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

MARK MUSSELMAN,

Petitioner, : Case No. 3:09-cv-407

-vs- : Magistrate Judge Michael R. Merz

WARDEN, Chillicothe Correctional Institution,

Respondent. :

DECISION AND ORDER ON CERTIFICATE OF APPEALABILITY

This habeas corpus action is before the Court on Petitioner's Motion for a Certificate of Appealability (Doc. No. 12), which Respondent opposes (Doc. No. 14).

Represented by counsel, Petitioner filed this case seeking relief from his conviction and sentence in the Montgomery County Common Pleas Court (Petition, Doc. No. 1). The Court dismissed the Petition with prejudice (Doc. Nos. 7, 8) and Petitioner has filed a Notice of Appeal (Doc. No. 9), but requires a certificate of appealability to proceed.

Standard for Certificate of Appealability

Title 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 (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.*[1] *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

[1]Petitioner here has paid the filing fee for an appeal and does not seek to proceed on appeal *in forma pauperis.*

encouragement to proceed further.'

Id. n.4. *Accord, Miller-El v. Cockrell*, 537 U.S. 322 (2003). Petitioner's suggestion that the Court is required to resolve all doubts about appealability in his favor (Motion, Doc. No. 12, PageID 577) is not supported by Supreme Court or Sixth Circuit law.

Analysis

Petitioner has sought a certificate on each of the grounds for relief he raised in his Petition and they will be discussed separately.

Branch One: *Brady* Violation and Prosecutorial Misconduct

In Branch One of his Petition, Mr. Musselman asserts (1) that the State violated its duty to disclosed evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), and (2) this same prosecutorial misconduct rendered his trial fundamentally unfair. The evidence in question is a false Indiana identification card with Mr. Musselman's picture but in the name of Kenneth Hagland. It was first disclosed during the prosecutor's cross-examination of Musselman after he denied he had obtained such a document.

The State contended that the *Brady* portion of this claim was procedurally defaulted because it had never been presented to the state courts as a federal constitutional claim and this Court agreed (Decision and Order, Doc. No. 7, PageID 558). In his Motion for Certificate of Appealability, Petitioner reargues the merits of his *Brady* sub-claim (Motion, Doc. No. 12, PageID 578-579). He

nowhere suggests any way in which this Court's decision that the sub-claim was procedurally defaulted would be debatable among jurists of reason. That is to say, he does not show how any federal court has construed a state court argument such as he made here – about the applicability of Ohio R. Crim. P. 16 – as fairly presenting a *Brady* claim. The question before this Court on the instant Motion is not whether the merits of the *Brady* claim are debatable, but whether its procedural default analysis is debatable. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Petitioner has not made such a showing and the Court declines to issue a certificate of appealability on the *Brady* sub-claim.

In the alternative, the Court denied Petitioner's *Brady* sub-claim on the ground that the fake Indiana ID did not constitute *Brady* material because it was not in any way favorable to Mr. Musselman; indeed, the gravamen of his complaint about it was that it was devastating to his credibility (Decision and Order, Doc. No. 7, PageID 558). In his Motion, Petitioner contends this was plainly impeachment evidence and therefore within *Brady, citing Strickler v. Greene*, 537 U.S 263 (1999). This argument completely ignores the holding of *Strickler* that evidence, if it is to come within *Brady*, must be favorable to the accused. The evidence withheld in *Strickler* was impeachment evidence to be sure, but it could have been used to impeach the witnesses against the defendant. Petitioner cites no case authority suggesting that material useful only to impeach the defendant is *Brady* material. This point also is not debatable among reasonable jurists and the Court declines to issue a certificate of appealability on this alternative merits holding on the *Brady* sub-claim.

The second sub-claim of Branch One argues the withholding of this false identification card was prosecutorial misconduct in that it should have been disclosed under a proper interpretation of

Ohio R. Crim. P. 16(B)(1)(c). This claim was presented to the Court of Appeals solely as a violation of Ohio R. Crim. P. 16. *State v. Musselman*, 2009 Ohio 424 (Ohio App. 2nd Dist. Jan. 30, 2009) (Decision and Order, Doc. No. 7, PageID 560). Because Petitioner did not fairly present a constitutional claim of prosecutorial misconduct to the state courts, Respondent could have defended this sub-claim as procedurally defaulted. The Court elected not to raise the procedural default defense *sua sponte*, but decided this claim on the merits. *Id.* at PageID 561-563.

While the Court remains persuaded that its weighing of the factors for finding prosecutorial misconduct is correct, that conclusion would be debatable among reasonable jurists. This sub-claim is accordingly certified for appeal.

In the Petition, Mr. Musselman presented a third sub-claim as that the nondisclosure of the fake Indiana ID caused his trial counsel to be ineffective. This Court held this sub-claim to be procedurally defaulted. While Petitioner argues the merits of this sub-claim in the Motion, he offers no argument as to why this Court's procedural default analysis would be debatable among reasonable jurists. Therefore no certificate of appealability will issue on this sub-claim.

Branch Two: Allied Offenses of Similar Import

In the second Branch of his Petition, Mr. Musselman contends the trial court violated the Due Process Clause by convicting and sentencing him on allied offenses of similar import. The Court denied this Branch of the Petition because it was argued solely as a matter of Ohio law: "Throughout his argument, [Petitioner] makes no constitutional analysis at all, instead relying on Ohio decisions interpreting the allied import statute." (Decision and Order, Doc. No. 7, PageID 564.)

In seeking a certificate of appealability on this Branch, argues that a state sentencing error can be addressed in federal habeas "if that error is unjust." (Motion, Doc. No. 12, PageID 585.) He relies on *Shields v. Beto*, 370 F.2d 1003 (5th Cir. 1967), *Foster v. People of Illinois*, 332 U.S. 134 (1947), and Peeks v. Sheets.

In *Shields,* the petitioner was "furloughed" from prison in Texas to serve a sentence in Louisiana after serving only a year of a forty year sentence. Texas placed no detainer on him but when he was convicted 28 years later of a forgery offense, Texas added the unserved 39 years back onto his sentence. The Fifth Circuit held that the 28-year delay constituted a direct violation of the Fourteenth Amendment.

In *Foster*, the Supreme Court held that the right to counsel in criminal cases provided by the Sixth Amendment is not incorporated into the Fourteenth Amendment and upheld the indeterminate sentences of the petitioners, who pled guilty without the assistance of counsel. *Foster* is, of course, no longer good law. *Gideon v. Wainwright*, 372 U.S. 335 (1963)(felony cases); *Argersinger v. Hamlin*, 407 U.S. 25 (1972)(misdemeanor cases where imprisonment is a possibility); *Alabama v. Shelton*, 535 U.S. 654 (2002)(even if sentence is suspended).

In *Peeks v. Sheets*, 2010 U.S. Dist. LEXIS 21202 (S.D. Ohio March 9, 2010), my colleague, The Honorable Norah McCann King held with respect to this issue:

> To the extent that petitioner alleges a violation of state law or the Ohio Constitution, such claim fails to present an issue appropriate for federal habeas corpus relief. A federal court may review a state prisoner's habeas petition only on the grounds that the challenged confinement is in violation of the Constitution, laws or treaties of the United States. 28 U.S.C. § 2254(a). A federal court may not issue a writ of habeas corpus "on the basis of a perceived error of state law." *Pulley v. Harris*, 465 U.S. 37, 41, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984); *Smith v. Sowders*, 848 F.2d 735, 738 (6th Cir. 1988). A federal habeas court does not function as an additional state appellate

> court reviewing state courts' decisions on state law or procedure. *Allen v. Morris*, 845 F.2d 610, 614 (6th Cir. 1988). "'[F]ederal courts must defer to a state court's interpretation of its own rules of evidence and procedure'" in considering a habeas petition. *Id*.(*quoting Machin v. Wainwright*, 758 F.2d 1431, 1433 (11th Cir. 1985)). Only where the error resulted in the denial of fundamental fairness will habeas relief be granted. *Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988).

Peeks v. Sheets, 2010 U.S. Dist. LEXIS 21202 * 20 (S.D. Ohio Mar. 9, 2010). Thus none of the authority cited by Petitioner supports the proposition that it is debatable among reasonable jurists whether the state courts' violation of Ohio Revised Code § 2941.25 – if such a violation occurred here – was so fundamental as to deny Mr. Musselman due process of law. Furthermore, although this Court denied the second Branch on the merits, it is also procedurally defaulted because it was not fairly presented as a federal constitutional issue to the state courts. Therefore no certificate of appealability will issue on Branch Two.

Branch Three: Failure to Provide an Adequate Record on Appeal

In the third Branch of his Petition, Musselman argued he was prejudiced by the lack of a complete record on appeal which happened because the recording system in the Common Pleas Court did not record bench conferences (Petition, Doc. No.1 PageID 29).

The Ohio Court of Appeals did not treat this as a federal constitutional issue and in fact deemed it abandoned altogether by Petitioner. *State v. Musselman*, 2009 Ohio 424, at ¶ 18. On that basis, this Court could have held the claim was not fairly presented to the state courts and thus procedurally defaulted. Instead, the Court decided the claim on the merits, holding

> There is no federal constitutional right to appeal criminal verdicts for error review. *McKane v. Durston*, 153 U.S. 684 (1894), cited as still good law in *Lopez v. Wilson*, 426 F.3d 339, 355 (6th Cir. 2005). "Due process does not require a State to provide appellate process at all." *Goeke v. Branch*, 514 U.S. 115, 120 (1995). Of course when it does provide a right to appeal, the State cannot discriminate against the poor by failing to provide the necessary transcript. *Griffin v. Illinois*,351 U.S. 12 (1956). Counsel must be appointed on appeal of right for indigent criminal defendants. *Douglas v. California*, 372 U.S. 353 (1963). In this case there was no question of discrimination or denial of equal protection: according to Petitioner's counsel, the recording equipment is inadequate for rich and poor alike. But there is no federal constitutional right to an error-free record on appeal. Petitioner's third ground for relief is therefore without merit.

(Decision and Order, Doc. No. 7, PageID 566.)

In his Motion, Petitioner cites no authority for the proposition that there is a federal constitutional right to an error-free record on appeal. In the absence of any such authority, he has not established that the point is debatable among reasonable jurists. Therefore no certificate of appealability will issue on Branch Three.

Conclusion

Petitioner's Motion for Certificate of Appealability is granted on the prosecutorial misconduct sub-claim of Branch One and otherwise denied.

May 19, 2010.

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