

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

MARK RUSSELL,

Petitioner,

v.

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

WANZA JACKSON, Warden,

Respondent.

OPINION AND ORDER

This is an action under the provisions of 28 U.S.C. §2254 challenging petitioner's state court conviction for murder with a firearms specification. The petition, including claims and sub-claims, asserted twenty-five (25) claims for relief. See Doc. Nos. 4, 12, at 2-8. The Magistrate Judge considered all twenty-five claims but nevertheless recommended that the petition be dismissed. Doc. No. 36. Petitioner's objections were overruled and, on August 11, 2009, final judgment dismissing the action was entered. Doc. No. 42. Petitioner's motion for reconsideration of that judgment was denied. Doc. No. 45.

On October 1, 2009, petitioner moved to supplement his request for a certificate of appealability, arguing that neither the state nor the federal courts considered a claim that petitioner had been denied his right to be present at a critical stage of the proceedings. Doc. No. 50. Although the Court granted petitioner's motion to supplement his request for a certificate of appealability, the Court nevertheless declined to entertain this new claim because "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." Doc. No. 51, at 5. Petitioner thereafter moved for reconsideration of that order, Doc. No. 53, which this Court denied. Doc. No. 55.

This matter is now before the Court on petitioner's May 27, 2010, motion for relief from the Court's most recent order denying petitioner's motion for reconsideration. Doc. No. 56.

In his motion for reconsideration and again in his motion for relief, petitioner insists that he in fact asserted a claim based on a denial of his right to be present at all critical stages. In this regard, petitioner refers – not to the claims for relief expressly articulated in his petition and memorandum in support of the petition, Doc. Nos. 4, 12, at 2-8 – but to language contained in a single page of an exhibit attached to respondent's 742-page *Return of Writ*, Doc. No. 23,<sup>1</sup> and to two sentences contained on one page of petitioner's 75-page memorandum in support of his petition, Doc. No. 12, at 75<sup>2</sup> – language and sentences that in any event appear to be unrelated to any of the claims expressly asserted by petitioner in either the state courts or in this Court. In the view of this Court, petitioner has not properly presented this claim for relief to this Court. Moreover, it does not appear that


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<sup>1</sup>"During jury deliberations, the jury submitted a written question asking for a copy of the first interview of the defendant. The court responded in writing indicating that they could not have it and that they would have to rely upon their collective memories of the evidence. There was no indication on the record that the defendant was present or informed of this question or that the defense had any input into the response." *Memorandum in Support of Jurisdiction of Appellant Mark R. Russell*, at 11, attached as Exhibit 12 to *Return of Writ*, Doc. No. 23, at 137.

<sup>2</sup>"There is no indication on the record that the Petitioner was present or informed of this [jury] question or that the defense counsel had any input into the response. That in itself is a constitutional violation." Doc. No. 12, at 75.

petitioner ever presented this claim to the courts of the State of Ohio as required by 28 U.S.C. §2254(b), (c) and he has therefore procedurally defaulted this claim. *See Murray v. Carrier*, 477 U.S. 478 (1986).

Petitioner's appeal from the final judgment entered by this Court remains pending. *Russell v. Jackson*, Case No. 09-4175 (6<sup>th</sup> Cir.), and this Court no longer has jurisdiction over the issues presented by petitioner's motion for relief. *See Pickens v. Howes*, 549 F.3d 377, 383 (6<sup>th</sup> Cir. 2008) ("Once divested of jurisdiction, the district court may 'aid the appellate process' but may not independently grant a Rule 60(b) motion"). Even if the matter were remanded to this Court for consideration of the motion, *see Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356 (6<sup>th</sup> Cir. 2001), this Court would conclude that petitioner's motion for relief, Doc. No. 56, lacks merit.

  
EDMUND A. SARGUS, JR.  
United States District Judge

9-15-2010  
Date