

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

JOSEPH A. ORTIZ,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 99-426-GMS
	)	
ROBERT SNYDER, Warden, and	)	
ATTORNEY GENERAL OF THE	)	
STATE OF DELAWARE,	)	
	)	
Respondents.	)	
	)	

**MEMORANDUM AND ORDER**

Petitioner Joseph A. Ortiz pleaded guilty in the Delaware Superior Court to kidnaping, assault, and violation of a protective order. The Superior Court sentenced Ortiz to two years in prison followed by four years probation. Ortiz has filed with the court the current petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. At the time he filed his habeas petition, Ortiz was incarcerated at the Delaware Correctional Center in Smyrna, Delaware. For the reasons set forth below, the court will deny Ortiz’s petition.

**I. BACKGROUND**

On December 23, 1996, a grand jury in the Delaware Superior Court charged Joseph Ortiz with three counts of unlawful sexual intercourse, kidnaping, assault, and violation of a protective order issued by the Family Court. The charges were based on a December 4, 1996 attack on a former girlfriend in New Castle County, Delaware. On December 23, 1997, the Superior Court ordered the prosecution to provide outstanding discovery. When the prosecution

failed to respond to the discovery order, Ortiz filed a motion to dismiss the charges. Following an office conference on February 3, 1998, the Superior Court (Goldstein, J.) concluded that the state had provided the required discovery, and denied Ortiz's motion to dismiss the charges.

A few days later, on February 9, 1998, Ortiz appeared before the Superior Court and pleaded guilty to kidnaping, assault, and violating the protective order.<sup>1</sup> The Superior Court (Carpenter, J.) sentenced Ortiz on May 8, 1998, to two years in prison followed by four years probation.<sup>2</sup> Rather than filing a direct appeal, Ortiz filed several motions for modification of sentence, as well as several motions for transcripts at the state's expense. Each of these motions was denied.

On December 30, 1998, Ortiz filed in the Superior Court a motion for postconviction relief pursuant to Rule 61 of the Superior Court Rules of Criminal Procedure. (D.I. 19.) The Superior Court denied Ortiz's Rule 61 motion on the merits. *State v. Ortiz*, Cr. A. No. IN 96-12-1200, 1999 WL 167825 (Del. Super. Ct. Mar. 3, 1999). The Delaware Supreme Court affirmed "for the reasons set forth in [the Superior Court's] well-reasoned decision." *Ortiz v. State*, No. 105, 1999, 1999 WL 1098165 (Del. Nov. 1, 1999). While his Rule 61 appeal was pending, Ortiz filed in the Superior Court a petition for a writ of habeas corpus. (D.I. 19.) The Superior Court stated that Ortiz was "legally being held in custody consistent with the sentencing order," and denied the petition. *Snyder v. Ortiz*, Cr. A. No. 99M-05-044 (May 28, 1999). The Delaware

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<sup>1</sup> The prosecution entered a *nolle prosequi* on the remaining charges.

<sup>2</sup> Ortiz received a sentence of one year in prison, followed by four years probation, on the charge of kidnaping. He received a consecutive sentence of six months in prison on the charge of assault, and another consecutive sentence of six months in prison on the charge of violating the protective order. (D.I. 19, App. to State's Answering Br., at B8-B10.)

Supreme Court affirmed. *Ortiz v. Snyder*, No. 241, 1999, 1999 WL 801443 (Del. Sept. 20, 1999).

Ortiz has now filed with the court the current petition for a writ of habeas corpus and a memorandum in support thereof, (D.I. 1 and 2), as well as a motion for appointment of counsel, (D.I. 16). The respondents ask the court to deny Ortiz's petition on the ground that his claims lack merit.

## **II. LEGAL PRINCIPLES**

### **A. Standards of Review**

A federal court may consider a habeas petition filed by a state prisoner only “on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”):

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) 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; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A federal court may issue a writ of habeas corpus under § 2254(d)(1) only if it finds that the state court decision on the merits of a claim either (1) was contrary to clearly established

federal law, or (2) involved an unreasonable application of clearly established federal law. *Williams v. Taylor*, 529 U.S. 362, 412 (2000). “A federal court may not grant a writ of habeas corpus merely because it concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly.” *Gattis v. Snyder*, 278 F.3d 222, 228 (3d Cir. 2002).

Specifically, a federal court may grant the writ under the “contrary to” clause only “if the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law or if the state court decides a case differently than [the United States Supreme Court] has on a set of materially indistinguishable facts.” *Id.* at 412-13. The court “must first identify the applicable Supreme Court precedent and determine whether it resolves the petitioner’s claim.” *Werts v. Vaughn*, 228 F.3d 178, 197 (3d Cir. 2000)(citing *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 888 (3d Cir. 1999)), *cert. denied*, 532 U.S. 980 (2001). In order to satisfy the “contrary to” clause, the petitioner must demonstrate “that Supreme Court precedent requires the contrary outcome.” *Matteo*, 171 F.3d at 888.

If the petitioner fails to satisfy the “contrary to” clause, the court must determine whether the state court decision was based on an unreasonable application of Supreme Court precedent. *Id.* Under the “unreasonable application” clause, the court “may grant the writ if the state court identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner’s case.” *Williams*, 529 U.S. at 413. In other words, a federal court should not grant the petition under this clause “unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent.” *Matteo*, 171 F.3d at 890.

Respecting a state court's determinations of fact, this court must presume that they are correct. 28 U.S.C. § 2254(e)(1). The petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. *Id.* The presumption of correctness applies to both explicit and implicit findings of fact. *Campbell v. Vaughn*, 209 F.3d 280, 286 (3d Cir. 2000), *cert. denied*, 531 U.S. 1084 (2001). When a state court denies a claim on the merits without specifically articulating its factual findings, federal courts on habeas review generally may “properly assume that the state trier of fact . . . found the facts against the petitioner.” *Weeks v. Snyder*, 219 F.3d 245, 258 (3d Cir.), *cert. denied*, 531 U.S. 1003 (2000).

**B. Exhaustion and Procedural Default**

Pursuant to the federal habeas statute:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

- (A) the applicant has exhausted the remedies available in the courts of the State; or
- (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). Grounded on principles of comity, the requirement of exhaustion of state court remedies ensures that state courts have the initial opportunity to review federal constitutional challenges to state convictions. *Werts*, 228 F.3d at 192.

To satisfy the exhaustion requirement, “state prisoners must 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, 844-45 (1999). Although a state prisoner is not required to “invoke extraordinary remedies,” he must fairly present each of his claims to the state courts. *Boerckel*, 526 U.S. at 845, 848. A claim raised in

a federal habeas petition has not been fairly presented unless it is “the substantial equivalent of that presented to the state courts” and unless the state court has “available to it the same method of legal analysis as that to be employed in federal court.” *Werts*, 228 F.3d at 192 (quoting *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997)). Fair presentation also requires raising the claim in a procedural context in which the state courts can consider it on the merits. *Castille v. Peoples*, 489 U.S. 346, 351 (1989).

Generally, federal courts will dismiss without prejudice claims that have not been fairly presented to the state courts, thereby allowing petitioners to exhaust their claims. *Lines v. Larkins*, 208 F.3d 153, 159-60 (3d Cir. 2000), *cert. denied*, 531 U.S. 1082 (2001). If, however, a claim has not been fairly presented, and state procedural rules preclude a petitioner from seeking further relief in the state courts, the exhaustion requirement is deemed satisfied because further state court review is unavailable. *Lines*, 208 F.3d at 160. Although deemed exhausted, such claims are considered procedurally defaulted. *Id.* Federal courts may not consider the merits of procedurally defaulted claims unless the petitioner demonstrates cause for the default and prejudice resulting therefrom, or a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Lines*, 208 F.3d at 160.

In order to demonstrate cause for a procedural default, a petitioner must show that “some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.” *Murray v. Carrier*, 477 U.S. 478, 488 (1986). A petitioner may establish cause, for example, by showing that the factual or legal basis for a claim was not reasonably available or that government officials interfered in a manner that made compliance impracticable. *Werts*, 228 F.3d at 193. In addition to cause, a petitioner must establish actual

prejudice, which requires him to show “not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” *Murray*, 477 U.S. at 494.

Alternatively, a federal court may excuse a procedural default if the petitioner demonstrates that failure to review the claim will result in a fundamental miscarriage of justice. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). The miscarriage of justice exception applies only in extraordinary cases “where a constitutional violation has probably resulted in the conviction of one who is actually innocent.” *Murray*, 477 U.S. at 496. To establish a miscarriage of justice, a petitioner must prove that it is more likely than not that no reasonable juror would have convicted him. *Schlup v. Delo*, 513 U.S. 298, 326 (1995); *Werts*, 228 F.3d at 193.

### **III. DISCUSSION**

In his habeas petition, Ortiz articulates the following claims for relief:

- (1) Counsel rendered ineffective assistance by negotiating a plea agreement before the prosecution fulfilled its discovery obligations.
- (2) The written order of sentence did not reflect the oral pronouncement of sentence.
- (3) The prosecution violated Ortiz’s right to due process by failing to follow the rules of discovery or comply with the Superior Court’s discovery orders.
- (4) The state courts refused his requests for copies of transcripts at the state’s expense.

(D.I. 1.) Ortiz also asks the court to appoint counsel to represent him in this matter.

#### **A. Claim 1**

Ortiz’s first claim is that counsel rendered ineffective assistance by negotiating a plea

agreement before the prosecution fulfilled its obligations to provide discovery. The respondents correctly acknowledge that Ortiz fairly presented this claim to the state courts in his Rule 61 proceedings. The Superior Court denied this claim because Ortiz did “not state what discovery he feels that the State failed to provide.” *State v. Ortiz*, 1999 WL 167825 at \*1.

The clearly established federal law governing Ortiz’s claim of ineffective assistance of counsel is *Hill v. Lockhart*, 474 U.S. 52 (1985). In *Hill*, the United States Supreme Court applied the two-part test of *Strickland v. Washington*, 466 U.S. 668 (1984), to challenges to guilty pleas based on ineffective assistance of counsel. *Hill*, 474 U.S. at 58. Under *Hill*, Ortiz must demonstrate: (1) that counsel’s performance was deficient, *i.e.*, that counsel’s representation fell below an objective standard of reasonableness, and (2) actual prejudice, *i.e.*, that there is a reasonable probability that, but for counsel’s errors, the defendant would not have pleaded guilty and would have insisted on going to trial. *Id.* at 58-59.

Although the Superior Court did not cite *Hill* or *Strickland*, it expressly found that Ortiz failed to identify any discovery that the state should have provided. Under the prejudice prong of *Hill*, Ortiz must show a reasonable probability that but for counsel’s failure to obtain discovery, he would not have pleaded guilty. The court has reviewed the entire record in this matter in an attempt to discern whether any specific discovery could have affected Ortiz’s decision to plead guilty. Based on the record as a whole, the court cannot determine which particular discovery items the state refused to provide, much less whether any of that discovery could have persuaded Ortiz not to plead guilty. Indeed, Ortiz has failed to allege that he would not have pleaded guilty if counsel had obtained any particular discovery item. His conclusory assertions that counsel should not have negotiated a plea agreement before the state complied



with its discovery obligations do not give rise to a claim of ineffective assistance of counsel.

In short, the court concludes that the state courts' decision to deny Ortiz's claim of ineffective assistance is neither contrary to, nor did it involve an unreasonable application of, the standard articulated in *Hill*. Accordingly, federal habeas relief as to this claim is denied.

**B. Claim 2**

Ortiz's next claim is that the written sentencing order does not reflect the sentence imposed at the sentencing hearing. While he concedes that he pleaded guilty in exchange for two years in prison followed by a period of probation, he argues that Judge Carpenter sentenced him to only one year in prison followed by four years probation. The respondents acknowledge that Ortiz raised this claim in his state habeas proceedings. The Superior Court found that "the defendant is legally being held in custody consistent with the sentencing order," and denied the petition without further explanation. *Snyder v. Ortiz*, Cr. A. No. 99M-05-044.

While the court agrees with the respondents that Ortiz raised this claim in his state habeas petition, the court nonetheless must determine whether he exhausted this claim by fairly presenting it to the state courts. Fair presentation requires raising a claim in a procedural context that allows the state courts to consider the merits of the claim. *Castille*, 489 U.S. at 351. The exclusive means for pursuing postconviction relief in the state courts of Delaware is through a Rule 61 motion for postconviction relief, not a state habeas petition. *See* Super. Ct. R. Crim. P. 61(a)(2); *Truitt v. State*, No. 34, 1996, 1996 WL 376943, \*\*1 (Del. 1996). In Delaware, "the writ of habeas corpus . . . provides relief on a very limited basis." *Hall v. Carr*, 692 A.2d 888, 891 (Del. 1997). It is not "a substitute for direct appeal or postconviction relief." *Ingram v. State*, No. 479, 2001, 2002 WL 86748, \*\*1 (Del. Jan. 15, 2002). Rather, habeas corpus in

Delaware provides only “an opportunity for one illegally confined or incarcerated to obtain judicial review of the jurisdiction of the court ordering the commitment.” *Hall*, 692 A.2d at 891. “[A]fter a judgment of conviction and a commitment pursuant to the conviction, the only material fact to be ascertained upon a petition for a writ of habeas corpus is the existence of a judgment of conviction by a court of competent jurisdiction and a valid commitment of the prisoner to enforce the sentence.” *Skinner v. State*, 135 A.2d 612, 613 (Del. 1957).

Based on the foregoing, the court finds that Ortiz did not fairly present his sentencing claim to the state courts. He should have raised this claim either on direct appeal or in his Rule 61 motion for postconviction relief, not in a state habeas petition.<sup>3</sup> The question remains, however, whether Ortiz is now procedurally barred from presenting this claim to the state courts. If so, federal habeas review of this claim is unavailable absent a showing of cause and prejudice, or a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750; *Lines*, 208 F.3d at 160.

Unfortunately for Ortiz, his sentencing claim is now procedurally barred for two separate reasons. First, in Delaware, the failure to raise an issue on direct appeal generally renders a claim procedurally defaulted under Rule 61(i)(3):

Procedural Default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows

- (A) Cause for relief from the procedural default and
- (B) Prejudice from violation of the movant’s rights.

Super. Ct. R. Crim. P. 61(i)(3); *see Bialach v. State*, 773 A.2d 383, 386 (Del. 2001). Ortiz did

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<sup>3</sup> Perhaps this explains why the Superior Court’s order denying Ortiz’s state habeas petition is “non-responsive” to his arguments, as Ortiz complains. (D.I. 7.) The arguments raised in his state habeas petition are beyond the scope of state habeas review.

not file a direct appeal, and has offered no reason for failing to do so. The court thus concludes that Ortiz's sentencing claim is procedurally barred by Rule 61(i)(3).

Alternatively, Ortiz's sentencing claim is procedurally barred for failure to raise it in his Rule 61 motion. Pursuant to Rule 61(i)(2):

Repetitive Motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.

Super. Ct. R. Crim. P. 61(i)(2). Rule 61(b)(2) requires a petitioner to present all his grounds for relief in his first Rule 61 motion. *See Robinson v. State*, 562 A.2d 1184, 1185 (Del. 1989) (stating that petitioner is required to include "all grounds for relief that were available to him" in his first Rule 61 motion). Delaware courts will not consider any claim that was not asserted in a prior Rule 61 motion unless "warranted in the interest of justice." *Maxion v. State*, 686 A.2d 148, 150 (Del. 1996). In order to satisfy the interest of justice exception, a petitioner must show that "subsequent legal developments have revealed that the trial court lacked the authority to convict or punish" him. *Woods v. State*, No. 259, 1997, 1997 WL 425492 (Del. July 18, 1997)(citing *Flamer v. State*, 585 A.2d 736, 746 (Del. 1990)). In the matter at hand, the record is devoid of any such subsequent legal developments. Accordingly, further state court review of Ortiz's sentencing claim is foreclosed by Rule 61(i)(2).

The court must next determine whether Ortiz has articulated any reason to excuse these procedural defaults. After reviewing the entire record, the court is unable to locate any explanation for failing to present his sentencing claim either on direct appeal or in his Rule 61 motion. Nor can the court locate any allegations of actual innocence sufficient to excuse his procedural defaults. The court thus concludes that federal habeas review of this claim is

procedurally barred.

**C. Claim 3**

Ortiz's next claim is that the prosecution violated his right to due process by failing to follow the rules of discovery or comply with the Superior Court's discovery orders. The respondents correctly acknowledge that Ortiz fairly presented this claim to the state courts in his Rule 61 proceedings. The Superior Court found that the "State provided all outstanding discovery." *State v. Ortiz*, 1999 WL 167825 at \*1. The Superior Court also concluded that Ortiz "gave up his right to argue that the State acted inappropriately in discovery matters" when he entered a guilty plea. *Id.*

On federal habeas review, this court must presume that the Superior Court's factual findings are correct. *See* 28 U.S.C. § 2254(e)(1). Ortiz bears the burden of rebutting the presumption of correctness by clear and convincing evidence. *Id.* The Superior Court found that the state had provided all outstanding discovery, a finding which Ortiz attempts to rebut with his own uncorroborated assertions to the contrary. Ortiz's statements, however, do not constitute clear and convincing evidence to overcome the presumption of correctness. For this reason, the court must presume that the state fulfilled its discovery obligations.

In short, Ortiz's claim that his right to due process was violated by the state's failure to fulfill its discovery obligations lacks any basis in fact. For this reason, federal habeas relief as to this claim is denied.

**D. Claim 4**

Ortiz's final claim is that the state courts have repeatedly denied his requests for transcripts of the February 3, 1998 office conference and the May 8, 1998 sentencing hearing. The respondents expressly waive the exhaustion requirement as to this claim.<sup>4</sup> (D.I. 18 at 12.)

It is well established that "the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal." *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). In determining whether a transcript is needed, the court considers two relevant factors: "(1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript." *Id.*

In the matter at hand, Ortiz pleaded guilty on February 9, 1998, and was sentenced on May 8, 1998. His time to file a notice of appeal expired on June 7, 1998, thirty days after his sentence was imposed. *See* Del. R. S. Ct. 6(a)(iii). According to the Superior Court docket sheet, he did not file a motion for transcripts until August 5, 1998. (D.I. 19, App. to State's Answering Br. in No. 241, 1999, at B4, docket entry no. 51.) Ortiz's request for transcripts, filed after the time to appeal expired, was too late to be of any value "in connection with the appeal or trial." *Britt*, 404 U.S. at 227.

Apparently, Ortiz requested free transcripts for the purpose of preparing a state collateral attack, not to prepare an appeal or his defense at trial. Whether Ortiz has a constitutional right to

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<sup>4</sup> A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

28 U.S.C. § 2254(b)(3).

free transcripts for the purpose of preparing a state collateral attack is unclear. *See Wade v. Wilson*, 396 U.S. 282, 286 (1970)(declining to decide whether the “Constitution requires that a State furnish an indigent state prisoner free of cost a trial transcript to aid him to prepare a petition for collateral relief.”). Assuming that he has such a right, he must show that the transcripts are needed, no less than those seeking free transcripts for the purpose of presenting a defense or pursuing an appeal. *See Jones v. Ferguson*, No. 98-8029, 1998 WL 886786, \*\*1 (10th Cir. Dec. 21, 1998)(assuming that the *Britt* standard applies to requests for transcripts to prepare a collateral attack); *Chavez v. Sigler*, 438 F.2d 890, 894 (8th Cir. 1971)(requiring petitioner to show “a reasonably compelling need for the specific documentary evidence which he requests”); *United States ex rel. Williams v. State of Delaware*, 427 F. Supp. 72, 74 (D. Del. 1976)(requiring a “minimal showing on the merits” to obtain a free transcript to pursue collateral relief).

The court concludes that Ortiz has failed to meet this standard. First, Ortiz alleges that the state wrongly refused his request for a transcript of the February 3, 1998 office conference at which the Superior Court denied his motion to dismiss the charges based on the state’s failure to provide discovery. The Superior Court’s docket entry reflects that Judge Goldstein ruled that the state had supplied all the required discovery. (D.I. 19, App. to State’s Answering Br. in No. 105, 1999, at B4, docket entry 42.) Ortiz argues that he was not present at the office conference, and that he needed a copy of the transcript to find out why Judge Goldstein ruled that the state had provided all the required discovery.

Ortiz’s argument overlooks the fact that he pleaded guilty:

[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he

is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea . . .

*Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Once Ortiz pleaded guilty, he waived his right to challenge the state's failure to fulfill its discovery obligations. Thus, a transcript of the February 3, 1998 office conference would not have assisted him in pursuing a collateral attack.

Ortiz also alleges that the state erred in denying his requests for a sentencing transcript. He asserts that he needed a sentencing transcript to prove that Judge Carpenter imposed a sentence of one year, not two years, in prison. The record, however, is full of evidence to the contrary. The plea agreement reflects that Ortiz pleaded guilty in exchange for a sentence of two years in prison followed by probation. (D.I. 19, App. to State's Answering Br. in No. 241, 1999, at B6.) Ortiz himself acknowledges that he pleaded guilty in exchange "for a sentence of 2 years level V, followed by probation." (D.I. 7, Appellant's Opening Br. at 1.) In a letter dated October 9, 1998, Ortiz's attorney wrote Judge Carpenter that "Mr. Ortiz received a two (2) year sentence at Level V." (D.I. 19, App. to State's Answering Br. in No. 241, 1999, at B14.) By letter to counsel dated October 22, 1998, Judge Carpenter reiterated that "Mr. Ortiz was sentenced to two years incarceration in compliance with the Rule 11 plea agreement that was executed by the parties." (*Id.* at B15.) Finally, the written order of sentence is plain that Ortiz received two years in prison followed by four years probation. (*Id.* at B8-B10.) In light of the overwhelming evidence demonstrating that Ortiz was sentenced to two years in prison, the state did not deprive Ortiz of any constitutional right by denying his request for a transcript of the sentencing hearing.

Moreover, the court cannot ignore the fact that Ortiz never fairly presented his sentencing

claim to the state courts. As described previously, Ortiz utilized the wrong procedural device by attempting to raise his sentencing claim in his state habeas petition. It would be anomalous for the court to find that the state violated Ortiz's constitutional rights by denying him a free copy of a sentencing transcript in order to pursue a sentencing claim which he never fairly presented to the state courts. Even if Ortiz possessed a copy of his sentencing transcript, his own failure to fairly present his claim precluded the state courts from considering the merits of his claim.

In sum, to the extent the Constitution requires the state to provide free transcripts to indigent prisoners for the purpose of pursuing a collateral attack, the court concludes that Ortiz has failed to demonstrate that he needed any transcripts for this purpose. For this reason, federal habeas relief as to this claim is denied.

**E. Motion for Appointment of Counsel**

Additionally, Ortiz has asked the court to appoint counsel to represent him in this matter. (D.I. 16.) It is well established that he has no Sixth Amendment right to counsel in this habeas proceeding. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *United States v. Roberson*, 194 F.3d 408, 415 n.5 (3d Cir. 1999). A district court, however, may appoint counsel to represent an indigent habeas petitioner "if the interest of justice so requires." Rule 8(c) of the Rules Governing Section 2254 Cases.

For the reasons stated, the court has determined that the claims presented in Ortiz's petition do not provide a basis for federal habeas relief. Accordingly, his motion for appointment of counsel will be denied as moot.

**F. Certificate of Appealability**

Finally, the court must determine whether a certificate of appealability should issue. *See*



Third Circuit Local Appellate Rule 22.2. The court may issue a certificate of appealability only if the petitioner “has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This requires the petitioner to “demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Here, the court has concluded that federal habeas relief is unavailable as to each of Ortiz’s claims. The court is persuaded that reasonable jurists would not find its conclusions debatable or wrong. Ortiz has, therefore, failed to make a substantial showing of the denial of a constitutional right, and a certificate of appealability will not be issued.

#### **IV. CONCLUSION**

For the foregoing reasons, IT IS HEREBY ORDERED THAT:

1. Ortiz’s petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (D.I. 1) is DENIED.
2. Ortiz’s motion for appointment of counsel (D.I. 16) is DENIED as moot.
3. The court declines to issue a certificate of appealability for failure to satisfy the standard set forth in 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

Dated: April 2, 2002

Gregory M. Sleet  
UNITED STATES DISTRICT JUDGE