

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

JAMES T. CONWAY, III,

Petitioner,

v.

MARC C. HOUK, Warden,

Respondent.

Case No. 2:07-cv-947

**JUDGE ALGENON L. MARBLEY
Magistrate Judge Norah McCann King**

OPINION AND ORDER

Petitioner, a prisoner sentenced to death by the State of Ohio, has pending before this Court a habeas corpus action pursuant to 28 U.S.C. § 2254. This matter is before the Court on Petitioner's Rule 7 Motion to Expand the Record (Doc. # 40), Petitioner's Notice Regarding Filing of Appendix to Rule 7 Motion to Expand the Record (Doc. # 41), Petitioner's (Sealed) Appendix to his First Rule 7 Motion to Expand the Record (Doc. # 42), Respondent's Response to the First Rule 7 Motion to Expand the Record (Doc. # 43), Petitioner's Corrected Appendix to his First Rule 7 Motion to Expand the Record (Doc. # 44), Petitioner's Second Rule 7 Motion to Expand the Record (Doc. # 45), and Respondent's Response to the Second Rule 7 Motion to Expand the Record (Doc. # 48).

I. Overview

Petitioner seeks to expand the record with numerous documents supporting his habeas corpus claims. In his first motion to expand, he seeks to add to the record thirty-five (35) documents obtained, pursuant to this Court's March 17, 2010 *Opinion and Order* granting discovery, from the Columbus Police Department concerning the investigation of the aggravated murder for which Petitioner was sentenced to death. Respondent does not oppose the motion,

“[t]o the extent the Court determines Conway’s tendered documents would aid the Court in its determination whether an evidentiary hearing would be justified,” but objects to this Court’s consideration of the documents in lieu of an evidentiary hearing. (Doc. # 43.)

In his second motion to expand, Petitioner asks this Court to add to the record documents concerning attorney Christopher Cicero. Petitioner obtained some of the documents through discovery conducted in this case; he obtained the other documents through discovery in another capital habeas corpus case that Petitioner is also litigating. Petitioner is under two separate sentences of death in Ohio, the first of which he is challenging in this case and the other of which he is challenging in Case No. 3:07-cv-345 (“Conway II”). Although the death sentences involve two unrelated murders, Petitioner contends that information concerning Cicero is relevant to both cases. According to Petitioner, “[t]he discovery conducted in Conway II produced substantial evidence that Attorney Cicero: 1) labored under a conflict, 2) divulged privileged information to the investigating officers and prosecutors, and 3) was actively involved in ‘covering up’ the evidence concerning Mr. Conway’s alleged shooting of Jason Gervais in this case.” (Doc. # 45, at 2-3.) As with Petitioner’s first motion to expand the record, Respondent does not object to consideration of the documents in determining whether an evidentiary hearing is warranted but does object to consideration of the documents in lieu of an evidentiary hearing. (Doc. # 48.)

II. Standard

Rule 7 of the Rules Governing Section 2254 Cases confers on the Court the authority to expand the record with materials relating to the petition. The rule provides:

(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.

Rules Governing § 2254 Cases, Rule 7, 28 U.S.C. foll. § 2254. According to the Advisory Committee Notes, the purpose of the rule is not only to enable the district court to dispose of petitions not dismissed on the pleadings without the time and expense of an evidentiary hearing, but also to assist the district court in determining whether an evidentiary hearing is warranted. *See Blackledge v. Allison*, 431 U.S. 63, 81 (1977); *see also Vincent v. Louisiana*, 469 U.S. 1166, 1169-1170 (1985)(Brennan, J., dissenting). The decision whether to order an expansion of the record under Rule 7 falls within the sound discretion of the district judge. *See Ford v. Seabold*, 841 F.2d 677, 691 (6th Cir. 1988).

As noted above, Respondent does not object to expansion of the record to the extent that this Court considers the new documents only for the purpose of determining whether Petitioner is entitled to an evidentiary hearing. In taking that position, Respondent appears to be invoking the limitations on factual development set forth in 28 U.S.C. § 2254(e)(2)(1996), which addresses whether, or under what circumstances, federal habeas corpus courts may hold evidentiary hearings. Section 2254(e)(2) provides:

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). The Supreme Court has explained, however, that “[b]y the terms of its opening clause the statute applies only to prisoners who have ‘failed to develop the factual basis of a claim in State court proceedings.’ ” *Williams v. Taylor*, 529 U.S. 420, 430 (2000) (quoting § 2254(e)(2)). Thus, the restrictions set forth in § 2254(e)(2) apply to limit factual development only where the petitioner failed to exercise due diligence in developing those facts first in the state courts.

Respondent is correct that the restrictions on factual development set forth in § 2254(e)(2) apply when a petitioner seeks to present new evidence not considered by the state courts, whether the petitioner seeks to present the new evidence through an evidentiary hearing or expansion of the record pursuant to Rule 7. *See Holland v. Jackson*, 542 U.S. 649, 653 (2004); *Samatar v. Clarridge*, 225 F.App’x 366, 374-75 (6th Cir. 2007) (declining to consider affidavit through either evidentiary hearing or expansion of record because the petitioner failed to exercise due diligence in presenting the affidavit first to the state courts). In view of the fact that it is not necessary at this time to determine whether Petitioner exercised due diligence, as well as the fact that the parties have not fully addressed that issue, the Court will confine its inquiry to whether the materials that Petitioner seeks to add to the record would assist the Court in determining whether an evidentiary hearing might be warranted. *See, e.g., Keenan v. Bagley*,

No. 1:01CV2139, 2008 WL 4372688, at * 2 (N.D. Ohio Sep. 22, 2008) (expanding record for limited purpose of determining whether the petitioner exercised diligence but reserving right to exclude evidence from consideration in addressing merits of claims).

III. Discussion

A. Petitioner's First Motion to Expand the Record (Doc. # 40)

As noted above, in Petitioner's first motion to expand, he seeks to add to the record thirty-five (35) documents obtained from the Columbus Police Department concerning the investigation of the aggravated murder for which Petitioner was sentenced to death. Before determining whether any of Petitioner's habeas claims have merit, this Court will be faced with determining whether an evidentiary hearing is warranted. If the documents with which Petitioner seeks to expand the record would be helpful to the Court in deciding whether an evidentiary hearing is warranted, then they satisfy the requirements set forth in Rule 7. The Court is satisfied that those requirements have been met. The thirty-five police investigation documents that Petitioner seeks to add fall, according to Petitioner, into four categories: 1) prior inconsistent statements of eyewitness Brian McWhorter; 2) eyewitness statements identifying someone else as the shooter; 3) eyewitness statements contradicting the State's theory of the case; and 4) statements suggesting that attorney Chris Cicero had a conflict of interest and had a role in the beating of eyewitness Brian McWhorter. At trial, Petitioner did not present a pure defense of actual innocence. Rather, he appeared to attack generally the sufficiency of the evidence against him, both as to the aggravated murder charge as well as to the capital specification with which he was charged, and the credibility of the witnesses who implicated him, in an effort to establish both reasonable doubt on the charge of aggravated murder and

grounds for an instruction on lesser included offenses. The documents that Petitioner seeks to add are relevant to that trial strategy. More important, the documents would assist this Court in determining whether an evidentiary hearing is warranted on such claims as those challenging the sufficiency of the evidence, the competency of the police investigation, and the effectiveness of Petitioner's trial counsel. As noted above, the Court will not consider the documents in addressing the merits of Petitioner's claims unless the Court first determines that Petitioner exercised due diligence in attempting to develop and present these facts to the state courts first. It is not necessary or even prudent for the Court to make that determination at this time. *See Keenan*, 2008 WL 4372688, at * 2 ("If the Court finds during the course of this habeas litigation that Keenan was not diligent in presenting obtainable evidence to the state courts or has no excuse for failing to be diligent, the Court reserves the right to exclude this evidence from consideration when it reaches the merits of Keenan's claims.")

B. Petitioner's Second Motion to Expand the Record (Doc. # 45)

In his second motion to expand, Petitioner seeks to add to the record documents obtained through discovery in an unrelated habeas corpus case relating to Chris Cicero, an attorney with whom Petitioner had a long-standing professional relationship and who initially represented Petitioner in both aggravated murder cases that were brought against Petitioner. According to Petitioner, the documents demonstrate that Cicero labored under a conflict of interest, divulged privileged information to police and the prosecution, and was actively involved in covering up evidence concerning Petitioner's alleged shooting of Jason Gervais. Petitioner asserts that expansion of the record with these documents would help "this Court to have a complete

understanding of the events surrounding the fatal shooting of Jason Gervais....” (Doc. # 45, at 3.)

As noted above, if the documents with which Petitioner seeks to expand the record would be helpful to the Court in deciding whether an evidentiary hearing is warranted on any of his habeas corpus claims, then the documents satisfy the requirements of Rule 7. The Court is satisfied from its review of the documents, as well as from Petitioner’s explanation for why they are relevant to this habeas corpus proceeding, that the Rule 7 requirements have been met as to the documents at issue in Petitioner’s second motion to expand. Petitioner reasons that Cicero’s alleged conflict of interest, stemming from the fact that he represented several suspects, as well as Cicero’s own alleged misconduct, stemming from his alleged efforts to cover up Petitioner’s role in the shooting of Jason Gervais, are relevant to the instant habeas corpus proceeding because Cicero could not advise Petitioner about accepting a plea bargain for fear that Petitioner might have testified against Cicero, and because Cicero could not fully investigate the matter for fear of unveiling evidence against himself. Petitioner further explains that documents demonstrating Cicero’s alleged misconduct and role in the alleged cover-up of evidence are also relevant to the mitigating factor, set forth at O.R.C. § 2929.03(B)(6), concerning Petitioner’s degree of involvement in the offense. Petitioner points out that his defense counsel never explored this possible mitigating factor because defense counsel failed to investigate Cicero’s involvement in allegedly covering up evidence that implicated Petitioner in the shooting of Jason Gervais. The Court agrees, therefore, that the documents concerning Cicero are relevant to the Court’s determination of whether an evidentiary hearing might be warranted on several of Petitioner’s claims, including but not limited to, his claims challenging the sufficiency of the

evidence (claims ten and eleven), as well as his claim alleging ineffective assistance of counsel (claim fifteen).

As noted above, the Court will not consider the documents in addressing the merits of Petitioner's claims unless the Court first determines that Petitioner exercised due diligence in attempting to develop and present these facts to the state courts first. It is not necessary or even prudent for the Court to make that determination at this time. *See Keenan*, 2008 WL 4372688, at * 2.

IV. Conclusion

For the foregoing reasons, Petitioner's first motion to expand the record (Doc. # 40) and Petitioner's second motion to expand the record (Doc. # 45) are **GRANTED**, subject to the limitations set forth in this order.

IT IS SO ORDERED.

s/Algenon L. Marbley
ALGENON L. MARBLEY
United States District Judge