

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

JOSEPH W. HUBER, JR.,

Petitioner,

Case No. 3:13-cv-055

-v-

District Judge Walter Herbert Rice
Magistrate Judge Michael R. Merz

NORMAN ROBINSON, Warden,

Respondent.

**DECISION AND ORDER GRANTING IN PART AND DENYING IN
PART PETITIONER'S MOTION TO EXPAND THE RECORD**

This habeas corpus case is before the Court on Petitioner's Motion to Expand the Record to include the document embodying the "Entry of Dismissal of the original defective indictment" in Petitioner's case (Motion, Doc. No. 8, PageID 635).

In opposition, the Warden notes that he incorporated in the Return here all the documents included in the record in Case No. 3:11-cv-008 and the transcript which purports to show the timing of the dismissal in question, but reports "the "Huber I" trial court docket does not reflect a formal entry prior to trial dismissing Counts 2 and 4, see attached Exhibit A, this statement by the trial court in the "Huber I" judgment of conviction conclusively demonstrates that the charge that was to be the foundation of "Huber II" had been dismissed prior to the trial in "Huber I"." (Doc. No. 9, PageID 638).

Accordingly, the Motion is GRANTED to the extent that the Court will consider the record from the prior case to the extent necessary to determine the Double Jeopardy claim. The Motion is DENIED to the extent that this Court cannot order the inclusion of a document which

does not exist. The Court considers the Warden's response as an admission that no such document exists or can be found.

April 28, 2013.

s/ *Michael R. Merz*
United States Magistrate Judge