

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

JAMES C. CARR, JR.,

Petitioner,

-vs-

WARDEN, Southern Ohio
Correctional Facility,

Respondent.

:

Case No. 3:10-cv-245

:

District Judge Walter Herbert Rice
Magistrate Judge Michael R. Merz

**DECISION AND ORDER DENYING MOTION FOR EVIDENTIARY HEARING
WITHOUT PREJUDICE**

This newly-filed habeas corpus case is before the Court on Petitioner’s Motion for Evidentiary Hearing (Doc. No. 3). Petitioner states that the reasons for a hearing are set forth in the Memorandum in Support of his Petition; but as presently presented, the Memorandum does not satisfy the requirements for an evidentiary hearing in habeas corpus.

28 U.S.C. §2254(e) as adopted by the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214)(the "AEDPA") provides:

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(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.

The Supreme Court has made it clear that, even after AEDPA, whether or not to hold an evidentiary hearing is a matter committed to the sound discretion of the trial court. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). That is, even if a petitioner is not precluded from a hearing by 2254(e)(1), that does not mean he is necessarily entitled to one.

To obtain an evidentiary hearing on a claim, a petitioner must show what facts he wishes to present by means of which witnesses or documents and what efforts he made to present those facts in the state courts.

On this basis, Petitioner's Motion for Evidentiary Hearing is denied without prejudice to its renewal in compliance with the standards adopted under the AEDPA.

June 28, 2010.

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