

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF ILLINOIS
 EASTERN DIVISION

LAWRENCE DALTON,)	
)	
Petitioner,)	
)	
vs.)	No. 97 C 2368
)	
JUDY SMITH, Warden,)	The Honorable
Oshkosh Correctional Institution, and)	Amy J. St. Eve,
LISA MADIGAN, ATTORNEY GENERAL)	Judge Presiding.
of Illinois,)	
)	
Respondent.)	

**MOTION TO RECONSIDER DENIAL
 OF RESPONDENT’S MOTION *IN LIMINE***

Now comes Respondent, LISA MADIGAN, Attorney General of Illinois, and respectfully requests this Court to reconsider its November 8, 2005 denial of respondent’s Motion *In Limine* to exclude any and all affidavits executed by Dalia Dalton which petitioner intends to submit to support his claim that his guilty plea was not knowing and voluntary because the trial court allegedly failed to inform him, at the time of the plea, that he was eligible for an extended-term sentence under Illinois law.

Because petitioner seeks to admit Dalia’s affidavits to prove both that Dalia was present at petitioner’s guilty plea and that the trial court did not inform petitioner that his guilty plea would render him eligible for an extended term sentence, these affidavits constitute inadmissible hearsay and should have been excluded by this Court.

This Court acknowledged the application of the Federal Rules of Evidence to habeas corpus proceedings, but noted that Fed. R. Evid. 1101(e) limits such application where provided by statutes or other rules prescribed by the Supreme Court pursuant to statutory authority. (*See* Doc. 163 at 1 (*citing* Fed. R. Evid. 1101(e)). The Court then determined that the Rules Governing Section 2254 Cases allow courts to consider affidavits as part of the record, even though they are hearsay. (*See* Doc. 163 at 1 (*citing* Rules 7(a), (b) of the Rules Governing Section 2254 Cases in the United States District Courts; Owens v. Frank, 394 F.3d 490, 498 (7th Cir. 2005)). This determination was in error.

Instead of supporting the Court's determination, Owens actually undermines it. In Owens, the Seventh Circuit discussed how a petitioner's ability to introduce new evidence into the record depends upon the interplay between Habeas Rule 7 and 28 U.S.C. § 2254(e)(2) (setting forth the requirements to obtain an evidentiary hearing). Owens makes clear that the procedural posture of a case is the key to the proper application of Habeas Rule 7. Owens, 394 F.3d at 498-499. The court explained that procedural devices such as Habeas Rule 7 "can be used to introduce new factual information into the record in lieu of an evidentiary hearing[.]" but when "expansion of the record is used to achieve the same end as an evidentiary hearing, the petitioner ought to be subject to the same constraints that would be imposed if he had sought an evidentiary hearing." *Id.* (*citing* Boyko v. Parke, 259 F.3d 781, 790 (7th Cir. 2001)).

The procedural posture of this case warrants exclusion of Dahlia Dalton's affidavits because the upcoming evidentiary hearing has been ordered to explore

undeveloped, disputed factual questions at which this Court can assess the weight and credibility of the witnesses. The primary reason for allowing the use of affidavits pursuant to Habeas Rule 7 is to limit the number and complexity of the evidentiary hearings required in section 2254 cases. Fuller v. Attorney General of State of Alabama, 36 F.Supp.2d 1323, 1326 (N.D. Al. 1999), *rev'd on other grounds by*, 197 F.3d 1109 (11th Cir. 1999) (*per curiam*). Often, the goal is to avoid the need for an evidentiary hearing entirely. Id. But a hearing has already been ordered in this case.

Despite the fact that the Advisory Committee Notes to Rule 7 comments that generally “an expanded record may be helpful when an evidentiary hearing is ordered,” that is not true here. *See also* James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 19.5 n.13 (2d ed. 1994) (noting that “affidavits still may be ‘helpful’ in . . . narrowing *the scope of the hearing to disputed matters.*”) (emphasis added). While an uncontradicted affidavit may constitute valid evidence at an evidentiary hearing, *see Fuller*, 36 F.Supp.2d at 1327, it does not where, as here, the affidavit concerns the heart of the disputed factual question for which the evidentiary hearing was ordered.

As this Court’s order denying respondent’s motion *in limine* implicitly acknowledged, Dahlia Dalton’s affidavits are hearsay. They might have been sufficient to warrant an evidentiary hearing, as the Seventh Circuit held in its opinion remanding this case, but without live testimony they prove nothing. *See United States ex rel. Rooney v. Ragen*, 158 F.2d 668, 670-671 (7th Cir. 1947) (once evidentiary hearing

is granted on basis of witness' affidavit recanting trial testimony, petitioner has burden of proving perjury with competent evidence); *compare* Shore v. Warden, 942 F.2d 1117, 1120-1121 (7th Cir. 1991) (where recanting witness testified at state post-conviction hearing). *Cf.* United States ex rel. Cross v. DeRobertis, 811 F.2d 1008, 1016 (7th Cir. 1987) (habeas petitioner claiming counsel was ineffective for failing to investigate must produce testimony of potential witnesses or explain their absence).

Federal Rule of Evidence 802 establishes a general prohibition on the use of hearsay evidence, *see* Fed. R. Evid. 802, which may be admitted only if it falls within a recognized exception. *See* Fed. R. Evid. 803(1)-(23) and 804(b)(1)-(6). This Court failed to determine whether the Dahlia Dalton's affidavits fit into any such exception; nor can it, for the reasons articulated in respondent's motion *in limine*.

This Court based its decision to consider Dahlia Dalton's 1996 affidavit, in part, on the fact that petitioner submitted it in connection with his state court post-conviction proceedings. But, because the state court denied relief based on the pleadings, without conducting an evidentiary hearing, the State did not have a previous opportunity to cross-examine the statements in Dahlia Dalton's 1996 affidavit, and her death precludes respondent from doing so at the upcoming evidentiary hearing. Even though the 1996 affidavit was submitted during state post-conviction proceedings, there is no basis to conclude that the State forfeited any objection to that affidavit. In fact, the circuit court dismissed the post-conviction petition on the State's motion without conducting an evidentiary hearing. The State's amended motion to dismiss directly contested petitioner's claim that he was not

informed that by pleading guilty he would be subject to an extended term. This amended motion included an affidavit from the Assistant State's Attorney present at the plea who averred that petitioner was advised of his rights and of the applicability of the extended term sentence. Dalton v Battaglia, 402 F.3d 729, 732 (7th Cir. 2005). In granting the State's motion, the state court implicitly credited the State's affidavit and rejected those submitted by petitioner.¹

Moreover, the 1998 affidavit was never presented during state court proceedings; rather, it was presented for the first time following the remand order by the Seventh Circuit for an evidentiary hearing. Thus, the instant case does not present a situation where the affidavits in question were "placed squarely in the record by the actions of both parties." *Contra Fuller*, 36 F.Supp.2d at 1325.

Therefore, the information that petitioner wishes to present by means of Dahlia Dalton's affidavits actually "requires testimonial evidence that necessitates not only inclusion of the documents into the expanded record, but also concomitant credibility determinations." *See Owens*, 394 F.3d at 498. As this Court acknowledged, Doc. 163 at 2, even, the Advisory Committee Notes following Habeas Rule 7 state that "When the issue is one of credibility, resolution on the basis of affidavits can rarely be

¹Specifically, the court stated that it was "disturbed that a transcript of Petitioner's plea [was] unavailable," but, contrary to petitioner's assertions, concluded that several pleadings within the court file — including an executed jury waiver, an executed waiver of presentence investigation report, a file stamped letter from the Psychiatric Institute stating that the Petitioner is mentally fit for trial, and a certified statement of conviction indicating petitioner was found fit — led it to believe the petitioner's plea was knowingly and intelligently entered. *Id.*

conclusive.” (*quoting* Raines v. United States, 423 F.2d 526, 529-30 (4th Cir. 1970)); Smith v. Zant, 887 F.2d 1407, 1433 n. 15 (11th Cir. 1989) (“We fail to see how the state habeas court could have made a decision on Fisher’s credibility when Fisher never gave oral testimony. We previously have expressed doubts as to whether a credibility determination can be fairly made on a paper record.”). Since such determinations can no longer be made, in light of Dahlia Dalton’s death, her affidavits should have been excluded.

Wherefore, respondent respectfully requests that this Court reconsider its denial of her Motion *In Limine* and instead exclude any and all affidavits executed by Dalia Dalton to support petitioner’s claim that his guilty plea was not knowing and voluntary because the trial court allegedly failed to inform him, at the time the plea was entered, that he was eligible for an extended-term sentence under Illinois law.

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LISA MADIGAN, ATTORNEY GENERAL)	Judge Presiding.
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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2005, I electronically filed respondent's Motion to Reconsider Respondent's Motion *In Limine* to Exclude Dalia Dalton's Affidavits with the Clerk of the United States District Court for the Northern District, Eastern Division, using the CM/ECF system which will send notification of such filing to the following: Eric Grush.

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