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

SIDNEY SOUFFRANCE,

Petitioner, : Case No. 1:09-cv-217

-vs- : District Judge S. Arthur Spiegel
Magistrate Judge Michael R. Merz

WARDEN, Lebanon Correctional Institution,

Respondent. :

DECISION AND ORDER ON PETITIONER'S MOTIONS TO AMEND AND SUPPLEMENT

This case is before the Court on Petitioner's "Motion to Supplement Supplemented Motion" (Doc. No. 38) and "Motion to Withdraw First Supplemental Motion to Amend and Resubmit Supplemental Motion to Amend" (Doc. No. 39).

Petitioner filed an Application for Leave to Proceed *in forma pauperis* with an attached habeas corpus petition on March 25, 2009. On April 7, 2009, Magistrate Judge Black[1] issued a Deficiency Order requiring completed financial information from the incarcerating institution before proceeding (Doc. No. 3). Although he received the Deficiency Order on April 9, 2009, Petitioner did not respond until a month later, whereupon Judge Black permitted him to proceed *in forma pauperis* and ordered an answer (Doc. No. 6). The Return of Writ was filed July 8, 2009, but Petitioner has

[1]The Deficiency Order is incorrectly docketed as having been signed by Magistrate Judge Hogan.

still not filed a reply. Immediately upon transfer of the case to the undersigned, he set a reply date of December 30, 2010 (Doc. No. 25). That date has now been extended twice on Petitioner's motion, first to January 31, 2011 (Notation Order granting Doc. No. 28) and then to April 1, 2011 (Decision and Order, Doc. No. 37). The most recent Order granted Petitioner's two Motions to Amend (Doc. Nos. 31 & 35) without prejudice to any affirmative defenses Respondent might plead in an amended return, which was ordered filed by March 1, 2011.

Now Petitioner seeks to file further amendments. His Motion to Withdraw contains four proposed grounds for relief numbered 4, 5, 6, and 7 and his Motion to Supplement contains two proposed rounds for relief numbered 7 and 8 with ground 7 being different from the ground 7 in the Motion to Withdraw.

The Rules Governing § 2254 Cases (the "Habeas Rules") do not contain a provision on amending the petition. However, 28 U.S.C. § 2242 provides in pertinent part that a petition may be amended or supplemented "as provided in the rules of procedure applicable to civil actions." That is Fed. R. Civ. P. 15 which allows an amendment once as a matter of course before a responsive pleading is filed. It was on that basis that the Court granted the Motion to Amend and Supplemental Motion to Amend. However, further amendment requires court permission.

The general standard for considering a motion to amend under Fed. R. Civ. P. 15(a) was enunciated by the United States Supreme Court in *Foman v. Davis*, 371 U.S. 178 (1962):

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of any allowance of the amendment, futility of amendment, etc.

-- the leave sought should, as the rules require, be "freely given."

371 U.S. at 182. In considering whether to grant motions to amend under Rule 15, a court should consider whether the amendment would be futile, i.e., if it could withstand a motion to dismiss under Rule 12(b)(6). *Hoover v. Langston Equip. Assocs.*, 958 F.2d 742, 745 (6th Cir. 1992); *Martin v. Associated Truck Lines, Inc.*, 801 F.2d 246, 248 (6th Cir. 1986); *Marx v. Centran Corp.*, 747 F.2d 1536 (6th Cir. 1984); *Communications Systems, Inc., v. City of Danville*, 880 F.2d 887 (6th Cir. 1989). *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134, 155 (6th Cir. 1983); *Neighborhood Development Corp. v. Advisory Council*, 632 F.2d 21, 23 (6th Cir. 1980).

28 U.S.C. §2244 (d) as enacted by the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214)(the "AEDPA") provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of — (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
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> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
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> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
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> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-

> conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

A district court may dismiss a habeas petition *sua sponte* on limitations grounds when conducting an initial review under Rule 4 of the Rules Governing §2254 Cases, *Day v. McDonough*, 547 U.S. 198 (2006)(upholding *sua sponte* raising of defense even after answer which did not raise it); *Scott v. Collins*, 286 F.3d 923 (6th Cir. 2002). If a court may dismiss a petition as barred by the statute, it may also refuse to allow an amendment which would be subject to dismissal as barred by the statute of limitations.

Even if an initial petition is timely filed, later amendments do not relate back to the date of original filing unless they arise from the same transaction or occurrence as the original claims. Fed. R. Civ. P. 15(c). The Supreme Court has interpreted the "transaction or occurrence" language narrowly in the habeas corpus context.

> An amended habeas petition ... does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground for relief supported by facts that differ in both time and type from those the original pleading set forth.

Mayle v. Felix, 545 U.S. 644, 650 (2005).

Petitioner's conviction became final on direct appeal on December 26, 2007, when the Ohio Supreme Court declined jurisdiction over his appeal from the First District Court of Appeals (Return of Writ, Doc. No. 10, Ex. 15.) Thus Petitioner's time to file a petition for writ of habeas corpus expired on March 26, 2009, one year after expiration of his time to seek a writ of certiorari from the United States Supreme Court. Because Petitioner signed his Petition on March 20, 2009, and the Clerk actually received it on March 25, 2009, it appears the initial Petition was timely filed.

Respondent does not assert a statute of limitations defense in the original Answer/Return of Writ.

Petitioner pled three Grounds for Relief in his Petition:

> **GROUND ONE:** Where the trial court admits gruesome and sexually explicit photographs that's more inflammatory than probative, defendant's right to a fair trial and due process of law are violated.
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> **Supporting Facts:** The state should not have admitted into evidence, State exhibits – 8-13 which explicitly dipict [sic] Ms. Vaughn's genital area to show various bruises and anomalies. Neither side disputes their existence, but only how they occurred. The testimony of Nurse Porter was sufficient to support the states case in that regard, and the introduction of the photos was nothing more than prurient and gratuitous inflamation of the jury.
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> **GROUND TWO:** Ineffective assistance of counsel.
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> **Supporting facts:** Appellate counsel failed to raise significant and obvious issues of constitutional magnitude, and is ineffective within the meaning of the constitution.
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> **GROUND THREE:** Sentence in a criminal case is enhanced beyond statutory maxium (sic).
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> **Supporting facts:** The defendant's right to a jury trial and to due process of law are violated where sentence is enhanced beyond statutory maximum based on judicial fact finding of elements never charged, admitted, or proven to a jury beyond a reasonable doubt.

(Quoted in Answer/Return of Writ, Doc. No. 10, PageID 62.)

In his Supplemental Motion to Amend which the Court granted subject to any affirmative defenses to be raised in an amended return, Petitioner added the following claims:

> **GROUND #4:** The trial court abused its discretion, depriving petitioner of the Fourteenth Amendment of the United States Constitution.
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> **SUPPORTING FACTS:** The trial court erred when it overruled the subpoena of Kelly Lynn Vaughn's ("purportedly alleged victim"), mental health records ("M.H.R.") without first conducting an in

> camera inspection, a deprivation of petitioner's Fourteenth Amendment right of the United States Constitution.
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> **GROUND #5:** Petitioner was denied the effective assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution.
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> **SUPPORTING FACTS:** Trial attorney (James F. Bogen), failed to keep petitioner informed of important developments, and to ask the trial court to create a Judgment entry overruling subpoena of the purportedly alleged victim's "M.H.R", and seek an interlocutory appeal, a violation guaranteed by the Sixth Amendment of the United States Constitution. Trial counsel also failed to object to Megan E. Shanahan's (prosecuting attorney), argument opposing subpoena of "M.H.R." and to adequately prepare and/or offer any memorandum and case law authority supporting the position of the defense at the hearing. A Sixth Amendment violation of the United States Constitution.
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> **GROUND #6:** The State failed to disclose evidence to the defense. A denial of petitioner's right to a fair trial; Fifth and Fourteenth Amendment of the United States Constitution.
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> **SUPPORTING FACTS:** Megan E. Shanahan contended that the state opposed the subpoena, when Ohio Rules of Criminal Procedure, Criminal Rule 16(B)(1)(d) states: "Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, or copies thereof, available to or within the possession, custody or control of the state, the existence of which is known to the prosecuting attorney". A Kyles violation, denying petitioner the Fifth and Fourteenth Amendments of the United States Constitution.

(Doc. No. 35, PageID 621-622.) Grounds Four, Five, and Six as pled in Doc. No. 35 were added to the Petition because, under Rule 15, a party has a right to amend once before a responsive pleading is filed. However, they are subject to any affirmative defenses Respondent may raise in an amended answer.

In the instant Motions, seeks to make several changes. First of all he seeks to replace Ground Four as it presently stands (a claim of abuse of trial court discretion) with a new Ground Four claiming denial of effective assistance of appellate counsel for failure to raise trial court abuse of discretion on direct appeal. Amendment to allow this substitution is denied because:

1. The claim does not arise out of the same transaction or occurrence as any claim in the original Petition and is therefore barred by the statute of limitations, and
2. This claim of ineffective assistance of appellate counsel is barred by procedural default because it has never been presented to the First District Court of Appeals in an application for reopening under Ohio R. App. P. 26(B) and the time within which Petitioner could have filed such an application expired several years ago.

Secondly, Petitioner seeks to replace Ground Five (a claim of ineffective assistance of trial counsel) with a new Ground Five stating a claim of ineffective assistance of appellate counsel. Amendment to allow this substitution is denied for the same reasons given as to Ground Four.

Third, Petitioner seeks to slightly reword Ground 6. That request is granted.

Fourth, Petitioner seeks to add a Ground 7 which complains of ineffective assistance of trial counsel when his trial attorney did not file a motion to dismiss on grounds of pre-indictment delay. This request is denied because:

1. It is barred by the statute of limitations in that it does not arise from the same transaction or occurrence as any of the originally filed grounds for relief, and
2. It is procedurally defaulted because it would have been available on direct appeal because provable from the record but was not raised on direct appeal.

Fifth, Petitioner seeks to add a different ground 7 claiming ineffective assistance of appellate

counsel arising from his appellate counsel's not raising the ineffective assistance of trial counsel claim proposed in the last request. This request is denied on the same bases as the denial of Ground Four above.

Sixth, Petitioner seeks to add an eighth ground for relief claiming ineffective assistance of trial counsel in five respects. This request is denied because

1. It is barred by the statute of limitations in that it does not arise from the same transaction or occurrence as any of the originally filed grounds for relief, and
2. To the extent it would rely on evidence not in the record on direct appeal, it is procedurally defaulted by Petitioner's failure to file a timely petition for post-conviction relief under Ohio Revised Code § 2953.21.

Conclusion

For the foregoing reasons, Petitioner's "Motion to Supplement Supplemented Motion" (Doc. No. 38) and "Motion to Withdraw First Supplemental Motion to Amend and Resubmit Supplemental Motion to Amend" (Doc. No. 39) are denied in their entirety except for the request to re-word Ground Six.

Respondent's amended return of writ remains due March 1, 2011, and Petitioner's reply remains due thirty days after the amended return is filed.

February 4, 2011.

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