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

MARCUS L. HARRIS,

Petitioner,

v.

CASE NO. 2:08-CV-1043
JUDGE GRAHAM
MAGISTRATE JUDGE KING

MICHAEL SHEETS, Warden,

Respondent.

ORDER

Petitioner, a state prisoner, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. Presently before the Court is petitioner's motion for expansion of the record, Doc. No. 13.

Petitioner asserts that he is in the custody of the respondent in violation of the Constitution of the United States based upon the following grounds:

> 1. Only three African-American jurors were included in the venire summoned for Mr. Harris' trial. Over defense objection, the prosecutor exercised a peremptory challenge to remove one of the African-American prospective jurors, Delores Livingston. The prosecutor claimed that he had a race-neutral explanation for removing Ms. Livingston, including the fact that her son and sister had past criminal convictions. By comparison, many prospective nonblack jurors had family members and friends with past criminal convictions, but the State did not exercise peremptory challenges against these nonblack jurors. In addition, the State subjected Ms. Livingston to far more scrutiny regarding her views on the death penalty when compared to other nonblack prospective jurors. In fact, the State's voir dire of Ms. Livingston was so aggressive that the trial court questioned the States' motive in continually interrogating Ms. Livingston regarding her views on the death penalty.

> 2. Mr. Harris' appellate counsel failed to ensure that ... juror questionnaires necessary to prove his *Batson* claim were part of the appellate record. Appellate counsel's failure to comply with the appellate rules regarding production of the record on appeal was unreasonable and constituted deficient performance. Moreover, having discovered the error, appellate counsel further prejudiced Mr. Harris by failing to cite the portion of the record indicating that the questionnaires were in fact part of the appellate record. As a result of appellate counsel's deficient performance, the court of appeals refused to consider compelling evidence that proved racial animus on the part of the prosecutor in selecting the jury.
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> 3. The conduct giving rise to Mr. Harris' convictions occurred in 2003, which was three years before the Ohio Supreme Court issued its decision in *Foster*. At the time the offense in this case occurred, there was a presumption in favor of the minimum authorized prison term. Following application of the *Foster* remedy, Mr. Harris was sentenced to nonminimum sentences.

Petitioner seeks expansion of the record to include copies of juror questionnaires from members of the venire who indicated that family members and friends had been arrested. He specifically seeks copies of juror questionnaires from prospective jurors Livingston, Ammons, Ensell, Smith, Buchanan, Neal, Moustaader, Petrosky, and C. Abdalla. *See Motion to Supplement Record,* Doc. No. 13. Petitioner contends that these questionnaires "highlight the pretextual nature of the prosecutor's purported reason for striking an African-American juror" and are required for resolution of his allegations in claims one and two of this habeas corpus petition. *See id.* Petitioner states that he is unable to obtain copies of these questionnaires from either the clerk of courts or the official court reporter, because the documents have been filed under seal. *Id*.

Respondent opposes petitioner's request to supplement the record on the basis that

petitioner failed to provide the questionnaires of prospective jurors to the state appellate court in support of his claims on direct appeal. *See Exhibits 20, 25 to Return of Writ.* Additionally, respondent asserts that petitioner failed to raise this issue in post conviction proceedings. *See Exhibit 34 to Return of Writ.* In any event, the state appellate court, in denying petitioner's claim of ineffective assistance of appellate counsel, noted that at least some of the questionnaires petitioner now seeks relate to prospective jurors who did not serve on the jury. *See Respondent's Response to Motion to Supplement Record,* Doc. No. 16, *Exhibit 39 to Return of Writ*:

> On September 25, 2006, Defendant-Appellant, Marcus Harris, filed an application to reopen the appeal this court decided on June 27, 2006, styled *State v. Harris*, 7th Dist. No. 04 JE 44, 2006-Ohio-3520. In that opinion, we decided, among other things, that Harris did not make the jury questionnaires part of the appellate record and could not rely on these questionnaires when arguing that the prosecutor committed purposeful racial discrimination when preemptively striking one potential juror. *Id.* at ¶21. Harris moved for reconsideration of that opinion on July 7, 2006, arguing that the jury questionnaires were actually part of the appellate record since they were in the court reporter's custody. He further argued that we made use of those questionnaires in our original opinion. We denied Harris's application for reconsideration on August 25, 2006, once again concluding that the jury questionnaires were not part of the appellate record and denying that we used those questionnaires when affirming Harris's conviction.
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> Harris argues his appellate counsel was ineffective for failing to cite the portion of the record in which Harris's trial counsel proffered the jury questionnaires. He contends that he would have been able to prove purposeful racial discrimination if these jury questionnaires had been part of the record since they

> would prove that the prosecutor's facial reason for striking the juror, the fact that her sister and son had extensive criminal histories, was merely pretextual.
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> Harris's argument misses a conclusion we reached in our original opinion in this case. At trial, Harris did not proffer all of the jury questionnaires into evidence; rather, he only proffered the questionnaires of the veniremen who had indicated that they had friends or family who had been convicted of a felony. However, none of the questionnaires in the custody of the court reporter were from people who were actually empanelled as jurors. Instead, these questionnaires are all from members from the venire who did not serve as jurors.
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> In his original brief, Harris argued that prospective jurors other than the one at issue in this appeal also admitted during voir dire that their friends and/or family had been charged with a crime and/or sent to prison, but that the prosecution did not preemptively strike them from the jury. We rejected this argument, concluding that "the fact that other members of the venire had friends and family with criminal histories does not show purposeful racial discrimination by the State when it preemptively struck this prospective juror for that reason." *Harris* at ¶58. That rationale applies equally well now, regardless of whether the facts were elicited at voir dire or in the jury questionnaires.
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> Even if appellate counsel had made the argument which Harris is now advocating, there is not a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal. There is not a reasonable possibility that, but for counsel's errors, the result of the proceeding would have been different.

Exhibit 39 to Return of Writ.

Respondent contends that juror questionnaires of members of the venire who did not sit on the jury, which apparently were made a part of the record on direct appeal, and

of Delores Livingston, are not relevant to resolution of petitioner's claims in these proceedings, and that expansion of the record to include the remaining questionnaires is prohibited under 28 U.S.C. §2254(e)(2).[1] *See Response to Motion to Supplement Record,* Doc. No. 16.

Rule 7 of the Rules Governing Section 2254 Cases 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.
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> (b) Types of Materials. The materials that may be required include letters predating the filing of the petition, documents,

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[1] 28 U.S.C. §2254(e)(2) provides:

> 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--
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> (A) the claim relies on--
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> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
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> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
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> (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.

> exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be submitted and considered as part of the record.
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> (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.

Rule 7, Rules Governing Section 2254 Cases.

> Rule 7 allows the record to be expanded to include additional material relevant to the merits of the petition. *Adkins v. Konteh*, No. 3:05cv2879, 2007 WL 461292 at *20 (N.D. Ohio Feb.7, 2007) (citing *Jamison v. Collins*, 291 F.3d 380, 387 (6th Cir. 2002)). Its purpose is to clarify the relevant facts. *Vasquez v. Hillery*, 474 U.S. 254, 258, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986).
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> In *Holland v. Jackson,* 542 U.S. 649, 653, 124 S.Ct. 2736, 159 L.Ed.2d 683 (2004), the United States Supreme Court held that the restrictions set forth in 28 U.S.C § 2254(e)(2) "apply *a fortiori* when a prisoner seeks relief based on new evidence *without* an evidentiary hearing." (emphasis in original); *see also Keenan v. Bagley,* No. 1:01cv2139, 2008 WL 4372688 at *2 (N.D. Ohio Sep.22, 2008); *Stallings v. Bagley,* No. 505 cv 722, 2007 WL 437888 at *2 (N.D. Ohio Feb. 6, 2007); *Phillips v. Bradshaw,* 5:03cv875, 2006 WL 2855077 at *10 (N.D. Ohio Sep. 29, 2006). Since *Holland,* the § 2254(e)(2) standards have been applied to motions to expand the record. *Phillips,* 2006 WL 2855077 at *10, (citing *Cooper-Smith v. Palmateer,* 397 F.3d 1236 (9th Cir. 2005)).

Brinkley v. Houk, 2009 WL 5217334 (N.D. Ohio December 28, 2009)(footnote omitted). Under 28 U.S.C. §2254(e)(2), "failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams v. Taylor*, 529 U.S. 420, 432 (2000).

> Where the failure to develop results from constitutionally ineffective assistance, however, the fault is not attributable to

> the habeas petitioner, or even to his counsel. As the Supreme Court has explained in the procedural default context, where the Sixth Amendment right to counsel exists the State is constitutionally obligated to provide effective assistance of counsel, and thus attorney errors amounting to constitutionally ineffective assistance are attributable to the State, rather than to the petitioner. *See Coleman v. Thompson*, 501 U.S. 722, 754, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). As the Supreme Court explained in *Thompson,* "[w]here a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default [.]" *Coleman*, 501 U.S. at 754. This reasoning should apply equally to §2254(e)(2): where a petitioner's failure to develop the factual basis of a claim is a result of the denial of the right to effective assistance of counsel, the State is responsible for the failure as a constitutional matter, and thus the State must bear the burden associated with a federal court evidentiary hearing. In such a case, essentially, it is the State, and not the petitioner, who has exhibited a lack of diligence or some greater fault in falling to develop the relevant facts in state court.

Zimmerman v. Davis, 2010 WL 104452 (E.D. Michigan January 7, 2010).

Here, the state appellate court rejected petitioner's claim that the prosecutor improperly exercised a peremptory challenge to remove a prospective African American from the jury without consideration of all of the juror questionnaires to which petitioner referred, concluding that his attorney failed to ensure that the record on appeal included such documents. Petitioner thereafter filed a motion for reconsideration of this decision, see *Exhibit 24 to Return of Writ*, as well as an application to reopen the appeal pursuant to Ohio Appellate Rule 26(B), in which he argued that he was thereby denied the effective assistance of appellate counsel. Although the state appellate court rejected petitioner's

claim of ineffective assistance of counsel, concluding that the juror questionnaires were not necessary for resolution of his underlying claim, this Court must determine whether that decision was contrary to, or involved an unreasonable application of, clearly established federal law, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. §2254(d). If petitioner has established the constitutionally ineffective assistance of counsel, then he did not "fail to develop" the factual basis for his claim that the prosecutor improperly removed Livingston from the jury.

Therefore, petitioner's request to supplement the record with those documents, Doc. No. 13, is **GRANTED.** Respondent shall supplement the record with copies of the juror questionnaires within twenty (20) days.

IT IS SO ORDERED.

February 9, 2010

s/Norah McCann King
Norah McCann King
United States Magistrate Judge