

**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 Third Rule 7 Motion to Expand the Record (Doc. # 49) and Respondent's Response to the Third Rule 7 Motion to Expand the Record (Doc. # 50).

**I. Overview**

Petitioner seeks to expand the record with numerous documents supporting his habeas corpus claims. This Court issued an order on December 7, 2010, granting Petitioner's first two Rule 7 motions to expand the record, albeit for the limited purpose of determining whether the materials 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). (Doc. # 51.) In his third Rule 7 motion to expand the record, Petitioner seeks to add to the record proposed Exhibits 36 through 62—documents from the Columbus Police Department concerning the investigation of the aggravated murder for which Petitioner was

sentenced to death that Petitioner obtained pursuant to this Court's March 17, 2010 *Opinion and Order* granting discovery. 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. # 50.)

## 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 (6<sup>th</sup> 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 (6<sup>th</sup> 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

As noted above, in the third Rule 7 motion before the Court, Petitioner seeks to add to the record documents, numbered by Petitioner as 36 through 62, 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 police investigation documents that Petitioner seeks to add fall, according to Petitioner, into five

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; 4) statements suggesting that attorney Chris Cicero had a conflict of interest and had a role in the beating of eyewitness Brian McWhorter; and 5) the March 12, 2002 letter from jailhouse informant Ronnie Trent to the Franklin County Prosecutor, wherein Trent stated that he wished to provide information about Petitioner in exchange for "a deal."

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.")

IV. Conclusion

For the foregoing reasons, Petitioner's third motion to expand the record (Doc. # 49) is **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**

**DATED: January 26, 2011**