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

OLUDAYO ASHIPA,

:

Petitioner, Case No. 1:08-cv-879

: District Judge Michael R. Barrett

-vs- Magistrate Judge Michael R. Merz

ROBYN KNAB, Warden,

:

Respondent.

SUPPLEMENTAL MEMORANDUM OPINION ON MOTION TO CERTIFY

This habeas corpus action is before the Court on Petitioner's Objections (Doc. No. 46) to the Magistrate Judge's Decision and Order (Doc. No. 44) denying Petitioner's Motion to Certify Questions to the Ohio Supreme Court (Doc. No. 41). The General Order of Reference for the Dayton location of court permits a magistrate judge to reconsider decisions or reports and recommendations when objections are filed.

Petitioner requested 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?
>
> 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 [sic] charged in his indictments (Case Nos. B-0401447 and B-0403917) to be proved to a jury beyond a reasonable doubt?

(Motion, Doc. No. 41, PageID 1777, 1779.)

The Magistrate Judge denied certification on two bases. First, the questions are mixed questions of law and fact, not the pure questions of law contemplated for certification under Ohio S. Ct. Prac. R. XVIII. Second, the proposed questions are, at least in part, questions of federal constitutional law, rather than Ohio law (Decision and Order, Doc. No. 44, PageID 1868-1869).

The premise of Mr. Ashipa's Objections is that there are only two requirements for certification: (1) that "the question certified must be one which 'may be determinative of the proceedings.'" and (2) "the question certified must be one 'for which there is no controlling precedent in the decisions of **the** Supreme Court'" (Objections, Doc. No. 46, purporting to quote Ohio S. Ct. Prac. R. XVIII.). Petitioner's analysis misses two important points: Rule XVIII says the certified question must be a question of **Ohio** law and it must be one for which there is no controlling precedent in the decisions of **this** [i.e. the Ohio] Supreme Court. In other words, Petitioner has misquoted the rule when he writes "the Supreme Court."

Rule XVIII does not provide for certification of mixed questions of law and fact, but only questions of Ohio law. Mr. Ashipa's first proposed question is about whether he was denied his rights when *Foster* was applied to him; his second proposed question is about whether he was prejudiced by application of *Foster* to his case. These are not a pure questions of law, but questions about how the law was applied in this case. Questions of the application of law to a particular case

are mixed questions of law and fact, not pure questions of law. Ohio S. Ct. R. Prac. XVIII provides for certification only of questions of Ohio law. If a federal habeas court were to certify a mixed question of law and fact, it would not only be exceeding what is allowed under the Ohio rule, it would also be improperly delegating the exercise of jurisdiction in the pending habeas case.

To the extent there is a question of law embedded in the first proposed certification, it is a question of federal constitutional law: was Petitioner denied his substantive and/or procedural due process rights when *Foster* was applied to him? Substantive and procedural due process are guaranteed by the Due Process Clause of the Fourteenth Amendment. While the Ohio Supreme Court is undoubtedly authorized to decide federal constitutional questions in cases properly before it, Rule XVIII does not provide for the federal courts to refer such questions (or mixed questions of law and fact which embody federal constitutional questions) to the Ohio Supreme Court for resolution.

As noted above, Mr. Ashipa's second proposed question for certification also is a mixed question of law and fact. Whether he was prejudiced by the way he was sentenced involves applying propositions of law to his whole case, not answering an abstract question of Ohio law. This proposed question may include implicit questions of Ohio law – e.g., interpretation of Ohio Revised Code § 2929.11, et seq. But it also plainly involves questions of federal constitutional law as well – none of the questions decided in *Foster* would even have been raised but for the United States Supreme Court decision in *Blakely v. Washington*, 542 U.S. 296 (2004).

Mr. Ashipa attempts to show certification is proper by noting the pendency before the Ohio Supreme Court of *State v. Hodge*, appeal accepted for review at 124 Ohio St. 3d 1472 (2010).

According to the Ohio Court of Appeals for Cuyahoga County,

> The Ohio Supreme Court recently decided to hear the *Ice/Foster* issue in *State v. Hodge*, Supreme Court No. 2009-1997. The court [presumably the Hamilton County Court of Appeals in *Hodge* Hamilton App. No. C-080968] certified the following proposition of law: "Before imposing consecutive sentences, Ohio trial courts must make the findings of fact specified by R.C. 2929.14(E)(4) to overcome the presumption favoring concurrent sentences in R.C. 2929.41(A)."

State v. Bankston, 2010 WL 1386380 (Ohio App. 8th Dist. Apr. 8, 2010). ¶ 65, n. 4. Petitioner cites numerous Ohio Court of Appeals opinions which evince awareness of the pendency of *State v. Hodge* in the Ohio Supreme Court (Doc. No. 46, PageID 1884). The question posed by the case – apparently the same question Petitioner wants answered – is whether *Oregon v. Ice*, ___ U.S. ___, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009), effectively overruled that part of *Foster* which severed as unconstitutional those portions of Senate Bill 2 which required judicial fact-finding before imposing consecutive sentences.[1]

This Court has been unable to ascertain the accuracy of footnote 4 in *Bankston* and thus verify that Ohio Court of Appeals in *Hodge* certified any question to the Ohio Supreme Court. The docket of the Hamilton County Court of Appeals does not disclose any entry "certifying" a question to the Ohio Supreme Court. But even if it did, that "certification" would be completely different from the certification Petitioner seeks here. Under Ohio S. Ct. R. Prac. IV, an Ohio court of appeals can certify that its decision in a particular case is in conflict with that of another court of appeals, thus permitting a party in the case to appeal to the Ohio Supreme Court. Upon receiving that appeal, the Ohio Supreme Court can decide whether there is a conflict and identify "those issues raised in

[1]The Ohio Supreme Court in *Foster* understood that the *Apprendi-Blakely* line of cases applied to consecutive sentencing. *Oregon v. Ice* holds that line of cases does not apply to consecutive sentencing because that question was never presented to the jury at common law.

the case that will be considered by the Supreme Court on appeal." *Id.*. at § 2(C). Under those circumstances, the Ohio Supreme Court gets the whole case to decide in light of its decision on the conflicted question. In other words, the Ohio Supreme Court will then decide the question of law on which the Ohio Courts of Appeal are in conflict, then apply that ruling to deciding the case on appeal. Although the difference may appear subtle to a layperson, in this situation, the Ohio Supreme Court decides the whole case, whereas under Rule XVIII, it decides only the question of state law certified by the federal court.

There is no doubt that the Ohio Supreme Court is competent to decide both questions which Mr. Ashipa proposes to have certified, including the embedded questions of federal constitutional law. If Mr. Ashipa had some remaining Ohio remedy by which he could place those questions before the Ohio courts, if he then returned to this Court on habeas (presuming he received an unfavorable decision in the Ohio courts), this Court would have to defer to the Ohio decision even on the questions of federal constitutional law, unless they were objectively unreasonable applications of clearly established United States Supreme Court precedent. 28 U.S.C. § 2254(d); *Terry Williams v. Taylor*, 529 U.S. 362 (2000). But certification of a question of Ohio law is not an Ohio "remedy" in the sense that a federal habeas court can send what would amount to two claims for relief to the Ohio Supreme Court for decision.

The Magistrate Judge agrees with Petitioner (Objections, Doc. No. 46, PageID 1884) that there is no controlling Ohio Supreme Court precedent on the question whether, under Ohio law, the *Foster* severance remedy related to consecutive sentences survives *Oregon v. Ice*, ___ U.S. ___, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009). Presumably that question will be answered by the Ohio Supreme Court in *State v. Hodge*. If it does not, the Ohio Supreme Court will also have to decide

whether to give its decision retroactive effect and how much retroactive effect (e.g., will it apply to persons such as Mr. Ashipa who received consecutive sentences after *Foster* but before *Oregon v. Ice*?) Those questions are not presently before this Court since *State v. Hodge* has not yet been decided.

In his Objections, Mr. Ashipa asserts that the decision of the United States Supreme Court in *United States v. O'Brien*, ___ U.S. ___, 2010 WL 2025204 (May 24, 2010), "will eventually strike down the Ohio Supreme Court's decision[s] in *Foster* and *Elmore*." *O'Brien* involves the Supreme Court's interpretation of a federal statute, 18 U.S.C. § 924(c), and thus is not in point on either *Foster* or *Elmore*. The language quoted by Petitioner about mandatory minimum sentences ("As Justice Thomas eloquently explained . . . Objections, Doc. No. 46, PageID 1885) is from the concurring opinion of Justice Stevens, not the controlling majority opinion.

Petitioner concludes by stating this Court (referring to Judge Barrett) "must decline to adopt the June 3rd, 2010, Magistrate Judge Merz decision (Doc. No. 44) until the Mag. Judge Merz stays, and certifies into the Ohio Supreme Court, pet. Ashipa's questions one (1) and two (2). . .," because of Judge Barrett's decision in *Gaines v. Warden*, 2009 WL 1926449 (March 31, 2009). In that case (Case No. 1:07-cv-347), Judge Barrett remanded a habeas petition to the assigned magistrate judge to reconsider in light of two state court decisions and the case was eventually stayed pending exhaustion by the Petitioner of his state court remedies. That of course is perfectly proper under *Rhines v. Weber*, 544 U.S. 269 (2005). But that is not what is involved here. Certification under Ohio Sup. Ct. R. Prac. XVIII is not a state court remedy which a criminal defendant is entitled to invoke. Rather, it is a discretionary method for a federal court to obtain a decision on a question of Ohio law.

For the foregoing reasons, it is respectfully recommended that the District Court affirm the Magistrate Judge's decision denying certification.

June 28, 2010.

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