

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HORACE WALLACE,

Petitioner,

v.

HUGH WOLFENBARGER,

Respondent,

Case No. 2:08-CV-13479

HON. VICTORIA A. ROBERTS
UNITED STATES DISTRICT COURT

OPINION AND ORDER DENYING THE MOTION FOR DISCOVERY

Before the Court is habeas petitioner Horace Wallace's motion for discovery. For the reasons stated below, the motion is denied without prejudice.

"A habeas petitioner, unlike the usual civil litigant, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Instead, a habeas petitioner is entitled to discovery only if the district judge "in the exercise of his discretion and for good cause shown grants leave" to conduct discovery. Rule 6 Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254. To establish "good cause" for discovery, a habeas petitioner must establish that the requested discovery will develop facts which will enable him or her to demonstrate that he or she is entitled to habeas relief. *See Bracy*, 520 U.S. at 908-09. The burden is on the petitioner to establish the materiality of the requested discovery. *See Stanford v. Parker*, 266 F. 3d 442, 460 (6th Cir. 2001).

Petitioner filed his habeas petition on August 12, 2008. On August 22, 2008, Magistrate Judge R. Steven Whalen signed an order of responsive pleading, requiring respondent to file an answer to the petition for writ of habeas corpus and the Rule 5 materials by February 18, 2009. Respondent has not yet filed an answer to the petition for writ of habeas corpus. Until a respondent files an answer to the habeas petition, “it is impossible to evaluate what, if any, discovery is needed and whether the discovery is relevant and appropriately narrow.” *Gengler v. United States ex rel. Dept. of Defense & Navy*, 463 F. Supp. 2d 1085, 1114-15 (E.D. Cal. 2006); *See also Shaw v. White*, No. 2007 WL 2752372, * 3 (E.D. Mich. September 21, 2007). In addition, none of the Rule 5 materials have been received by the Court; “and receipt of those materials may obviate the need to order discovery.” *Shaw*, No. 2007 WL 2752372, at * 3. Granting Petitioner’s discovery request at this time would be premature. Therefore, the motion for discovery will be denied without prejudice. *Id.*

IT IS HEREBY ORDERED that motion for discovery [Dkt. # 2] is **DENIED WITHOUT PREJUDICE**. The Court will reconsider Petitioner's motion if, following receipt of the responsive pleading and Rule 5 materials, the Court determines that additional discovery is necessary.

S/Victoria A. Roberts
Victoria A. Roberts
United States District Judge

Dated: December 15, 2008

The undersigned certifies that a copy of this document was served on the attorneys of record Horace Wallace by electronic means or U.S. Mail on December 15, 2008.

s/Carol A. Pinegar _____

Deputy Clerk