

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

MICHAEL ADAM CARNEAL,)
)
Petitioner,)
)
vs.)
)
J. DAVID DONAHUE, WARDEN,)
)
)
Respondent.)
)
_____)

Case No.: 5:09-cv-00032-TBR

Electronically Filed

**PETITIONER’S PRE-HEARING AND BRIEFING STATEMENT
AND EVIDENTIARY ISSUE STATEMENT**

Comes Petitioner, by counsel, and hereby complies with this Court’s Order of September 10, 2010 and submits his Prehearing and Briefing Statement and Evidentiary Issue Statement. See DN 60. In this Court’s Order granting an evidentiary hearing, this Court stated: “Carneal has presented at least a colorable argument that equitable tolling/actual innocence applies in this case based on his alleged mental incompetency.” DN 32, p. 2. This Court then went on to state: “Based on the record thus far, the Court finds an evidentiary hearing would allow Carneal the opportunity to fully develop his claim of equitable tolling and is necessary for the Court to properly decide the pending motion to dismiss.” *Id.*, p. 3. Thus, Petitioner plans to put forward evidence at the hearing evidence to support equitable tolling.¹

STATEMENT OF THE CASE

On the morning of December 1, 1997, Petitioner, Michael Carneal, opened fire on a group of students at the Heath High School in Paducah, Kentucky, killing three people and

¹ The Sixth Circuit treats actual innocence as a sub-category of equitable tolling. *McSwain v. Davis*, 287 F.Appx. 450, 461-463 (6th Cir. 2008).

wounding five others. He was fourteen years old at the time.

Carneal's case was transferred to circuit court for trial as an adult, and he was indicted by a Grand Jury on three counts of murder, five counts of attempted murder, and one count of burglary. TR I, 1.² The case was not a whodunit. Because the only important question was why Carneal did what he did, the defense and the prosecution quickly retained psychiatric experts.

Carneal's counsel retained Dr. Diane Schetky and Dr. Dewey Cornell to evaluate Carneal for criminal responsibility. The Commonwealth has endorsed Drs. Cornell and Schetky as possessing "credentials which have made them nationally known in the field of adolescent psychological disorders," TR III, 302. Dr. Cornell was also appointed by the court to evaluate Carneal's competency prior to his sentencing. TR II, 220. The Commonwealth retained Dr. Elissa Benedick, Dr. William Weitzel, and Dr. Charles Clark. TRSE, Envelope 1.

The reports produced by these experts reflect the difficulties associated with diagnosing mental illness in an adolescent boy - particularly one who was, by every account, not entirely open about his mental condition. All of the experts noted unusual patterns of behavior that predated the shootings - such as only taking a shower with the door locked and the heating vent covered. Typical was this passage from the report prepared by the Commonwealth's experts, which noted that:

[Carneal] always showered fast because he worried people were watching him through the vents in the floor of the bathroom. He stuffed towels around the vents in the floor in the bathroom because of that concern. He added that he had a number of "stupid" thoughts, such as that "there were people under the bed who were going to cut me." He reported that on occasions he would jump from his bed and try to get to the bathroom quickly because he was concerned that people would "cut my feet off." He also worried that people from the neighborhood

² **Note Regarding Citations:** The state court transcript of record in this case includes three bound volumes of record, a volume of newspaper citations, and a bound volume of sealed exhibits. For the purpose of this brief "TR" refers to the bound transcript of record, and "TRSE" refers to the sealed exhibits. No references will be made to the newspaper compilation.

would “creep up and look in my windows.”

TRSE, Envelope 1, pg. 6. At the time, Carneal did not indicate at that time that these delusions were part of a broader delusional system, or that he was subject to commands, and instead generally described these beliefs as “stupid.” *Id.* Nevertheless, all the experts who interviewed Carneal expressed doubts about whether they had learned all there was to know about him.

Dr. Schetky concluded that Carneal had “many of the features of Schizotypal Personality Disorder” ... but that “personality disorder diagnosis [sic] are usually not applied prior to the age of 18.” TR III, 307. Dr. Cornell agreed with Dr. Schetky's conclusion, but noted that “Michael's condition has fluctuated over time and that he has not been fully cooperative in describing his paranoid fears and other symptoms,” making it possible that he was in the early stages of Schizophrenia or Schizoaffective Disorder, *Id.* at 308. At the time, he noted that the diagnosis of Schizophrenia could only be confirmed if in the coming years Carneal “exhibits more clear-cut and unequivocal symptoms of psychosis, accompanied by a substantial decline in day-to-day functioning.” TRSE, Env. 13, pg. 6. Dr. Cornell ultimately concluded that based on the information he could obtain, Carneal was mentally ill, but that his mental illness did not rise to either the level needed to negate criminal responsibility or the level needed to effect competency. *Id.* at 7. The Commonwealth's experts concluded that Carneal's conduct was not caused by mental illness, but nevertheless questioned the reliability of what he told them during their interview, and noted the “impossible task *at this time* of explaining precisely why Carneal acted as he did ...” TRSE, Env. 1, pg. 25 (emphasis added).

On October 5, 1998, Carneal, acting on advice of counsel, moved the court to withdraw his plea of not guilty, and enter a plea of guilty but mentally ill to all charges. TR II, 191. The Commonwealth objected, arguing that the victims in the case were “overwhelmingly opposed to

[Carneal's] plea of guilty but mentally ill." TR II, 196. Five days later, the Commonwealth submitted an offer on a plea to guilty but mentally ill to the maximum term in jail - life without the possibility of parole for 25 years. TR II, 205. Carneal accepted that offer, and entered an *Alford* plea of Guilty but Mentally Ill to the charged offenses. TR II, 211. On December 16, 1998, he was sentenced in accordance with the plea agreement to the statutory maximum of Life without Parole for 25 years. TR II, 216.

Remarks by trial counsel, the Hon. Chuck Granner, at the final sentencing illustrate that counsel had doubts that everything operating within Carneal's mind had been known:

If someone can look into this young man's head and say "My God, what kind of devils are in there - how can we help him?" If he is not an antisocial creature, if he really is only suffering a mental disease and defect, then perhaps he is going to have some meaningful life in the future. To that end, we ask that the Court sentence him, but yet be cognizant of the fact that if he can get any mental help assistance from the doctors, who said, "Medication, psychology, rehabilitation, treatment - all of these things," then maybe there is one less life that's going to be just flushed away - because there isn't a thing we can do at this stage to help all these people who have suffered so much.

(VR: Tape 2, 12/16/98, 16:43:07).

Due to his age, Carneal's initial sentence was served in an institution operated by the Department of Juvenile Justice. This continued until his eighteenth birthday, at which time his case was to be returned to court for a hearing. TR II, 269. Carneal, acting on the advice of the same counsel who represented him at the time of the plea, waived his right to appear at the hearing. At the hearing, the court ordered Carneal to serve the remainder of his sentence at an institution operated by the Department of Corrections.

Upon arriving at the Department of Corrections, Carneal - now eighteen years of age - apparently received much more potent medications than he had received with the Department of Juvenile Justice. Over time, the use of these medications allowed Carneal to reveal the full

extent of his pervasive delusional system. TRSE, Env. 13, pgs. 3-4. The system involved visual hallucinations of a group of tormentors Carneal referred to as the "Danes", whom he believed were attempting to harm him. *Id.* These individuals would appear from under his bed, or through the heating vents in his home. *Id.* This system was operating on Carneal at the time of the shootings, and left Carneal unable to differentiate between his forensic examiners and the "Danes." *Id.* at 3.

In light of these new revelations, Carneal was re-evaluated by both Dr. Schetky and Dr. Cornell. Dr. Schetky reviewed Carneal's prison medical records, and spoke with Carneal, and concluded:

Michael was seriously mentally ill at the time of his crime. However, owing to the nature of his paranoid delusion system he was not able to reveal the full extent of his delusions, confused mental state, and his hallucinations to his forensic examiners. This, in turn, affected their ability to arrive at the correct diagnoses and to adequately assess issues of criminal responsibility. Having recently spoken with Michael and reviewed his psychiatric records, *it is now my opinion that, as a result of Paranoid Schizophrenia, he lacked substantial capacity to appreciate the criminality of his conduct at the time of his crime. In regard to Michael's capacity to conform to requirements of the law, he appears to have been acting in response to command hallucinations, which he was not able to resist.*

TRSE, Env. 12, pg. 5 (emphasis added). Dr. Cornell's report was even more comprehensive, describing with specificity the symptoms he had experienced in prison, and how those statements supported Carneal's revelations. Cornell wrote:

I asked Michael why he did not tell me this account when I evaluated him in 1998. He replied, "The reason was I thought you might be one of them. I felt that way about everybody, everybody I met might be a Dane. You might tell somebody and then they would come to get me for saying it. Even though I didn't tell you, the talking in my head said 'you told him too much, we're gonna kill you now.'"

TRSE, Env. 13, pg. 3. After reviewing all of the available information, Dr. Cornell concluded:

Had Michael been fully cooperative with me and disclosed the full extent of his psychotic symptoms at the time of my original evaluation of him in 1998, I could

have offered a stronger opinion about his mental state at the time of the offense. In my original report, I concluded that Michael was mentally ill with paranoid delusions at the time of the offense, but I did not find sufficient evidence to support a further conclusion that his mental condition caused him to lack substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. He did not tell me enough about the relationship between his paranoid hallucinations and the shooting to indicate insanity. ***Based on the new information that Michael has provided to me, and based on the voluminous records of his mental condition during his incarceration, there is now sufficient evidence to support an insanity defense.***

Id. at 7 (emphasis added). As stated above, Dr. Cornell also evaluated Carneal in 1998 for his competency to stand trial. After reevaluation, Dr. Cornell concluded:

Michael's psychotic symptoms would also affect his competency to stand trial and to plead guilty. I questioned Michael's competency at the time he decided to plead guilty, but he did not reveal to me that he was hearing voices telling him what to do and preventing him from fully cooperating in his defense. ***Had I known of his auditory hallucinations and their effect on his judgment and behavior, I would have recommended that he be found incompetent to stand trial, so that he could be hospitalized and treated with antipsychotic medication before making decisions about his case.***

TRSE, Env. 13, pg. 7 (emphasis added).

As to the timing of when Carneal was able to free himself from his delusional system, Dr.

Cornell's report states:

Michael indicated that he has only gradually come to terms with his psychotic symptoms. For years he has been frightened by hallucinations and believed that the Danes might punish him if he were to reveal too much about himself. He frequently hears voices commenting on his actions and criticizing him (which is a particular form of auditory hallucination seen in schizophrenia). However, when Michael began taking the antipsychotic medication Geodon approximately a year and a half ago, he began to think more clearly and began to grow stronger in his conviction that the hallucinations were not real. When his medication was switched to Zyprexa six months ago, he experienced further improvement and began to find that he could ignore or resist the hallucinations.

Id., pp. 3-4.

In light of these new findings, Carneal filed a motion under RCr 10.02, RCr 10.06, and RCr 11.42, seeking to vacate the judgment. TR III, 285-296. The Commonwealth argued that

the motion - which was filed three years to the day from Carneal's 18 year old hearing - was untimely under RCr 10.06 and RCr 11.42(10). *Id.* at 301-06. Carneal made several arguments in response, including that the timeline created by RCr 11.42(10) should not commence to run until the claim is discovered (for example, in the case of incompetency), and that in the case of a youthful offender that the timeline should not begin to run until the final sentencing hearing under KRS 640.030(2). *Id.* at 307-15. A day after receiving the response, the McCracken Circuit Court entered an order summarily denying Carneal's motion. *Id.* at 317. Carneal appealed from that ruling.

On appeal, the Kentucky Court of Appeals found that Petitioner had timely filed his motion and that he was entitled to a hearing on his claim that he was incompetent at the time of his plea. The holding reads:

In sum, Carneal's RCr 11.42 motion was timely filed within three years of his majority, and the motion presents sufficient evidence to raise real and substantial doubts concerning his competence to plead guilty. Accordingly, we vacate the June 30, 2004, order of the McCracken Circuit Court and remand this case for the court to determine whether a retrospective competency hearing is permissible and, if so, to conduct such a hearing. If a retrospective competency determination is not feasible, or if it determined at the hearing that Carneal was not competent to enter his guilty plea, then he shall be permitted to withdraw the plea and, if competent to do so, either plead again, or proceed to trial.

Opinion, page 14.

The Kentucky Supreme Court then granted discretionary review and reversed the granting of a hearing. The Court found that Petitioner had not timely filed his post-conviction action as to his incompetency claim. Commonwealth v. Carneal, 274 S.W.3d 420, 429 (Ky. 2008). The Court did not make any merits ruling on the incompetency claim itself. *Id.*

The Kentucky Supreme Court decision became final on February 19, 2009. On February 25, 2009, Carneal filed the instant habeas petition, arguing the same competency and actual

innocence issues addressed in state court. The Warden moved to dismiss the claim, arguing that the claim was untimely. (DN, 10). This Court rejected that argument, finding that

Carneal has presented at least a colorable argument that equitable tolling/actual innocence applies in this case based on his alleged mental incompetency. The record in this case contains evidence that could tend to suggest that Carneal was not competent to enter a guilty plea, and that his incompetence also prevented him from timely filing his state-court petition, and in turn, his habeas petition. The state court did not conduct an evidentiary hearing and as Respondent asserts in its reply in support of its motion to dismiss, the affidavits submitted by Carneal have not been subjected to cross-examination. DN 32, pg. 2.

This Court has ordered the instant hearing, in order to “allow Carneal the opportunity to fully develop his claim of equitable tolling . . .” (DN 32, pg. 3).

LEGAL STANDARD AND BURDEN OF PROOF

Burden of Proof: The Petitioner bears the burden in this hearing to prove he meets the criterion for equitable tolling by a preponderance of the evidence. Benn v. Greiner, 275 F. Supp. 2d 371, 374 (E.D. N.Y. 2003) *rev. on other grounds*, 402 F.3d 100 (2d Cir.2005).

Legal Standard for Equitable Tolling: As the Supreme Court has recently stated, equitable tolling is not a one-size-fits-all proposition:

The “flexibility” inherent in “equitable procedure” enables courts “to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct ... particular injustices.” Taken together, [the caselaw] recognize[s] that courts of equity can and do draw upon decisions made in other similar cases for guidance. Such courts exercise judgment in light of prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case.

Holland v. Florida, 130 S.Ct. 2549, 2563 (2010) (citation omitted) See also Keenan v. Bagley, 400 F.3d 417, 421 (6th Cir.2005) (identifying factors but stating that “[T]hese factors ‘are not necessarily comprehensive or always relevant; ultimately every court must consider an equitable tolling claim on a case-by-case basis.’”).

This Court has already ruled that in this case “[i]n order to be entitled to equitable tolling the petitioner must make a threshold showing of incompetence and must also demonstrate that the alleged incompetence affected her ability to file a timely habeas petition.” DN 32, pg. 2 (quoting McSwain v. Davis, 287 F. App’x 450, 456 (6th Cir. 2008)). Given the variable nature of mental conditions such as schizophrenia, it would be impossible to prove that a Petitioner was incapable of action during the entire limitations period, and such a showing is not required. As the cases relied upon by the McSwain court both noted, even if the Petitioner’s current mental state would not justify tolling, tolling is appropriate where there was “evidence ‘of ongoing, if not consecutive, periods of mental incompetency.’” Laws v. LaMarque, 351 F.3d 919, 924 (9th Cir. 2003)(quoting Nara v. Frank, 264 F.3d 310, 319-20 (3d Cir.2001)); see also Aiello v. Warden, SCI Graterford, 2006 WL 1050283, at 4 (E.D. Pa., 2006)(finding that even where schizophrenic inmate had “moments of lucidity”, equitable tolling could apply).

In short, Petitioner is only required to show the following:

1. He has a mental illness,
2. His mental illness substantially impaired his ability to act upon his legal claims; and
3. The amount of untolled time between the accrual of his claims, and the time he filed his state court petition, is fewer than 360 days.³

Petitioner believes that the evidence presented at this hearing will meet this burden.

Alternatively, Petitioner will show that at the time of the offense that he suffered from a mental disease that under Kentucky Law rendered him not criminally responsible for his actions. Thus, the habeas statute of limitations should be tolled because Petitioner is actually innocent of his crimes. Britz v. Cohan, 192 F.3d 1101, 1103 (7th Cir.1999) (Insanity qualifies for actual

³ The Warden has not disputed that the state court petition was “properly filed” and thus “stopped the clock” for AEDPA purposes. Only five days elapsed between the time the state court action was final, and the filing of the instant petition.

innocence exception to the dictates of 2244(d)(1)). Under Kentucky Law one is criminally insane if he “lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.” KRS 504.020(1). To show that he was not criminally responsible, Petitioner will, as required, present “new reliable evidence...that was not presented at trial.” House v. Bell, 547 U.S. 518, 538 (2006).

ANTICIPATED TESTIMONY

Petitioner anticipates calling three witnesses during their case in chief: Dr. Dewey Cornell, Dr. Diane Schetky, and Mr. Michael Carneal.

Drs. Cornell and Schetky will testify in a manner consistent with their reports, and as described above in the “statement of the case.” Both will state that in their professional judgment, to a reasonable degree of medical certainty, that Michael suffers from schizophrenia which for most of the relevant period both prevented him from being aware that he had a legal claim, and prevented him from acting on that claim. Both will state that Michael did not achieve a sustained ability to describe his mental state to others which would be sufficient to pursue a legal claim until approximately six months prior to the state court petition being filed.

Specifically, Dr. Schetky found:

Ongoing mental illness of psychotic proportions combined with serious complications of his medication and minimal insight into the nature of his condition and its relationship to his crime, prevented him from being able to file an appeal on his case in timely fashion.

Schetky Report, 11/28/2010, p. 16. Dr. Cornell likewise found

It would seem reasonable to extend the deadline for Michael to appeal his case if he were in a coma from 1998 to 2003. Instead, he was in an irrational state of mind suffering from a severe form of mental illness, schizophrenia. Because of the extraordinary nature of his mental illness, he was troubled by hallucinations and delusions that prevented him from recognizing that his decision-making about his case from 1998 was not rational and that he had reason to pursue an insanity defense. From this perspective, his mental illness was coma-like with regard to

his ability to understand himself and make rational decisions about his case. Only after he experienced a psychological awakening that gave him awareness that his mental illness had affected his competence in 1998 could he possibly have pursued an appeal.

Cornell Report, 10/26/2009, p. 6.

Drs. Cornell and Schetky will also testify that Michael was not criminally responsible for his offenses due to his schizophrenia. They will testify that he was under the influence of command hallucinations. They will also testify that they were unable to diagnose Michael at the time of his trial due to the nature of the illness.

Michael will testify to his history of delusions, and that his delusions were affecting him for some time prior to the offense, and continue to affect him in the present day. He will testify that he concealed his mental illness for many years because he believed his delusions were real, and that they would kill him if he disclosed their presence to anybody. Eventually, after he was properly diagnosed, he received medications and treatment which permitted him to describe his delusions to others. He will testify that a sustained ability to communicate his condition did not occur until within approximately six months of when he filed his state court action. Michael will also testify to how his delusions caused him to commit the offense.

Petitioner also may call the following witnesses during his case in chief: Ms. Kelly Firesheets, Ms. Ann Carneal, Mr. John Carneal, and Paige McGuire.

Ann and John Carneal, Michael's parents, and Kelly Firesheets, Michael's sister, if called, will testify that they had regular communication with Michael from prior to the offense until the present day. They will testify that Michael exhibited odd paranoid behavior prior to the offense. Kelly may testify about the events of the offense, as she was present. Kelly, Ann and John also visited Michael regularly from the time of offense until the present. They will testify

as to their perceptions of his mental health during the time of his incarceration. They will testify that it improved over time.

Paige McGuire, former Deputy Warden at Kentucky State Reformatory (KSR), the prison at which Michael is incarcerated, if called, will testify that Michael was in the Correctional Psychiatric Treatment Unit upon arrival at KSR. She will testify to the mission and purpose of CPTU. She will testify that Michael's extended stay there was related to his mental health. She will testify to her contacts with Michael.

After Petitioner's witnesses testify, it is anticipated that the Commonwealth will put on three expert witnesses who will testify that Michael does not have a major mental illness. They will testify that without a major mental illness that he does not qualify for equitable tolling of any sort. If this is the testimony from the Commonwealth's witnesses, the Petitioner will put on rebuttal testimony of Dr. Kathleen O'Connor and Dr. Laura Moore. Dr. O'Connor treated Michael as a juvenile after his conviction. She will testify that he is a schizophrenic. Dr. Moore currently treats Michael. She will testify that he is a schizophrenic.

The Petitioner will update this document if it appears that further witnesses are anticipated.

EVIDENTIARY ISSUE STATEMENT

There are currently no evidentiary issues known to Petitioner.

Respectfully submitted,

/s/ David H. Harshaw III
DAVID H. HARSHAW III, KBA #86435
Assistant Public Advocate
DEPARTMENT OF PUBLIC ADVOCACY
207 Parker Drive, Suite 1
LaGrange, Kentucky 40031
502/222-6682

Fax: 502/222-3177
David.Harshaw@ky.gov

w/permission Timothy G. Arnold
TIMOTHY G. ARNOLD, KBA # 86500
Assistant Public Advocate
DEPARTMENT OF PUBLIC ADVOCACY
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
502/564-8006
Fax: 502/564-7890
Tim.Arnold@ky.gov

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a copy of this pleading was served through the CM/ECF system to the Hon. Kenneth W. Riggs and the Hon. Christian K.R. Miller, Assistant Attorney Generals, Criminal Appellate Division, 1024 Capital Center Drive, Frankfort, Kentucky 40601-8204, on this 25th day of January, 2011.

/s/ David H. Harshaw III
COUNSEL FOR PETITIONER