

NO. 18-7872

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN TORRES,

Petitioner,

v.

RANDEE REWERTS, WARDEN,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Steven Torres # 688446
In Propria Persona
Carson City Correctional Facility
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*NOTICE: This document was prepared with the assistance of a non-attorney prisoner assigned to the Legal Writer Program with the Michigan Department of Corrections.

ORIGINAL

Supreme Court, U.S.
FILED

JAN 23 2019

OFFICE OF THE CLERK

QUESTIONS PRESENTED

1. DID THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN AND THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRONEOUSLY DENY MR. TORRES REQUEST FOR A CERTIFICATE OF APPEALABILITY IN THIS HABEAS CORPUS CASE WHERE JURISTS OF REASON COULD CLEARLY DEBATE WHETHER MR. TORRES WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT WHEN THE COURT UPWARD DEPARTURED FROM MR. TORRES RECOMMENDED GUIDELINES RANGE WITHOUT EXPLANATION, AND FAILED TO INDICATE WHETHER IT WOULD DEPART TO THE SAME DEGREE WITHOUT THE INVALID REASONS?

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ORDERS BELOW

The United States Court of Appeals for the Sixth Circuit denied Mr. Steven Torres a certificate of appealability in an unpublished Order dated December 19, 2018. This Order is reproduced in the appendix to this petition as Appendix A and is cited at *Torres v. Rewerts*, (2018 Case No. 18-1935).

United States District Court for the Eastern District of Michigan denied Mr. Steven Torres's petition for writ of habeas corpus in an unpublished opinion and order on July 12, 2018. The court went on to deny Mr. Steven Torres a certificate of appealability as to his issue in the petition in the same opinion and order. This Opinion and Order is reproduced in the appendix to this petition as Appendix B and is cited at *Torres v. Rewerts*, (2018 U.S. Dist. LEXIS 116002).

The Michigan Supreme Court denied Mr. Torres leave to appeal of his state court judgment in an Order dated October 31, 2017. This Order is reproduced in the appendix to this petition as Appendix C and is cited at *People v. Torres*, (2017 Case No. 154532).

The Michigan Court of Appeals Denied the delayed application for Leave to Appeal of Mr. Torres's conviction and sentence from his state court judgment in an unpublished Order dated August 24, 2016. This Order is reproduced in the appendix to this petition as Appendix D and is cited at *People v. Torres*, (2016 Case No. 333684).

STATEMENT OF JURISDICTION

The final judgment dismissing Mr. Torres's habeas corpus petition in this case was entered by the United States District Court for the Eastern District of Michigan on July 12, 2018. The district court's judgment is reproduced in the appendix to this petition as Appendix B. On the same date, the district court denied a certificate of appealability with respect to the issue raised in the habeas petition in the same opinion and order that it issued denying the writ. See Appendix B.

The Petitioner filed a timely notice of appeal. The United States Court of Appeals for the Sixth Circuit subsequently issued an order denying a certificate of appealability on December 19, 2018. See Appendix A.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1); *United States v. Hohn*, 524 U.S. 236, S.Ct. 1969, 141 L.Ed.2d 242 (1998).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1254(1):

Cases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. § 2253(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).

STATEMENT OF THE CASE

Petitioner, Steven Adam Torres acknowledged his status as a 4th habitual offender (PT-3) and pleaded no contest to the added court of attempted child abuse, first degree, in consideration of dismissal of count 1 (Child abuse in the first-degree). (PT-7). In support of his plea the trial court reviewed a Saginaw Police Incident Report with which Petitioner acknowledged his familiarity and from which the court found a sufficient factual basis to accept the plea. (PT-7).

Mr. Torres was sentenced to 90-months to 180-months. (ST). Hon. Darnell Jackson, Saginaw county Judge, presided.

Mr. Torres appealed by delayed application for leave to appeal the conviction and sentence in this matter. The Michigan Court of Appeals denied leave to appeal on August 24, 2016. The Michigan Supreme Court subsequently denied leave to appeal on October 31, 2017.

Mr. Torres filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Michigan, which is the subject of the instant petition for certiorari. The district court had jurisdiction over this habeas proceeding under 28 U.S.C. § 2254. Mr. Torres's petition raised the following claim for relief: (1) the Michigan appellate courts unreasonably applied Supreme Court precedents in denying that Mr. Torres is not entitled to resentencing because his sentence represents an upward departure from his recommended guidelines range and the court failed to indicate whether it would depart to the same degree without the invalid reasons.

The district court denied Torres's habeas corpus petition and declined to issue a certificate of appealability. See Appendix B.

Mr. Torres timely filed a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit. On December 19, 2018, the Sixth Circuit denied Mr. Torres's request for a certificate of appealability. See Appendix A.

Mr. Torres asserts that he is entitled to proceed on appeal to the United States Court of Appeals for the Sixth Circuit with respect to the issue in his habeas petition, and he petitions this Court for permission to do so.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN AND THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRONEOUSLY DENIED MR. TORRES REQUEST FOR A CERTIFICATE OF APPEALABILITY IN THIS HABEAS CORPUS CASE WHERE JURISTS OF REASON COULD CLEARLY DEBATE WHETHER THE COURT DENIED MR. TORRES CONSTITUTIONAL RIGHT WHEN IT UPWARD DEPARTED FROM MR. TORRES RECOMMENDED GUIDELINES RANGE WITHOUT EXPLANATION, AND FAILED TO INDICATE WHETHER IT WOULD DEPART TO THE SAME DEGREE WITHOUT THE INVALID REASONS.

Mr. Torres raised one ground for relief in his petition for writ of habeas corpus in the district court. Mr. Torres has made a substantial showing of the denial of a constitutional right, as required by 28 U.S.C. § 2253(c)(2), with respect to his only issue in his habeas petition, which alleges that the trial court upward departed from Mr. Torres recommended guidelines range without explanation, and failed to indicate whether it would depart to the same degree without the invalid reasons.

Prior to the effective date of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat 1214, a certificate of probable cause was required before an appeal from a federal district court order could be taken in habeas cases. In order to obtain a certificate of probable cause a petitioner was required to make a "substantial showing of the denial of (a) federal right" *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983). Under *Barefoot*, all doubts are to be resolved in favor of the petitioner in making this determination. *Barefoot, supra*, 463 U.S. at 893, n. 4. The probable cause standard in this context was intended to be a low hurdle to surmount, and has been noted to require only "something more than the absence of frivolity." *Barefoot, supra*, 463 U.S. at 893.

Obviously, Mr. Torres is not required to show that he should prevail on the merits as in every case where a certificate of appealability is requested the district court has made a determination against the petitioner on the merits.

Under *Barefoot*, this Court has instructed that the certificate should be issued when a petitioner shows that “the issues are debatable among jurists of reason,” or “a court could resolve the issues in a different manner,” or “the issues are adequate to deserve encouragement to proceed further,” or the issues are not “squarely foreclosed by statute, rule or authoritative court decision or [not] lacking any factual basis in the record.” *Barefoot, supra*, 463 U.S. at 894.

While *Barefoot, supra*, was obviously issued when the required certificate was one of probable cause, this Court, along with several circuits, has held that there is no real change from the showing required for a certificate of probable cause now that the required certificate is one of appealability under the AEDPA. *Slack v. McDaniel*, 529 U.S. 473, 483-484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). *See also Reyes v. Keane*, 90 F.3d 676 (2nd Cir. 1996). In fact, the intent of Congress in this respect when passing the AEDPA was to codify the *Barefoot* standard. *Slack v. McDaniel, supra*, 120 S.Ct. at 1603; *Lennox v. Evans*, 87 F.3d 431 (10th Cir. 1996); *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063 (6th Cir. 1997) (noting that “the AEDPA merely codifies the *Barefoot* standard” and that the only difference in the statutory language is an applicant seeking a certificate of appealability must make “a substantial showing of the denial of a *constitutional* right.”) (emphasis added).

In *Miller-El v. Cockrell*, 537 U.S. 322, 336, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003), this Court reaffirmed its prior holding in *Slack* when it stressed that the AEDPA’s section 2253(c) “codified our standard, announced in *Barefoot v. Estelle* [], for determining what constitutes the requisite showing [for obtaining leave to appeal a district court’s denial of habeas corpus relief]. Under the controlling standard, a petitioner must ‘sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner’ or that the issues presented were ‘adequate to deserve encouragement to proceed further.’”

Miller-El, *supra*. This Court further stressed in *Miller-El* that the standard for a certificate of appealability is “much less stringent” than the standard for success on the merits, and that petitioners need not show that they are likely to succeed on appeal or that any reasonable jurist would, after hearing the appeal, rule in their favor. *Id.* Rather, the petitioner need only show that “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong. *Id.*

A review of the issue that Mr. Torres raised in his habeas petition confirms the conclusion that this particular issue is substantial. Petitioner argued in his only ground in the petition for writ of habeas corpus that the trial court’s upward departure from Mr. Torres recommended guidelines range without explanation, and failed to indicate whether it would depart to the same degree without the invalid reasons violated his constitutional right. Mr. Torres relied on *People v. Lockridge*, 870 N.W.2d 502, 506 (Mich. 2015), in which the Michigan Supreme Court recognized that Michigan’s sentencing scheme that determined a mandatory minimum sentence based on judge-found facts violated *Apprendi* and *Alleyne*. This court has held that “*Alleyne* clearly established the unconstitutionality of Michigan’s mandatory sentencing regime.” See *Robinson v. Woods*, 901 F.3d 710, 714 (6th Cir. 2018).

In the instant case, Petitioner sentencing guidelines range as scored by the probation department was 19 to 76 months. (PT-3). Yet, the trial court imposed a sentence of 90 to 180 months’ imprisonment. (ST-8). The 90-month minimum sentence imposed is 14-months above the top of the minimum guideline range. More significant, however, is that the maximum of 180-months is triple the statutory maximum of 60-months for this offense. (PT-6).

Without reiterating the memorandum of law in support of the habeas petition, Petitioner contends that the trial court did not state that it would depart to the same extent absent any invalid

reasons.

The trial court justified its decision for upwards departure by mentioning the seriousness of the offense (ST-29), the extreme cruelty perpetrated by Petitioner, and that the injuries sustained by the victim equated with cruel and unusual punishment. However, the court also noted that the Petitioner posed a very serious danger to society and especially to children (ST-31), exhibited a low potential for rehabilitation, and a lack of remorse. (ST-32).

On appeal, the Michigan Court of Appeals ordered that petitioner delayed application for leave to appeal be denied for lack of merit.

When confronted with this issue on habeas review, the district court judge found that the trial court's denial of relief is neither contrary to United States Supreme Court precedent nor an unreasonable application of federal law or the facts. In coming to this conclusion, the district court essentially adopted the order of the Michigan Court of Appeals. Consequently, the district court denied habeas relief on this claim.

The district court also declined to issue a certificate of appealability on the basis that reasonable jurists could not find the court's assessment of the claim debatable or wrong, and the Sixth Circuit Court of Appeals subsequently declined to issue a certificate of appealability in relation to this claim for the same reason.

Mr. Torres would strongly urge that the decisions of the district court and Sixth Circuit Court of Appeals in declining to issue a certificate of appealability in relation to this particular habeas claim under the circumstances of this case was such a departure from the accepted and usual course of judicial proceedings as to call for this Court's supervisory power to intervene in the matter because this issue is clearly and unequivocally debatable among reasonable jurists, a

court *could* resolve this issue in a different manner, the issue does not lack merit, and, ultimately, the issue deserves encouragement to proceed further.

First, reasonable jurists could debate whether Mr. Torres claim presents a denial of his constitutional right on its face.

Second, although the Michigan Court of Appeals found that Mr. Torres claim lack merit. This finding in itself is incorrect because reasonable jurists could debate whether his claim presents a denial of his constitutional right.

For all of the above reasons, reasonable jurists could find that the district court's decision to deny habeas relief with respect to his claim in the habeas petition was debatable or wrong and that Petitioner Steven Torres was entitled to resentencing. Therefore, the district court or Sixth Circuit Court of Appeals should have issued a certificate of appealability.

The denial of a certificate of appealability would effectively preclude appellate review of Mr. Torres sentencing claim, despite the fact that this particular claim plainly deserves encouragement to proceed further on appeal. The requirement of a certificate of appealability is designed to bar frivolous appeals, not to preclude appellate review of cases involving substantial issues. *See* Moore's Federal Practice (2d Ed), § 220.03. Nonetheless, that is just what has happened here; a substantial issue is being passed upon without the benefit of full appellate review. A fair review of the record in this case clearly demonstrates that a certificate of appealability should issue with respect to this particular claim and that the decisions of the district court and Sixth Circuit Court of Appeals declining to issue the same were an extraordinary departure from the accepted and usual course of judicial proceedings in these types of cases.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner Steven Torres respectfully asks this Honorable Court to grant certiorari in this case and remand this matter to the United States Court of Appeals for the Sixth Circuit for full appellate review of the issue that was raised in Steven Torres's petition for writ of habeas corpus.

Respectfully Submitted,

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APPENDIX A