

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

UGBE OJILE,

Petitioner,

: Case No. 1:13-cv-844

- vs -

District Judge Michael R. Barrett
Magistrate Judge Michael R. Merz

MICK R. OPY, WARDEN,
Correctional Reception Center,

:

Respondent.

**DECISION AND ORDER ON MOTION TO SUPPLEMENT THE
RECORD**

This habeas corpus case is before the Court on Petitioner Ugbe Ojile's Motion to Supplement the Record (Doc. No. 22). As he represents it, the supplementation would consist of two items:

1. "[A] more legible copy of Exhibit 88 of the Respondent's Return of Writ" and
2. "[A] Business Record Affidavit for Flight Records from the Custodian of Records for Continental Airlines (Debbie Myers) explaining flight records that were introduced as Defense Exhibit C during Petitioner's trial (Return of Writ, Doc. No. 13-2, Exhibit 88, PageID 904-20)." (Motion, Doc. No. 22, PageID 2679.)

More Legible Copy of Exhibit 88

Exhibit 88 as attached to the Return of Writ consists of fourteen pages (PageID 903-16).

PageID 903 is a fax cover sheet from Allyson Hawkins in the Legal Department of Continental Airlines dated June 1, 2011, and purporting to attach a subpoena, a certified records declaration, and 11 copies of records from Continental's Documentation Department. Ojile's proposed replacement consists of ten pages. It does not include the subpoena, the fax cover sheet, or the original certified records declaration. Some of the pages of the proposed substitution are plainly not copies of the pages in Exhibit 88. See, for example, PageID 2693 and 2698. Finally, the Court has no difficulty with the legibility of Exhibit 88 in the current record. Branch 1 of the Motion is denied.

2. Affidavit of Debbie Myers

Ojile also seeks to add to the record the Affidavit of Debbie Myers explaining the Continental Airlines documentation. Her Affidavit is seven single-spaced pages long and is dated September 9, 2014 (PageID 2683-89).

On February 12, 2014, Ojile filed a prior Motion to Supplement the Record (Doc. No. 8) seeking to add a prior Affidavit from Ms. Myers dated September 3, 2013 (PageID 110) and a Declaration of Authenticity of Records from her dated June 1, 2011 (PageID 112). Magistrate Judge Litkovitz denied this Motion, holding:

[T]his Court is not permitted to consider evidence outside the state-court record in assessing, under the applicable the standard of review set forth in 28 U.S.C. § 2254(d), whether the state courts' rulings were contrary to or involved an unreasonable application of clearly-established Supreme Court precedents, or were based on an unreasonable determination of the facts. See *Cullen v. Pinholster*, 131 S.Ct. 1388, 1398 (2011); see also *Keeling v. Warden, Lebanon Carr. Inst.*, 673 F.3d 452, 464 (6th Cir.), cert. denied, 133 S.Ct. 141 (2012); *Robinson v. Howes*, 663 F.3d 819, 823 (6th Cir. 2011); *Sheppard v. Bagley*, 657 F.3d 338, 343-44 (6th Cir. 2011). Cf

Barton v. Warden, Southern Ohio Corr. Facility, No. 1:09cv353, 2011 WL 2293225, at *4-5 (S.D. Ohio June 8, 2011) (Merz, M.J.) (vacating order granting an evidentiary hearing in a § 2254 habeas case in light of *Pinholster*).

(Order, Doc. No. 17, PageID 2616-17.)

The law cited by Judge Litkovitz continues to be binding precedent in this Court. Ojile argues that *Pinholster* did not purport to affect Habeas Rule 7. It is correct that in *Pinholster* the Supreme Court was concerned directly with evidentiary hearings under Habeas Rule 8. However, the Sixth Circuit has held the limitations in *Pinholster* apply to expansion of the record as well as to evidentiary hearings. *Moore v. Mitchell*, 708 F.3d 760, 780-784 (6th Cir. 2013).

Accordingly, Branch 2 of the Motion is DENIED.

January 2, 2015.

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