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

RICHARD FERNBACH,

Petitioner, : Case No. 3:10-cv-040

-vs- : Magistrate Judge Michael R. Merz

LAWRENCE MACK, Warden,

Respondent. :

DECISION AND ORDER

This habeas corpus case is before the Court for decision on the merits. Petitioner is in the custody of Respondent Lawrence Mack, Warden of the Dayton Correctional Institution, on his convictions for felonious assault, witness intimidation, and two counts of violating a protective order.

The parties have unanimously consented to plenary magistrate judge jurisdiction and the case has been referred on that basis (Doc. No. 6).

Procedural History

In an Indictment filed June 6, 2005, Petitioner was charged in Warren County Common Pleas Case No. 2005-CR-22343 with one count of domestic violence (Count One), one count of felonious assault (Count Two), and one count of attempt to endanger children (Count Three)(Return of Writ,

Exhibit 1, PageID 87-89). On August 3, 2005, Petitioner pled guilty to one count of felonious assault (Return of Writ, Exhibit 3, PageID 92-93).

On August 29, 2005, Petitioner was indicted in Warren County Common Pleas Case No.2005-CR-22570on one count of witness intimidation (Count One), four counts of violating a protection order (Counts Two, Three, Four, and Five), and two counts of menacing by stalking (Counts Six and Seven)(Return of Writ, Exhibit 5, PageID 96-102). On November 9, 2005, he pled guilty to one count of intimidation of a witness, and two counts of violation of a protection order, one as a felony of the third degree and one as a felony of the fifth degree (Return of Writ, Exhibit 8, PageID 106-107).

On December 2, 2005, Petitioner filed *pro se* Notice of Appeal in both cases (Return of Writ, Exhibit 10-11, PageID 111-112). His appointed appellate attorney, Jonathan Smith, filed an *Anders* Brief (Return of Writ, Exhibit 13, PageID 114-120). Mr. Smith then consulted with Mr. Fernbach. advised him it would not be in his best interest to take a remand under *State v. Foster*, 109 Ohio St. 3d 1, 845 N.E. 2d 470 (2006), but filed a Supplement Brief claiming *Foster* error (Return of Writ, Exhibit 15, PageID 122-126). The State of Ohio acceded to a remand under *Foster*, noting that it could request a higher sentence on remand (Return of Writ, Exhibit 17, PageID 128-132). On September 5, 2006, the Court of Appeals reversed and remanded for resentencing under *Foster* (Opinion, Return of Writ, Exhibit 18, PageID 133-135). On remand on October 27, 2006, Petitioner was sentenced to four years for the felonious assault conviction in 2005-CR-22343 (Return of Writ, Exhibits 19-20, PageID 136-139). Notices of Appeal were filed in both cases on Petitioner's behalf by Attorney John C. Kaspar (Return of Writ, Exhibits 21-22, PageID 140-143). On November 3, 2008, the Court of Appeals affirmed (Opinion, Return of Writ, Exhibit 27, PageID 230-241). On

December 9, 2008, Petitioner filed a *pro se* Notice of Appeal to the Ohio Supreme Court (Return of Writ, Exhibit 28, PageID 242-243), but on March 23, 2009, that court declined to exercise jurisdiction (Return of Writ, Exhibit 31, PageID 286).

While he was awaiting a decision from the Ohio Supreme Court on direct appeal, Petitioner filed an Application to Reopen under Ohio R. App. P. 26(B) (Return of Writ, Exhibit 32, PageID 287-323). On June 3, 2009, the court of appeals denied reopening (Entry Return of Writ, Exhibit 33, PageID 361-364). On October 26, 2009, Petitioner moved the court of appeals to refile its decision (Return of Writ, Exhibit 34, PageID 365-368). On December 9, 2009, the court of appeals denied this motion (Entry, Return of Writ, Exhibit 35, PageID 369-370). No further appeal to the Ohio Supreme Court appears. Mr. Fernbach filed his Petition in this Court on January 27, 2010, pleading the following grounds for relief:

> **Ground One:** Constructive denial of effective assistance of counsel in trial court.
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> **Ground Two:** The trial courts [sic] denial of petitioner/appellant's motion to withdraw plea before sentence was passed without conducting a separate hearing on the substantial issues was in violation of state and federal law.
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> **Ground Three:** The trial courts [sic] increase in the sentence of petitioner- after successful appeal- and no new evidence having been submitted amounts to vindictiveness and in violation of state and federal law.
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> **Ground Four:** Consecutive sentencing of petitioner/ appellant violates state and federal law.
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> **Ground Five:** Ineffective assistance of appellate counsel.
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> **Ground Six:** Denial of petitioner/appellant's fundamental rights from a partial bias, and hostile tribunal that impermissibly eased the burden of proof required by the state and refused to conduct a separate [sic] evidentiary hearing on the contested issues of material

fact.

> **Ground Seven:** Non-minimum consecutive sentencing of petitioner/appellant violates state and federal law by not including the necessary elements in the indictment to invoke jurisdiction on the trial court to impose said sentence.
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> **Ground Eight:** The constitutional rights of petitioner to have an impartial and unbiased tribunal were clearly violated, which is structural error.
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> **Ground Nine**: The appellate court and court clerk deprived petitioner of his due process and equal protection rights.

(Petition, Doc. No. 3, as quoted in Return of Writ, Doc. No. 7, PageID 54-55).

Analysis

Ground One

In Ground One, Petitioner claims the trial court subjected him to ineffective assistance of trial counsel by denying him a continuance "in order to have a first opportunity to confer with surprise counsel." (Petition, Doc. No. 3, PageID 30).

On October 10, 2006, Petitioner was before the Common Pleas Court for resentencing, pursuant to the *Foster* remand. The proceedings were transcribed and have been filed by Petitioner as Exhibit C to his Reply (Doc. No. 19). Attorney Jonathan Smith who had represented Petitioner on appeal, was present with him, but sought permission to withdraw at Petitioner's request. After

colloquy with Mr. Fernbach about his desire to have attorney Clyde Bennett appointed[1], Judge Heath permitted Mr. Smith to withdraw, appointed William Duning, and continued the resentencing (Transcript, Ex. C. to Reply, PageID 600-612).

On October 27, 2006, Petitioner was back before Judge Heath for resentencing. Appearing with him that morning was attorney John Kaspar. Mr. Fernbach asserts Mr. Kaspar was neither appointed nor hired to represent him. He does not dispute the later finding by the Court of Appeals that he had hired Mr. Kaspar separately to represent him in juvenile court regarding visitation with his daughter. *State v. Fernbach*, 2008 Ohio 5670, 2008 Ohio App. LEXIS 4763, ¶13 (12th Dist. Nov. 3, 2008). At the time of the hearing, Mr. Kaspar represented to the trial court that he had consulted prior to the hearing with Mr. Fernbach as his client (Transcript of 10/27/2006 Proceeding, Doc. No. 8, PageID 435). Although he spoke a great deal on his own behalf during that hearing, Mr. Fernbach never represented to Judge Heath that Mr. Kaspar did not represent him or that anything Mr. Kaspar said on his behalf was contrary to Mr. Fernbach's wishes or intentions.

Mr. Kaspar asked on Mr. Fernbach's behalf for a further continuance of the sentencing and to allow Petitioner to withdraw his guilty plea. Both motions were denied, but the court heard statements on Mr. Fernbach's behalf from witnesses, including his mother and brother.

On appeal, Petitioner was represented by another attorney John Helbling, who was appointed for the appeal. The court of appeals dealt with the claim made in this Ground for Relief as follows:

Continuance Request

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[1]Attorney Clyde Bennett had been retained by Mr. Fernbach as his second trial counsel. Apparently as of October 10, 2006, Mr. Fernbach contended Mr. Bennett had not completed his contractual obligations to Petitioner. Judge Heath continued to point out that any contractual issues were between Bennett and Fernbach and that Mr. Bennett was not on the Warren County attorney appointment list.

[*P8] Appellant first argues that the trial court's denial of a request by his counsel for a continuance denied him of the effective assistance of counsel.

[*P9] The decision to grant or deny a motion for a continuance is a matter within the sound discretion of the trial court. *State v. Unger* (1981), 67 Ohio St.2d 65, 67, 423 N.E.2d 1078. Absent an abuse of discretion, a reviewing court will not disturb a trial court's decision denying a motion for a continuance. *State v. Grant*, 67 Ohio St.3d 465, 479, 1993 Ohio 171, 620 N.E.2d 50. An abuse of discretion is more than an error of law or judgment; rather, it requires a finding that the trial court's decision is unreasonable, arbitrary, or unconscionable. *See State v. Hancock*, 108 Ohio St. 3d 57, 2006 Ohio 160, 840 N.E.2d 1032. "Whether the court has abused its discretion depends upon the circumstances, 'particularly * * * the reasons presented to the trial judge at the time the request is denied.'" *State v. Powell* (1990), 49 Ohio St.3d 255, 259, 552 N.E.2d 191, quoting *Ungar v. Sarafite* (1964), 376 U.S. 575, 589, 84 S.Ct. 841, 11 L. Ed. 2d 921. The reviewing court must weigh the potential prejudice to the defendant against the trial court's "right to control its own docket and the public's interest in the prompt and efficient dispatch of justice." Powell at 259.

[*P10] In addition, appellant alleges that the trial court's denial of his continuance request rendered his trial counsel ineffective. In determining whether counsel's performance constitutes ineffective assistance, an appellate court must find that counsel's actions fell below an objective standard of reasonableness and that appellant was prejudiced as a result. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L. Ed. 2d 674. In demonstrating prejudice, an appellant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Id.*. at 694. A strong presumption exists that a licensed attorney is competent and that the challenged action is the product of sound trial strategy and falls within the wide range of professional assistance. *Id.* at 689.

[*P11] This case was remanded to the trial court for resentencing based on the trial court's use of sentencing provisions subsequently found unconstitutional in *State v. Foster*. A resentencing hearing was held on October 10, 2006. At the hearing, a request by counsel to withdraw was discussed and appellant indicated he was dissatisfied with his current counsel. Appellant also attempted to present

evidence and argument to the court regarding why his counsel was not acting in his best interest. The court noted that appellant had the same types of issues with the attorney representing him at the time of entering his pleas and the case had to be continued several times for those issues, but granted counsel's request to withdraw.

[*P12] After much discussion with appellant about who would represent him, the court appointed an attorney to represent appellant and told him that he could try to obtain the services of a private attorney if he desired. After further discussion by the parties about setting a date and giving appellant time to contact counsel who represented him at the time of the plea to possibly represent him again, the court agreed to a 30-day continuance.

[*P13] The hearing was set for October 27 2 and on that date, appellant appeared in court with the attorney who had represented him in juvenile court in matters involving visitation with his daughter. The attorney requested a continuance based on the fact that appellant wanted to withdraw his plea. Counsel also stated that he would like to have more time to prepare for purposes of sentencing. The state objected to a continuance, arguing that they had been in court several times on the case, sentencing was conducted once, there had been an appeal, the case was now back again, and some finality was necessary in the matter. Appellant and his counsel then discussed the reasons for requesting to withdraw the plea. After listening to appellant's arguments, the court then indicated that it was not going to set aside appellant's plea. There was no further discussion regarding counsel's request for more time to prepare for sentencing. The court proceeded to sentencing, with the state arguing for a greater sentence and appellant's counsel arguing on his behalf.

[*P14] We find no abuse of discretion in the trial court's decision to deny the request for a continuance. Appellant's counsel was familiar with the facts of the case and did not present any argument why additional time was needed to prepare for sentencing. In addition, the case had been continued previously for appellant to retain new counsel, a pattern that had been set by several previous continuances in the case. Moreover, the case was remanded based on the unconstitutionality of parts of the sentencing statute, and so the facts on which the charges were based were the same as at the previous hearing. Appellant was put on notice at the October 10, 2006 hearing that the state would be seeking a higher penalty so the state's request was not a surprise.

> [*P15] In addition, we find no indication that appellant's counsel was ineffective at the sentencing hearing, or that appellant was prejudiced in any manner by his counsel's representation. His attorney was familiar with the case and presented arguments and witnesses who testified and argued on behalf of leniency for appellant. Appellant's counsel objected to the admission of a phone call that was played at sentencing and when the objection was overruled, he presented appropriate argument regarding interpretation of the phone call.
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> [*P16] Accordingly, because the trial court did not abuse its discretion in overruling the request for a continuance and the evidence does not show that appellant's counsel was ineffective, appellant's first assignment of error is overruled.

State v. Fernbach, 2008 Ohio 5670, ¶¶ 8-16 (12th Dist. Nov. 3, 2008).

When a state court has dealt with a federal constitutional claim on the merits, the federal habeas court must deny the writ unless the state court's decision is contrary to or an unreasonable application of clearly established precedent of the United States Supreme Court.

> AEDPA [the Antiterrorism and Effective Death Penalty Act of 1996] provides that, when a habeas petitioner's claim has been adjudicated on the merits in state-court proceedings, a federal court may not grant relief unless the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A state-court decision is contrary to this Court's clearly established precedents if it applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result. *Williams v. Taylor, supra,* at 405; *Early v. Packer,* 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002) *(per curiam).* A state-court decision involves an unreasonable application of this Court's clearly established precedents if the state court applies this Court's precedents to the facts in an objectively unreasonable manner. *Williams v. Taylor, supra,* at 405; *Woodford v. Visciotti,* 537 U.S. 19, 24-25, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) *(per curiam).*

Brown v. Payton, 544 U.S. 133, 134 (2005).

The Twelfth District Court of Appeals relied upon the governing federal standard for ineffective assistance of counsel, *Strickland v. Washington, supra.* The question for this Court, then, is whether *Strickland* was applied in an objectively unreasonable manner.

Petitioner repeatedly asserts in his Reply that he did not have any prior opportunity to consult with Mr. Kaspar before the court appearance on October 27, 2006 (See PageID 570-574). The record does not bear that interpretation. Mr. Kaspar spoke as one who represented Mr. Fernbach and Mr. Fernbach never told the court that he did not or that Mr. Kaspar had omitted matters Mr. Fernbach wanted argued. Indeed, the request to Judge Heath for a continuance was quite vague as to grounds.

Petitioner argues that he was prejudiced by the lack of a continuance to consult further with Mr. Kaspar in that such a continuance would have enabled him to subpoena witnesses to support his motion to withdraw his guilty plea and that he would have been entitled to an evidentiary hearing on that motion, citing *State v. Xie*, 62 Ohio St. 3d 521 (1992). Petitioner overreads *Xie* which does not hold that there is any right to a full evidentiary hearing on a motion to withdraw a guilty plea. But in any event, Petitioner's purported showing of prejudice falls short in that he does not provide this Court with proof of what would have been shown at such a hearing or that it would have made a difference in getting his plea withdrawn. In particular, Petitioner's assertions that his guilty pleas were not knowing, intelligent, and voluntary in light of the plea colloquies with Judge Heath were not likely to have been persuasive to Judge Heath or to the court of appeals.

Petitioner has not persuaded this Court that the ruling on his ineffective assistance of trial counsel claim by the Twelfth District Court of Appeals was an objectively unreasonable application of *Strickland*. The first Ground for Relief is therefore denied.

Ground Two

In Ground Two, Petitioner asserts that denial of his motion to withdraw his guilty plea without a separate hearing was a violation of both state and federal law.

To the extent this Ground for Relief raises a claim of violation of state law, it is not cognizable in federal habeas corpus. Federal habeas corpus is available only to correct federal constitutional violations. 28 U.S.C. §2254(a); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990); *Smith v. Phillips*, 455 U.S. 209 (1982), *Barclay v. Florida*, 463 U.S. 939 (1983).

In his Reply at PageID 563, Petitioner specifies that one of the denials of due process was the refusal of the state court to allow him to present on October 10, 2006, affidavits concerning the asserted ineffective assistance of Jonathan Smith on the first direct appeal. This refusal has nothing to do with whether or not he was entitled to a separate hearing on his motion to withdraw his guilty plea because Smith was not either one of the lawyers who represented him at the time he pled guilty. In addition, the proper place to present a claim of ineffective assistance of appellate counsel in Ohio is on a motion to reopen the appeal, not on a motion to withdraw a guilty plea in the trial court.

Respondent asserts this claim is barred by Petitioner's procedural default in failing to raise the claim on his first direct appeal (Return of Writ, Doc. No. 7, PageID 57-59). The procedural default defense in habeas corpus is described by the Supreme Court as follows:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an adequate and independent state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause of the default and actual prejudice as a result of the alleged violation of federal law; or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 749 (1991); *see also Simpson v. Jones*, 238 F. 3rd 399, 406 (6th Cir. 2000). That is, a petitioner may not raise on federal habeas a federal constitutional right he could not raise in state court because of procedural default. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Engle v. Isaac*, 456 U.S. 107 (1982). Absent cause and prejudice, a federal habeas petitioner who fails to comply with a State's rules of procedure waives his right to federal habeas corpus review. *Boyle v. Million*, 201 F.3d 711, 716 (6th Cir. 2000); *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Engle v. Isaac*, 456 U.S. 107 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). *Wainwright* replaced the "deliberate bypass" standard of *Fay v. Noia*, 372 U.S. 391 (1963). The Sixth Circuit Court of Appeals requires a four-part analysis when the State alleges a habeas claim is precluded by procedural default. *Reynolds v. Berry*, 146 F.3d 345, 347-48 (6th Cir. 1998), citing *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986); *accord Lott v. Coyle*, 261 F.3d 594 (6th Cir. 2001); *Jacobs v. Mohr*, 265 F.3d 407 (2001); *Eley v. Bagley*, 604 F.3d 958, (6th Cir. 2010).

> First the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule.
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> . . . .
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> Second, the court must decide whether the state courts actually enforced the state procedural sanction, citing *County Court of Ulster County v. Allen*, 442 U.S. 140, 149, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).
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> Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim.
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> Once the court determines that a state procedural rule was not

> complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate under *Sykes* that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Maupin,785 F.2d, at 138.

> [The Sixth Circuit Court of Appeals] "applies a four-part test to determine whether a claim has been procedurally defaulted: (1) the court must determine that there is a state procedural rule with which the petitioner failed to comply; (2) the court must determine whether the state courts actually enforced the state procedural sanction; (3) the state procedural rule must have been an adequate and independent state procedural ground upon which the state could rely to foreclose review of a federal constitutional claim; and (4) if the court has determined that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate that there was cause for his failure to follow the rule and that actual prejudice resulted from the alleged constitutional error.

Hartman v. Bagley, 492 F.3d 347, 357 (6th Cir. 2007), *quoting Monzo v. Edwards*, 281 F.3d 568, 576 (6th Cir. 2002).

Ohio applies the *res judicata* doctrine in criminal cases to bar defendants from raising at a later stage of the case claims which they could have raised earlier. *State v. Perry*, 10 Ohio St. 2d 175 (1967). The court of appeals enforced this procedural bar against Mr. Fernbach when it held:

> [*P19] We begin by noting that the issues now raised by appellant regarding his plea could have been raised in appellant's first appeal of the case to this court and are therefore barred by the doctrine of res judicata. HN3Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant from further litigation of issues which were raised or could have been raised previously in an appeal. *State v. Perry* (1967), 10 Ohio St.2d. 175, 226 N.E.2d 104; *State v. Gaston*, Cuyahoga App. No. 82628, 2003 Ohio 5825, P8; *State v. Herbert*, Wyandot App. No. 16-06-12, 2007 Ohio 4496, P17. Likewise, in the specific context of Foster resentencing cases, other courts are in accord with refusing to consider issues that should have

> or could have been raised in the first direct appeal. *State v. McLeod III*, Jefferson App. No. 07-JE-17, 2008 Ohio 3405, P16.

State v. Fernbach, supra, at ¶ 19. *Res judicata* is an adequate and independent state ground of decision. *Durr v. Mitchell*, 487 F.3d 423, 432 (6th Cir. 2007); *Buell v. Mitchell*, 274 F. 3rd 337 (6th Cir. 2001); *Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2001); *Byrd v. Collins*, 209 F.3d 486, 521-22 (6th Cir. 2000); *Rust v. Zent,* 17 F.3d 155, 160-61 (6th Cir. 1994); *Van Hook v. Anderson*, 127 F. Supp. 2d 899 (S.D. Ohio 2001).

Petitioner argues that *res judicata* is inapplicable because his first sentence was void under *State v. Foster* and he should be treated on remand as if the first sentence and appeal had never happened (Reply, Doc. No. 19, PageID 564-566). But the court of appeals itself cited other authority in Ohio for applying *res judicata* after a *Foster* remand. *Id... citing State v. McLeod, supra.*

Petitioner argues that *res judicata* does not apply because the court of appeals went on to discuss the merits of this claim (Reply, Doc. No. 19, PageID 566). Supreme Court law, however, does not preclude a finding that the state procedural rule was actually enforced where the state court decision also relies on an alternative ground. *Scott v. Mitchell*, 209 F.3d 854 (6th Cir. 2000).

To the extent Petitioner is claiming (Reply, PageID 563) he had the right to a "complete, impartial, evidentiary hearing" on his motion to withdraw at which he would have been able to subpoena witnesses, he relies on *In re Oliver*, 333 U.S. 257 (1948); *United States v. Maselli*, 534 F.2d 1197 (6th Cir. 1976); *Cole v. Arkansas*, 333 U.S. 196 (1948); and *Powell v. Alabama*, 287 U.S. 45 (1932). None of these cases purports to mandate a full evidentiary hearing on a motion to withdraw a guilty plea.

Ground Two for Relief is thus procedurally defaulted and without merit.

Ground Three

In Ground Three, Petitioner asserts that the increase in his cumulative sentence on remand was vindictive. The court of appeals ruled on this as Petitioner's third assignment of error:

> **Increase in Sentence**
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> [*P24] In his third assignment of error, appellant argues that the trial court's decision to increase his sentence on remand amounts to vindictiveness in violation of Ohio law. As discussed above, in the second case, the court originally sentenced appellant to three years on both the intimidation of a witness charge and on the felony charge of violation of a protection order. On resentencing, the court sentenced appellant to four years on each of these charges. The court resentenced appellant to the same sentences on the other charges, and again ran the sentences in the second case concurrent to each other and consecutive to the first case. Appellant argues that this increase in his sentence is presumptively vindictive and that the trial court did not justify the increased sentence.
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> [*P25] In *North Carolina v. Pearce* (1969), 395 U.S. 711, 89 S.Ct. 2072, 23 L. Ed. 2d 656, the United States Supreme Court set aside the sentence of a defendant who had successfully appealed his conviction, but on remand was given a harsher sentence. The Court held that a defendant's due process rights were violated when a harsher sentence was imposed as a result of vindictiveness in a successful appeal. *Id.*. at 726. Appellant argues that the Pearce presumption of vindictiveness applies in this case since he was given a greater sentence on remand.
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> [*P26] However, in a later case, the Supreme Court further clarified its decision in *Pearce* by explaining that unless there was a "reasonable likelihood" that the increased sentence was the product of vindictiveness, the burden was on the defendant to show actual vindictiveness. *Alabama v. Smith* (1989), 490 U.S. 794, 109 S.Ct. 2201, 104 L. Ed. 2d 865. The Court determined that because the defendant in Smith pled guilty, then on remand a trial was held, at the second sentencing, the presumption of vindictiveness did not apply because the information available to the judge on a plea is "considerably less than that available after a trial" since the information discussed in a plea is usually "far less than that brought

out in a full trial on the merits." Id.. at 801.

[*P27] Furthermore, several Ohio courts, including this court, have questioned whether the *Pearce* presumption applies with equal force to cases remanded for resentencing pursuant to *Foster* or have held that the presumption is not applicable in *Foster* remands. *State v. Andrews*, Butler App. No. CA2006-06-142, 2007 Ohio 223; *State v. Smith*, Morrow App. No. 2007 CA 0003, 2008 Ohio 2772; *State v. Johnson*, 174 Ohio App.3d 130, 2007 Ohio 6512, 881 N.E.2d 289; *State v. Shaffer*, Portage App. No. 2006-P-0115, 2007 Ohio 6404; *State v. Wagner*, Union App. No. 14-06-30, 2006 Ohio 6855. These courts have questioned the application of the *Pearce* presumption as Foster remands are based on void sentences rather than sentences found to be in error, and because the trial judge was originally constrained by sentencing factors which the Ohio Supreme Court later found unconstitutional.

[*P28] Courts have been reluctant to impose the requirement of additional findings on the trial court in a *Foster* remand, where it is apparent or can be readily presumed that the original sentence was the result of constraint imposed by a sentencing factor now deemed unconstitutional, or where the court has reevaluated the record or considered additional factors on resentencing. *See Wagner* at P11. Instead, courts have reviewed of the propriety of an increased sentence on a case-by-case basis. *State v. Warden*, Wood App. No. WD-06-041, 2007 Ohio 1046, P15.

[*P29] Turning to the facts of this case, we find no vindictiveness in the trial court's determination on resentencing. At the outset of the hearing, the state indicated that it was seeking an increased sentence based on four factors: appellant's lengthy record as shown in the presentence investigation, the facts of the case, the fact that appellant has never accepted responsibility and instead continues to argue the victim's fault in the incident, and a tape recording of one of the conversations appellant made from the jail to the victim. The state indicated that listening to the actual conversation would help the court in understanding appellant's attempts to manipulate the victim.

[*P30] In this recording, the court was able to hear not only testimony regarding the conversation that led to the second set of charges, but the actual conversation itself that was the basis of the charges. In the conversation, appellant tried to get the victim to write a letter on his behalf. The conversation regarding the victim's unwillingness to write a letter includes comments by appellant such

> as, "[d]o you think that I won't want to get out and fucking kill you then?" When the victim indicated that she "might be gone" by the time appellant got out of prison, he began to play on her sympathies, stating, "[Y]ou're tearing my mother-fucking heart out completely. You tore mine out several times, man. I can't believe I've given it back to you again." He then again tried to talk her into writing a letter on his behalf.
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> [*P31] In this conversation appellant also told the victim that she is taking him away from his kids. Appellant also told his daughter that her mother is taking him away from her and making sure that he is not in her life and that he wants her to "think every day that when you're not able to see me and when you miss me and when you hurt because you can't see me, it's because your mom has taken you away from me and me away from you." He also told his daughter to "try and talk to your mom" and "tell her that she needs to write this letter for me."
>
> [*P32] We find no error in the trial court's determination to sentence appellant to four years on the violation of a protective order and intimidation of a witness charges. Initially, both terms are within the range of sentences provided by statute. In addition, instead of the brief statement of facts read at the initial sentencing hearing regarding the charges, during the re-sentencing hearing, the court had the opportunity to listen to a tape that was the basis of the charges and to hear the events firsthand. The court therefore, had more information regarding those two charges than it did at the time of the original sentencing. Accordingly, we find no merit to appellant's argument and his third assignment of error is overruled.

State v. Fernbach, *supra*, at ¶¶24-32.

This Court concludes that the state court's decision is not an unreasonable application of the relevant United States Supreme Court case law.

First of all, the reversal on the basis of *Foster* was in no way a comment on Judge Heath's handling of the first plea and sentencing. Literally hundreds of sentences were rendered void by *Foster* and their reversal was not "error correction" in the sense that the trial judge had made a mistake which needed to be corrected. Rather, the Ohio Supreme Court created new law in *Foster*

by applying *Blakely v. Washington*, 542 U.S. 296 (2004), to Ohio's sentencing scheme under Senate Bill 2 in a way anticipated by few if any trial court judges. Many Ohio Common Pleas judges were reversed under *Foster* and required to resentence. There is no reason to presume any of them, including Judge Heath, would have had a vindictive motive towards a defendant in a *Foster* reversal. This is unlike the situation where a particular reversal is likely to inspire vindictiveness in some judges.

Second, even assuming a presumption of vindictiveness did apply, the facts here overcome that presumption: on re-sentencing Judge Heath heard the actual taped conversation which formed the basis of the second indictment and it contains a death threat toward the woman whose broken jaw formed the basis of the felonious assault conviction.

Petitioner argues that this does not constitute new evidence sufficient to support a harsher sentence because this evidence had been "suppressed," but Judge Heath had actually heard it in the course of ruling on the suppression motion. This argument misses the weight of another argument Petitioner makes. While he speaks of the "suppression" of the tape, what actually happened, as he admits at PageID 582, is that Judge Heath ruled the tape could not be heard by the jury because, under Ohio Evid. R. 403(A), its prejudicial impact outweighed its probative value. In that sense the evidence was "new" in that it had not previously been admitted and was not played at the initial sentencing in 2005. The fact that the tape was not admissible at trial does not mean it could not be relied on by the judge at resentencing.

Ground Three is without merit and will be dismissed.

Ground Four

In Ground Four Petitioner asserts that imposing consecutive sentences on him violated state and federal law. This Ground for Relief is without merit. Ohio trial judges continue to have authority to impose consecutive sentences after *Foster, supra*. *State v. Elmore*, 122 Ohio St. 3d 472 (2009). Continued use of consecutive sentences as was customary at common law does not violated the United States Constitution as interpreted in the *Apprendi-Blakely* line of cases. *Oregon v. Ice*, ___ U.S. ___, 129 S. Ct. 711, 172 L. Ed. 2d 517 (2009).

Ground Five

In Ground Five Petitioner claims he received ineffective assistance of appellate counsel in that "Appellate counsel refused to renew specifically preserved issues on direct appeal; issues that were significant and obvious and detrimental to Petitioner/Appellant." (Petition, Doc. No. 3, PageID 37).

Respondent asserts this claim is procedurally defaulted by Petitioner's failure to appeal from denial of his Rule 26(B) Application to the Ohio Supreme Court. Petitioner asserts his failure to do so is excused by the failure of the Clerk of the Twelfth District Court of Appeals to serve a copy on him of the June 3, 2009, decision denying the Application. Petitioner attempted to rectify this problem by asking the Court of Appeals to refile its decision so that the time for appeal would start over (Motion to Re-File, Exhibit 34 to Return of Writ, PageID 365-368). The Court of Appeals denied that Motion, noting that Petitioner had apparently not informed the Ohio Supreme Court of the Clerk's failure to make service and finding that "Appellant's recourse, if any, is to again appeal the appropriate entry to the Ohio Supreme Court." (Entry, Exhibit 35 to Return of Writ, PageID 369-

370). There is no evidence in the record that Petitioner did so. The docket does show, however, that contrary to the Court of Appeals order to serve Mr. Fernbach personally with the June 3, 2009, Entry denying his Rule 26(B) Application, the Clerk sent it to the prosecutor, Josh Engels, and the appellate attorney, John Helbling, of whose conduct Petitioner was complaining (Docket, Exhibit 38, PageID 387). This Court therefore concludes that Petitioner's procedural default in appealing from denial of his Rule 26(B) application to the Ohio Supreme Court was caused by failure to notify him of that ruling, a cause which qualifies as excusing cause under *Wainwright v. Sykes*, 433 U.S. 72 (1977).

To determine whether Petitioner has shown excusing prejudice under the "cause and prejudice" rule, the Court must examine the merits of the ineffective assistance of appellate counsel claim. Petitioner does not spell that claim out in his Petition, so the Court must recur to his Rule 26(B) Application. In the Revised Application, he listed four omitted assignments of error: I. Ineffective assistance of appellate counsel [by Mr. Helbling on the second appeal], II. Biased tribunal that refused to conduct a separate evidentiary hearing [on the motion to withdraw guilty plea]; III. Non-minimum consecutive sentences violated the Ohio and United States Constitutions by not including necessary elements in the indictment; and IV. Biased tribunal (Exhibit 32 to Return of Writ, PageID 287 ff.). The Court of Appeals applied the correct standard (*Strickland v. Washington, supra*), but only ruled in a conclusory fashion that "the specific assignment of error appellant presents in his application does not raise a *genuine issue* as to whether appellate counsel was ineffective." (Entry, Exhibit 33 to Return of Writ, PageID 363, emphasis in original). This Court must therefore review the merits of these four proposed assignments of error to determine whether the Court of Appeals decision that omitting them was not ineffective assistance of appellate

counsel constitutes an unreasonable application of *Strickland*.

The first omitted assignment appears to be that Mr. Helbling should have raised his own ineffectiveness as an assignment of error. That claim is without merit because an attorney cannot be expected to raise his or her own ineffectiveness as an assignment of error. In other words, if any attorney believed that it was ineffective assistance of appellate counsel to omit a particular assignment of error, that attorney should just raise the assignment, not accuse himself or herself of ineffective assistance of appellate counsel.

The second omitted assignment of error relates to failure of Judge Heath to hold a full separate evidentiary hearing on the motion to withdraw guilty plea. For the reasons stated under Ground for Relief Two, that claim is also without merit.

The third omitted assignment of error is that the "indictment omitted elements necessary to the punishment he received and the trial court lacked subject matter jurisdiction to impose non-minimum consecutive terms of imprisonment." (PageID 335) It appears to the Court that the supposed omitted elements of which Petitioner complains are those which enabled the trial court to impose a sentence above minimum concurrent terms of imprisonment. In Senate Bill 2, those were referred to as sentencing factors and were to be found by the trial judge after verdict. In *State v. Foster, supra*, the Ohio Supreme Court determined that that approach violated the Sixth Amendment as interpreted in *Blakely, supra*. The remedy for this unconstitutionality, however, was to sever those portions of Senate Bill 2 which required these findings and to remand for resentencing any defendant who had been sentenced before Foster and whose direct appeal was still pending. Petitioner was in that class of defendants. At the time of his resentencing, there was no requirement in Ohio law for any additional findings of fact to justify a more-than-minimum more-than-

concurrent sentence. It is true that those "elements" were not in the indictment, but *Foster* made that irrelevant. Since Petitioner would not have prevailed on this assignment of error had it been made, it was not ineffective assistance of appellate counsel to omit it.

The fourth omitted assignment of error complains that Petitioner was subjected to a biased judge. Petitioner is correct that being subjected to a biased judge is a structural error which is not analyzed for harmlessness. However, he has not shown that Judge Heath was biased against him. All of the examples he cites are from the October 27, 2006, resentencing hearing. At the point in time at which Judge Heath told Mr. Fernbach to keep his mouth shut, that this is not a dialogue, and that he didn't want Mr. Fernbach responding to anything, Mr. Fernbach and his witnesses had already been fully heard and it was at the point in the proceeding when the judge was required to pronounce his judgment. When one reviews the entire transcript of that proceeding, one sees Mr. Fernbach repeatedly interrupting others, including Judge Heath, and not permitting them to finish what they were saying. Court proceedings are not a free-for-all in which a criminal defendant is permitted to interrupt every time someone else says something. Given Petitioner's dissatisfaction (whether justified or not) with the performance of his attorneys, it is understandable that he would not want anything with which he disagreed to go unchallenged, but Judge Heath was completely within his prerogative to stop the interruptions.

A disqualifying prejudice or bias must ordinarily be personal or extrajudicial. *United States v. Sammons*, 918 F.2d 592 (6th Cir. 1990); *Wheeler v. Southland Corp.*, 875 F.2d 1246, 1250 (6th Cir. 1989). That is, it "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp*., 384 U.S. 563, 583, 86 S. Ct. 1698, 1710, 16 L. Ed. 2d 778 (1966); *see also Youn*

v. Track, Inc., 324 F.3d 409 (6th Cir. 2003)*;Bradley v. Milliken*, 620 F.2d 1143 (6th Cir. 1980); *Woodruff v. Tomlin*, 593 F.2d 33, 44 (6th Cir. 1979). The Supreme Court has written:

> The fact that an opinion held by a judge derives from a source outside judicial proceedings is not a *necessary* condition for 'bias and prejudice' recusal, since predispositions developed during the course of a trial will sometimes (albeit rarely) suffice. Nor is it a *sufficient* condition for 'bias and prejudice' recusal, since some opinions acquired outside the context of judicial proceedings (for example, the judge's view of the law acquired in scholarly reading) will not suffice. ... [J]udicial rulings alone almost never constitute valid basis for a bias or partiality motion. See *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966). ... Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible."

Liteky v. United States, 510 U.S. 540 (1994); *see also Alley v. Bell*, 307 F. 3d 380, 388 (6th Cir. 2002)(quoting the deep-seated favoritism or antagonism standard). The Court went on to hold:

> *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration — even a stern and short-tempered judge's ordinary efforts at courtroom administration — remain immune.

Id..

Petitioner has not shown that Judge Heath was unconstitutionally biased against him. It was therefore not ineffective assistance of appellate counsel to omit this assignment of error on appeal. Petitioner's fifth Ground for Relief is without merit.

Ground Six

In Ground Six, Petitioner makes the direct claim that he was denied an impartial tribunal and that Judge heath impermissibly eased the burden of proof and refused to conduct a full separate evidentiary hearing on the motion to withdraw.

Respondent contends this Ground for Relief is procedurally defaulted because it was raised for the first time in Petitioner's Rule 26(B) Application to Reopen the direct appeal (Return of Writ, Doc. No. 7, PageID 61). Petitioner does not deny that this is the case and makes no response to this argument.

Because claims of ineffective assistance of appellate counsel are based on an analytically distinct legal theory from the underlying claims, the 26(B) application does not preserve the underlying claims from default. *Davie v. Mitchell*, 547 F.3d 297 (6th Cir. 2008)(Rogers, J.), and *Garner v. Mitchell*, 502 F. 3d 394 (6th Cir. 2007)(Moore, J.), both citing *White v. Mitchell*, 431 F.3d 517, 526 (6th Cir. 2005); *Moore v. Mitchell*, 531 F. Supp. 2d 845, 862 (S.D. Ohio 2008)(Dlott, J.); see also *Bailey v. Nagle*, 172 F.3d 1299, 1309 n. 8 (11th Cir. 1999); and *Levasseur v. Pepe*, 70 F.3d 187, 191-92 (1st Cir. 1995).

Ground Six is therefore without merit.

Ground Seven

In Ground Seven Petitioner asserts that his non-minimum consecutive sentencing violates both state and federal law "by not including the necessary elements in the indictment to invoke the

jurisdiction of the trial court to impose said sentence." (Petition, Doc. No. 3.) This Ground for Relief is procedurally defaulted by Petitioner's failure to present it to the state courts at any time prior to his Rule 26(B) Application to Reopen, under the authority cited as to Ground Six. Moreover, this Ground for Relief is without merit upon the analysis given in analyzing Ground Five.

Ground Eight

In Ground Eight, Petitioner presents directly his claim that Judge Heath was biased against him. This Ground for Relief is procedurally defaulted by Petitioner's failure to present it to the state courts at any time prior to his Rule 26(B) Application to Reopen, under the authority cited as to Ground Six. Moreover, this Ground for Relief is without merit upon the analysis given in analyzing Ground Five.

Ground Nine

In his ninth Ground for Relief, Petitioner claims the court of appeals and its clerk deprived him of due process of law and equal protection of the laws by the manner in which they handled the notice to him of the decision on his Rule 26(B) Application.

Respondent argues this Ground for Relief presents only a question of state law, but the Court disagrees. There is no genuine issue of equal protection here because Petitioner does not contend that he was selected not to receive notice on some invidious basis such as race or national origin. His claim that he was not given notice because he was *pro se* and indigent rests on no evidence at all. In fact, the Court of Appeals ordered the Clerk to give him notice personally and the Clerk apparently sent the notice to his former lawyer instead. That simply is insufficient evidence of any discrimination.

However the Court agrees with Petitioner that the notice question does raise due process of law concerns. Because he did not receive timely notice of the denial of his Rule 26(B) Application, Petitioner missed the 45-day deadline for appeal to the Ohio Supreme Court from that denial. He was therefore deprived of an opportunity for a hearing before that court on his ineffective assistance of appellate counsel claim.

However, in arguing this claim Petitioner loses sight of the underlying requirement for federal habeas corpus. To obtain relief, a habeas petitioner must show that he is confined on a conviction which violates the United States Constitution. Failure to give Petitioner adequate notice of the Rule 26(B) decision did not result in his conviction's being unconstitutional. Although he may have been deprived of an opportunity to argue that his conviction was unconstitutional, that

does not make the underlying conviction unconstitutional. Post-conviction state collateral review is not a constitutional right, even in capital cases. *Murray v. Giarratano*, 492 U.S. 1, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987); *Estelle v. Dorrough*, 420 U.S. 534, 536 (1975); *Kirby v. Dutton,* 794 F.2d 245 (6th Cir. 1986)(claims of denial of due process and equal protection in collateral proceedings not cognizable in federal habeas because not constitutionally mandated). *Accord, Greer v. Mitchell,* 264 F. 3rd 663, 681 (6th Cir. 2001); *Johnson v. Collins*, 1998 WL 228029 (6th Cir. 1998); *Trevino v. Johnson*, 168 F.3d 173 (5th Cir.), *cert denied,* 120 S. Ct. 22 (1999); *Zuern v. Tate*, 101 F. Supp. 2d 948 (S.D. Ohio 2000), *aff'd*.,336 F.3d 478 (6th Cir. 2003). Thus the failure of the State of Ohio to give Petitioner does not make his conviction unconstitutional. The State did not deprive Petitioner of his liberty without notice and an opportunity to be heard. At most, it deprived him of the opportunity to seek review in the Ohio Supreme Court for denial of his claims of ineffective assistance of appellate counsel. Because those claims are without merit in any event, as shown above, any error in not allowing him an opportunity to seek review in the Ohio Supreme Court is harmless.

Conclusion

Petitioner's Grounds for Relief are barred by his procedural defaults in presenting them to the state courts or they are without merit. The Clerk will enter judgment dismissing the Petition with prejudice.

August 3, 2010.

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