

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

LARRY GAPEN,

Petitioner, : Case No. 3:08-cv-280

- vs -

: District Judge Walter Herbert Rice  
Magistrate Judge Michael R. Merz

DAVID BOBBY, Warden,

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Respondent. :

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**ORDER**

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This capital habeas corpus case is before the Court on two motions from Respondent: (1) Respondent’s Motion to Substitute Photographs for Physical Evidence (Doc. No. 43) and (2) Respondent’s Motion for Leave to Amend the Appendix to the Return of Writ and Trial Transcript Volumes (Doc. No. 42). Petitioner Larry Gapen opposes both motions (Doc. Nos. 45 and 44, respectively).

**Respondent’s Motion to Substitute Photographs for Physical Evidence**

In 2009, the parties agreed to photograph the physical evidence in Gapen’s case which had been transmitted to this Court from the Montgomery County, Ohio, Common Pleas Court. (Doc. No. 25.) In May of that year, the evidence was photographed with both parties present; the entire process was videotaped as well. (*See* Doc. No. 26.) Respondent now seeks to amend the record in this case to include the photographs taken of the physical evidence “pursuant to Rule 16 of the Ohio Rules of Criminal Procedure so that these items [of physical evidence] can be returned to the Clerk of Courts [of Montgomery County, Ohio].” As the rule cited governs discovery procedures in

criminal cases in the state courts, it is of no relevance in these proceedings.

As Gapen points out, the photographs are not contained within the state-court record transmitted to this Court (Doc. No. 45 PAGEID 569). There is no reason to risk comingling and confusing the photographs that are a part of the state -court record and those that are not, especially when the actual physical evidence portrayed in the photographs is in the possession of this Court. As it is, the Court ordered Gapen to provide a copy of the videotape, and both parties to provide electronic copies of all photographs taken of the physical evidence to the Court “without delay” on May 12, 2009. (Order, Doc. No. 26.) To date, neither party has complied with the order. Once the parties comply with order, the video and photographs will become a part of this Court’s record, while leaving the state trial court record undisturbed.

Respondent’s only expressed purpose in requesting the substitution of photographs for the physical evidence is so the physical evidence can be returned to the state court. Respondent fails to explain why that is imperative, necessary, or desirable. Accordingly, Respondent’s Motion to Substitute Photographs for Physical Evidence is DENIED.

**Respondent’s Motion for Leave to Amend the Appendix to the Return of Writ and Trial Transcript Volumes**

Respondent moves for the addition of page 212A to Volume 15 of the Appendix, which apparently an inadvertent omission occurring during the copying process. (Doc. No. 42 PAGEID 558.) Gapen agrees that the page is properly part of the record and should be included in the Appendix. (Doc. No. 44 PAGEID 564.) Respondent’s motion to supplement the record to include the page in question is therefore GRANTED.

Respondent moves to remove the state trial court’s Exhibit VII from Volume 18 of the trial transcript and insert it in Volume 17 instead. Although Gapen has no objection, the re-ordering of the state trial court record is unnecessary, and no compelling reason is given for doing so.

Accordingly, Respondent's motion to move Exhibit VII from Volume 18 of the trial transcript to Volume 17 is DENIED.

Respondent moves to include trial court Exhibits VI through X and two jury questions in Volume 17 of the trial transcript. (Doc. No. 42 PAGEID 558.) Gapen agrees that the erroneously omitted Exhibits and jury questions should be included. (Doc. No. 44 PAGEID 564.) Respondent's motion to supplement the record with Exhibits VI through X and the jury questions is therefore GRANTED.

Respondent moves to create a compact disc and a digital versatile disc of the state court post-conviction evidentiary hearing (Doc. No. 42 PAGEID 558), and Gapen is in agreement (Doc. No. 44 PAGEID 564). Accordingly, Respondent's motion to supplement the record with digital recordings of Gapen's state court post-conviction evidentiary hearing is GRANTED.

### **Conclusion**

Respondent's Motion to Substitute Photographs for Physical Evidence is DENIED.

Respondent's Motion for Leave to Amend the Appendix to the Return of Writ and the Trial Transcript Volumes is GRANTED in part and DENIED in part.

October 15, 2010.

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