

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

James O'Neal,

Petitioner,

v.

Case No. 1:02-cv-00357

Margaret A. Bagley, Warden,

Judge Michael R. Barrett

Respondent.

**ORDER**

Before the Court is Petitioner James O'Neal's Motion for Certificate of Appealability (Doc. 96), Respondent's Response in Opposition to Petitioner's motion (Doc. 98), and Petitioner's reply (Doc. 99). Also before the Court is the Report & Recommendation ("R&R") of Magistrate Judge Michael R. Merz (Doc. 100), and Petitioner's objections to the R & R (Doc. 101).

For the reasons that follow, Petitioner's Motion for Certificate of Appealability (Doc. 96) is hereby GRANTED in part, and DENIED in part. Further, the Court ADOPTS in part, and DECLINES TO ADOPT in part the Magistrate's R & R (Doc. 100), and SUSTAINS Petitioner's objection to the Magistrate's R & R (Doc. 101) as to ground seven, and DENIES Petitioner's request to remand ground eighteen to the Magistrate Judge.

Therefore, a certificate of appealability ("COA") SHALL ISSUE as to grounds one, two, seven, and eighteen. A certificate of appealability is DENIED as to ground seventeen.

## I.

An appeal of a final order in a habeas corpus proceeding cannot be taken unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1) A certificate of appealability will issue only where the petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C § 2253(c)(2). A petitioner must show 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 v. Cockrell*, 537 U.S. 322, 336 (2003).

## II.

In Petitioner’s Motion for Certificate of Appealability (Doc. 96), COAs were requested for grounds one, two, seven, seventeen, and eighteen. In the Magistrate’s R & R (Doc. 100), it was recommended that this Court issue COAs as to grounds one, two, and eighteen, and deny them as to grounds seven and seventeen (Id. at 9).

The grounds for relief for which Petitioner requested the issuance of a COA are as follows:

### **Ground One**

Petitioner’s right to fair warning and due process under the Fourteenth Amendment was denied by the change in the rule of law with respect to a spouse’s privilege to enter the marital residence by the Court of Appeals in its pretrial decision in *O’Neal I* and by the Ohio Supreme Court in the application of its decision in *State v. Lilly*.

### **Ground Two**

Petitioner’s right to due process under the Fourteenth Amendment was denied by his convictions on counts, specifications, and

charges of aggravated burglary on insufficient evidence.

**Ground Seven**

Petitioner was denied his Sixth Amendment right to the effective assistance of counsel by the failure of trial counsel to introduce a complete copy of the lease listing Petitioner as husband and occupant of the home and by their failure to introduce evidence that locks to the home had not been changed.

**Ground Seventeen**

Petitioner's right to due process under the Fourteenth Amendment and his right to be free from cruel and unusual punishment under the Eighth Amendment were violated by the cumulative effect of all the errors committed during the culpability and penalty phases of the trial and on appeal.

**Ground Eighteen**

The imposition of a sentence of death on Petitioner violates his right to be free from cruel and unusual punishment under the Eighth Amendment to the United States Constitution because he is mentally retarded under the standards – reasonably applied – announced in *Atkins v. Virginia* and in light of the facts – reasonably determined – presented to the state courts that show that Petitioner suffers from significantly subaverage intellectual functioning which had its onset before he attained the age of 18 and which leaves Petitioner with significant limitations in two or more adaptive behavior skills.

On grounds one, two, and eighteen, this Court agrees with the Magistrate Judge's determination that COAs should issue, and finds that reasonable jurists could debate whether the outcome of those grounds should have been resolved differently. The Magistrate Judge's recommendation that a COA should not issue on ground seventeen was not objected to by Petitioner, and this Court adopts that recommendation.

As to ground seven, this Court declines to adopt the Magistrate's

recommendation that no COA should issue. The Magistrate Judge reasoned that Petitioner had shown no prejudice from the trial counsel's failure to introduce a complete copy of the lease of the residence where Petitioner's wife was killed and evidence that the locks of the residence had not been changed (Doc. 100, p. 6). The Magistrate Judge pointed to the state appellate court's determination that the pages of the "lease" at issue did not have the legal effect of giving Petitioner a right to be on the property. Further, the Magistrate Judge found that because there was already testimony of record as to the intention of the victim to change the locks, any additional testimony would have been cumulative (Id.).

While the evidence at issue might not have been dispositive as to Petitioner's right to be on the property, in light of the state's burden to prove that Petitioner committed a trespass, and the evidence's relevance as to whether "both parties...understood that the possessory interest of one was being relinquished," *State v. O'Neal* (1995), 103 Ohio App.3d 151, 155, 658 N.E.2d 1102, 1104, this Court finds that reasonable jurists could disagree as to whether the outcome of ground seven of the petition should have been different. For this reason a COA as to ground seven will issue.

Finally, the Court denies Petitioner's request that ground eighteen be remanded to the Magistrate Judge for determination of the supplemental appendix (Doc. 83). While the supplemental appendix was filed after the Magistrate Judge's Report and Recommendations (Doc. 80), it was filed over a month before Petitioner's objections to the R & R, and three months before this Court's Order Adopting Report and Recommendations (Doc. 91).

This Court reviews *de novo* “those portions of the report or specified proposed findings or recommendations to which objection is made.” *Tuggle v. Seabold*, 806 F.2d 87, 92 (6<sup>th</sup> Cir. 1986); 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(3). Petitioner made extensive arguments in support of his objection to the Magistrate Judge’s recommendation as to ground eighteen (Doc. 88, pp. 17-39). Petitioner’s supplemental appendix was a part of the record in this case at the time that this Court undertook *de novo* review of the Magistrate Judge’s recommendation on ground eighteen, and Petitioner cited specifically to the supplemental appendix in his objections. Therefore, this Court finds it unnecessary to remand to the Magistrate Judge for further consideration on ground eighteen.

### III.

For the foregoing reasons, the Court finds as follows:

1. Certificates of Appealability SHALL issue as to grounds one, two, seven, and eighteen.
2. A Certificate of Appealability is DENIED as to ground seventeen.
3. Petitioner’s Motion for Certificate of Appealability (Doc. 96) is GRANTED in part, and DENIED in part.
4. Magistrate Judge’s R & R (Doc. 100) is ADOPTED in part, and DECLINED in part.
5. Petitioner’s objections to the R & R (Doc. 101) are SUSTAINED in part and DENIED in part.

**IT IS SO ORDERED.**

s/ Michael R. Barrett  
Michael R. Barrett  
United States District Judge