and sentence. *State v. Bays*, 716 N.E.2d 1126, 1145 (Ohio 1999).

In 1996, Bays filed a state petition for post-conviction relief. After conducting an evidentiary hearing, the trial court denied Bays's petition, and the Ohio Court of Appeals affirmed that decision. *State v. Bays*, No. 2003 CA 4, 2003 WL 21419173 (Ohio Ct. App. June 20, 2003). In 2003, Bays filed a second state post-conviction petition, alleging that he was intellectually disabled and ineligible to be executed. Bays voluntarily dismissed this petition, but

later moved to withdraw this voluntary dismissal. The trial court denied this motion, but not before Bays had filed a third state post-conviction petition, again challenging his competency to be executed. On appeal, the Ohio Court of Appeals affirmed the trial court's decision denying Bays's motion to withdraw the voluntary dismissal of his second post-conviction petition, but the court remanded for consideration of his third state post-conviction petition. *State v. Bays*, No. 2014-CA-24, 2015 WL 2452324 (Ohio Ct. App. May 15, 2015). Bays's third post-conviction petition remains pending in the trial court.

In 2008, Bays filed his § 2254 petition, raising eleven grounds for relief. The magistrate judge issued reports recommending that part of Bays's Fourth Claim concerning counsel's performance during the trial's penalty phase and his Ninth Claim concerning the state courts' proportionality review be dismissed as procedurally defaulted. The magistrate judge also recommended that his Tenth Claim be dismissed without prejudice as premature and not exhausted in state court. *Bays v. Warden*, No. 3:08-CV-076, 2009 WL 1617950 (S.D. Ohio Mar. 16, 2009); *Bays v. Warden*, No. 3:08-CV-076, 2009 WL 1617946 (S.D. Ohio Apr. 29, 2009). The district court adopted these recommendations. *Bays v. Warden*, No. 3:08-CV-076, 2009 WL 1617944 (S.D. Ohio June 9, 2009).

The magistrate judge subsequently recommended that Bays's remaining claims be dismissed as meritless. *Bays v. Warden*, No. 3:08-CV-076, 2012 WL 553092 (S.D. Ohio Feb. 21, 2012). While this report was pending before the district court, Bays moved to file an amended § 2254 petition, raising new claims concerning Ohio's lethal injection protocol, and the magistrate judge granted the motion to amend. The district court subsequently overruled Bays's objections to the magistrate judge's report concerning the claims from his original habeas petition and dismissed those claims. *Bays v. Warden*, No. 3:08-CV-076, 2012 WL 3224107 (S.D. Ohio Aug. 6, 2012).

Bays next moved to file another amended habeas petition raising a claim that he was intellectually disabled and ineligible for execution, as well as a related ineffective-assistance-of-counsel claim. The magistrate judge denied this motion, *Bays v. Warden*, No. 3:08-CV-076,

2013 WL 4502205 (S.D. Ohio Aug. 22, 2013), and the district court overruled objections to that decision. *Bays v. Warden*, No. 3:08-CV-076, 2014 WL 29564 (S.D. Ohio Jan. 3, 2014). The magistrate judge did grant Bays permission to file another amended complaint raising additional challenges to Ohio's execution protocol, *Bays v. Warden*, No. 3:08-CV-076, 2017 WL 1315793 (S.D. Ohio Apr. 10, 2017), and the district court overruled objections to this decision. The magistrate judge subsequently issued reports recommending that Bays's remaining claims be dismissed, *Bays v. Warden*, No. 3:08-CV-076, 2017 WL 5128277 (S.D. Ohio Nov. 6, 2017); *Bays v. Warden*, No. 3:08-CV-076, 2017 WL 6035231 (S.D. Ohio Dec. 6, 2017), and the district court adopted that recommendation. *Bays v. Warden*, No. 3:08-CV-76, 2017 WL 6731493 (S.D. Ohio Dec. 29, 2017).

The district court did grant Bays a COA for the following issues: (1) whether his inculpatory statements to the police were improperly admitted at trial; (2) whether Ohio can constitutionally execute Bays because the only manner available under the law to execute him violates his Eighth Amendment rights; (3) whether Ohio can constitutionally execute Bays because the only manner available for execution violates the Due Process Clause or the Privileges or Immunities Clause; (4) whether Ohio can constitutionally execute Bays because the only manner of execution available under Ohio law violates the Equal Protection Clause; and (5) whether Ohio can constitutionally execute Bays because Ohio's violations of federal law constitute a fundamental defect in the execution process, and the only manner of execution available depends on execution laws that are preempted by federal law. *Bays*, 2017 WL 6731493; *Bays v. Warden*, No. C-3:08-CV-076, 2013 WL 361062 (S.D. Ohio Jan. 29, 2013).

Under 28 U.S.C. § 2253(c)(1)(A), this court will grant a COA for an issue raised in a § 2254 petition only if the petitioner has made a substantial showing of the denial of a federal constitutional right. A petitioner satisfies this standard by demonstrating that reasonable jurists "could disagree with the district court's resolution of his constitutional claims or that jurists

could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Buck v. Davis*, 137 S. Ct. 759, 773 (2017).

In his application for an expanded COA, Bays raises the following issues: (1) whether the district court improperly denied his motion to amend and add a claim challenging his competency to be executed and a related ineffective-assistance-of-counsel claim; (2) whether the trial court improperly denied him access to the identity of the confidential informant; (3) whether his trial counsel rendered ineffective assistance by failing to introduce compelling evidence in support of his motion to suppress his confession to the police; (4) whether his jury waiver was knowing, intelligent, and voluntary; (5) whether his trial counsel were ineffective in advising him to waive his right to a jury trial and in failing to ensure that his jury waiver was knowing, intelligent, and voluntary; and (6) whether cumulative error deprived Bays of a fair trial. Although Bays seeks a COA for these issues from his § 2254 petition (in addition to the issues already granted a COA by the district court), he does not request a COA for a number of other claims from that petition. Consequently, this court considers the remaining issues from his § 2254 petition to be abandoned and not reviewable. *See Jackson v. United States*, 45 F. App’x 382, 385 (6th Cir. 2002); *Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000).

Upon review, we conclude that Bays has not made a substantial showing of the denial of a federal constitutional right for any of the issues from his COA application. Accordingly, we **DENY** Bays’s application for an expanded COA. The Clerk’s Office shall issue a briefing schedule.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

EXHIBIT C

No. 18-3101
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
December 13, 2018
DEBORAH S. HUNT, Clerk

RICHARD BAYS,)
Petitioner-Appellant,)
v.) **O R D E R**
WARDEN, CHILLCOTHE CORRECTIONAL)
INSTITUTION,)
Respondent-Appellee.)

Before: GIBBONS, KETHLEDGE, and DONALD, Circuit Judges.

Richard Bays, an Ohio prisoner under sentence of death, petitions for rehearing en banc of this court's order entered on August 28, 2018, denying his application for a certificate of appealability. The petition was initially referred to this panel. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied as to the issues raised in the rehearing en banc petition. The petition then was circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk