

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

RICHARD FERNBACH,

Petitioner,

-vs-

LAWRENCE MACK, Warden,

Respondent.

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Case No. 3:10-cv-040

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Magistrate Judge Michael R. Merz

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**ORDER TO RESPONDENT**

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This habeas corpus case is before the Court on Petitioner's Motion to Deem Motion to Compel Filed As Of April 19, 2010 (Doc. No. 9). For good cause shown, said Motion is granted.

The case is also before the Court on Petitioner's Motion to Compel Compliance with Rule 5(c) of the Rules Governing § 2254 Cases (Doc. No. 10). Petitioner seeks to have the Respondent (1) set forth what transcripts are available, when they can be furnished, and what proceedings have been recorded but not transcribed; and (2) furnish him with copies of the transcripts which have been filed with the Court.

The two filed transcripts are of Petitioner's sentencing hearing on November 9, 2005, and his resentencing hearing on October 27, 2006 (Doc. No. 8). While state trial court transcripts are not one of the papers expressly listed in Fed. R. Civ. P. 5(a), this Court has long taken the position that it cannot properly consider transcripts which have been filed *ex parte*, without furnishing the petitioner a copy. The Court notes that the Notice of Filing does not contain a certificate of service.

It is accordingly ordered that:

1. Not later than May 14, 2010, Respondent shall furnish Petitioner with copies of the filed transcripts unless good cause to the contrary be shown.
2. Not later than May 14, 2010, Respondent shall supplement his Answer and Return of Writ by stating expressly whether there are any other state court proceedings which were recorded but have not yet been transcribed; which transcripts have been prepared and not yet filed. Respondent shall also advise the Court why these transcripts have not yet been filed and what Respondent intends in that regard.
3. Petitioner's date to file his reply will be reset by the Court when the transcript issues are resolved.

May 3, 2010.

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

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