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

ANTONIO SANCHEZ FRANKLIN,

Petitioner, : Case No. 3:04-cv-187

- vs -

Magistrate Judge Michael R. Merz

NORMAN ROBINSON, Warden,

Respondent. :

DECISION AND ORDER DENYING MOTION TO REVIVE

This capital habeas corpus case is before the Court on Petitioner's Motion to Revive Decision and Order Granting Motion for Relief from Judgment Provisionally (Doc. No. 171). The Warden opposes the Motion (Doc. No. 172) and Franklin has filed a Reply in support (Doc. No. 177).

When the Court entered judgment in this case, in denying relief on the First and Second Grounds, it wrote in part:

> Franklin's burden here is to demonstrate that the state supreme court's determination that it was rudeness rather than incompetence that explained his strange behavior during his trial was an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). He has not done so. The brief portions of the videotape of Franklin's trial that were viewed during his evidentiary hearing here are insufficient to render the state court's determination unreasonable. In the other sixteen videotapes of the trial, the video camera's lens is generally trained on the attorneys, witnesses, or the trial judge, rather than Franklin. Moreover, many of the videos are so scrambled that it is impossible to tell who, if anyone, appears in the frame, much less to evaluate the individual's behavior. Thus, this Court is unable to view Franklin's behavior during the extended period of time over which his trial took place.

> Dr. Pearson's testimony about Franklin's conduct at his trial related to a few instances of peculiar behavior and Dr. Cherry's observation of Franklin at trial was also limited to the time during which Dr. Cherry was testifying. This is not the type of "clear and convincing" evidence sufficient to justify a finding that the state supreme court's factual determination that Franklin was rude rather than incompetent was unreasonable. *Nields v. Bradshaw*, 482 F.3d 442, 449 (6th Cir. 2007).

(Decision and Order, Doc. No. 104, PageID 1509.) Petitioner's counsel were surprised by the finding that the video images were scrambled and moved for relief from judgment on that basis (Doc. No. 106), a motion the State opposed (Doc. No. 109). Because the case had already been appealed, this Court did not have authority to vacate the judgment. *Marrese v. American Academy of Osteopathic Surgeons*, 470 U.S. 373 (1985); *Pickens v. Howes*, 549 F.3d 377, 381 (6th Cir. 2008); *Pittock v. Otis Elevator Co.*, 8 F.3d 325, 327 (6th Cir. 1993); *Lewis v. Alexander*, 987 F.2d 392, 394 (6th Cir. 1993); *Cochran v. Birkel*, 651 F.2d 1219, 1221 (6th Cir. 1981). Acting on authority in case law later codified in Fed. R. Civ. P. 62.1, this Court provisionally granted relief (Doc. No. 126), writing:

> It is this Court's opinion that it would be wrong to refuse to reopen a judgment which is based in part on unviewable videotape when more accurate copies are available and the fact that the more accurate copies were not substituted before judgment was the result of the collective mistake of the Court and counsel in believing that the old copies were as good as were available. The Court is not saying that substituting the new copies will change the result in the case, but merely that the Court's judgment should be based on the evidence actually submitted, rather than an unviewable copy of part of that evidence.

(Decision and Order, Doc. No. 126, PageID 1866-67.)

As this quotation hopefully demonstrates, the Court did not believe review of the better copies of the tapes would necessarily change its judgment. However, as a matter of judicial

economy, it made little sense to have the case decided by the Sixth Circuit in a situation where the trial judge admitted being unable to see part of the record submitted. Under those circumstances, the Sixth Circuit could have reversed and remanded on that point and would have, possibly, wasted its own time getting to that conclusion, Moreover, the case would have been much staler in this Court's mind.

The Sixth Circuit, however, declined to grant a remand. It wrote: "Upon consideration of appellant's motion to remand, and further considering the responses thereto, It is ORDERED that the motion be and it hereby is DENIED." *Franklin v. Bradshaw*, Case No. 09-3389 (Order of September 15, 2009)(unreported, copy at Doc. No. 130). Three years later the Sixth Circuit affirmed this Court's denial of habeas relief. *Franklin v. Bradshaw*, 695 F.3d 439 (6th Cir. 2012). It carefully distinguished, as this Court had not, between a claim that Franklin was incompetent to stand trial and a claim that he should have been given a midtrial competency evaluation. *Id.* at 451. It then held:

> Subclaim 1(b) (incompetency during trial) and claim 2 (error in not holding a second competency hearing)—which are distinct legal claims—rest on the exact same evidence: Franklin's behavior *after* the first competency hearing and *during* the trial. These claims are subject to the deferential AEDPA standard. 28 U.S.C. § 2254(d)(2) ("[A] writ of habeas corpus . . . shall not be granted . . . unless the adjudication of the claim . . . 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."); *Harrington*, 131 S. Ct. at 786 (noting that as long as "fairminded jurists could disagree on the correctness of the state court's decision," relief is precluded under AEDPA.) As discussed earlier, a review of only the evidence before the trial court—and not new evidence raised at the evidentiary hearing, *see Cullen v. Pinholster*, 131 S. Ct. 1388, 1398, 179 L. Ed. 2d 557 (2011)—regarding Franklin's competency falls short of indicating that Franklin was incompetent during trial. Franklin fails to establish that having him stand trial in light of his unusual courtroom behavior, which the Ohio Supreme Court deemed a demonstration of "rudeness," is contrary to or an unreasonable application of clearly established federal law.

Id. Thus though the Sixth Circuit was aware that there was a better copy of portions of the record than this Court had seen, it did not deem that omission material to its decision.

Petitioner does not cite authority for his Motion to Revive, but it must be treated as a motion for relief from judgment under Fed. R. Civ. P. 60(b). The only possible subsection under which relief could be granted is Rule 60(b)(6) since a motion under 60(b)(1), (2), or (3) would be untimely and there is no assertion the judgment is void (Rule 60(b)(4)) or comes within Fed. R. Civ. P. 60(b)(5). While there is no time limit in Fed. R. Civ. P. 60(c) for motions under 60(b)(6), the must be made "within a reasonable time." The Motion was made February 18, 2014, and thus was filed more than ninety days after the deadline for 60(b) motions the Court set in September 2013 (Doc. No. 153).

It is well established that Rule 60(b)(6) is not to be used as a substitute for appeal. *Polites v. United States*, 364 U.S. 426 (1960); *Ackerman v. United States*, 340 U.S. 193 (1950). Relief should be granted under Rule 60(b)(6) only in unusual circumstances where principles of equity mandate relief, *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990), and the district court's discretion under 60(b)(6) is particularly broad. *Johnson v. Dellatifa*, 357 F.3d 539 (6th Cir. 2004); *McDowell v. Dynamics Corp.*, 931 F.2d 380, 383 (6th Cir. 1991); *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989). Relief is warranted only in exceptional or extraordinary circumstances not addressed by the other numbered clauses of Rule 60. *Johnson*, 357 F.3d 539; *Hopper*, 867 F.2d at 294.

Franklin cites no exceptional circumstances to justify the relief he seeks. He does not on this Motion even have the benefit of a change in relevant decisional law such as he relied on in his other 60(b)(6) Motion (Doc. No. 159). "The decision to grant Rule 60(b)(6) relief is a case-by-case inquiry that requires the trial court to intensively balance numerous factors, including the

competing policies of the finality of judgments and the incessant command of the court's conscience that justice be done in light of all the facts." *Thompson v. Bell*, 580 F.3d 423, 442 (6th Cir. 2009), *quoting Blue Diamond Coal Co. v. Trustees of UMWA Combined Benefits Fund,* 249 F.3d 519, 529 (6th Cir. 2001). If there was no need for this Court to further review the videotapes before the Sixth Circuit reached judgment, there is much less demonstrated need for it now.

The Motion to Revive, decided here as made under Fed. R. Civ. P. 60(b)(6), is DENIED.

August 26, 2014.

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