

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CHARLES McCULLER

Petitioner

-vs-

STUART HUDSON, WARDEN

Respondent

: JUDGES:
: Hon. William B. Hoffman, P.J.
: Hon. Julie A. Edwards, J.
: Hon. Patricia A. Delaney, J.
:
:

: CASE NO. 08-CA-59
:
:

: OPINION

CHARACTER OF PROCEEDING: Petition for Writ of Habeas Corpus

JUDGMENT: WRIT DENIED

DATE OF JUDGMENT ENTRY: 9-10-2008

APPEARANCES:

For Petitioner – pro se:

CHARLES McCULLER
Inst. No. 482-821
Mansfield Correction Institution
P.O. Box 788
Mansfield, OH 44901

For Respondent:

M. SCOTT CRISS
Assistant Attorney General
Corrections Litigation Section
150 East Gay Street – 16th Floor
Columbus, OH 43215

Edwards, J.,

{¶1} Petitioner, Charles McCuller, has filed a Petition for Writ of Habeas Corpus. This Court initially set this matter for hearing, however, the hearing was continued to allow Petitioner time to respond to the Motion to Dismiss filed by Respondent. Petitioner has not filed a response to Respondent's Motion to Dismiss.

{¶2} Petitioner is currently incarcerated pursuant to his conviction and sentence from the Cuyahoga County Court of Common Pleas for one count of Robbery, in violation of R.C. 2911.02, and one count of Drug Possession, in violation of R.C. 2925.11. The trial court sentenced Petitioner to a term of six years in prison on the robbery count, concurrent with twelve months on the drug possession charge.

{¶3} "A writ of habeas corpus is warranted in certain extraordinary circumstances where there is an unlawful restraint of a person's liberty and there is no adequate remedy in the ordinary course of law." *Johnson v. Timmeman-Cooper* (2001), 93 Ohio St.3d 614, 616, 757 N.E.2d 1153, quoting, *Pegan v. Crawmer* (1996), 76 Ohio St.3d 97, 99, 666 N.E.2d 1091.

{¶4} Petitioner suggests he is entitled to immediate release based upon the Supreme Court's holding in *State v. Colon* (2008), 118 Ohio St.3d 26, wherein the Court held, "[W]hen an indictment fails to charge a mens rea element of a crime, the error is structural and, thus, the defendant's failure to raise that defect in the trial court does not waive appellate review." Petitioner has attached a copy of his indictment to his Petition. The indictment presented by Petitioner does not appear to contain a mens rea element.

{¶5} In response, Respondent's motion to dismiss urges this Court to deny and dismiss the petition because the Supreme Court, upon reconsideration of *Colon I*, has

limited the holding of *Colon I* stating, “[T]he rule announced in *Colon I* is prospective in nature and applied only to those cases pending on the date *Colon I* was announced.” *State v. Colon* (2008), 2008 Ohio 3749 at **3. *Colon I* was announced on April 9, 2008. Petitioner did not have a pending case at the time *Colon I* was announced, therefore, *Colon I* does not apply to Petitioner. Because the Petition rests solely on the applicability of *Colon I* to Petitioner, we must deny the Petition and grant Respondent’s Motion to Dismiss based upon the Supreme Court’s clarification contained in *Colon II*.

{¶6} MOTION TO DISMISS GRANTED.

{¶7} PETITION DENIED.

By: Edwards, J.
Hoffman, P.J. and
Delaney, J. concur

HON. JULIE A. EDWARDS

HON. WILLIAM B. HOFFMAN

HON. PATRICIA A. DELANEY

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JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, Petitioner's Writ of Habeas Corpus is hereby denied. Costs taxed to Petitioner.

HON. JULIE A. EDWARDS

HON. WILLIAM B. HOFFMAN

HON. PATRICIA A. DELANEY