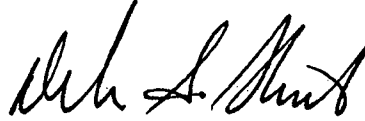


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- 2 -

2016 motion, Arevalo's request has no merit. *See* Fed. R. App. P. 40(a)(2). Accordingly, the petition for rehearing is **DENIED**.

ENTERED BY ORDER OF THE COURT

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Deborah S. Hunt, Clerk

FILED
Jul 18, 2017
DEBORAH S. HUNT, Clerk

To obtain a certificate of appealability, a habeas corpus petitioner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Where a district court has rejected a constitutional claim on the merits, a petitioner must show that jurists of reason would find it debatable whether the district court correctly resolved the claim under the Antiterrorism and Effective Death Penalty Act of 1996. *Miller-El*, 537 U.S. at 336; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where a

district court has rejected a claim on procedural grounds, the petitioner must show both that jurists of reason would find the district court's procedural ruling debatable and that jurists of reason would find it debatable whether the petition states a valid constitutional claim. *Slack*, 529 U.S. at 484.

Arevalo first argues that his right to counsel was violated when the Department of Public Advocacy withdrew from representing him during his post-conviction appeal despite his difficulty with the English language. Reasonable jurists would not debate the district court's determination that the state courts reasonably rejected this claim because there is no federal constitutional right to appointed counsel in state post-conviction proceedings. *See Taylor v. McKee*, 649 F.3d 446, 452 (6th Cir. 2011).

Arevalo next argues that the trial court, prosecutor, and police department violated his rights by failing to advise him of his right under Article 36 of the Vienna Convention to consult with Mexican consular officials. Reasonable jurists would not debate the district court's determination that this claim is procedurally defaulted because Arevalo failed to raise it on direct appeal, the Kentucky Court of Appeals declined to review the claim on that basis, and the court relied on an independent and adequate state ground for denying review, *see Wheeler v. Simpson*, 852 F.3d 509, 515 (6th Cir. 2017). *See Howard v. Bouchard*, 405 F.3d 459, 477 (6th Cir. 2005). And Arevalo has not shown cause and prejudice to excuse the procedural default or that failing to review his claim will result in a miscarriage of justice. *See Sutton v. Carpenter*, 745 F.3d 787, 789-90 (6th Cir. 2014).

Arevalo next argues that his trial counsel rendered ineffective assistance in the following ways: (1) by failing to advise him of his rights under the Vienna Convention; (2) by failing to inform him that he had the right to seek post-conviction relief; (3) by failing to properly investigate the case; (4) by failing to obtain a ballistics expert; (5) by failing to argue for a reduced sentence based on his immigration status; and (6) by failing to inform him of his right to testify in his own defense. Arevalo also argues that the cumulative effect of counsel's errors denied him the effective assistance of counsel. Reasonable jurists would not debate the district

court's determination that the state courts reasonably rejected these claims because Arevalo has not shown that he was prejudiced by counsel's alleged errors. *See United States v. Wynn*, 663 F.3d 847, 851 (6th Cir. 2011).

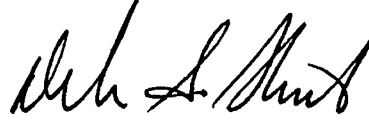
Arevalo next argues that he was denied the right to present evidence of actual innocence, that he was denied the services of a ballistics expert, and that his rights were violated because no gunpowder residue tests were performed to determine whether he had fired a weapon. Reasonable jurists would not debate the district court's rejection of these claims because Arevalo has not shown that his rights were violated by the lack of gunpowder residue testing or that the trial court or prosecutor prevented him from obtaining the services of a ballistics expert or denied him the opportunity to present evidence of his innocence. And, to the extent that Arevalo bases his claims on the alleged ineffectiveness of his trial counsel, he has not shown that counsel performed deficiently by failing to present evidence of his innocence or that he was prejudiced by counsel's failure to hire a ballistics expert or seek gunpowder residue testing.

Arevalo next argues that there was insufficient evidence to support his conviction and that his rights were violated when the trial court admitted certain evidence as an excited utterance. Reasonable jurists would not debate the district court's determination that these claims are procedurally defaulted because Arevalo failed to raise them on direct appeal, the Kentucky Court of Appeals declined to review the claims on that basis, and the court relied on an independent and adequate state ground for denying review, *see Wheeler*, 852 F.3d at 515. *See Howard*, 405 F.3d at 477. And Arevalo has not shown cause and prejudice to excuse the procedural default or that failing to review his claims will result in a miscarriage of justice. *See Sutton*, 745 F.3d at 789-90.

Finally, Arevalo argues that the cumulative effect of the alleged errors denied him a fair trial. This claim does not warrant a certificate of appealability because constitutional errors that do not individually support habeas relief cannot be cumulated to support habeas relief. *See Hoffner v. Bradshaw*, 622 F.3d 487, 513 (6th Cir. 2010).

Accordingly, Arevalo's motion for a certificate of appealability is **DENIED**.

ENTERED BY ORDER OF THE COURT

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Deborah S. Hunt, Clerk

No. 17-5586

FILED
Aug 23, 2017
DEBORAH S. HUNT, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: JOSUE MARQUEZ AREVALO,

Petitioner.

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O R D E R

Before: KEITH, CLAY, and McKEAGUE, Circuit Judges.

Josue Marquez Arevalo petitions for a writ of mandamus, asking us to compel the district court to rule on his motion to alter, amend, or vacate, which arose from the denial of his habeas petition and to appoint counsel to represent him in his habeas proceedings. He also moves to proceed *in forma pauperis*.

“‘[M]andamus relief is an extraordinary remedy.’” *John B. v. Goetz*, 531 F.3d 448, 457 (6th Cir. 2008) (quoting *In re Perrigo Co.*, 128 F.3d 430, 435 (6th Cir. 1997)). It is not available when petitioners have “‘adequate alternative means to obtain the relief they seek.’” *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1078 (6th Cir. 1996) (quoting *Mallard v. U.S. Dist. Court*, 490 U.S. 296, 309 (1989)). It is also not “‘intended to substitute for appeal after a final judgment.’” *In re Life Inv’rs Ins. Co. of Am.*, 589 F.3d 319, 323 (6th Cir. 2009).

Arevalo’s petition is moot to the extent he requests a ruling on his motion to alter, amend, or vacate because, on November 8, 2016, the district court sustained the motion to the extent it misidentified the petitioner and otherwise overruled the motion. To the extent he seeks the appointment of counsel, mandamus is inappropriate because he may challenge the denial of his motions for appointment of counsel on direct appeal.

Accordingly, the mandamus petition is **DISMISSED IN PART AS MOOT** and **DENIED IN PART**. Further, the motion to proceed *in forma pauperis* is **DENIED AS MOOT**.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", written in a cursive style.

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
at LEXINGTON

Civil Action No. 14-415-HRW

JOSQUE MARQUEZ AREVALO,

PETITIONER,

v.

ORDER

RANDY WHITE, WARDEN,

RESPONDENT.

Luther Creech filed, *pro se*, a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. United States Magistrate Judge Hanly A. Ingram has issued a report and recommends that the Petition be dismissed [Docket No.30].

Petitioner has filed objections [Docket No. 31]. The Court having reviewed the objections, as well as the record, finds nothing therein which would contradict or call into question the findings of the Magistrate. Thus, the Court shall adopt the report and recommendation as and for its own opinion.

Accordingly, **IT IS HEREBY ORDERED** that the Magistrate Judge's report and recommendation [Docket No. 30] is hereby, **APPROVED** and **ADOPTED** as for the opinion of the Court. **IT IS FURTHER ORDERED** that the petition be **DISMISSED**, this matter **STRICKEN** from the docket of this Court and no Certificate of Appealability be issued.

This 13th day of May, 2016.



Signed By:

Henry R. Wilhoit, Jr.

United States District Judge

Henry R. Wilhoit, Jr., Senior Judge

**Additional material
from this filing is
available in the
Clerk's Office.**