

Rule 7. Expanding the Record

(a) In General. If the petition is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the petition. The judge may require that these materials be authenticated.

(b) Types of Materials. The materials that may be required include letters predating the filing of the petition, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record.

(c) Review by the Opposing Party. The judge must give the party against whom the additional materials are offered an opportunity to admit or deny their correctness.

Petitioner seeks to expand the record to include “the trial exhibits referred to by Smith in his Traverse³ which are currently located in courthouse storage.” (Motion, Doc. No. 38, PageID 2065.) The exhibits in question are not tendered with the Motion because “doing so would require extensive scanning of documents located in courthouse storage.” *Id.* at PageID 2066.

The Warden opposes the Motion first on the ground that “leave of court is not required prior to submitting materials that were introduced at trial.” (Response, Doc. No. 39, PageID 2069-70.) The Court disagrees on this point. Habeas Rule 5 details the mandatory contents of a habeas answer which is to be filed by the State; Rule 7 says the Court may order the record expanded and in this District the Order for Answer usually does so. But the Habeas Rules do not give a petitioner leave to file parts of the state court record without court permission.

Secondly, the Warden asserts Smith must demonstrate how the trial exhibits “would further any of Smith’s constitutional claims.” *Id.* at PageID 2070, *citing Beuke v. Houk*, 537 F.3d 613, 653-54 (6th Cir. 2008). The Warden adverts to demonstrative exhibits, the inability of this Court to do DNA analysis, and the lack of utility of photographs.

³ Petitioner has labeled the relevant document as Traverse/Reply and filed it at Doc. No. 30.

In his Reply, Smith details the exhibits sought to be added to the record and includes exhibits admitted at “the August 2009 post-conviction hearing.” (Reply Doc. No. 41, PageID 2074.) They include State’s Exhibits 9, 12, 30 and 31; Defense Exhibits 1, 3, 4, 7, 8, 9, 11, 13, 14, 16, 17, 18 A-B, 19 A-B, 20 A-B, 21 A-B, 26, 27, 28, 29, 30, 31, 32, 33; and Defense Hearing Exhibit A, B, and C. Petitioner’s counsel also requests that her copy of the trial transcript and the August 2009 post-conviction hearing be added to the record. Finally, Petitioner asks to reserve the opportunity to expand the record further with remaining trial or post-conviction exhibits should they become required.

In his Sur-Response, the Warden continues to oppose the Motion in its entirety

because the sole purpose served by the exhibits appears to be an effort to undermine the finding of guilty by the state court and the adjudication by the state Court of Appeals without suggesting to this Court how that finding and adjudication may be contrary to constitutional precedent [and] the proposed exhibits do not explain how the adjudication by the state courts was contrary to or involved an unreasonable application of clearly established Federal law as determined by the United States Supreme Court.

(Sur-Response, Doc. No. 42, PageID 2092-93.)

Analysis

State Court Exhibits

The Warden’s position on the Motion is not well taken. Habeas corpus review is limited to the record before the state courts insofar as those courts decided claims on the merits. *Cullen v. Pinholster*, 563 U.S. ___, 131 S.Ct. 1388 (2011). But all of the exhibits sought to be added to

the record here are part of the state court record. Habeas review is not limited to determining whether the state court conclusions are contrary to or any objectively unreasonable application of Supreme Court precedent. Instead, we are also to decide if any state court adjudication of a constitutional claim on the merits “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.” 28 U.S.C. § 2254(d)(2). The exhibits sought to be added by Petitioner are part of the evidence presented to the state courts. Therefore, the Motion is GRANTED with respect to State’s Exhibits 9, 12, 30 and 31; Defense Exhibits 1, 3, 4, 7, 8, 9, 11, 13, 14, 16, 17, 18 A-B, 19 A-B, 20 A-B, 21 A-B, 26, 27, 28, 29, 30, 31, 32, 33; and Defense Hearing Exhibits A, B, and C. As the Court understands Petitioner’s Sur-Reply, it asserts that all of the argument needed to connect these exhibits to controlling law, both substantive and procedural, is made in the Traverse.

The Court acknowledges its obligation to consider all the exhibits on which the state courts relied. To the extent that there are additional trial or post-conviction hearing exhibits which, in the opinion of the Warden, are needed to complete the record as to any factual determinations made by the state courts, Warden’s counsel should move to further expand the record to add those exhibits.

From the descriptions of some of the exhibits in Smith’s Reply, it appears they are audio or video recordings. In order for this Court to perceive that evidence as it was perceived by the Ohio courts, it needs to be presented here in the same form as it was presented in the state courts. The parties are granted permission to manually file any such audio or video recordings, along with an electronic notice of filing. To ensure that these exhibits are audible or viewable on court equipment, audio copies should be filed in mp3 format and video copies in mpg format. All

documentary exhibits shall be scanned and uploaded to the Court's CM/ECF system unless they are too large, in which case they may be copied and filed in the same manner as the audio and video exhibits.

State Court Transcripts

Petitioner's counsel's request to expand the record by adding her copies of the trial and post-conviction transcripts is DENIED. Those transcripts are already of record with PageID numbers supplied by the Court's Electronic Case Filing system (See Return of Writ, Doc. No. 12). It is important that all record references be to the PageID number in this Court and the Sixth Circuit requires the use of such numbers. Petitioner shall re-file his Reply/Traverse not later than April 10, 2014, to include PageID record references.

Manner of Compliance

The Court understands that the parties have an agreement with the custodian of the exhibits referenced herein which will permit the copying of the exhibits to be added to the record. If that is not the case, the Court is prepared to issue a writ of certiorari to obtain the exhibits.

Scheduling

The Magistrate Judge believes the case will be ripe for a report and recommendations on

the merits as soon as the exhibits are filed and Petitioner's Reply with the PageID numbers is filed. To the extent either party contemplates further steps in the litigation prior to ripeness, those steps should be sought by appropriate motion as soon as possible.

March 19, 2014.

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