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

SAMUEL C. STEIN,

Petitioner, : Case No. 3:14-cv-274

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

MARK HOOKS, Warden,

:

Respondent.

DECISION AND ORDER DENYING, WITHOUT PREJUDICE, PETITIONER'S MOTION TO EXPAND THE RECORD, FOR LEAVE TO COMPEL DISCOVERY, AND/OR FOR EVIDENTIARY HEARING

This habeas corpus case is before the Court on Petitioner's Motion to Expand the Record, to Compel Discovery, and/or for an Evidentiary Hearing (Doc. No.4). The Motion is DENIED without prejudice to its renewal in proper form and at the proper time.

With respect to expansion of the record, it is not appropriate to consider a motion to that effect until the State has filed the Return of Writ and the portions of the state court record ordered in the Order for Answer (Doc. No. 4). That is, we cannot expand the record until we know what the record is.

With respect to both expansion of the record and an evidentiary hearing, this Court is limited in the evidence it may consider. On the question of whether the state court decisions in the case were contrary to, or an objectively unreasonable application of clearly established law, the Court can only consider the record that was before the state courts. *Cullen v. Pinholster*, 563

U.S. ___, 131 S. Ct. 1388 (2011); *Ballinger v. Prelesnik*, 709 F.3d 558, 561 (6th Cir. 2013); *Bray v. Andrews*, 640 F.3d 731, 737 (6th Cir. 2011). The limitations in *Pinholster* are virtually jurisdictional and apply to expansion of the record as well as to evidentiary hearings. *Moore v. Mitchell*, 708 F.3d 760, 780-784 (6th Cir. 2014).

Petitioner also seeks an extensive amount of discovery. A habeas petitioner is not entitled to discovery as a matter of course, but only upon a fact-specific showing of good cause and in the Court's exercise of discretion. Rule 6(a), Rules Governing § 2254 Cases; *Bracy v. Gramley*, 520 U.S. 899 (1997); *Harris v. Nelson*, 394 U.S. 286 (1969); *Byrd v. Collins*, 209 F.3d 486, 515-16 (6th Cir. 2000). Before determining whether discovery is warranted, the Court must first identify the essential elements of the claim on which discovery is sought. *Bracy*, 520 U.S. at 904, *citing United States v. Armstrong*, 517 U.S. 456, 468 (1996). The burden of demonstrating the materiality of the information requested is on the moving party. *Stanford v. Parker*, 266 F.3d 442, 460 (6th Cir. 2001), *cert. denied*, 537 U.S. 831 (2002), *citing Murphy v. Johnson*, 205 F.3d 809, 813-15 (5th Cir. 2000). "Even in a death penalty case, 'bald assertions and conclusory allegations do not provide sufficient ground to warrant requiring the state to respond to discovery or require an evidentiary hearing.'" *Bowling v. Parker*, 344 F.3d 487, 512 (6th Cir. 2003), *cert. denied*, 543 U.S. 842 (2004), *quoting Stanford*, 266 F.3d at 460.

Rule 6 does not "sanction fishing expeditions based on a petitioner's conclusory allegations." *Williams v. Bagley*, 380 F.3d 932, 974 (6th Cir. 2004), *cert. denied*, 544 U.S. 1003 (2005), *citing Rector v. Johnson*, 120 F.3d 551, 562 (5th Cir. 1997); *see also Stanford*, 266 F.3d at 460. "Conclusory allegations are not enough to warrant discovery under [Rule 6]; the petitioner must set forth specific allegations of fact." *Williams*, 380 F.3d at 974, *citing Ward v. Whitley*, 21 F.3d 1355, 1367 (5th Cir. 1994).

After he files his reply to the Warden's answer, Petitioner may renew his motion for discovery, relating each piece of discovery he seeks to the particular grounds for relief he believes the discovery will support.

September 9, 2014.

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