

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

DENNIS D. JACKSON,

Petitioner,

: Case No. 3:13-cv-347

- vs -

District Judge Thomas M. Rose  
Magistrate Judge Michael R. Merz

WARDEN, Lebanon Correctional  
Institution,

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Respondent.

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**DECISION AND ORDER DENYING MOTION TO EXPAND THE  
RECORD**

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This habeas corpus case is before the Court on Petitioner's Motion to Expand the Record (Doc. No. 21).

The matter Petitioner wishes to add to the record are police reports which are identified as Exhibits B, D, and H to Petitioner's Motion to Supplement the Record (Doc. No. 8, PageID 1990-91, 1993, and 1998-2000) and Exhibit A-1 to Petitioner's Motion for Leave to File a Delayed Motion for New Trial in the Common Pleas Court (Motion at Return of Writ, Doc. No. 6-2, PageID 558-63, Exhibit A-1 is at PageID 564).

Exhibit A-1 is already part of the record, having been filed by the Respondent.

The Magistrate Judge already rejected a request to expand the record to include Exhibits B, D, and H in rejecting Jackson's previous Motion to Supplement (Report and Recommendations, Doc. No. 10, PageID 2025). However, for the limited purpose of meeting the *Schlup* actual innocence gateway, the Supplemental Report and Recommendations admitted

the tendered exhibits, but noted that they could not “be considered in deciding the question presented by 28 U.S.C. § 2254(d)(1), . . .” (Supplemental Report, Doc. No. 19, PageID 2203).

Jackson’s basis for expanding the record are Fed. R. Evid. 102, 803(6), and 803(8)(Motion Doc. No. 21, PageID 2246). Jackson argues that the police reports, as business records, are admissible despite the hearsay rule and are authentic, per Fed. R. Evid. 901(b)(7).

Whether or not these police reports would have been admissible at trial if offered by the defense, they cannot be admitted now in habeas corpus. In *Cullen v. Pinholster*, 563 U.S. \_\_\_, 131 S. Ct. 1388 (2011), the Supreme Court held that a federal court’s review of a state court decision under 28 U.S.C. § 2254(d)(1) is strictly limited to “review of the state court record,” and that evidence acquired through use of an evidentiary hearing may not be considered. *Id.* at 1399. *Pinholster* applies to motions to expand the record. *Moore v. Mitchell*, 708 F.3d 760, 780-784 (6<sup>th</sup> Cir. 2014); *See also Boyko v. Parke*, 259 F.3d 781, 790 (7<sup>th</sup> Cir. 2001).

As noted in the Report,

When a state court decides on the merits a federal constitutional claim later presented to a federal habeas court, the federal court must defer to the state court decision unless that decision is contrary to or an objectively unreasonable application of clearly established precedent of the United States Supreme Court. 28 U.S.C. 2254(d)(1); *Harrington v. Richter*, 562 U.S. \_\_\_, 131 S. Ct. 770, 785 (2011); *Brown v. Payton*, 544 U.S. 133, 140 (2005); *Bell v. Cone*, 535 U.S. 685, 693-94 (2002); *Williams (Terry) v. Taylor*, 529 U.S. 362, 379 (2000).

(Report and Recommendations, Doc. No. 10, PageID 2032.) The Report concluded that the state courts’ decisions on the merits of Jackson’s claims were neither contrary to nor an objectively unreasonable application of clearly established law as determined by the United States Supreme Court and were thus entitled to deference under 28 U.S.C. § 2254(d)(1).<sup>1</sup> (See Supplemental

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<sup>1</sup> Some of Jackson’s claims were determined to be non-cognizable in habeas corpus or procedurally defaulted, so

Report, Doc. No. 19, PageID 2217 as to Ground One; PageID 2226 as to Ground Two; PageID 2229 as to Ground Three; PageID 2233 at to Grounds for Relief Four, Five, Six, and Ten; PageID 2237 as to Ground Seven; Ground Eight was found to be forfeited by failure to present it to the state courts, PageID 2229; and PageID 2239 as to Ground Nine.)

Jackson must overcome the hurdle of 28 U.S.C. § 2254(d)(1) before he can present new evidence not in the state court record. This he has not done. The (third) Motion to Expand the record is DENIED.

September 3, 2014.

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

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that they did not received merits consideration in the state courts.