

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

MARK RUSSELL,

Petitioner,

vs.

CASE NO. 2:08-CV-171  
JUDGE SARGUS  
MAGISTRATE JUDGE KING

WANZA JACKSON, Warden,

Respondent.

OPINION AND ORDER

On August 11, 2009, final judgment was entered dismissing the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. *Judgment*, Doc. No. 42. On September 21, 2009, this Court denied petitioner's motion for reconsideration of that order. *Order*, Doc. No. 45. This matter now is before the Court on petitioner's September 16, 2009, notice of appeal, Doc. No. 47, which this Court construes as a request for a certificate of appealability. Petitioner's motion to supplement his request for a certificate of appealability, Doc. No. 50, hereby is **GRANTED**. For the reasons that follow, petitioner's request for a certificate of appealability, Doc. No. 47, is **DENIED**.

Petitioner's motion to reconsider, Doc. No. 44, was filed on August 31, 2009, but was apparently delivered to prison officials for mailing on August 21, 2009. *See* Doc. No. 44. Therefore, under *Houston v. Lack*, 487 U.S. 266 (1988), the Court deems petitioner's Rule 60(b) motion to have been filed within ten days of the final judgment of dismissal of this action. Thus, his September 16, 2009, notice of appeal is timely. F.R.App.P. 4(a)(4)(A)(vi); 4(a)(4)(B)(i).

In his habeas corpus petition, petitioner asserted the following claims:

1. Prosecutorial misconduct in closing arguments violated petitioner's rights of due process under the 14th Amendment [o]f the United States Constitution and violated the province of the jury and DR-7106(c)(4).

1A. Prosecutorial misconduct in closing arguments violated petitioner's 6th and 14th Amendment rights [under] the United States Constitution.

1B. Prosecutorial misconduct during opening statements, 14th Amendment violation.

1C. Prosecutorial misconduct during trial of leading questions, a 14th Amendment violation.

2. Petitioner was denied due process of law when former trial counsel Robert Suhr coerced defendant to waive his 5th Amendment rights under the United States Constitution.

2A. Attorney Keeling failed to raise in the Court of Appeals that the trial court erred in admitting the letter of Mark Russell into evidence as a portion of the State's case in chief. This violated petitioner's 6th and 14th Amendment rights.

2B. The trial court erred in admitting the letter of Mark Russell into evidence as a portion of the States's case in chief, when the prosecution knew the letter was false.

2C. Prosecutorial misconduct, the prosecution purposely mislead the defense concerning the discovery material in [its] possession in violation of petitioner's 6th and 14th Amendment rights.

3. Petitioner was denied his right to effective assistance of counsel when counsel failed to properly investigate and [conduct] pretrial discovery and failed to have scientific tests performed on the porcelain glass crack pipe in violation of his 6th Amendment [rights].

3A. Petitioner was denied effective assistance [o]f counsel when trial counsel failed to object to prosecutorial misconduct committed by the prosecutor during their opening statement, their leading questions, and in their closing arguments. Defense counsel also waived opening statements in violation of petitioner's 6th and 14th Amendment rights of the United States Constitution.

4. Attorney Keeling failed to raise in the Court of Appeals the fact that the petitioner was not given his Miranda rights, and did not sign a waiver of his constitutional rights when he was questioned by the police and the two summaries had a prejudicial effect on the case, because it denied petitioner his right to counsel and right against self incrimination.

4A. Petitioner was denied effective assistance of trial counsel when counsel allowed the State to use two unsigned and unsworn statements for purposes other than impeachment, a violation of the 6th and 14th Amendments.

5. The trial court erred when it refused to allow the tape recorded interviews between the defendant and the detective into evidence when both the detective and the defendant testified. There were major conflicts in their testimony with respect to what was said during those interviews.

5A. The 5th, 6th, and 14th Amendment rights of the accused were violated when the prosecution allowed their witness Det. Gillette to testify from summaries which they knew were false.

5B. The 5th, 6th, and 14th Amendment rights [o]f the accused were violated when the prosecution elicited false testimony from Detective Gillette concerning gunpowder residue.

5C. The 5th, 6th and 14th Amendment rights of the accused were violated when the prosecution[']s witness Sgt. Brian Reigle gave false testimony concerning the accuracy of the polygraph test he performed on the accused.

6. The improper impeachment of petitioner during the State's case in chief with his alleged inconsistent pretrial statements to police and the mischaracterization of the same during the

State's closing arguments, a violation of petitioner's 5th, 6th and 14th Amendment rights.

7. The exclusion of a letter that defendant had written to the mother of the deceased, which was needed to explain and put into context defendant's earlier letter to the mother that was introduced into evidence by the State which resulted into a 5th, 6th and 14th Amendment violation.

8. The trial court erred when it allowed the State to introduce and admit evidence that was not admissible because the recorded part was purposely destroyed in violation of Evid. R. 106 and the 14th Amendment.

9. The trial court erred by denying petitioner's motion requesting the grand jury transcripts, a 14th Amendment violation.

10. The prosecution denied petitioner his constitutional rights by the non-disclosure of Crim.R. 16. The statements and identity of the person who petitioner supposedly confessed to, of the murder of Kenny Sartin (6th and 14th Amendment violation).

11. There were numerous errors in the introduction of the evidence that prevented petitioner from receiving a fair trial, most of the errors were not objected to, but rose to the level of plain error, either individually or collectively, and petitioner was denied effective assistance of counsel by counsel's failure to object to these errors.

11A. Petitioner was denied effective assistance of appellate counsel when appellate counsel failed to raise on direct appeal that the trial court erred when it denied petitioner's Crim.R. 29 motion. Petitioner's conviction is against the sufficiency and/or manifest weight of the evidence in violation of petitioner's 6th and 14th Amendment rights.

12. Petitioner's 4th and 14th Amendment rights of the United States Constitution were violated when a warrant for his arrest was issued without probable cause, nor was the probable cause shown.

12A. Petitioner's 4th and 14th Amendment rights of the United

States Constitution were violated when the complaint filed by Detective Gillette to secure petitioner's arrest warrant was deficient, the complaint also violated Crim. R. 33.

On August 11, 2009, final judgment was entered dismissing as procedurally defaulted claims 1, 1A, 1B, 1C, 2, 2B, 2C, 3, 3A, 4A, 5A, 5B, 5C, 6-11, 11A, 12, and 12A; the remaining claims were dismissed on the merits. *Opinion and Order*, Doc. No. 41.

In his motion to supplement his request for a certificate of appealability, petitioner complains that neither this Court nor the state courts reviewed his claim that he was denied his right to be present at a critical stage of the proceedings when the trial court responded to a question during jury deliberations. *See* Doc. No. 50. He requests a certificate of appealability on this claim. *Id.* However, petitioner did not identify this issue as a claim in his habeas corpus petition, *see* Doc. Nos. 4, 12, or in his objections to the Magistrate Judge's *Report and Recommendation*. *See* Doc. No. 39. Therefore, the issue does not form a basis for issuance of a certificate of appealability.

When a Court dismisses a claim on procedural grounds, a certificate of appealability

should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

*Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Thus, there are two components to determining whether a certificate of appealability should issue when a claim is dismissed on procedural grounds: "one directed at the underlying constitutional claims and one directed at the district court's procedural holding." The court may first "resolve the issue whose answer

is more apparent from the record and arguments." *Id.*

When a claim has been denied on the merits, a certificate of appealability may issue only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). This standard is a codification of *Barefoot v. Estelle*, 463 U.S. 880 (1983). *Slack v. McDaniel*, *supra*. To make a substantial showing of the denial of a constitutional right, a petitioner must show

that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further." *Barefoot*, 463 U.S. , at 893, and n. 4...


*Id.*

Upon review of the record, the Court is not persuaded that petitioner has established either that reasonable jurists would debate whether the petition states a valid claim of the denial of a constitutional right or whether this Court properly dismissed petitioner's claims as procedurally defaulted. Therefore, petitioner's request for a certificate of appealability, Doc. No. 47, is **DENIED**.

Petitioner's motion to supplement his request for a certificate of appealability, Doc. No. 50, is **GRANTED**.

**IT IS SO ORDERED.**

10-14-2009  
Date

  
EDMUND A. SARGUS, JR.  
United States District Judge