

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

ATROPIN PALMER,

Petitioner,

CASE NO. 2:08-cv-726

JUDGE FROST

MAGISTRATE JUDGE KEMP

v.

MICHELLE EBERLIN, Warden,

Respondent.

OPINION AND ORDER

On May 11, 2010, final judgment was entered dismissing the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. This matter is before the Court on petitioner's June 3, 2010, notice of appeal and request for a certificate of appealability, and his supplemental memorandum in support. Doc. Nos. 67-69. For the reasons that follow, petitioner's request for a certificate of appealability is **DENIED**.

In this habeas corpus petition, petitioner asserts:

1. 5th and 14th Amendment violation.

Denied due process and equal protection rights from trial court's abuse of discretion in erring to grant petitioner's motion criminal Rule 14 to sever counts 1 and 2 of the indictment for the right to a fair trial.

2. 5th, 8th and 14[th] Amendment violation.

Trial court denied petitioner's due process and equal protection by creating cruel and unusual punishment when imposing consecutive sentencing terms and nonminimum term.

3. 5th, 6th and 14[th] Amendment violations.

Count 1 of the indictment violated due process of the jury's verdict of guilty against the manifest weight of the evidence not sustained proven beyond a reasonable doubt present at trial denied petitioner's a fair trial [sic].

4. 6th, 14th Amendment violation.

Jury selection pre-judicial impact tampering violated juror's voir dire selection of prior known juror's with the prosecutor's relationship with previous case and juror's and other juror's personal friendship co-prosecutor's wife [sic]. Denied petitioner fair trial [sic].

5. 5th, 6th and 14th Amendment violation.

Trial court's jury instruction(s) prejudicially violated petitioner's due process rights to the incorrect statement of the law of statutory definition of the constructive law.

6. 5th, 14th Amendment violation.

[D]ue process i[s] violated of the jury's verdict of guilty, insufficient evidence not sustained the insufficiency proven beyond a reasonable doubt presented at trial, denied petitioner a fair trial [sic].

7. 5th, 6th and 14th Amendment violation.

[T]rial court denied petitioner due process improper tried petitioner on count 1 of the indictment before the same juror's prejudicial and prejudice to a fair trial of the escape charge, that defense counsel effectiveness at trial in representing a fair trial on escap[e]s constituted criminal prosecution [sic].

8. 5th, 6th, 14th Amendment violation.

Petitioner was denied trial defense counsel's effectiveness at trial in cross examining testimonies of witnesses.

9. 5th, 6th and 14th Amendment violation.

Petitioner was denied trial defense counsel's effectiveness at re-sentencing hearing of failing to object to trial court on applying uncorrected mitigating facts, violated Ex Post Facto Clauses.... and separation of powers under State Court severance of statutes of the Legislatures... intent.

10. 5th, 6th Amendment violation, due process 14th Amendment violations.

Petitioner received ineffective assistance of trial defense counsel when counsel failed to produce compulsory process, counsel withholding a recorded cassette tape, basis exculpatory evidence, counsel failure to sured [sic] the witness of the tape and the victim of the charge.

11. 5th, 6th, 14th Amendment violation.

Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

12. 5th, 6th and 14th Amendment violation.

Petitioner was denied right to the post conviction application, w[h]ere there was clearly evidence of ineffective assistance of counsel, failed to sured [sic] evidence and knows witnesses.

13. 5th, 6th, 14th Amendment violation.

Petitioner denied right to appellate review when appellate counsel was effective for not rais[ing] meritorious errors also same appellate counsel file[d] no merit brief when meritorious errors w[ere] not raised.

On May 11, 2010, the Court dismissed claims 1, 3-8, and 11 as procedurally defaulted, and denied the remainder of petitioner's claims on the merits.

Where the 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, 484-85 (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.*

Petitioner has failed to establish that reasonable jurists would debate whether this Court properly dismissed his claims as procedurally defaulted. As reflected in the Court’s opinion and order of May 11, 2010, from which petitioner appeals, petitioner does not necessarily dispute that he procedurally defaulted these claims, but he advances ineffective assistance of counsel as cause for the default. However, the law is clear that this is not an excuse for procedural default if petitioner had no Sixth Amendment right to counsel in the proceedings where the default occurred. Such is the case here.

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.

This Court is not persuaded that reasonable jurists could debate whether the claims which were decided on their merits should have been resolved in a different manner. Again, as explained by the Court’s May 11, 2010 Opinion and Order, there can be little debate that any errors allegedly committed by the state courts during the course of post-conviction proceedings are not cognizable in federal habeas corpus, or that the state courts unreasonably dealt with those aspects of petitioner’s ineffective assistance of counsel claims which were not procedurally defaulted. As to his claim about the proper application of the Ohio Supreme Court’s decision in *State v. Foster*, 109 Ohio St. 3d 1 (2006), the Court of Appeals has recently rejected a similar claim about Ohio’s post-*Foster* sentencing procedures in *Hooks v. Sheets*, 603 F.3d 316 (6th Cir. 2010). In light of that decision, it is not fairly debatable whether this Court correctly analyzed and disposed of petitioner’s *Foster* claim.

Therefore, petitioner’s request for a certificate of appealability, Doc. No. 67, is

DENIED.

IT IS SO ORDERED.

 /s/ Gregory L. Frost
GREGORY L. FROST
United States District Judge

