In the United States District Court
for the Southern District of Georgia
Waycross Division

BILLY DANIEL RAULERSON, JR., : CIVIL ACTION

Petitioner, :

v. :

HILTON HALL, Warden, Georgia Diagnostic Prison, :

Respondent. : NO. CV505-57

O R D E R

Death row inmate Billy Daniel Raulerson, Jr., filed a petition for habeas corpus, attacking the validity of his sentence on several grounds. Presently before the Court is Raulerson's motion for discovery. Because Raulerson has demonstrated good cause for some of his request, the motion will be **GRANTED** in part. Because Raulerson has not demonstrated significant need to retain a clinical psychologist, his request for funds to retain one will be **DENIED** at this time.

BACKGROUND

Over the course of two days in 1993, Raulerson killed three people in Ware County, Georgia. On May 30, 1993, Raulerson shot and killed two teenagers parked near a

lakeside "lovers' lane," Jason Hampton and Charlye Dixon. The next day, Raulerson shot and stabbed Gail Taylor to death. Each victim had been shot multiple times with a .22 rifle. Raulerson v. State, 268 Ga. 623, 623 (1997).

On May 31, 1993, the victims' bodies were discovered, all at separate locations. The crime went unsolved for seven months. In January 1994, Raulerson was arrested on unrelated assault and weapons charges, and he gave the police a blood sample. DNA analysis linked Raulerson to Dixon's murder, and upon questioning by law enforcement, Raulerson confessed to the three murders. Id. at 623-24.

Raulerson admitted that he parked near Hampton's pickup truck, and that he shot Hampton several times from the bed of Hampton's truck. Raulerson also confessed that he shot Dixon as she attempted to flee from the truck. Raulerson dragged Hampton from the truck and shot him several more times, and then put Dixon, and two of Hampton's fishing rods, in his vehicle. Raulerson drove to a wooded area several miles away, where he shot Dixon again, and sodomized her lifeless body. Id. at 624-25.

Raulerson attempted to return to Dixon's body the next day, but decided not to approach the site because people were nearby. Instead, Raulerson drove to a rural area of Ware

County and looked for a house to burglarize. Raulerson stopped at a house with no cars in the carport. When no one responded to his knock at the door, he broke into a utility shed and stole meat from a freezer. Id. at 624.

Raulerson heard someone in the house as he was loading the meat into his car. Raulerson entered the home, and encountered Gail Taylor, who was armed with a kitchen knife. After struggling with Taylor and stabbing her in the wrist, perhaps fatally, Raulerson shot Taylor multiple times as well. Raulerson stole Taylor's purse and left. Raulerson told investigators that he had stolen the .22 rifle from a Pierce County, Georgia, residence that he had burglarized in early May 1993. Id.

After his January 1994 confession, law enforcement officials executed a search warrant on Raulerson's residence and found a fishing rod that was identified as having been taken from Hampton's pickup truck the night he was killed. Parts of a .22 caliber rifle were also found at Raulerson's home. A ballistics expert later testified that the shell casings found near Hampton and Taylor were probably fired from Raulerson's gun. Id.

On February 2, 1994, Raulerson was indicted on two counts of malice murder, burglary, felony murder, kidnapping,

aggravated sodomy, necrophilia, two counts of possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon. The state sought the death penalty against Raulerson, and the venue of the trial was changed to Chatham County, Georgia. The trial was held from February 20 to March 7, 1996. Id. at 623 n.1.

At trial, Raulerson offered expert testimony that indicated that tests administered after the crime showed that Raulerson was mentally retarded, with an IQ of 69.[1] The state submitted other IQ test evidence that was taken nine years earlier, when Raulerson was fifteen, indicating that his IQ was 83. The state abandoned prosecution of the "felon in possession of a gun" charge, and the jury found Raulerson not guilty of aggravated sodomy. The jury convicted Raulerson of the remaining counts, and imposed three death sentences for the murders. Id. at 623 n.1.

The jury found several aggravating factors justifying the sentence. It found that the murder of Dixon was committed while Raulerson was engaged in the commission of murdering Hampton, and that the murder of Hampton occurred

---

[1] It is estimated that between 1 and 3 percent of the population has an IQ of 70-75 or lower. Atkins v. Virginia, 536 U.S. 304, 309 n.5 (2002).

while Raulerson was kidnapping Dixon. The jury found that the murders of Hampton, Dixon, and Taylor were all outrageously or wantonly vile, horrible, or inhuman in that the acts involved torture, depravity of mind, or aggravated battery. The jury also found that the murder of Taylor was committed while Raulerson was committing a burglary, and that Raulerson committed murder to obtain money or other things of value.

In 1997, the Georgia Supreme Court affirmed Raulerson's conviction. The court noted that "the jury was authorized to find that [Raulerson's] expert's testimony [of his mental retardation] at trial was effectively rebutted by the State." Id. at 627. The court rejected Raulerson's constitutional challenge to Georgia's law that requires the defense of mental retardation to be proven beyond a reasonable doubt in order for a jury to return a "guilty but mentally retarded verdict." Id. at 632 (citing Burgess v. State, 264 Ga. 777, 789-92 (1994)); Burgess, 264 Ga. at 793-95 (Benham, J., dissenting).

Raulerson is incarcerated on death row at the Georgia Diagnostic Prison in Jackson, Georgia. Raulerson filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia, in 1998, and amended his petition

in 2000. An evidentiary hearing was held on February 20 and 21, 2001. On March 22, 2004, the court denied the petition. On January 11, 2005, the Supreme Court of Georgia denied Raulerson's application to appeal from that determination.

On July 18, 2005, Raulerson filed his petition for a writ of habeas corpus in federal court. On November 28, 2007, the case was transferred to the undersigned Judge for plenary disposition. On February 21, 2008, the Court held a status conference to consider the briefing schedule presented by the parties. The Court entered the scheduling order proposed by the parties, and now considers Petitioner's motion for authorization of funds to hire experts and to propound interrogatories to Defendant.

DISCUSSION

To prevail in this action, Raulerson bears the burden of establishing that the state courts' findings are contrary to, or are an unreasonable application of, clearly established federal law, as pronounced by the United States Supreme Court. 28 U.S.C. § 2254(d)(1)(2008).

Under Rule 6 of the Federal Rules Governing Habeas Corpus Cases Under Section 2254, good cause must be shown for

the Court to authorize a party to conduct discovery. "A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents." Rule 6(b).

I. Funds for Experts

Raulerson asserts that he will later fully brief an argument based on (1) that the right not to be executed if one is mentally retarded is a fundamental constitutional right under Supreme Court's decision in Atkins, (2) due process requires that constitutional rights be administered consistent with principles of fundamental fairness, and (3) under Cooper v. Oklahoma, 517 U.S. 348 (1996), requiring criminal defendants to prove mental retardation beyond a reasonable doubt, violates principles of fundamental fairness.

Raulerson argues that because the state supreme court had held, at the time of his state habeas proceeding, that the burden of proof did not violate the federal constitution, the habeas court had no authority to find that the statute was unconstitutional. Indeed, the state habeas court

determined that the state supreme court's decision on direct appeal on the constitutionality of the burden of proof was res judicata, and that it had no jurisdiction to reconsider that ruling. Now, Raulerson has the opportunity to present such evidence to this Court, which is obliged to consider his constitutional claim on its merits. Accordingly, Petitioner seeks authorization to pay experts and leave to conduct discovery.

Absent extraordinary circumstances, the law requires a habeas petitioner to raise all claims and present all necessary evidence during his first habeas proceeding. Benton v. Washington, 106 F.3d 162, 163 (7th Cir. 1996); McCleskey v. Zant, 499 U.S. 467, 477-496 (1991). Accordingly, the Court must ensure that the petitioner has a full and fair chance to litigate his claims during the initial habeas proceeding in federal court. Brown v. Vasquez, 952 F.2d 1164, 1167 (9th Cir. 1992).

Raulerson argues that to properly apply principles of fundamental fairness in this case, it will be critical for the Court to receive and assess factual information about the nature and diagnosis of mental retardation. The Court will have to assess the varying degrees of retardation, the kinds of deficiencies and behavioral attributes involved, the

evidence that psychologists evaluate in making determinations pertaining to mental retardation, and whether those determinations are capable of being proved beyond a reasonable doubt. Raulerson maintains that evidence and testimony about the nature and practice of clinical evaluations for mental retardation will have a significant impact on the Court's evaluation of Raulerson's claim that the state's burden of proof is unconstitutional.

Consequently, Raulerson seeks funds to retain two experts related to his claim that Georgia's burden of proof is unconstitutional, Ruth Luckasson, and a practicing psychologist. Luckasson is a past President of the American Association on Mental Retardation ("AAMR"), and is a Professor and Chair of the University of New Mexico's Department of Educational Specialties. Luckasson has chaired the AAMR's Committee on Terminology and Classification since 1989. The Diagnostic & Statistical Manual of Mental Disorders ("DSM") later adopted the definition of mental retardation promulgated by Luckasson's committee, and the Georgia legislature has tracked the DSM definition in its statute. Ga. Code. Ann. § 17-7-131(j). In short, it appears that Luckasson is uniquely qualified to inform the Court's decision-making process regarding whether the mental

retardation standard is susceptible to a burden of proof beyond a reasonable doubt.

Raulerson further seeks funds for an unnamed practicing psychologist to demonstrate a clinical perspective supporting the notion that the subtleties and judgments involved in making a diagnosis of mental retardation make certainties beyond reach.[2]

Raulerson argues that factual developments regarding the diagnosis, sentencing, and execution of mentally retarded criminals that have occurred since his state court proceedings, also support his request because these facts could not have been developed previously. 28 U.S.C. § 2254(e)(2)(a)(ii). Raulerson urges that part of his proposed experts' testimony will concern new scientific developments and insights about whether Georgia's standard can pass constitutional muster.

Warden Hall opposes Raulerson's motion and rejoins that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") erects additional barriers to the Court's authorization to conduct discovery.

---

[2] Raulerson does not seek to present testimony as to his own mental condition. He concedes that this information was fully presented in the state habeas proceeding.

The AEDPA provides, in relevant part:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--
> (A) the claim relies on--
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

However, the AEDPA does not preclude the requested discovery, as the Supreme Court's decision in Williams v. Taylor makes clear:

> The question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts. The purpose of the fault component of "failed" is to ensure the prisoner undertakes his own diligent search for evidence. Diligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; it does not depend, as the Commonwealth would have it, upon whether those efforts could have been successful.

529 U.S. 420, 435 (2000).

"If there has been no lack of diligence at the relevant

stages in the state proceedings, the prisoner has not 'failed to develop' the facts under § 2254(e)(2)'s opening clause, and he will be excused from showing compliance with the balance of the subsection's requirements." Id. at 437.

The State asserts that Petitioner was thorough in his presentation to the state habeas court, but to the extent Petitioner claims these witnesses can provide information that is not cumulative of that presented earlier, Petitioner was not diligent. Respondent maintains that there is no new rule of constitutional law involved because Georgia has prohibited the execution of mentally retarded persons since 1988. Fleming v. Zant, 259 Ga. 687 (1989); Ga. Code Ann. § 17-7-131(c)(3) & (j).

The Court disagrees with both arguments. Because Georgia's courts rejected Raulerson's burden of proof claim prior to Atkins, and the habeas court considered itself bound by that decision, it would have been futile, and a waste of judicial and party resources, to attempt to develop and present evidence in the state habeas proceedings pertaining to the constitutionality of the mental retardation burden of proof. Raulerson has never had a court squarely address his argument that the state's burden of proof contravenes Atkins. Given this intervening precedent, and Raulerson's diligence

under the circumstances in the state habeas court, Petitioner has shown good cause for the requested expert assistance of Luckasson.

The Court also dismisses the State's suggestion that Atkins is not new law because Georgia prohibited the execution of mentally retarded convicts in 1988. The particular recognition of the constitutional right in Atkins in 2002 is not coextensive with the limited statutory right recognized in the Georgia Code 1988, and Petitioner has a right to have a court evaluate his claim that, under Atkins, Georgia's burden of proof is unconstitutional.

Under the parties' jointly proposed scheduling order, it is plain that the parties envisioned that they may be permitted to conduct some initial discovery before the Court decides whether to grant an evidentiary hearing. This is consistent with the advisory committee notes to Rule 6, which provide that "[d]iscovery may . . . aid in developing facts necessary to decide whether to order an evidentiary hearing or grant the writ[.]" Rule 6 advisory committee's notes (1976). Accordingly, the Court rejects the State's argument that no funds are authorized because it has not yet been determined whether Raulerson is entitled to an evidentiary

hearing.

Although Respondent notes that 21 U.S.C. § 848(q)(9) was repealed in March 2006, Respondent does not dispute that the Court has the power to authorize funds for experts in this federal habeas case, regardless of whether that statute is in force presently. 18 U.S.C. §3006A (2008); In re Lindsey, 875 F.2d 1502, 1505-08 (11th Cir. 1989) (per curiam).

> Where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry. Obviously, in exercising this power, the court may utilize familiar procedures, as appropriate, whether these are found in the civil or criminal rules or elsewhere in the "usages and principles of law."

Harris v. Nelson, 394 U.S. 286, 299 (1969); Bracy v. Gramley, 520 U.S. 899, 908-09 (1987).

In sum, Raulerson has demonstrated that evidence from Luckasson is reasonably necessary for the Court to review his claim that Georgia's burden of proof on the relevant affirmative defense is impossible to demonstrate as a practical matter. However, it is not yet plain that Raulerson's case will require evidence from a clinical psychologist. The evidence submitted by Luckasson may shed light on that question, and Luckasson's report may inform

the State's desire to submit any expert evidence on behalf of its case. The Court can evaluate these matters, and consider whether Court-certification is necessary for any additional expenses, once it considers the limited discovery authorized herein. See 18 U.S.C. § 3006(A)(e)(3) (2008); see also 21 U.S.C. § 848(q)(10) (repealed in 2006).

II. Interrogatories

Additionally, Raulerson asserts that evidence about the effects of Georgia's burden of proof in practice will inform the Court's decision in this case. This information will also be relevant to Petitioner's expert(s) as they formulate their conclusions. To that end, Raulerson seeks to discover from the State the number of defendants to have raised mental retardation claims, the number who have met the beyond a reasonable doubt standard, and how many of those defendants were "mildly" mentally retarded, as Raulerson claims he is.

Specifically, Raulerson seeks limited discovery from the State regarding historical, quantitative data with respect to how Georgia's unique burden of proof has affected other criminal defendants in the State from 1988 to the

present in death penalty cases, through a number of interrogatories.

Raulerson seeks to establish that, as a matter of practice, Georgia's reasonable doubt standard does not provide the required safeguards for mentally retarded persons accused of crimes to establish their retardation. Petitioner asserts that the Warden does possess some of the requested information because, presumably, the prison keeps records about its death row inmates. According to Raulerson, because the State is the entity with the easiest access to this information, and the requests do not pose an undue burden on the State, the requested discovery should be produced.

The parties have intimated that the requested information may be in the records of separate state agencies, including the Office of Forensic Services within the Georgia Department of Human Resources, and the Department of Corrections, rather than maintained by Warden Hall or the Georgia Attorney General. According to Raulerson, those departments are responsible for court-ordered evaluations for mentally-retarded criminal defendants. To the extent Respondent cannot adequately respond to Petitioner's interrogatories for this reason, it

may be necessary for the Court to authorize subpoenas to these separate state offices. However, the Court will consider such a course only if Respondent's counsel is unable to procure these records that are in the State's control.

CONCLUSION

For the reasons described above, the motion is **GRANTED** in part and **DENIED** in part. Raulerson's request for the authorization of funds to retain Luckasson to prepare an expert report is **GRANTED**, and Raulerson's request to hire a clinical psychologist is **DENIED** at this time. As to Raulerson's requested interrogatories, the Court **DIRECTS** Respondent to answer these questions to the best of his ability, and/or make specific objections to the scope or propriety of individual questions.

The Clerk is **DIRECTED** to change the caption of the case to reflect that the Warden of Georgia's Diagnostic Prison is now Hilton Hall.

SO ORDERED, this 9th day of June, 2008.

JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA