

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
at CHATTANOOGA

HAROLD WAYNE NICHOLS,	)	
	)	
<i>Petitioner,</i>	)	
v.	)	No. 1:02-CV-330
	)	<i>Edgar/Inman</i>
RICKY BELL, WARDEN,	)	
	)	
<i>Respondent.</i>	)	

**MEMORANDUM AND ORDER**

Petitioner Harold Wayne Nichols (“Nichols”) filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. This matter is presently before the Court on the parties’ timely objections<sup>1</sup> [Court File Nos. 125, 127, & 128] to the Magistrate Judge’s Report and Recommendation and Order [Court File No. 124 & 130].<sup>2</sup> The respondent objects to the portions of the Magistrate Judge’s Report and Recommendation and Order disposing of petitioner’s motion to expand the record with the reports of his expert witnesses [Court File No. 111], and the portions disposing of respondent’s motion to dismiss the petition as time-barred [Court File No. 104]. Petitioner objects to those portions of the Report and Recommendation and Order disposing of respondent’s motion to exclude the testimony of petitioner’s witnesses, or in the alternative, to require petitioner to comply with Rules 26(a)(2) and 26(a)(3) [Court File No. 107] and those portions of the Report and Recommendation and Order

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<sup>1</sup> Rule 72(a) of the FEDERAL RULES OF CIVIL PROCEDURE implements 28 U.S.C. § 636(b)(1)(A) and requires that a party objecting to a magistrate’s order file his objection with a district court judge within ten days after service of the order.

<sup>2</sup> The Magistrate Judge’s memorandum and order [Court File No. 124] was amended [Court File No. 130] to reflect the title of “Report and Recommendation and Order.”

petitioner claims contains negative characterizations of his counsel. United States Magistrate Judge Dennis H. Inman entered a Report and Recommendation and Order granting the motion to expand the record; granting the motion to require petitioner to comply with Rule 26(a)(2) and 26(a)(3); and recommending that the motion to dismiss the habeas petition as time-barred be denied [Court File No. 124].

Before the Court is petitioner's objection to portions of the Magistrate's Report and Recommendation and Order [Doc. 125]<sup>3</sup>; respondent's objection to Part V (which allowed the record to be expanded) of the Magistrate's Report and Recommendation and Order [Doc. 127]; and respondent's objection to the Magistrate Judge's Report and Recommendation and Order denying respondent's motion to dismiss petitioner's habeas petition as untimely [Doc. 128]. These objections are treated as an appeal to the District Judge.

#### ***I. Standard of Review***

Under 28 U.S.C. § 636(b)(1)(A), a district court may “designate a magistrate to hear and determine any pretrial matter pending before the court,” with certain exceptions which involve dispositive matters. 28 U.S.C. § 636(b)(1)(A); *Massey v. City of Ferndale*, 7 F.3d 506, 508 (6th Cir. 1993). When a magistrate judge issues an order concerning a nondispositive pretrial motion, the district court has the authority to “reconsider” the determination under a limited standard of review. 28 U.S.C. § 636(b)(1)(A); *Massey*, 7 F.3d at 509 (6th Cir. 1993). Under this standard of review, the district court may overturn the magistrate's determination only if it is “clearly erroneous or contrary

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<sup>3</sup> Petitioner complains about the “negative characterizations of Petitioner's counsel's conduct in this proceeding . . .” contained in the Magistrate Judge's Report and Recommendation and Order, in addition to objecting to the Magistrate Judge's order requiring him to comply with the rules of discovery, *i.e.*, Rule 26, within ten days.

to law.” 28 U.S.C. § 636(b)(1)(A); *Vogel v. U.S. Office Products*, 258 F.3d 509, 515 (6th Cir. 2001); *Ocelot Oil Corp. v. Sparrow Industries*, 847 F.2d 1458, 1461-62 (10th Cir. 1988).

However, if the motion is a dispositive motion, 28 U.S.C. § 636(b)(1)(B) & (C) provides that the district court should conduct a *de novo* review. Therefore, petitioner’s objections to the discovery and the characterization of counsel, and respondent’s objection to expansion of the record will be reviewed under the “clearly erroneous or contrary to law” standard. However, respondent’s objection to the motion to dismiss will be reviewed *de novo*. Nevertheless, under either standard of review, the Court determines it should **ACCEPT AND AFFIRM** the Magistrate Judge’s decision.

## **II. Petitioner’s Objections [Court File No. 125]**

Petitioner objects to Magistrate Judge Inman’s Report and Recommendation and Order on two basis. First, he objects to the “negative characterizations of Petitioner’s counsel’s conduct in this proceeding . . .” which are contained in the Magistrate Judge’s Report and Recommendation and Order denying respondent’s motion to dismiss the habeas petition as time-barred [Doc. 125]. Second, petitioner objects to the Magistrate Judge requiring him to comply with Rule 26(a)(2) and (a)(3) within 10 days. The Court will resolve each claim separately.

### **A. Petitioner’s Objection to Report and Recommendation and Order Denying Respondent’s Motion to Dismiss**

Petitioner contends this Court should refuse to adopt the portions of the Report and Recommendation and Order which contain negative characterizations of his counsel’s conduct in this proceeding. Respondent contends “an evaluation of the petitioner’s counsel conduct of this litigation was required because the petitioner’s counsel answered the respondent’s statute of

limitations motion on the merits and with an alternative claim of equitable tolling.” [Doc. 133]. Furthermore, argues respondent, the record clearly supports the Magistrate Judge’s characterizations.

Petitioner is objecting to the portion of the Magistrate’s Report and Recommendation and Order which he contends contains negative characterizations of his counsel. The Court would normally conduct a *de novo* review of this portion of the objection because it is based on the report and recommendation of the Magistrate Judge. However, petitioner is not objecting to the Magistrate Judge’s determination that the motion to dismiss should be denied. Petitioner is attacking the language used by the Magistrate Judge. Petitioner is only asking this Court to refrain from accepting “those portions of the Magistrate’s order which unnecessarily impugn counsel’s integrity.” [Doc. 125, at 5]. The Court finds that this is not an objection to the Magistrate Judge’s determination of the motion to dismiss. Petitioner is not objecting to the proposed findings and recommendations, thus, he is not entitled to any relief on this objection. Accordingly, petitioner’s objections to Magistrate Judge Inman’s characterization of petitioners counsel’s conduct are **OVERRULED** [Doc. 125].

**B. Petitioner’s Objection to Order Granting Alternative Relief on Respondent’s Discovery Motion**

Petitioner also objects to the Magistrate Judge’s Order claiming any order requiring petitioner to abide by the requirements of Rule 26(a)(2) and 26(a)(3) of the Federal Rules of Civil Procedure should be equally applicable to both parties and should allow a reasonable amount of time for the parties to comply. The issue before the Magistrate Judge was whether or not petitioner’s witnesses should be excluded from testifying and whether or not, in the alternative, petitioner should be compelled to comply with Rules 26(a)(2) and 26(a)(3). The Magistrate Judge determined

petitioner must comply with Rule 26(a)(2) and (a)(3) of the *Federal Rules of Civil Procedure* within 10 days of the date of the order. The Magistrate Judge granted the motion to the extent it compelled petitioner to comply with Rules 26(a)(2) and 26(a)(3).

Petitioner is seeking clarification of the portions of the order which he claims seem to suggest that respondent is not required to comply with Rule 26(a)(2) and 26(a)(3). Petitioner is also seeking additional time to comply with Rule 26(a)(2) disclosures. Specifically, petitioner is requesting that he not be required to provide the names, addresses, and phone numbers of lay witnesses until the Court has resolved respondent's motion for summary judgement or until the Court limits the obligations to supply that information required by Rule 26(a)(2) of the *Federal Rules of Civil Procedure*. It appears that petitioner is attempting to file a motion to compel the respondents to provide Rule 26(a)(2) and 26(a)(3) discovery, a motion for an extension of time to comply with the Magistrate Judge's order, and lastly, it appears that he is objecting to the Magistrate Judge's order that he provide the names, addresses, and phone number of lay witnesses within 10 days.

Petitioner's request seeking clarification of the portions of the order which he claims seem to suggest that respondent is not required to comply with Rules 26(a)(2) and 26(a)(3) is not an objection and thus, will not be addressed.<sup>4</sup> The only objection to the Magistrate Judge's order is petitioner's objection to having to comply with the discovery within 10 days.

Respondent contends that petitioner's request for additional time should be denied because

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<sup>4</sup> The question of whether respondent had to comply with Rule 26(a)(2) and 26(a)(3) was not before the Magistrate Judge, and since the Magistrate Judge did not make a specific ruling on respondent's compliance with the rule, petitioner's argument is not an objection. However, the Court does observe that respondent claims this objection is frivolous because nothing in the Magistrate Judge's order indicates the Rules do not apply equally in this matter.

petitioner has had a substantial amount of time *i.e.*, over a year, in which to make the required disclosures. On November 19, 2002, this Court entered a scheduling order in which petitioner was ordered to disclose his witnesses and expert testimony by February 17, 2004. Furthermore, argues respondent, petitioner has had another four and a half months since the February 17, 2004, deadline to disclose witnesses and expert testimony in which to make the required disclosures.

The Magistrate Judge ordered petitioner to comply with Rule 26(a)(2) and (a)(3) of the *Federal Rules of Civil Procedure* within ten days of the date of his order. Petitioner objects to providing the information within 10 days. Petitioner has not demonstrated and the Court does not find that the Magistrate Judge's determination was "clearly erroneous or contrary to law." Accordingly, the decision of the Magistrate Judge requiring petitioner to comply with Rule 26(a)(2) and 26(a)(3) within 10 days is **ACCEPTED AND AFFIRMED**. Hence, petitioner is to comply with Rule 26(a)(2) and (a)(3) immediately.

### **III. Respondent's Objection to Magistrate Judge's Order Expanding the Record [Court File No. 127]**

Respondent objects to the order of the Magistrate Judge granting petitioner's motion to expand the record with reports of his expert witnesses in this case. The Magistrate Judge granted petitioner's motion to expand the record with expert materials of Dr. Sultan and Dr. Lisak, but specified that he was making no determination of whether or not the District Judge should consider the supplemental documents in further proceedings.

#### **A. Respondent's Objections**

Respondent argues the stated bases for the motion were improper, the reports were not the type of material permitted to be included in the expanded record, the factual predicates and legal

theories arising from the reports were procedurally defaulted, and the reports are not relevant to the claims in the petition. According to respondent, expansion of the record is only proper if the documents are documentary evidence introduced into evidence during a previous judicial proceeding involving either the original conviction and sentence or a collateral attack to the conviction and sentence. Furthermore, argues respondent, the type of testimonial evidence that may be included in the expanded record is limited to oral testimony, depositions, and affidavits.

**B. Petitioner's Argument**

Petitioner submits that the Magistrate Judge's decision is in accordance with the law and furthers the ends of justice, and thus, should be affirmed. Petitioner avers the materials are relevant to the determination of the merits of the petition as required by Rule 7 of the RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS. In addition, petitioner contends that the decision of whether to expand the record is within the sound discretion of the Judge. Moreover, petitioner avers, the only allegation that even comes close to a proper legal test for challenging the expansion of the record is respondent's allegation that the reports are irrelevant.

Petitioner contends the reports are relevant to the determination of his constitutional claims. Thus, argues petitioner, since they are relevant to the merits of his petition, the Magistrate Judge's decision was correct and should be affirmed.

**C. Analysis**

\_\_\_\_\_Petitioner claims his trial attorneys were ineffective for failing to question whether his confessions were false; for failing to analyze evidence showing his confession was unreliable; and for failing to investigate and analyze evidence of his actual innocence in light of the fact that the only

evidence that connects him to this crime is his confession. Petitioner also claims his trial attorneys were incompetent for failing to investigate and present a competent mitigation case.

The Magistrate Judge, observing that this Court must evaluate each and every claim raised in the habeas petition, determined that arguably the expansion of the record with the reports of Dr. Sultan and Dr. Lisak could be relevant to petitioner's claim that counsel was ineffective for failing to conduct an adequate mitigation investigation. The Magistrate Judge also observed that there was possibly an argument that the reports supplement the legal claim made in state court. Moreover, the Magistrate Judge determined the reports may be helpful to this Court in providing the meaningful federal review to which petitioner is entitled. Observing that the District Judge would further evaluate the relevance and significance of these reports when it reviews the merits of petitioner's claim, and that as these proceedings progress the evidence may not be considered in disposing of the habeas petition, the Magistrate Judge granted the expansion of the record. The Court agrees with the Magistrate Judge's analysis and decision.

The reports of these experts identify allegedly mitigating evidence and are arguably relative to the claims that petitioner's confession was false and he received ineffective assistance of counsel. If the need arises, these reports could be used to determine whether petitioner meets the conditions under § 2254 (e)(2) to obtain an evidentiary hearing.<sup>5</sup> At this time in the proceedings, the Court is

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<sup>5</sup> Section 2254 (e)(2) provides:

(2) 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



unable to determine whether the reports will be used in these proceedings. However, the Court agrees with the Magistrate Judge's conclusion that it is better to err on the side of obtaining too much information rather than obtaining too little.

The Court did review respondent's supplement to his objections and the recently decided United States Supreme Court decision of *Holland v. Jackson*, 124 S.Ct. 2736 (June 28, 2004), which was decided after the respondent filed his objections to the Magistrate Judge's order. The Supreme Court determined the Sixth Circuit erred in finding the state court's application of *Strickland v. Washington*, 466 U.S. 668 (1984) was unreasonable because the evidence the Sixth Circuit relied upon was not evidence properly before the state court. In *Jackson*, Jessie Jackson was tried in 1987 for the murder of James Crawley. The most substantial evidence was the eyewitness testimony of Jonathan Hughes, who claimed to have been at the scene with this girlfriend, Melissa Gooch, when the shooting occurred. Gooch did not testify.

Jackson was convicted and subsequently denied state post-conviction relief. Then Jackson filed a "Motion for Hearing in the Nature of Motion for New Trial," alleging newly discovered evidence. Jackson claimed, for the first time, that Gooch would now testify she was not with Hughes on the night of the shooting. The Tennessee appellate court upheld the State court's denial of the "Motion for Hearing in the Nature of Motion for New Trial."

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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 fact-finder would have found the applicant guilty of the underlying offense.

Jackson then sought federal habeas relief which was denied by the District Court. However, the Sixth Circuit reversed on the ground that the state court had unreasonably applied *Strickland* given that Gooch's statement undermined the credibility of Hughes' testimony.<sup>6</sup> The Supreme Court determined the Sixth Circuit erred in relying on evidence not properly before the state court, *i.e.*, the alleged statement of Gooch that she was not with Hughes on the night of the shooting.

The Supreme Court observed that under the habeas statute, Gooch's statement could have been the subject of an evidentiary hearing by the District Court, but only if Jackson was not at fault in failing to develop the evidence in state court, or if he was at fault, that the conditions of § 2254 (e)(2) were met. This section of the habeas statute allows a petitioner to proceed to an evidentiary hearing even if the petitioner fails to develop the factual basis of a claim in State court proceedings but only if the claim relies on a retroactive new rule of constitutional law that was previously unavailable or if the factual basis of the claim could not have been previously discovered through the exercise of due diligence. If a habeas petitioner satisfies one of the two prongs, then he also has to demonstrate "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense." §2254(e)(2)(B).

The Supreme Court concluded that the Sixth Circuit did not independently inquire into these matters but instead, simply ignored the State's argument that Gooch's statement was not properly before it. The Supreme Court believed it would be difficult for Jackson to claim due diligence in obtaining Gooch's statement given the seven year delay.

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<sup>6</sup> The Sixth Circuit also reversed on another ground which is not relevant to this discussion.

It appears that the petitioner in the case before this Court is in a different posture than Jackson was in *Holland v. Jackson*. The petitioner before this Court apparently raised the claim that his trial attorneys were ineffective for failing to analyze evidence and question the falsity of his confessions in his state post-conviction proceedings. Moreover, whether an evidentiary hearing will be held or whether § 2254(e) will preclude the Court from considering the expanded record will be determined as these proceedings progress. When making those decisions, the Court will be guided, at least in part, by *Jackson*. Therefore, it is premature to apply *Holland v. Jackson* to the petitioner's case at this time. Consequently, the Court does not find that *Holland v. Jackson* prevents the expansion of the record in this case.

The Court observes another recent development in the law which may have an effect on the Court's determination of whether it can consider the evidence when disposing of petitioner's petition, *i.e.*, *Thompson v. Bell*, 373 F.3d 688 (6th Cir. 2004). The Sixth Circuit recently remanded a habeas death penalty case back to this Court to consider evidence that apparently was not before the state court. *See Thompson v. Bell*, 373 F.3d 688 (6th Cir. 2004). The evidence this Court has been directed to consider consist of Dr. Sultan's<sup>7</sup> deposition which was taken by habeas counsel for respondent. Petitioner did not attach Dr. Sultan's deposition to his response to the state's motion for summary judgment. The deposition apparently demonstrates that Dr. Sultan concluded petitioner suffered serious mental illness at the time of the 1985 offense for which he has been convicted and sentenced; and that the mental illness would have substantially impaired Mr. Thompson's ability to conform his conduct to the requirements of the law. The Sixth Circuit, observing that this deposition

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<sup>7</sup> Dr. Sultan was hired by petitioner during his habeas proceedings.

was not a part of the record created in the district court, used their inherent equitable powers to expand the record on appeal to consider the deposition. This case arguably supports the Magistrate Judge's decision to expand the record in the case before this Court.

Consequently, the State has not demonstrated that the Magistrate Judge's decision to expand the record is "clearly erroneous or contrary to law." This is not to say that this evidence will be considered in disposing of the habeas petition. That determination cannot be made at this point in the proceedings. Whether or not the Court will rely on this deposition, will be determined when the Court addresses the merits of the petitioner's claims.

Therefore, the Court finds that the Magistrate Judge's determination to expand the record is not clearly error or contrary to law. Respondent's objection to Magistrate Judge's order to expand the record [Doc. 127] is **OVERRULED**. The decision of the Magistrate Judge to expand the record is **ACCEPTED AND AFFIRMED**.

**IV. Respondent's Objections to Magistrate Judge's Order Denying the Motion to Dismiss the Habeas Petition as Time-barred [Court File No. 128]**

Respondent objects to the Magistrate Judge's report and recommendation denying respondent's motion to dismiss the habeas petition as barred by the statute of limitations. Respondent contends the Magistrate Judge's report and recommendation relies upon non-binding dicta and fails to follow controlling precedent.

**A. Petitioner's Arguments**

Petitioner contends the Magistrate Judge's report and recommendation is correct and should be affirmed. Petitioner contends respondent is incorrect in his argument that the statute of limitations is not tolled from the filing of an application for state post-conviction relief until the

conclusion of the time for seeking certiorari review in the United States Supreme Court when the petitioner does not actually file a petition for certiorari.

**B. Analysis**

\_\_\_\_\_The motion to dismiss the habeas petition as time-barred is a dispositive motion and pursuant to 28 U.S.C. § 636(b)(1)(B) & (C) the district court conducts a *de novo* review. The Magistrate Judge recommended that petitioner's habeas petition should not be dismissed as time-barred. Respondent avers that since the Supreme Court of Tennessee affirmed the appellate court's denial of post-conviction relief on October 7, 2002, Petitioner had until October 7, 2003, to file his petition for a writ of habeas corpus. Respondent contends petitioner's habeas petition is untimely since his amended corrected petition was not filed until January 21, 2004. Therefore, argues respondent, the Magistrate Judge erred in finding the petition was timely filed.

First, the Court will attempt to place the sequence of events in context by briefly describing the relevant documents which have been filed in this case in chronological order. Then the Court will address the claim that the Magistrate Judge erred in relying on *Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003), *cert. denied*, 124 S.Ct. 2388 (2004), to determine when the statute of limitations expired. Lastly, the Court will address respondent's claim that the Magistrate Judge erred in deeming an untimely petition timely through *nunc pro tunc* filing.

Thus, beginning with the history of this case, a habeas petition was originally timely filed by petitioner on May 23, 2003. The petition was quite lengthy, consisting of approximately one hundred and ninety-five (195) pages with approximately one thousand (1000) pages of attachments [Court File No. 9]. On July 1, 2003, respondent filed a motion to return insufficient petition [Court File No. 13], requesting the Court to "forward a copy of the required form to petitioner's counsel

with instructions that failure to complete and file the same within thirty (30) days will result in the dismissal of the petition[.]” [Court File No. 13]. The Court granted the motion to return insufficient petition. The Court observes that it did not dismiss the petition, it just returned the petition to petitioner for the purpose of bringing the petition into compliance with the required form and with the page limitation set by the Court. Thus, the petition was timely filed, albeit too lengthy and not on the correct habeas form. Therefore, the Court required petitioner to correct the petition by limiting the number of pages. Petitioner then filed two (2) petitions for writ of habeas corpus relief on September 2, 2003 [Court File No. 34 and 35].

Court File No. 34 is the form petition with additional pages identifying all the grounds for which petitioner seeks relief. Court File No. 35 is a fifty page type-written document with at least that many pages of attachments. On October 28, 2003, Respondent filed a motion to strike Court File No. 35 [Court File No. 53]. On November 19, 2003, this Court granted Respondent’s motion to strike Court File No. 35. However, the Court observes that Petitioner continued to have a properly and timely filed form § 2254 petition, *i.e.*, Court File No. 34, which replaced the original petition that was returned as insufficient.

On November 20, 2003, Petitioner filed an amended petition for writ of habeas corpus [Court File No. 78].<sup>8</sup> The amended petition was amending the timely filed form petition but was not on the § 2254 form and exceeded 50 pages in length. Respondent filed a motion to dismiss this amended petition [Court File No. 79]. On January 21, 2004, petitioner filed a motion to accept a corrected amended petition for writ of habeas corpus *nunc pro tunc* to November 20, 2003, along with a

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<sup>8</sup> The revised scheduling order [Court File No. 15] provided that any amendment to the petition shall be filed on or before **November 20, 2003**.

corrected amended petition for writ of habeas corpus [Court File No. 82]. On January 26, 2004, this Court granted respondent's motion to dismiss petitioner's amended petition for writ of habeas corpus [Court File No. 84]. In that same order, the Court also granted petitioner's motion to accept the corrected amended petition *nunc pro tunc* to November 20, 2003, and specifically ruled that the form habeas petition [Court File No. 34] was being replaced with the corrected amended petition [Court File No. 82].

First Respondent claims the Magistrate Judge erred in relying on *Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003), *cert. denied*, 123 S.Ct. 2388 (2004)(habeas petitioners are to receive the benefit of the ninety-day certiorari period even when they seek no such relief in the United States Supreme Court), and failing to apply the controlling precedent established by *Isham v. Randall*, 226 F.3d 691 (6th Cir. 2000), *cert. denied*, 531 U.S. 1201 (2001)(habeas petitioners are not to receive the benefit of the ninety-day certiorari period in which they could have petitioned the United States Supreme Court for a writ of certiorari). Relying on *Abela* the Magistrate Judge determined that the one-year statute of limitations governing the filing of federal habeas petitions did not begin to run until the expiration of the ninety (90) days in which Petitioner could have filed for certiorari review in the United States Supreme Court. Therefore, the Magistrate Judge determined Petitioner was required to file his habeas petition on or about January 5, 2004. Consequently, the Magistrate Judge's ruling meant that any habeas petition filed on or before January 5, 2004, was timely filed.

Respondent argues that the portion of the Sixth Circuit's opinion in *Abela* indicating the statute of limitations is tolled even when a petitioner does not seek a writ of certiorari is dicta and the Magistrate Judge erred in applying the dicta of *Abela* to this case.

The Court disagrees. The Sixth Circuit made the following determination:

Because *Clay* explicitly holds that *federal* petitioners are to receive the benefit of the ninety-day certiorari period even when they seek no such relief, because *Carery* advances a broad definition of when a petition for state relief is “pending” under section 2244(d)(2), and because the contrary view leads to an unstable limitations scheme prone to subsequent revision, ***we hold*** that under section 2244(d)(2), the statute of limitations is tolled from the filing of an application for state post-conviction or other collateral relief until the conclusion of the time for seeking Supreme Court review of the state’s final judgment on that application independent of whether the petitioner actually petitions the Supreme Court to review the case.

*Abela v. Martin*, 348 F.3d at 172-73 (emphasis added).

Subsequent to *Abela*, the Sixth Circuit has applied the rule of *Abela* and reversed district court decisions that have found habeas petitions untimely because the ninety (90) day period for seeking certiorari review was excluded from the statute of limitations calculus. *See Freeman v. Tibbals*, 83 Fed.Appx.707 (6th Cir. 2003) (unpublished table decision), *available in* 2003 WL 22976549 (The Sixth Circuit determined that the district court’s conclusion declining to toll the statute of limitations for the ninety-day period during which petitioner could have sought a writ of certiorari in the United States Supreme Court, was an understandable conclusion given the case law at the time, *i.e.*, *Isham v. Randle*, 226 F.3d 691, 692 (6th Cir. 2000) (concluded that the one-year statute of limitations period was not tolled during the ninety days in which defendant could have petitioned the United States Supreme Court for a writ of certiorari). However, the Sixth Circuit reversed the district court, finding that *Abela* altered the law of this circuit by holding that the statute of limitations is tolled during the ninety-day period in which a defendant may seek a writ of certiorari from the Supreme Court. *Id.* at 709, \*2); *also see Hudson v. Kapture*, 2004 WL 1759148 (unpublished table decision) (6th Cir. Aug. 3, 2004) (“We held that the statute remained tolled ‘until the conclusion of the time for seeking Supreme Court review of the state’s final judgment on that



application independent of whether the petitioner actually petitions the Supreme Court to review the case.” (quoting *Abela*); *King v. Bell*, 2004 WL 1724551 (6th Cir. Aug. 3, 2004) (The Sixth Circuit stated “*Abela* overruled *Isham*”).

Consequently, the Court finds that the Magistrate Judge’s determination that the habeas one-year statute of limitation period did not begin to run until after the expiration of the time in which petitioner could have filed for certiorari review in the United States Supreme Court is correct. Therefore, the Court **ACCEPTS AND AFFIRMS** the Magistrate Judge’s finding.

Respondent then contends that if the Magistrate Judge correctly applied *Abela*, the petition was nevertheless untimely filed because the Magistrate Judge incorrectly determined that the petition was timely filed because it was accepted *nunc pro tunc*. Respondent claims to be “unaware of any provision of law that allows a court to avoid or toll the statute of limitations simply by accepting an original petition *nunc pro tunc* for a timely filing date.” [Court File No. 128, at 4]. However, this is not the case before this Court. This Court did not accept an original habeas petition *nunc pro tunc* for a timely filing date. As the Court previously noted, petitioner timely filed his original habeas petition on May 23, 2003 [Court File No. 9]. On July 1, 2003, respondent filed a motion to return insufficient petition [Court File No. 13] requesting the Court to “forward a copy of the required form to petitioner’s counsel with instructions that failure to complete and file the same within thirty (30) days will result in the dismissal of the petition[.]” The Court granted the motion to return the insufficient petition [Court File No. 14]. Therefore, the Court did not dismiss the petition but rather returned it to enable the Petitioner to reduce the length of the petition and submit it on the proper form.

Two petitions for writ of habeas corpus were filed on September 2, 2003 [Court File Nos. 34 and 35]. One was a form petition [Court File No. 34] which was timely filed and was only replaced with the final amended corrected petition. Moreover, the corrected amended petition was filed to correct the amended petition which was timely filed on November 20, 2003. The amended petition was amending the timely filed form petition. Although the Court struck or dismissed various petitions, the form petition [Court File No. 34] was timely filed and remained timely filed throughout these proceedings until the Court accepted petitioner's corrected amended petition *nunc pro tunc*. When the Court accepted petitioner's corrected amended petition *nunc pro tunc* to November 20, 2003, it replaced the timely filed amended petition. In addition, the Court ruled that the corrected amended petition would be treated as the entire habeas petition; the Court specifically ruled it was just replacing the form petition which was timely filed on September 2, 2003. In addition, the corrected amended petition was simply correcting the amended petition that was previously filed on November 20, 2003. Consequently, at all relevant times a timely and properly filed habeas petition was pending.

Respondent claims the Sixth Circuit's statement that a *nunc pro tunc* filing cannot cure fatal defects in the filing of a notice of appeal is analogous to the situation before this Court. *See United States v. Hoyer*, 548 F.2d 1271, 1273 (6th Cir. 1977). The Court disagrees that the statement is applicable to the case before it because there was not a fatal defect in the filing of the habeas petition. The defect was the length of the document and the failure to use the habeas form. *Hoyer* does not appear to support respondent's argument for dismissal of the habeas petition, but instead, appears to support the Court's allowance of the *nunc pro tunc* filing.

[The district court entered Hoyer's] judgment on June 6, 1975. On July 7, 1975, defendant's counsel filed a motion for a delayed appeal, explaining that on June 11, Hoyer had written him a letter requesting that he pursue the appeal, which was not received until June 13. Counsel erroneously concluded that the ten days for appeal as of right had expired by that time. The district court did not act upon the motion until February 4, 1976, when it entered an order granting the motion and extending the time for filing the notice of appeal for a period of ten(10) days from that date. It noted that 'in the light of the strict time limitations prescribed in Fed.R.App.P. 4(b), this order will be entered nunc pro tunc.' On February 13, 1976, a formal notice of appeal was filed in the district court.

*United States v. Hoyer*, 548 F.2d at 1272-72(footnotes omitted).

The Sixth Circuit observed that "where a document is filed within the 40-day period which represents a clear assertion of an intent to appeal, courts of appeals have the power to overlook the irregularities where fairness and justice so require." *Id.* at 1273 (citing 9 Moore's Federal Practice P203-09 at 729 (1975)).<sup>9</sup> The Sixth Circuit found that counsel timely filed the motion for delayed appeal on July 7, 1975, because it was filed within the thirty day period following the expiration of the regular appeal time. Therefore, since the motion for delayed appeal was timely filed and contained most of the essential facts required for a proper notice of appeal, the Court treated it as being "in substantial compliance with the requirements of that rules." *Id.*

In the case before this Court, the original habeas petition and the form petition were timely filed. They contained the essential facts required for a proper habeas petition. Both petitions were in substantial compliance with the requirement of the habeas rules. The initial petition was not on

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<sup>9</sup> Under Rule 4(b), a notice of appeal is to be filed within ten days after entry of the judgment or order appealed from. Upon a showing of excusable neglect, a district court may extend the time for filing an appeal for a period not to exceed 30 days from the expiration of the prescribed ten day period. However, it has uniformly been held that the notice of appeal must actually have been filed within the 30-day period following the expiration of the regular appeal time for the district court to have jurisdiction to excuse the delay. *United States v. Hoyer*, 548 F.2d at 1273.

the habeas form and exceeded the page limitation set by the Court, however, the form petition was on the habeas form, did not exceed the page limitation, and was timely filed. Therefore any defect in the form petition does not appear to be fatal and, to the extent necessary, the Court exercises its power to overlook any alleged irregularities where fairness and justice so require. Therefore, the Court finds that the *nunc pro tunc* filing of the corrected amended petition simply replaced the form petition and corrected the timely amended petition. Consequently, the Court finds the habeas petition was timely filed. Accordingly, the Court **AFFIRMS and ADOPTS** the Magistrate Judges Report and Recommendation.

***V. Conclusion***

For the reasons stated above, upon review of the record and applicable law, under both the *de novo* standard and the clearly erroneous or contrary to law standard, the Court **ACCEPTS AND AFFIRMS** the Magistrate Judge's Report and Recommendation and Order. The Magistrate Judge correctly denied respondent's motion to dismiss the habeas petition as time barred; correctly granted the respondent's motion to the extent petitioner was ordered to comply with Rules 26(a)(2) and 26(a)(3); and correctly granted petitioner's motion to expand the record. Petitioner's and respondent's objections [Court File Nos. 125,128, 127] are **OVERRULED**. The Report and Recommendation and Order of the Magistrate Judge is **ACCEPTED AND AFFIRMED**.

SO ORDERED.

ENTER this 12th day of August, 2004.

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/s/ R. Allan Edgar  
R. ALLAN EDGAR  
CHIEF UNITED STATES DISTRICT JUDGE