

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

ANTONIO FRANKLIN,

Petitioner,

-vs-

MARGARET BRADSHAW, Warden,

Respondent.

:

Case No. 3:04-cv-187

:

Magistrate Judge Michael R. Merz

:

DECISION AND ORDER ON MOTION FOR CERTIFICATE OF APPEALABILITY

This capital habeas corpus case is before the Court on Petitioner's Renewed Application for Certificate of Appealability (Doc. No. 133) which the Warden opposes in its entirety (Doc. No. 138). Petitioner has not filed a reply in support and the time for doing so has expired. Therefore the Application is ripe for decision. Because the parties unanimously consented to plenary magistrate judge jurisdiction in this case, the Application is properly decided by the undersigned. *Hanson v. Mahoney*, 433 F.3d 1107 (9th Cir. 2006)

The Petition pleads fifty-one grounds for relief. After discovery and an evidentiary hearing, the Court denied all relief on March 9, 2009, and Petitioner has appealed. He seeks a certificate of appealability on his First, Second, Fourth, Fifth, Sixth, Eighth, Fourteenth, Eighteenth, Twentieth, Twenty-Second, Twenty-Fifth, Thirtieth, Thirty-First, Thirty-Second, Thirty-Fourth, and Forty-Fifth Grounds for Relief.

A petitioner seeking to appeal an adverse ruling in the district court on a petition for writ of habeas corpus or on a § 2255 motion to vacate must obtain a certificate of appealability before

proceeding. 28 U.S.C. §2253 as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214)(the "AEDPA"), provides in pertinent part:

(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).

District courts have the power to issue certificates of appealability under the AEDPA in §2254 cases. *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063 (6th Cir. 1997); *Hunter v. United States*, 101 F.3d 1565 (11th Cir. 1996)(en banc). Likewise, district courts are to be the initial decisionmakers on certificates of appealability under §2255. *Kincade v. Sparkman*, 117 F.3d 949 (6th Cir. 1997)(adopting analysis in *Lozada v. United States*, 107 F.3d 1011, 1017 (2d Cir. 1997). Issuance of blanket grants or denials of certificates of appealability is error, particularly if done before the petitioner requests a certificate. *Porterfield v. Bell*, 258 F.3d 484(6th Cir. 2001); *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001).

To obtain a certificate of appealability, a petitioner must show at least that “jurists of reason would find it debatable whether the petition states a valid claim of denial of a constitutional right.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). That is, it must find that reasonable jurists would find the district court’s assessment of the petitioner’s constitutional claims debatable or wrong or because they warrant encouragement to proceed further. *Banks v. Dretke*, 540 U.S. 668, 705 (2004); *Miller-*

El v. Cockrell, 537 U.S. 322, 336 (2003). If the district court dismisses the petition on procedural grounds without reaching the constitutional questions, the petitioner must also show that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 484. The procedural issue should be decided first so as to avoid unnecessary constitutional rulings. *Slack*, 529 U.S. at 485, citing *Ashwander v. TVA*, 297 U.S. 288, 347 (1936)(Brandeis, J., concurring). The first part of this test is equivalent to making a substantial showing of the denial of a constitutional right, including showing that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further, *Slack v. McDaniel*, 529 U.S. 473 at 484, 120 S. Ct. 1595, 1604, 146 L. Ed. 2d 542 (2000), quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). The relevant holding in *Slack* is as follows:

[W]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

529 U.S. at 478.

The standard is higher than the absence of frivolity required to permit an appeal to proceed *in forma pauperis*. *Id.* at 893.

Obviously the petitioner need not show that he should prevail on the merits... Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'

Id. n.4. *Accord, Miller-El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029, 1039-1040, 154 L.Ed.2d 931 (2003). A certificate of appealability is not to be issued pro forma or as a matter of course. *Id.* at

1040. Rather, the district and appellate courts must differentiate between those appeals deserving attention and those which plainly do not. *Id.* A blanket certificate of appealability for all claims is improper, even in a capital case. *Frazier v. Huffman*, 348 F.3d 174 (6th Cir. 2003), *citing Porterfield v. Bell*, 258 F.3d 484 (6th Cir. 2001).

Analysis

First and Second Grounds for Relief

In his first ground for relief, Franklin contends constitutional error occurred at his trial because he was incompetent to stand trial at the time. (Petition, Doc. No. 21 at 16-17.) His second claim alleges the trial court should have conducted a second competency hearing based upon his peculiar behavior during trial. *Id.* at 17-18. The Court denied both these claims on the merits (Decision and Order, Doc. No. 104, at 20-31). Having reviewed the motion papers, the Court agrees that reasonable jurists could disagree with the Court's resolution of these two claims and grants a certificate of appealability as to both of them.

Fourth, Fifth, and Sixth Grounds for Relief

In his fourth, fifth, and sixth grounds for relief, Franklin contends the security measures taken during the mitigation phase of his trial were unreasonable and inherently prejudicial. (Petition, Doc. No. 21 at 18-20.) This Court held that all three claims were barred by Petitioner's procedural default in presenting them to the state courts (Decision and Order, Doc. No. 104, at 35-37). In the alternative, the Court found they were without merit. Petitioner has not demonstrated that these

conclusions are debatable among reasonable jurists and no certificate of appealability will be issued as to Grounds Four, Five, and Six.

Eighth Ground for Relief

In his eighth ground for relief, Franklin contends the prosecutors withheld exculpatory evidence from the defense contrary to *Brady v. Maryland*, 373 U.S. 83 (1963). (Petition, Doc. No. 21 at 21-22.) He seeks to appeal only the denial of sub-claim (1), that prosecutors should have divulged to the defense the recording of the 911 call that precipitated his arrest. The Court denied this sub-claim on the merits and finds that conclusion would not be debatable among reasonable jurists.

Petitioner is denied a certificate of appealability on his Eighth Ground for Relief.

Fourteenth Ground for Relief

In his fourteenth ground for relief, Franklin argues that his counsel were ineffective when they failed to request a second competency hearing in response to his peculiar behavior during his trial. (Petition, Doc. No. 21 at 25.) Based on having granted a certificate of appealability on Grounds One and Two, the Court also grants a certificate of appealability on this claim.

Eighteenth Ground for Relief

In his eighteenth ground for relief, Franklin states that his trial counsel's failure to object to his shackling and his being flanked by additional guards during the mitigation phase of his trial constituted ineffective assistance. (Petition, Doc. No. 21, at 26.) For the same reasons as it rejected these claims on the merits, the Court finds that the conclusion that this claim is without merit is also not debatable among jurists of reason and a certificate is denied on this claim.

Twentieth Ground for Relief

In his twentieth ground for relief, Franklin contends his counsel provided ineffective assistance when they failed to request that the aggravated murder counts for each victim be merged into one for sentencing purposes, that the aggravated arson counts be merged, and that the duplicative aggravating circumstances be merged prior to the jury's sentencing phase deliberations. (Petition, Doc. No. 21 at 27.)

For the reasons set forth in Respondent's Memorandum in Opposition (Doc. No. 138 at 12), the Court finds its conclusions on this Ground for Relief would not be debatable among reasonable jurists. A certificate of appealability is denied on Ground Twenty.

Twenty-Second Ground for Relief

In his twenty-second ground for relief, Franklin contends he was deprived of due process when the trial court refused repeated requests by defense counsel for a continuance following the unexpected death of one of the defense's arson experts just days before he was scheduled to testify in the defense's case in chief. (Petition, Doc. No. 21 at 28.)

The Court agrees that reasonable jurists could disagree with this Court's resolution of this

claim on the merits and certifies Ground Twenty-two as appealable.

Twenty-Fifth Ground for Relief

In his twenty-fifth ground for relief, Franklin contends that the trial court erred in allowing the jurors to consider in the mitigation phase all of the charges and specifications of which Franklin had been found guilty rather than merging those that arose out of the same course of conduct. (Petition, Doc. No. 21 at 30-31.)

For the reasons set forth in the Warden's Memorandum in Opposition (Doc. No. 138), the Court finds its resolution of this claim is not debatable among reasonable jurists and a certificate of appealability on this claim is denied.

Thirtieth, Thirty-First, and Thirty-Second Grounds for Relief

In these three claims, Franklin alleges his mental illness precludes his execution under various constitutional theories. (Petition, Doc. No. 21 at 34-35.) Essentially he argues for an extension of *Atkins v. Virginia*, 536 U.S. 304 (2002).

The Court believes that its resolution of the precise question before it – whether clearly established United States Supreme Court precedent prevented Petitioner's being sentenced to death at the time Mr. Franklin was thus sentenced – is correct. However, the issue deserves encouragement for further appellate consideration and he is granted a certificate of appealability on these three grounds.

Thirty-Fourth Ground for Relief

In his thirty-fourth ground for relief, Franklin claims the trial court failed to properly instruct the jury on the burden of proof and the definition of reasonable doubt. (Petition, Doc. No. 21 at 37.)

The Court concludes Petitioner raises question debatable among reasonable jurists in his Motion and grants a certificate of appealability on this claim.

Forty-fifth Ground for Relief

The last claim Petitioner seeks to appeal is that his trial was rendered unfair by the introduction of numerous gruesome photographs. (Petition, Doc. No. 21 at 42-43.)

This Court did not review this claim on the merits because it found that the photographs were not part of the record. Based on the Petitioner's Memorandum, the Court finds that reasonable jurists could find its conclusion debatable and grants a certificate of appealability on this claim.

Conclusion

In accordance with the foregoing analysis, Petitioner is granted a certificate of appealability on Grounds One, Two, Fourteen, Twenty-two, Thirty, Thirty-One, Thirty-two, Thirty-Four, and Forty-Five. In all other respects the Application is denied.

December 18, 2009.

s/ **Michael R. Merz**
United States Magistrate Judge