

No. 18-3425

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 20, 2018
DEBORAH S. HUNT, Clerk

HAKEEM SULTAANA,

Petitioner-Appellant,

V.

CHAE HARRIS, Warden,

Respondent-Appellee.

ORDER

Hakeem Sultaana, an Ohio prisoner proceeding pro se, appeals the district court's judgment dismissing his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. Sultaana has filed an application for a certificate of appealability and numerous other motions.

In 2014, a jury convicted Sultaana of one count of engaging in a pattern of corrupt activity, fourteen counts of motor vehicle title offenses, twenty-six counts of forgery, twenty-eight counts of tampering with records, one count of grand theft, twenty-two counts of securing writings by deception, and two counts of possessing criminal tools. *See State v. Sultaana*, No. 101492, 2016 WL 299208, at *2 (Ohio Ct. App. Jan. 21, 2016). The trial court sentenced him to an aggregate term of fourteen years of imprisonment. *See id.* The Ohio Court of Appeals affirmed. *Id.* at *1, *12. Sultaana did not appeal. On February 9, 2016, Sultaana filed an Ohio Rule of Appellate Procedure 26(B) motion to reopen his direct appeal. The Ohio Court of Appeals denied the motion. Sultaana filed a notice of appeal and a motion for leave to appeal, which the Ohio Supreme Court appears to have denied.

Sultaana previously filed two federal habeas petitions, both of which were dismissed without prejudice because Sultaana failed to exhaust his remedies in state court. *See Sultaana v.*

Sloan, Nos. 16-3299/3301, slip op. at 2-3 (6th Cir. July 15, 2016) (order). This court denied Sultaana's requests for certificates of appealability. *Id.*, slip op. at 5. In November 2016, Sultaana filed a third habeas petition, in which he challenged: (1) the Ohio Court of Appeals' denial of his Rule 26(B) application (Ground 1); (2) the Ohio Court of Appeals' failure to appoint replacement counsel after allowing his appellate attorney to withdraw (Ground 2); and (3) his appellate attorney's filing of allegedly fraudulent jury-verdict forms to supplement the appellate record (Ground 3). Sultaana also attached his Rule 26(B) application and stated that he wished to raise the twenty claims set forth therein (Grounds 4-24).

The State moved to dismiss Sultaana's habeas petition because his claims were procedurally defaulted. A magistrate judge recommended granting the State's motion to dismiss and dismissing Sultaana's habeas petition with prejudice. He found that Ground 1 was both non-cognizable in a federal habeas proceeding and procedurally defaulted and that Sultaana's remaining grounds for relief were procedurally defaulted. The magistrate judge further found that Sultaana failed to show cause to excuse the procedural default of his claims. Sultaana objected. The district court overruled Sultaana's objections, finding that his claims were procedurally defaulted and that Sultaana failed to make the requisite showing of cause and prejudice to overcome the procedural defaults. It dismissed the petition with prejudice.

In his application for a certificate of appealability, Sultaana argues that the district court erred in its analysis of whether he exhausted his state-court remedies and incorrectly found that he represented himself on direct appeal. He also contends that reasonable jurists could debate whether he showed cause and prejudice to overcome the procedural default of his claims and whether failing to consider the merits of his claims would result in a miscarriage of justice.

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where, as here, the petition was denied on procedural grounds, the petitioner must show "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 (2000).

I. Ground 1

Sultaana argued in Ground 1 that the Ohio Court of Appeals violated his due process and equal protection rights by refusing to consider his timely Rule 26(B) application. The Ohio Court of Appeals denied the Rule 26(B) application because Sultaana “represented himself pro se, and the motion does not comport with App.R. 26(B),” which provides that a direct criminal appeal may be reopened “based on a claim of ineffective assistance of appellate counsel [(“IAAC”).” Ohio R. App. P. 26(B)(1). Sultaana contended that, although his public defender was permitted to withdraw on direct appeal, her brief was reinstated and his direct appeal was submitted on the briefs.

The district court found that Ground 1 was procedurally defaulted because Sultaana did not present the claim to the state courts and he was now procedurally barred from doing so. But Sultaana submitted a “notice of appeal” that he filed with the Ohio Supreme Court on February 22, 2016, which stated that he was appealing the Ohio Court of Appeals’ order denying his Rule 26(B) application. He also requested leave to file the notice of appeal, which he was required to do because of his vexatious-litigator status. The Ohio Supreme Court appears to have denied the motion for leave, although it is possible that the order in question was actually denying a simultaneously filed motion for leave to file a petition for a writ of mandamus. Regardless, reasonable jurists could debate whether Sultaana’s attempt to appeal the Ohio Court of Appeals’ denial of his Rule 26(B) motion was sufficient to exhaust and preserve the claim.

Even assuming that reasonable jurists could debate whether Ground 1 was procedurally defaulted, Sultaana is entitled to a certificate of appealability only if reasonable jurists could also debate whether the underlying habeas claim states an “arguably *valid* or *meritorious*” constitutional claim. *Dufresne v. Palmer*, 876 F.3d 248, 254 (6th Cir. 2017); *see Slack*, 529 U.S. at 484. Reasonable jurists would agree that Sultaana cannot make this showing because he is challenging the Ohio Court of Appeals’ finding that his application to reopen “[did] not comport

with [Rule] 26(B).” Because this is an issue of state law, and because Sultaana is attacking an alleged defect in the state’s post-conviction proceeding, reasonable jurists would agree that his claim is not cognizable in a federal habeas proceeding. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Cress v. Palmer*, 484 F.3d 844, 853 (6th Cir. 2007). Accordingly, Ground 1 does not deserve encouragement to proceed further.

II. Ground 2

In his second ground for relief, Sultaana argued that the Ohio Court of Appeals deprived him of the effective assistance of counsel on direct appeal by allowing his attorney to withdraw and failing to appoint replacement counsel. According to Sultaana, he never relinquished his right to counsel and never requested to proceed pro se.

The district court found that this claim was procedurally defaulted because Sultaana did not present it to the Ohio Supreme Court on direct appeal and did not raise it in his Rule 26(B) application. Indeed, Sultaana provided no evidence that he filed a notice of appeal from, or sought leave to appeal, the Ohio Court of Appeals’ January 21, 2016, decision affirming his convictions. He therefore did not “give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process.” *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Sultaana could not have exhausted this claim in his Rule 26(B) application because it challenges the district court’s actions rather than appellate counsel’s performance. *See Ohio R. App. P. 26(B)*; *Wogenstahl v. Mitchell*, 668 F.3d 307, 338 (6th Cir. 2012).

Because Sultaana could have raised this issue on direct appeal to the Ohio Supreme Court, Ohio’s doctrine of res judicata would now bar him from raising it in a post-conviction petition filed under Ohio Revised Code § 2953.21. *See Lundgren v. Mitchell*, 440 F.3d 754, 765 n.2 (6th Cir. 2006). A post-conviction petition would be untimely in any event, because the trial transcript was filed in the Ohio Court of Appeals more than 360 days ago. *See Ohio Rev. Code* § 2953.21(A)(2). Sultaana also could not make the requisite showings for filing an untimely § 2953.21 petition. *See Ohio Rev. Code* § 2953.23(A)(1), (2). Because no state remedies

remain, reasonable jurists could not debate the district court's conclusion that Ground 2 is procedurally defaulted. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

A habeas court will not review procedurally defaulted claims unless the petitioner can show either (1) cause for the default and actual prejudice from the alleged constitutional violation or (2) that failure to consider the claims would result in a "fundamental miscarriage of justice." *Id.* at 750. The fundamental-miscarriage-of-justice exception applies when "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986). It generally requires a petitioner to present "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

As cause to excuse the procedural default, Sultaana argued that the Ohio Court of Appeals improperly construed a motion that he filed on direct appeal as a motion to proceed pro se, when he was actually requesting the appointment of a different attorney. This argument does not explain Sultaana's failure to appeal the Ohio Court of Appeals' decision to the Ohio Supreme Court. A petitioner's pro se status, standing alone, does not constitute cause to excuse a procedural default. *See Hannah v. Conley*, 49 F.3d 1193, 1197 (6th Cir. 1995). Furthermore, Sultaana had no constitutional right to the appointed attorney of his choice. *Daniels v. Lafler*, 501 F.3d 735, 739 (6th Cir. 2007). Although Sultaana argued that he was actually innocent, he did not present any new, reliable evidence to support that claim, as required to invoke the fundamental-miscarriage-of-justice exception. *See Schlup*, 513 U.S. at 324. Accordingly, this claim does not deserve encouragement to proceed further.

III. Grounds 3, 8, and 19

In Ground 3 of his habeas petition, Sultaana argued that his due process and equal protection rights were violated when one of his appointed appellate attorneys, Ericka Cunliffe, supplemented the appellate record with allegedly fraudulent jury-verdict forms. Sultaana raised a similar argument in Ground 8, in which he argued that his sentence was void because the

original jury-verdict forms were not filed in the trial court. In Ground 19, he argued that the trial court's docket sheet falsely stated that the jury-verdict forms had been filed.

The district court found that, to the extent that Sultaana challenged the Ohio Court of Appeals' reliance on the jury-verdict forms submitted by Cunliffe, the issue was procedurally defaulted because he did not present that issue to the Ohio Supreme Court. It also found that Sultaana procedurally defaulted any argument that Cunliffe performed ineffectively by filing the jury-verdict forms, because he did not appeal the denial of his Rule 26(B) application.

To the extent that Sultaana challenged the Ohio Court of Appeals' reliance on the jury-verdict forms submitted by Cunliffe and the lack of jury-verdict forms in the trial court's record, reasonable jurists could not debate the district court's finding that these claims were procedurally defaulted. Although Sultaana filed several pro se motions in the Ohio Court of Appeals raising the verdict-form issue, he did not appeal the Ohio Court of Appeals' decision to the Ohio Supreme Court. He therefore did not "invok[e] one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 845. Because Sultaana could have raised these arguments on direct appeal, and because a post-conviction petition would now be untimely, no state remedies remain. See Ohio Rev. Code § 2953.21(A)(2); *Lundgren*, 440 F.3d at 765 n.2. For reasons discussed previously, reasonable jurists also could not debate the district court's conclusion that Sultaana failed to make the requisite showing of cause and prejudice or a fundamental miscarriage of justice.

Reasonable jurists could debate the district court's conclusion that Sultaana procedurally defaulted any IAAC claim challenging Cunliffe's decision to supplement the appellate record with the verdict forms. Sultaana's Rule 26(B) application could be construed as raising the issue and, once the Ohio Court of Appeals denied the Rule 26(B) application, Sultaana filed a notice of appeal and a motion for leave to appeal with the Ohio Supreme Court. This arguably satisfied Sultaana's duty to "invok[e] one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 845.

Nevertheless, to be entitled to a certificate of appealability, Sultaana must also show that reasonable jurists could debate whether his underlying claim raises an “arguably *valid* or *meritorious*” constitutional claim. *Dufresne*, 876 F.3d at 254; *see Slack*, 529 U.S. at 484. Sultaana cannot make this showing because the Ohio Court of Appeals has held that “where the verdict, conviction, and sentence are properly journalized, the failure to file the jury verdict forms with the clerk does not create reversible error.” *State v. Lumbus*, No. 102273, 2016 WL 5253467, at *2 (Ohio Ct. App. Sept. 19, 2016), *appeal denied*, 65 N.E.3d 778 (Ohio 2016) (table). Here, because the verdict, conviction, and sentence were journalized, any argument that the judgment was void would have lacked merit, and appellate counsel cannot be deemed to have performed deficiently by failing to raise an argument that lacks merit. *Mapes v. Coyle*, 171 F.3d 408, 413 (6th Cir. 1999). Accordingly, this claim does not deserve encouragement to proceed further.

IV. Grounds 4 through 7, 9 through 18, and 20 through 23

The district court adopted the magistrate judge’s finding that Sultaana procedurally defaulted the remaining claims raised in his Rule 26(B) application because he did not appeal the Ohio Court of Appeals’ order denying his Rule 26(B) application to the Ohio Supreme Court and he was precluded from doing so now.

Reasonable jurists could not debate the district court’s ultimate conclusion that Sultaana did not exhaust these grounds for relief, albeit for a different reason from that cited by the district court: None of these claims raised IAAC claims. A Rule 26(B) application cannot serve to exhaust non-IAAC claims. *Wogenstahl*, 668 F.3d at 338; *see Ohio R. App. P. 26(B)*. Most of the claims raised in Sultaana’s Rule 26(B) application could have been raised on direct appeal and would therefore be barred by Ohio’s doctrine of res judicata. *See Lundgren*, 440 F.3d at 765 n.2. Because no state remedies remain, reasonable jurists would agree that these claims are procedurally defaulted. *Coleman*, 501 U.S. at 375 n.1.

Sultaana did raise three ineffective-assistance-of-trial-counsel claims in his Rule 26(B) application. Two of these claims—challenging trial counsel’s failure to object to a jury

instruction and failure to request that the rule of lenity apply at sentencing—could have been adjudicated based on the evidence in the record at the time of Sultaana’s direct appeal. Furthermore, the attorney who filed Sultaana’s direct appeal brief was not the same attorney who represented him in the trial court. Under these circumstances, these two ineffective-assistance-of-counsel claims would now be barred by Ohio’s rule of res judicata. *See State v. Cole*, 443 N.E.2d 169, 171 (Ohio 1982); *see also Fautenberry v. Mitchell*, 515 F.3d 614, 633 (6th Cir. 2008).

Sultaana also argued in his Rule 26(B) application that trial counsel performed ineffectively by failing to challenge an arrest warrant, failing to diligently prepare for trial, failing to identify necessary witnesses, and disclosing “client/attorney secrets” to the State. Because this claim appears to rely on information outside the record, it would not be barred by Ohio’s res judicata rule. *See Cole*, 443 N.E.2d at 171. However, any post-conviction petition raising this claim would be untimely because Sultaana’s trial transcript was filed in the Ohio Court of Appeals more than 365 days ago. *See Ohio Rev. Code § 2953.21(A)(2)*. Sultaana also could not make the requisite showings under Ohio Revised Code § 2953.23(A)(1) or (2) for filing an untimely § 2953.21 petition. Accordingly, reasonable jurists would agree that this claim, too, is procedurally defaulted.

As noted previously, Sultaana argued that the procedural default of his claims should be excused because the Ohio Court of Appeals improperly construed a motion that he filed on direct appeal as a motion to proceed pro se, when he was actually requesting the appointment of a different attorney. This argument, even if true, does not excuse the procedural default, because Sultaana provided no evidence that a different attorney would have, on direct appeal, raised the claims Sultaana later set forth in his Rule 26(B) application. Furthermore, the Ohio Court of Appeals addressed the merits of the arguments raised in the direct appeal brief filed by Cunliffe, *see Sultaana*, 2016 WL 299208, at *1, and Sultaana had no constitutional right to the appointed attorney of his choice, *Daniels*, 501 F.3d at 739. Sultaana also did not present any new, reliable evidence of his actual innocence, which is required to invoke the miscarriage-of-justice

No. 18-3425

- 9 -

exception to the procedural-default rule. See *Schlup*, 513 U.S. at 324. Accordingly, the claims raised in his Rule 26(B) application do not deserve encouragement to proceed further.

For the foregoing reasons, this court **DENIES** Sultaana's application for a certificate of appealability and **DENIES** all pending motions.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", is written over a horizontal line.

Deborah S. Hunt, Clerk

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

HAKEEM SULTAANA,	)	CASE NO. 1:16 CV 2884
)	
Petitioner,	)	JUDGE DAN AARON POLSTER
)	
vs.	)	<u>JUDGMENT ENTRY</u>
)	
BRIGHAM SLOAN, Warden,)	
)	
Respondent.)	

For the reasons stated in the Opinion and Order filed contemporaneously with this Judgment Entry, and pursuant to Federal Rule of Civil Procedure 58, it is hereby ORDERED, ADJUDGED AND DECREED that the above-captioned case is hereby terminated and dismissed as final.

Furthermore, pursuant to 28 U.S.C. §2253(c) and Fed. R. App. P. 22(b), there is no basis upon which to issue a certificate of appealability. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that an appeal from this decision could not be taken in good faith.

IT IS SO ORDERED.

/s/ Dan A. Polster April 26, 2018
Dan Aaron Polster
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HAKEEM SULTAANA,	)	CASE NO. 1:16 CV 2884
)	
Petitioner,	)	JUDGE DAN AARON POLSTER
)	
vs.	)	<u>OPINION AND ORDER</u>
)	
BRIGHAM SLOAN, Warden,)	
)	
Respondent.)	

This case is before the Court on the Report and Recommendation of Magistrate Judge William H. Baughman, Jr. **Doc #: 183** ("R&R"). The Magistrate Judge recommends that the Court grant Respondent's Motion to Dismiss the Petition for Writ of Habeas Corpus filed by Petitioner Hakeem Sultaana and dismiss the Petition. Respectively, **Doc ##: 130, 1**. Petitioner has filed Objections. **Doc ##: 189, 191**. The Court has reviewed these documents along with the voluminous record and is prepared to issue a ruling.

I.

Petitioner Hakeem Sultaana is incarcerated at the Warren Correctional Institution where he is serving an aggregate 14-year prison sentence imposed following state-court jury convictions for numerous offenses related to his participation in a car title flipping scheme. The convictions and sentence were affirmed on direct appeal. *State v. Sultaana*, No. 101492, 2016-Ohio-199 (Ohio App. Jan 21, 2016) Petitioner did not appeal the affirmance to the Ohio Supreme Court.

Sultaana has filed several petitions for writ of habeas corpus in this district, all of which were dismissed without prejudice so that Petitioner could exhaust his claims in state court. If it

is possible to separate the wheat from the chaff in this sizeable record, it appears that Sultaana has finally exhausted all his claims in state court. See, e.g., Doc #:184 and attachments thereto.

That said, Sultaana's claims were procedurally defaulted before he returned to state court to exhaust them, and the state appeals courts chose to deny him leave to consider his claims on the merits. So, although his claims are now exhausted, they are still procedurally defaulted for reasons set forth in the R&R. Sultaana makes no intelligible argument that the claims are not procedurally defaulted; rather, he devotes the lion's share of his Objections to the argument that his claims are exhausted and there is cause and prejudice to excuse the procedural defaults. The Court has already determined that he has exhausted all his claims, so the remaining question is whether he can show cause and prejudice to excuse the procedural defaults.

As "cause," Sultaana refers back to the argument he made in his opposition to Respondent's first Motion to Dismiss. See Doc #: 191 at 8 (referring to his argument in Doc #: 123). There, Sultaana argued that the state appeals court made a mistake when it denied his ineffective assistance of appellate counsel claims in his Rule 26(B) application because he represented himself on his direct appeal. Sultaana contends that he did not represent himself on his direct appeal – and it is this mistake that constitutes the cause to excuse his procedural defaults.

The Court has reviewed the state court docket which reveals that Sultaana did in fact represent himself on his direct appeal. See Cuyahoga County Clerk of Court's public docket, Case No. CA-14-101492.¹ Accordingly, since he waived his Sixth Amendment right to counsel,

¹ Although three attorneys from the Ohio Public Defenders Office attempted to represent Sultaana during his direct appeal, they all eventually filed motions to withdraw because Sultaana either filed grievances against them in the Ohio Supreme Court (Assistance Public Defenders Cunliffe and Sweeney) or sued them in federal court (Assistant Public Defender Peter Galyardt).

he cannot bring ineffective assistance of counsel claims. Because he has failed to show cause to excuse his procedural defaults, the Court concludes that his claims are procedurally defaulted.

Based on the foregoing, the Court **ADOPTS** the R&R (**Doc #: 183**), **OVERRULES** the Objections (**Doc ##: 189, 191**), and **DISMISSES WITH PREJUDICE** the Petition (**Doc #: 1**).

II.

While courts are tolerant of legal filings submitted by pro se litigants, such tolerance is not limitless. Federal courts have both the inherent power and constitutional obligation to protect their jurisdiction from conduct which impairs the ability to carry out Article III functions. *Procup v. Strickland*, 792 F.2d 1069, 1073 (11th Cir. 1986). Moreover, this Court has the responsibility to prevent litigants from unnecessarily encroaching on judicial machinery needed by others. *Id.* To achieve these ends, the United States Court of Appeals for the Sixth Circuit has approved enjoining vexatious and harassing litigants by requiring them to obtain leave of court before submitting additional filings. *See, e.g., Filipas v. Lemons*, 835 F.2d 1145 (6th Cir. 1987); *Wrenn v. Vanderbilt Univ. Hosp.*, 1995 WL 111480 (6th Cir. Mar. 15, 1995) (authorizing a court to enjoin harassing litigation under its inherent authority and the All Writs Act, 28 U.S.C. § 1651(a)) (citations omitted).

Former Magistrate Judge Greg White previously deemed Sultaana a vexatious litigator and enjoined him from filing new motions, objections, notices, or any other filings in one of Sultaana's earlier § 2254 petitions. *See* Case No. 1:15 CV 1963, Doc #: 44. And Magistrate Judge Baughman has already warned Sultaana about continuing his pattern of filing frivolous,

The state appeals court granted those motions and, on October 15, 2015, construed a document Sultaana filed pro se on October 1, 2015 as a motion to proceed pro se and granted it.

unintelligible and unnecessary filings. Doc #: 125. Even the Eighth District Court of Appeals and the Ohio Supreme Court declared Sultaana a vexatious litigator and prohibited him from instituting any appeals or original actions, continuing any appeals or original actions, or filing any motions in any pending appeals or original actions without first obtaining leave of court.

Accordingly, the Court hereby **DEEMS** Hakeem Sultaana a vexatious litigator and **ENJOINS** him from filing any new motions, objections, notices or any other filings in this case including, as the Court previous stated, a motion to reconsider this ruling. If Sultaana disagrees with this Opinion and Order, he shall appeal it to the Sixth Circuit Court of Appeals. The Clerk's Office is hereby **ORDERED** to refrain from filing any document submitted by Petitioner Sultaana or anyone on his behalf, and to return those documents citing this Order.

IT IS SO ORDERED.

/s/ Dan A. Polster April 26, 2018
Dan Aaron Polster
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

HAKEEM SULTAANA,	)	CASE NO. 1:16 CV 2884
)	
Petitioner,	)	JUDGE DAN AARON POLSTER
)	
v.	)	MAGISTRATE JUDGE
	)	WILLIAM H. BAUGHMAN, JR.
BRIGHAM SLOAN, <i>et al.</i> ,)	
)	
Respondents.	)	<u>REPORT AND RECOMMENDATION</u>

Introduction

Before me by referral¹ in Hakeem Sultaana's *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2254² is a motion to dismiss the petition filed by the State,³ which Sultaana has opposed⁴ and to which the State has replied.⁵ In addition, Sultaana has filed a motion for partial summary judgment⁶ to which the State has responded by moving to stay consideration of that motion until after adjudicating its own motion to dismiss.⁷

¹This matter was referred to me under Local Rule 72.2 by United States District Judge Dan Aaron Polster in a non-document order entered on December 28, 2016.

²ECF # 1.

³ECF # 130.

⁴ECF # 132.

⁵ECF # 159.

⁶ECF # 171.

⁷ECF # 173.

Sultaana has opposed that motion.⁸

Sultaana is currently incarcerated at the Warren Correctional Institution⁹ where he is serving an aggregate sentence of 14 years in prison imposed in 2014 by the Cuyahoga County Common Pleas Court following Sultaana's conviction at a jury trial of various offenses related to his participation in a car title flipping scheme.¹⁰

In its motion to dismiss, the State argues that all of Sultaana's grounds for federal habeas relief are procedurally defaulted and/or non-cognizable. For the reasons that follow, I will recommend granting the State's motion to dismiss and thus further recommend dismissing the entire petition with prejudice. In that regard, I recommend that Sultaana's motion for partial summary judgment be denied.¹¹

Facts

For purposes of the deciding the State's motion, I here incorporate by reference the complete statement of underlying facts as set forth by Magistrate Judge White in his Report and Recommendation recommending granting the State's prior motion to dismiss for failure to exhaust in a prior case.¹²

⁸ECF # 174.

⁹See, drc.ohio.gov/offendersearch. I note that Sultaana was incarcerated at the Lake Erie Correctional Institution at the time his petition was filed.

¹⁰See, ECF # 130 at 6-7 (citing record).

¹¹ECF # 171.

¹²See, 1:15-cv-01963, ECF # 45.

As regards the present petition,¹³ Sultanna claims some twenty-three grounds for habeas relief.¹⁴ Subsequent to lengthy proceedings, the State, as noted, has moved to dismiss all grounds asserted in the petition as procedurally defaulted and/or non-cognizable.¹⁵

Analysis

A. Relevant law - procedural default

A claim not adjudicated on the merits by a state court is not subject to AEDPA review.¹⁶ Such a claim is subject to procedural default if a petitioner failed to raise it when state court remedies were still available, the petitioner violated a state procedural rule.¹⁷ The petitioner must afford the state courts “opportunity to pass upon and correct alleged violations of its prisoners’ federal rights.”¹⁸ This requires a petitioner to go through “one complete round” of the state’s appellate review process,¹⁹ presenting his or

¹³I note that Sultaana has sought to attack the current 2014 conviction in two separate habeas filings prior to this one: 1:15-cv-01963 and 1:16-cv-00571. Both were dismissed for lack of exhaustion. 1:15-cv-01963, ECF # 48 ; 1:16-cv-00571, ECF # 6.

¹⁴ECF # 1.

¹⁵ECF # 130.

¹⁶*See Harrington v. Richter*, 562 U.S. 86, 98 (2011).

¹⁷*West v. Carpenter*, 790 F.3d 693, 697 (6th Cir. 2015).

¹⁸*Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam) (citation omitted).

¹⁹*Boerckel*, 526 U.S. at 845.

her claim to “*each* appropriate state court.”²⁰ A petitioner may not seek habeas relief then if he or she does not first “fairly present[] the substance of his [or her] federal habeas corpus claim to the state courts.”²¹

When a state asserts that a violation of a state procedural rule is the basis for default in a federal habeas proceeding, the Sixth Circuit has long employed a four-part test to determine whether the claim is procedurally defaulted.²² A petitioner’s violation of a state procedural rule will bar federal review if the state procedural rule satisfies the standards set out in the test:²³

(1) “[T]here must be a state procedure in place that the petitioner failed to follow.”²⁴

(2) “[T]he state court must have denied consideration of the petitioner’s claim on the ground of the state procedural default.”²⁵

(3) “[T]he state procedural rule must be an ‘adequate and independent state

²⁰*Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (emphasis added).

²¹*West*, 790 F.3d at 697 (quoting *Picard v. Connor*, 404 U.S. 270, 278 (1971) (internal quotation marks omitted).

²² See *Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986) (outlining four-part test); see *Landrum v. Mitchell*, 625 F.3d 905, 916-17 (6th Cir. 2010) (applying test post-AEDPA).

²³*Jells v. Mitchell*, 538 F.3d 478, 488 (6th Cir. 2008).

²⁴ *Id.* (citing *Maupin*, 785 F.2d at 138).

²⁵ *Id.*

ground,²⁶ that is both ‘firmly established and regularly followed.’²⁷

(4) The petitioner cannot demonstrate either “cause for the default and actual prejudice as a result of the alleged violation of federal law,” or “that failure to consider the claims will result in a fundamental miscarriage of justice.”²⁸

In order to show “cause” for the default, the petitioner must show that “some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.”²⁹ In order to show “prejudice” for the default, the petitioner must show that the errors at trial “worked to [his or her] *actual* and substantial disadvantage, infecting [the] entire trial with error of constitutional dimensions.”³⁰

B. Application of relevant law

1. Ground One

As the State points out, Sultaana’s first ground for federal habeas relief - that the Ohio Appeals Court violated his rights to substantive and procedural due process, and to equal protection of the law, by denying him leave to re-open his appeal under Ohio Rule

²⁶ *Id.* (quoting *Maupin*, 785 F.2d at 138). (“A state procedural rule is an independent ground when it does not rely on federal law.”) (citing *Coleman v. Thompson*, 501 U.S. 722, 732).

²⁷ *Id.* (citation omitted).

²⁸ *Id.* (quoting *Coleman*, 501 U.S. at 750).

²⁹ *Id.* (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).

³⁰ *Id.* (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original)).

of Appellate Procedure 26(B) - is non-cognizable because Sultaana has no federal right to a collateral appeal.³¹ Further, Sultaana never presented this claim to an Ohio court and there is now no procedural mechanism for him to do so. Thus, under Ohio's *res judicata* doctrine,³² he is barred from now raising this claim.

In that regard, and as the State observes, Ohio's *res judicata* rule is recognized as an adequate and independent state law ground to bar federal habeas review, absent a showing of cause and prejudice.³³ Here, Sultaana has made no showing of cause to excuse this default, or any other default.³⁴ In particular, Sultaana cannot assign blame to any attorney for his failure to take his claims to the Ohio Supreme Court in a timely manner because, as noted, he had no right to counsel in those proceedings.³⁵

Therefore, I recommend Ground One be dismissed for the reasons stated.

³¹*Evitts v. Lucey*, 469 U.S. 387, 393 (1985).

³²See, *State v. Perry*, 10 Ohio St. 2d 175 (1967).

³³*Durr v. Mitchell*, 487 F.3d 423, 432 (6th Cir. 2007).

³⁴Sultaana argues he did appeal the denial of his Rule 26(B) application to the Ohio Supreme Court. ECF # 132 at 3-5. However, as the State observes, the application itself was denied by the appeals court because it did not comply with the rules and because Sultaana, as a vexatious litigator, had not paid a filing fee and security costs. ECF # 159 at 5. Moreover, the State found no entry on the appeals court docket of an appeal nor did it find on the docket of the Ohio Supreme Court any attempt to timely attempt appeal to that court. *Id.* Sultaana's filings in this Court of material relating to the Ohio Supreme Court's treatment of his dispute over obtaining jury forms (ECF ## 175, 176, 177, 178) concerns an entirely different matter and is not relevant here.

³⁵The State presents a brief cogent summary of Sultaana's failure to timely appeal to the Ohio Supreme Court in his direct appeal, as concerns the denial of his Rule 26(B) application or with regards to the denial of his motion for a new trial. ECF # 159 at 4-6.

2. Ground Two

In this ground, Sultaana maintains that his Sixth Amendment right to have counsel free from conflict of interest was violated when the Ohio court of appeals denied his counsel's motion to withdraw. Once again, the State notes that Sultaana did not appeal the decision of the appellate court that affirmed his conviction, and that no procedure is available to do so now.³⁶ Moreover, the State also observes that this point was not raised to the Ohio court of appeals in Sultaana's Rule 26(B) application, the denial of which, as stated above, was not appealed to the Ohio Supreme Court.³⁷

Accordingly, and for similar reasons to those outlined above, I recommend that Ground Two be dismissed as procedurally defaulted.

3. Ground Three

In this ground for relief Sultaana contends that his right to substantive and procedural due process and to equal protection were violated when his appellate attorney supplemented the record on appeal. This also appears to be the issue raised in Ground Nineteen, where Sultaana includes it as an example of ineffective assistance. This matter also appears to be the issue raised in various supplements to the record filed by Sultaana and referenced previously.³⁸

³⁶ECF # 130 at 24.

³⁷*Id.*

³⁸The State also observes that at least part of the substantive question concerning the use of these jury forms relates to the forms being under seal because they contain the names of jurors. ECF # 130 at 25.

I note initially in that regard that these motions and attempts to appeal go to the substantive merits of whether, as Sultaana claims, the use of the jury verdict forms was fraud upon the court, leaving the appellate court without jurisdiction. To that point, and as noted above, Sultaana did not properly appeal this substantive issue to the Ohio Supreme Court and so procedurally defaulted that issue. Further, these supplemental filings do not assert or otherwise deal with a properly framed federal claim of ineffective assistance of counsel in regards the use of these jury forms, and because Sultaana never properly or timely appealed from the denial of his Rule 26(B) application, the ineffective assistance element of this claim is also procedurally defaulted.

Accordingly, and for the reasons stated, I recommend dismissing Ground Three as procedurally defaulted.

4. *Grounds Four through Twenty-three*

Sultaana raises these grounds by attaching the claims presented in his Rule 26(B) application to his federal habeas petition. The claims were originally denied by the Ohio appeals court when it ruled that Sultaana had represented himself on appeal and so did not have counsel, it further concluded that the motion did not comport with Ohio Appellate Rule 26(B), and it finally ruled that Sultaana's filing could not be accepted because, as a vexatious litigator, he had not complied with Local Appellate Rule 3(A).³⁹

According to Rule 7.01(A)(1)(a)(i) of the Ohio Supreme Court Rules of Practice,

³⁹*Id.* at 26 (citing record).

Sultaana had 45 days after the appellate court decision of February 17, 2016 to appeal to the Supreme Court of Ohio. As noted, he did not do so. Further, Rule 7.01(A)(4)(c) of the Ohio Supreme Court Rules of Practice precludes Sultaana from now moving for a delayed appeal in a Rule 26(B) matter. Moreover, such a delayed appeal would be precluded by Ohio's *res judicata* rule.

Thus, for the reasons stated, I recommend dismissing Grounds Four through Twenty-three as procedurally defaulted. I state again, as was noted above, that Sultaana has made no showing of cause such as would excuse this or any other procedural default.

Conclusion

For the reasons stated, I recommend granting the State's motion to dismiss,⁴⁰ and so further recommend dismissing, with prejudice, the entire *pro se* petition of Hakeem Sultaana for a writ of habeas corpus under 28 U.S.C. § 2254.⁴¹ If this recommendation is adopted, I then further recommend denying Sultaana's motion for partial summary judgment.⁴²

IT IS SO ORDERED.

Dated: April 4, 2018

s/ William H. Baughman, Jr.
United States Magistrate Judge

Objections

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within fourteen (14) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order.⁴³

⁴⁰ECF # 130.

⁴¹ECF # 1.

⁴²ECF # 171.

⁴³See, *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). See also, *Thomas v. Arn*, 474 U.S. 140 (1985), *reh'g denied*, 474 U.S. 1111 (1986).

No. 18-3425

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 15, 2018
DEBORAH S. HUNT, Clerk

HAKEEM SULTAANA,

Petitioner-Appellant,

v.

CHAE HARRIS, WARDEN,

Respondent-Appellee.

ORDER

Before: GUY, STRANCH, and LARSEN, Circuit Judges.

Hakeem Sultaana petitions for rehearing en banc of this court's order entered on August 20, 2018, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk