

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION**

CARL TICE

PETITIONER

v.

NO. 5:09CV00029 JLH

LARRY NORRIS, Director of the
Arkansas Department of Correction

RESPONDENT

ORDER

The Court has received findings and a recommendation from Magistrate Judge H. David Young. After a careful review of the findings and recommendation, the timely objections received thereto, and a *de novo* review of the record, the Court concludes that the findings and recommendation should be, and hereby are, approved and adopted in their entirety as this Court's findings in all respects.

After the Magistrate Judge issued the findings and recommendation, the petitioner filed two motions for leave to amend his petition. Documents #16 and #17. The first motion seeks to add grounds 17 through 23 to his petition. His second motion seeks to state additional grounds for avoiding the conclusion that his claims are procedurally defaulted.

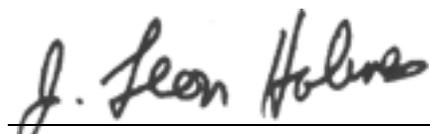
Assuming, *arguendo*, that the grounds for relief that the petitioner proposes to add to his petition would relate back to the original petition and therefore would not be barred by the one-year statute of limitations, none of the seven new grounds was presented to the state courts of Arkansas. As his cause for failing to present them to the state courts, he says that he was not in possession of the state court records at that time. However, he was represented by counsel, and his attorney had access to the state court records. Therefore, he has failed to allege facts that establish cause for failing to present these issues to the state court. Furthermore, he has failed to allege facts that would

establish prejudice. The Court has reviewed each of the alleged new grounds, along with the entirety of the state court transcript, and the Court does not believe the allegations in the proposed amended petition are sufficient to show actual prejudice. *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 2565, 115 L. Ed. 2d 640 (1991). Therefore, the motion to amend is denied as futile. Document #16.

As to the motion that states additional grounds for avoiding the conclusion that his claims are procedurally defaulted, the Court has considered that motion as an additional objection to the Magistrate Judge's proposed findings and recommended disposition. The petitioner cites *Smart v. Scully*, 787 F.2d 816 (2nd Cir. 1986), for the proposition that the failure to verify his state court petition does not bar review in this Court, even though the Arkansas Supreme Court deemed it a procedural default. That argument seems to be foreclosed by the case law in the Eighth Circuit. *See Oxford v. Delo*, 59 F.3d 741, 744-45 (8th Cir. 1995). The second motion to amend is denied as moot. Document #17.

The petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by petitioner Carl Tice is denied, this proceeding is dismissed, and judgment will be entered for respondent Larry Norris.

IT IS SO ORDERED this 17th day of July, 2009.



J. LEON HOLMES
UNITED STATES DISTRICT JUDGE