

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

GEORGE SKATZES,

Petitioner,

-vs-

KEITH SMITH, Warden,

Respondent.

:

Case No. 3:09-cv-289

:

District Judge Timothy S. Black
Magistrate Judge Michael R. Merz

:

DECISION AND ORDER

This capital habeas corpus case is before the Court on Respondent's Motion to Expand the Record (Doc. No. 36) which Petitioner opposes (Doc. No. 38). The Warden has filed a Reply in support (Doc. No. 39). A motion to expand the record in a habeas corpus case is one on which a magistrate judge has decisional authority under 28 U.S.C. § 636(b).

The Warden moves to supplement the record with an October 29, 2010, Affidavit of Mark E. Piepmeier which authenticates and explains the context of (1) an attached October 8, 2007, letter from Emanuel Newell to Piepmeier; (2) an audio recording of a meeting on October 19, 2007, among Piepmeier, Newell, and William Breyer; and (3) a December 18, 2007, Affidavit of Newell. These documents purport to speak to the veracity of Newell's 2006 Affidavit, submitted with a Notice of New Evidence in Petitioner's post-conviction process.

The October 8, 2007, Newell letter and the December 18, 2007, Newell affidavit are in the Appendix to the Return of Writ filed by the Warden. (Appx. Vol. 21, pp. 129-136). The Warden has admitted that these documents were included in the Appendix without being part of the state court record:

The Warden recognizes that this affidavit, although included in the Warden's appendix as a part of the record, was withdrawn from the state court post-conviction record by the State of Ohio during a teleconference held on 6/18/08. J.A. Vol. 21, pp. 155-56. The Warden intends to file, in conjunction with his Return of Writ, a motion to expand the record under R. 7 of the Federal Habeas Rules.

(Return of Writ, Doc. No. 31, PageID 498, n. 1.)

Petitioner opposes the Motion to Expand because, he says, "the State of Ohio deliberately abandoned the Newell letter and 2007 affidavit during Skatzes' post-conviction proceedings." (Memo Opp. Doc. No. 38, PageID 583.) As proof, he offers the June 19, 2008, Decision, Entry and Order of Judge Tucker ruling on requests to supplement the **appellate** record. Paragraph 4 reads

Respondent State of Ohio has requested the appellate record be supplemented to include a letter and two affidavits. Respondent, through counsel, withdrew its supplementation request during a telephone conference with this court on June 18, 2008.

(Memo Opp., Doc. No. 38, Ex. A, PageID 586-587.) This Court assumes, without any confirmation from the parties, that Judge Tucker was acting under the authority of Ohio trial court judges to correct the record on appeal. Ohio R. App. P. 9(E). There is no further identification in Judge Tucker's Order of the documents of which he writes, but there must have been more than the 2007 Newell letter and affidavit, because he writes of two affidavits.¹ Because we do not have a record of Judge Tucker's June 18, 2008, conference call, we do not presently know the circumstances of the request to withdraw the appellate supplementation request. As the Warden notes at the conclusion of his reply, "[i]f there is a factual dispute as to the prosecutor's reasons for withdrawing the motion, that may be subject to a need for further evidence." (Doc. No. 39, PageID 589.) At this point, the record does not support Petitioner's assertion that whatever happened before Judge Tucker on June 18, 2008, constitutes a deliberate

¹The other affidavit cannot be the Piepmeier affidavit attached to the Motion to Expand because that affidavit was signed October 29, 2010.

abandonment of these pieces of evidence for all purposes.

Petitioner also opposes the Motion on “principles of equity.” Skatzes argues that if a petitioner fails to offer evidence in state court post-conviction proceedings through lack of diligence, he is barred from offering that evidence in later habeas proceedings, citing *Holland v. Jackson*, 542 U.S. 649 (2004). The Court in *Holland* was interpreting 28 U.S.C. § 2254(e)(2) which expressly limits the rights of a habeas petitioner to introduce evidence. The Court is not authorized to impose the same limits on the State out of a sense of equity.

Petitioner’s objections aside, the submitted materials clearly come within the description of materials which may be added to the record under Habeas Rule 7. Respondent’s Motion is granted.

November 17, 2010.

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