

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

RALPH LYNCH,

Petitioner,

v.

STUART HUDSON, Warden,

Respondent.

Case No. 2:07-cv-948

JUDGE GREGORY L. FROST

Magistrate Judge E.A. Preston Deavers

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 motion to expand or supplement the record (Doc. # 37), Respondent's memorandum in opposition (Doc. # 40), and Petitioner's reply (Doc. # 46). Also before the Court are Petitioner's motion for leave to file a supplemental motion to expand or supplement the record (Doc. # 43) and Respondent's memorandum in opposition (Doc. # 48). For the following reasons, Petitioner's motions are **GRANTED**.

I. Overview

Petitioner seeks to add in support of his first, sixth, seventh, and eleventh grounds for relief the affidavit, report, and curriculum vitae of Dr. Michael M. Gelbort, who recently conducted a neuropsychological evaluation of Petitioner as permitted by this Court's order of October 29, 2009. (Doc. # 31.) Petitioner avers that the materials he seeks to add support his claims that he is mentally retarded and accordingly ineligible for the death penalty; that his trial attorneys were ineffective for failing to present mental health testimony to support conviction on

a lesser included offense¹ and for failing to investigate and present available mitigating evidence; and that evidence of his asserted bad character, including the presence of stuffed animals and toys in Petitioner's apartment, was incorrectly admitted. Petitioner avers that Dr. Gelbort's report supports the claims set forth above by demonstrating Petitioner's long-standing organic brain dysfunction and low-cognitive functioning that pre-date the offense for which he was convicted and sentenced to death. Petitioner explains that he "does not have a normal functioning brain which impairs his coping skills and impulse control." (Doc. # 37, at 4.)

Respondent opposes Petitioner's motion on several grounds. (Doc. # 40.) First, Respondent argues that Dr. Gelbort's affidavit is not an affidavit because it is neither signed nor notarized.² Petitioner's later-filed affidavit, Respondent complains, was untimely and did not include Dr. Gelbort's report or curriculum vitae. Alternatively, Respondent argues that Dr. Gelbort's report is not relevant to any of Petitioner's habeas claims because the standard of review set forth in 28 U.S.C. § 2254(d) requires this Court to consider Petitioner's claimed constitutional violations based only on the evidence that was presented to the state courts when they considered Petitioner's claims. According to Respondent, a claimed constitutional violation

¹ In his original motion to expand or supplement the record (Doc. # 37), Petitioner neglected to include his assertion that Dr. Gelbort's report supports his sixth ground for relief. In his motion for leave to file a supplemental motion to expand or supplement the record, Petitioner explains that he inadvertently neglected to include ground six and seeks leave to add that claim to his motion to expand or supplement the record. (Doc. # 43.) Respondent opposes Petitioner's motion, but for the same reasons set forth in this Order, the Court finds Petitioner's motions well taken.

² Petitioner explains in his motion to expand or supplement the record that due to scheduling conflicts, Petitioner could not submit a signed and notarized affidavit with his motion. (Doc. # 37, at 1 n.1.) Petitioner indicated that he would file a signed and notarized affidavit by March 26, 2010. He did so on March 23, 2010. (Doc. # 38.)

does not warrant habeas corpus relief unless the state court's decision rejecting the claim was unreasonable. Moreover, Respondent emphasizes that "[t]he U.S. Supreme Court has 'made clear that whether a state court's decision was unreasonable must be assessed in light of the record the court had before it.' " (Doc. # 40, at 4 (quoting *Holland v. Jackson*, 542 U.S. 649, 652 (2004))). Respondent also argues in the alternative that 28 U.S.C. § 2254(e)(2), which governs the circumstances under which an evidentiary hearing would be permitted, precludes Petitioner in the instant case from expanding the record pursuant to Rule 7 of the Rules Governing Section 2254 Cases. Respondent asserts that Petitioner cannot satisfy the requirements for an evidentiary hearing and that Petitioner should not be able to accomplish by way of a Rule 7 motion to expand the record what § 2254(e)(2) does not permit him to accomplish through an evidentiary hearing—namely, to add to the record before this Court facts and evidence that were not part of the record before the state courts.

In his reply, Petitioner asserts that nothing in 28 U.S.C. § 2254 or Habeas Corpus Rule 7 precludes this Court from admitting and considering Dr. Gelbort's affidavit, report, and curriculum vitae simply because Petitioner failed, as fully explained in his motion, to submit a signed affidavit by Dr. Gelbort until one day after Petitioner filed his motion, due only to a scheduling conflict. (Doc. # 46, at 1-2.) With respect to Respondent's argument that Dr. Gelbort's report is not relevant to any of Petitioner's habeas claims, by virtue of the fact that this Court should consider Petitioner's claims based only on the facts and evidence that the state courts considered, Petitioner asserts that Respondent's interpretation of *Holland* to support that position is incorrect. According to Petitioner, the Sixth Circuit recently explained in *Garner v. Mitchell*, 502 F.3d 394, 406 (6th Cir. 2007), that although the *Holland* Court stated that a federal

court should assess the reasonableness of a state court's decision in light of the record that the state court had before it, the Court then made clear in the next sentence of the *Holland* decision that additional evidence could be introduced so long as the habeas petitioner was not at fault in failing to develop that evidence in the state courts. (Doc. # 46, at 2-3.)

Concerning Respondent's argument that Petitioner is not permitted to have this Court consider facts and evidence of which the Ohio courts did not have the benefit when they rejected Petitioner's various challenges to the constitutionality of his convictions and death sentence, Petitioner asserts that because the Ohio courts denied him the opportunity to conduct discovery on the claims described above, any failure to develop in the state courts the facts and evidence that Petitioner now seeks to add to the record before this Court cannot be attributed to Petitioner. Specifically, Petitioner states that when he raised his claims in postconviction, he offered and developed evidence in support of those claims. Petitioner also states that in order to complete his postconviction investigation, he additionally filed a motion for funds for a neuropsychological evaluation by Dr. Gelbort, which the state opposed and the trial court denied. Petitioner argues that his efforts constituted sufficient due diligence to defeat the conclusion that he, rather than the state, was at fault for the failure to develop the facts and evidence that Petitioner now seeks to add to the record before this Court.

II. Standard of Review

Rule 7 of the Rules Governing Section 2254 Cases permits federal habeas corpus courts to direct the parties to supplement the state court record with materials relevant to the Court's resolution of the petition. The decision of whether to order Rule 7 expansion is within the sound discretion of the district judge. *Ford v. Seabold*, 841 F.2d 677, 691 (6th Cir. 1988) (holding that

record expansion is left to discretion of the district court). Expansion pursuant to Rule 7, under the language of that Rule, therefore contains only a relevancy limitation. That is, the materials a petitioner seeks to include need only be relevant to the determination of the merits of the constitutional claims in order to be added to the record.

Section 2254(e)(2) of the habeas corpus statute places more significant limitations on the ability of a federal court to permit factual development. That section 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). In *Holland*, the Supreme Court held 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 he seeks to present that new evidence through an evidentiary hearing or expansion of the record pursuant to Rule 7 of the Rules Governing Section 2254 Cases. 542 U.S. at 653.

The United States 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)). The Supreme Court further clarified that “[i]f the prisoner failed to develop the facts, an evidentiary hearing cannot be granted unless the prisoner’s case meets the other conditions of § 2254(e)(2).” *Id.* Thus, when a petitioner seeks to develop facts in an evidentiary hearing that the state courts did not consider and to have a federal court consider his constitutional claims in light of those new facts, the petitioner must demonstrate that he was not at fault for the failure to develop the facts underlying his claims. A petitioner is at fault for the failure to develop the facts if he failed, based on the evidence that was available to him, to exercise due diligence in developing and presenting that evidence. *Id.* at 432. Generally, a petitioner exercises due diligence if he requests an evidentiary hearing in the state courts in accordance with state law. *Id.* at 437; *see also Greer v. Mitchell*, 264 F.3d 663, 681 (6th Cir. 2001) (holding that the petitioner satisfied the diligence requirement by raising his claim in the appropriate forum and requesting a hearing that was never afforded by the state courts); *Jackson v. Anderson*, 141 F. Supp. 2d 811, 828 (N.D. Ohio 2001) (“The Petitioner sought an evidentiary hearing in state court, which was denied, and thereby satisfied the diligence requirement of §2254(e)(2).”)

III. Discussion

The Court is satisfied that the expansion of the record sought by Petitioner is warranted. Under the strictures of Rule 7, the materials that Petitioner seeks to add are relevant to several of his claims. Whether or to what extent Petitioner possessed diminished mental functioning that pre-dated and contributed to the offenses was a critical issue in both the culpability and mitigation phases of his capital trial. The materials that Petitioner seeks to add will assist the Court in deciding whether Petitioner is mentally retarded and therefore ineligible for the death

penalty, whether Petitioner's trial attorneys performed unreasonably and to his prejudice in failing to develop mental health evidence in support of culpability-phase and mitigation-phase issues, and whether the trial court erred in admitting certain "bad character" evidence.

Further, under controlling precedent, the Court is satisfied that Petitioner exercised due diligence in attempting to develop these facts during state court proceedings sufficient that § 2254(e)(2) does not limit this Court's consideration of the materials. With the exception of his eleventh ground for relief, which he raised on direct appeal, Petitioner presented his constitutional claims to the state courts in postconviction, supported them with evidence outside the record, and sought funds for a neuropsychological evaluation by Dr. Gelbort. That is enough to satisfy the due diligence requirement of § 2254(e)(2). Moreover, having found that Petitioner was not at fault for the failure to develop and present Dr. Gelbort's findings to the state courts, the Court concludes that *Holland* does not render Dr. Gelbort's findings irrelevant by constraining this Court to only the facts and evidence that the state courts considered.

IV. Conclusion

For the foregoing reasons, the Court **GRANTS** Petitioner's motions to expand or supplement the record (Doc. # 37) and for leave to file a supplemental motion to expand or supplement the record (Doc. # 43).

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE