

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

MARK MUSSELMAN,

Petitioner,

-vs-

WARDEN, Chillicothe Correctional
Institution,

Respondent.

:

Case No. 3:09-cv-407

:

Magistrate Judge Michael R. Merz

:

**DECISION AND ORDER ON PETITIONER'S MOTION TO SUPPLEMENT THE
RECORD**

This habeas corpus action is before the Court on Petitioner's Motion to Supplement the Record (Doc. No. 16) which Respondent opposes (Doc. No. 17).

Petitioner seeks to add the trial transcripts and exhibits from his state court trial and particularly wishes to scan Exhibit 20, a photocopy of his driver's license, which apparently is in the custody of the Montgomery County Common Pleas Court.

This case is presently on appeal to the Sixth Circuit. Once an appeal is taken, the District Court loses jurisdiction of the case, except in aid of the appeal. Fed. R. App. P. 10 describes the record on appeal to a United States Court of Appeals as including the original papers and exhibits in the district court, a transcript of the district court proceedings, and a certified copy of the district court docket. This is consistent with the ordinary notion that the Court of Appeals considers on appeal only what the District Court had before it. Fed. R. App. 10(e)(2) allows for correction of the

record if anything was omitted by “error or accident.” Rule 10(e)(3) expressly provides “All other questions as to the form and content of the record must be presented to the court of appeals.”

Since the items offered by Petitioner were not before this Court when it rendered its decision, this Court lacks authority to add them to the record now. Petitioner’s request must be submitted to the Court of Appeals.

The Motion is denied for lack of authority to grant it without prejudice to its renewal in the Court of Appeals.

July 15, 2010.

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