

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

OLUDAYO ASHIPA,

Petitioner,

-vs-

ROBYN KNAB, Warden,

Respondent.

:

Case No. 1:08-cv-879

:

District Judge Michael R. Barrett
Magistrate Judge Michael R. Merz

DECISION AND ORDER DENYING MOTION TO CERTIFY

This habeas corpus case is before the Court on Petitioner Oludayo Ashipa’s Motion to Certify certain questions to the Ohio Supreme Court (Doc. No. 41). Respondent opposes the Motion (Doc. No. 43).

Petitioner requests that the following two questions be certified:

1. Whether the trial court denied Mr. Ashipa his substantive and procedural due process (liberty interest) rights when it failed to consider Ohio’s Ohio Revised Code § 2929.14(E)(4) prior to imposing the *State v. Foster*, 109 Ohio St. 3d 1, 845 N.E. 2d 470 (2006), remedy on consecutive sentences decision upon him and not noting the consideration on the record pursuant to Ohio Revised Code § 2929.19(B)(2) as mandated by the Ohio General Assembly under Senate Bill 2, since the United States Supreme Court decision in *Oregon v. Ice*, ___ U.S. ___, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009), controls the *Foster* remedy consecutive sentence proposition? (Motion, Doc. No. 41, PageID 1777.)

2. Whether the trial court committed prejudicial error when it used the judge-found sentencing factors (Ohio Revised Code §§ 2929.11, 2929.12, et seq.) under the *State v. Foster*

remedy to increase Mr. Ashipa's statutory minimum sentence of two years to ten years and without the trial court satisfying itself that the elements of Mr. Ashipa's crime was charged in his indictments (Case Nos. B-0401447 and B-0403917) to be proved to a jury beyond a reasonable doubt? (*Id.*..., PageID 1779)

Ohio S. Ct. Prac. R. XVIII is Ohio's adopted form of the Uniform Certification of Questions of Law Act. Section 1 of the Rule provides:

The Supreme Court may answer a question of law certified to it by a court of the United States. This rule may be invoked when the certifying court, in a proceeding before it, issues a certification order finding there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court.

The questions which Petitioner poses are not appropriate for certification under Rule XVIII. First of all, these are not "questions of law," but mixed questions of law and fact. Whether or not the trial court in this case considered certain factors in imposing sentence or whether it committed prejudicial error are questions with embedded factual elements. In contrast, Rule XVIII is designed to deal with pure questions of law. For example, in *Morgan v. Eads*, 104 Ohio St. 3d 142, 818 N.E. 2d 1157 (2004), the Ohio Supreme Court held that 26(B) proceedings are collateral in nature rather than part of the direct appeal. This was an abstract or general question of law which was potentially determinative in a case before the United States District Court for the Northern District of Ohio (and many other federal cases), so it was appropriate for certification, but it did not require the Ohio Supreme Court to decide any subordinate or embedded factual questions.

Second, the questions proposed are not questions of Ohio law, but of federal constitutional law, at least in part. The first question, involving due process questions, is purely federal; the second question may include federal questions if the posited error is one of federal constitutional

dimensions.

Because the proposed questions are not appropriate for certification under Ohio S. Ct. Prac.

R. XVIII, the Motion to Certify is DENIED.

June 3, 2010.

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