

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

DERRICK E. VINZANT,

Petitioner,

-vs-

ALAN LAZAROFF, Warden,

Respondent.

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Case No. 3:04-cv-444

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Magistrate Judge Michael R. Merz

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**DECISION AND ORDER DENYING IN PART AND ORDERING AMPLIFICATION IN  
PART OF MOTION FOR EVIDENTIARY HEARING**

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This case is before the Court on Petitioner's Reply and Motion for Evidentiary Hearing (Doc. No. 37).

With respect to the proposed testimony of Dr. Lewinski at a new trial, Petitioner proffered that testimony in the state court hearing on his motion for new trial. 28 U.S.C. § 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.

Given the strictures of § 2254(e)(2), the Court believes it would be inappropriate to hear testimony from Dr. Lewinski which was not proffered to the Common Pleas Court since anything

which might be in such testimony clearly could have been discovered in time to present it to Judge Froelich.

§ 2254(e)(2) does not apply, however, to evidentiary questions relating to procedural matters in the federal proceeding. Petitioner requests an evidentiary hearing if the Court requires one “to determine the timeliness of this petition.” (Reply, Doc. No. 37, at 15-16.) If Petitioner believes there is any evidence which would support any of his theories of timeliness which is not already of record, he should immediately file a list of the witnesses who would testify and the substance of their testimony.

Finally, Petitioner “requests the opportunity to supplement this record with any additional portions of the state record not before this Court that would assist in the adjudication of this matter.” If there are any additional portions of the state court record which are, in Petitioner’s counsel’s judgment, needed to adjudicate this matter and not presently filed, he must immediately identify the relevant documents and move to expand the record to include them, having first complied with S. D. Ohio Civ. R. 7.3.

The Court emphasizes the need to proceed as promptly as possible because it is the Court’s intention to complete these proceedings by September 30, 2009.

June 22, 2009.

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