

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

WILLIAM BERNARD VORE,

Petitioner, : Case No. 1:13-cv-800

- vs -

Chief Judge Susan J. Dlott
Magistrate Judge Michael R. Merz

WARDEN, Richland Correctional Institution,

:
Respondent.

DECISION AND ORDER

This habeas corpus case under 28 U.S.C. § 2254 is before the Court on Petitioner's Motion for Leave of Court to Amend and Supplement Pending Petition for Writ of Habeas Corpus (Doc. No. 22). Respondent opposes the Motion (Doc. No. 25) and Petitioner has filed a Reply in support (Doc. No. 26). Vore seeks to add the following claim:

THE STATE TRIAL COURT ERRED WHEN IT RESENTENCED THE PETITIONER TO FIVE YEARS IN PRISON FOR VIOLATING R.C. 2911.02(A)(3), A THIRD DEGREE FELONY WHEN PETITIONER WAS RESENTENCED AFTER THE EFFECTIVE DATE OF H.B. 86, AND AT THE TIME OF THE PETITIONER'S RESENTENCING HEARING THE MAXIMUM PENALTY WAS 36 MONTHS IN PRISON.

(Motion, Doc. No. 22, PageID 1395.)¹

¹ When any document is filed with this Court, the Court's electronic filing system affixes a unique Page Identification Number in the upper right hand corner of every page. The attention of the parties is directed to this Magistrate Judge's Standing Order of May 8, 2014, which provides in pertinent part "All references to the record in this Court must be to the filed document by title, docket number, and PageID reference. (E.g., Defendant's Motion to Dismiss, Doc. No. 27, PageID ____.) The large majority of cases before this Magistrate Judge are habeas corpus cases with large state court records and correct citation to the record is critical to judicial economy. Therefore,

28 U.S.C. § 2242 permits amendment of a habeas corpus petition “as provided in the rules of procedure applicable to civil actions.” Fed. R. Civ. P. 15 permits second or later amendments with 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). Likewise, a motion to amend may be denied if it is brought after undue delay or with dilatory motive. *Foman v. Davis*, 371 U.S. 178 (1962); *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1259 (6th Cir. 1990). The Sixth Circuit has expressly applied these factors to habeas corpus cases. *Coe v. Bell*, 161 F.3d 320, 341-2 (6th Cir. 1998).

Respondent argues the amendment would be futile because the claim asserted is not nonconforming filings will be stricken.

cognizable in habeas corpus in that it does not state a claim for violation of the United States Constitution (Response, Doc. No. 25, PageID 1809-11).

The Federal Rules of Civil Procedure favor deciding cases on their merits. Therefore, unless an amendment will seriously complicate a case or delay its decision, this Court prefers to allow amendments and decide the added claims on their merits directly, rather than through the “back door” of deciding whether they are futile. Particularly when a case has been referred for report and recommendations, this Magistrate Judge prefers to provide the District Judge with an integrated report dealing with all grounds for relief and the certificate of appealability issue.

Vore’s proposed additional claim is not so obviously futile as to be frivolous. Accordingly, the Motion is GRANTED and the Petition is deemed amended to add the claim quoted above. Petitioner and Respondent have sufficiently argued the merits of this claim that no further briefing is needed.

October 30, 2014.

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