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

ROBERT BUTT, :

Petitioner, Case No. 3:09-cv-395

:

-vs- Magistrate Judge Michael R. Merz

ROBIN KNAB, Warden,
Chillicothe Correctional Institution,

:

Respondent.

DECISION AND ORDER DENYING CERTIFICATE OF APPEALABILITY

This habeas corpus case is before the Court upon Petitioner's appeal to the United States Court of Appeals for the Sixth Circuit from the final judgment in this case, dismissing the Petition with prejudice. Because the case was referred under 28 U.S.C. § 636(c), the Magistrate Judge is authorized to decide whether a certificate of appealability should issue.

A petitioner seeking to appeal an adverse ruling in the district court on a petition for writ of habeas corpus or on a § 2255 motion to vacate must obtain a certificate of appealability before proceeding. 28 U.S.C. §2253 as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214)(the "AEDPA"), provides in pertinent part:

> (c)
> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> (B) the final order in a proceeding under section 2255.

> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

District courts have the power to issue certificates of appealability under the AEDPA in §2254 cases. *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063 (6th Cir. 1997); *Hunter v. United States*, 101 F.3d 1565 (11th Cir. 1996)(en banc). Likewise, district courts are to be the initial decisionmakers on certificates of appealability under §2255. *Kincade v. Sparkman*, 117 F.3d 949 (6th Cir. 1997)(adopting analysis in *Lozada v. United States*, 107 F.3d 1011, 1017 (2nd Cir. 1997). Issuance of blanket grants or denials of certificates of appealability is error, particularly if done before the petitioner requests a certificate. *Porterfield v. Bell*, 258 F.3d 484(6th Cir. 2001); *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001).

To obtain a certificate of appealability, a petitioner must show at least that "jurists of reason would find it debatable whether the petition states a valid claim of denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). That is, it must find that reasonable jurists would find the district court's assessment of the petitioner's constitutional claims debatable or wrong or because they warrant encouragement to proceed further. *Banks v. Dretke*, 540 U.S. 668, 705 (2004); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). If the district court dismisses the petition on procedural grounds without reaching the constitutional questions, the petitioner must also show that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 484. The procedural issue should be decided first so as to avoid unnecessary constitutional rulings. *Slack*, 529 U.S. at 485, citing *Ashwander v. TVA*, 297 U.S. 288, 347 (1936)(Brandeis, J., concurring). The first part of this test is equivalent to making a substantial

showing of the denial of a constitutional right, including showing that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further, *Slack v. McDaniel*, 529 U.S. 473 at 484, 120 S. Ct. 1595, 1604, 146 L. Ed. 2d 542 (2000), quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). The relevant holding in *Slack* is as follows:

> [W]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if 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.

529 U.S. at 478.

The standard is higher than the absence of frivolity required to permit an appeal to proceed *in forma pauperis*. *Id.* at 893.

> Obviously the petitioner need not show that he should prevail on the merits... Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'

Id. n.4. *Accord, Miller-El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029, 1039-1040, 154 L.Ed.2d 931 (2003). A certificate of appealability is not to be issued pro forma or as a matter of course. *Id*. at 1040. Rather, the district and appellate courts must differentiate between those appeals deserving attention and those which plainly do not. *Id*. A blanket certificate of appealability for all claims is improper, even in a capital case. *Frazier v. Huffman*, 348 F.3d 174 (6th Cir. 2003), *citing Porterfield v. Bell*, 258 F.3d 484 (6th Cir. 2001).

In Petitioner's first ground for relief, he complained of a police search beyond the scope of consent in violation of the Fourth Amendment. The Court found that litigation of this issue

was barred by *Stone v. Powell,* 428 U.S. 465 (1976), because Petitioner had been given a full and fair opportunity to litigate this issue in the Ohio courts. Furthermore, the Court found the claim was without merit because the record citation offered by Petitioner did not provide any evidentiary support for his argument.

In his second ground for relief, Petitioner asserted a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), in the failure of the State to turn over a particular statement which Petitioner asserts exists. The Ohio courts found that no such document did in fact exist and this Court concluded that the claim was both procedurally defaulted and lacked merit because Petitioner had not overcome the presumption of correctness attaching to the State courts' conclusion that no such document in fact existed.

In his third ground for relief, Petitioner asserted ineffective assistance of counsel in several particulars. Two of the sub-claims were dismissed on the same basis as Ground Two. A sub-claim relating to an alibi defense was dismissed because Petitioner had not shown that the decision of the state courts rejecting this claim was an objectively unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984).

Having reviewed its decision, the Court concludes that reasonable jurists would not disagree with the conclusions reached. Petitioner is accordingly denied a certificate of appealability. The Court further certifies to the Court of Appeals that the appeal is objectively frivolous and should not be permitted to proceed *in forma pauperis*.

August 17, 2010.

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