

No. \_\_\_\_

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IN THE SUPREME COURT OF THE UNITED STATES  
October Term, 2020

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DAVID SCOTT FRANKS,  
Petitioner

-v-

BENJAMIN FORD, Warden,  
Georgia Diagnostic Prison,  
Respondent.

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On Petition for a Writ of *Certiorari*  
to the United States Court of Appeals  
for the Eleventh Circuit

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**MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

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\*MONET BREWERTON-PALMER  
S. JILL BENTON  
FEDERAL DEFENDER PROGRAM,  
INC.  
101 Marietta Street, Suite 1500  
Atlanta, Georgia 30303  
404-688-7530  
Monet\_Brewerton@fd.org

\*Counsel of Record

Counsel for David Scott Franks

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COMES NOW Petitioner, David Scott Franks, by and through his undersigned counsel, and, pursuant to Rule 39, Rules of the Supreme Court of the United States, moves this Court for an Order granting him leave to proceed *in forma pauperis*, and without prepayment of fees. In support thereof, Petitioner shows this Court the following:

1) Petitioner currently is confined under a sentence of death at the Georgia Diagnostic and Classification Prison in Jackson, Georgia. He was permitted to proceed as an indigent without payment of costs and fees in the United States District Court for the Northern District of Georgia and the United States Court of Appeals for the Eleventh Circuit throughout the proceedings below.

2) Petitioner remains indigent and files herewith a petition for writ of *certiorari* from this Court to the Eleventh Circuit Court of Appeals, which denied Petitioner's appeal of the district court's dismissal of his petition for writ of habeas corpus by a prisoner in state custody on September, 16, 2020, and denied his timely-filed petition for rehearing and rehearing *en banc* on November 27, 2020.

3) The order of the United States District Court finding Mr. Franks to be indigent and appointing undersigned counsel is attached as Exhibit A.

WHEREFORE, Petitioner respectfully requests that this Court grant his motion and allow Petitioner to proceed *in forma pauperis* and without prepayment of costs.

Respectfully submitted, this the 26th day of April, 2021.

/s/ Monet A. Brewerton-Palmer  
MONET BREWERTON-PALMER  
S. JILL BENTON  
FEDERAL DEFENDER PROGRAM, INC.  
101 Marietta Street, Suite 1500  
Atlanta, Georgia 30303  
404-688-7530  
Monet\_Brewerton@fd.org

*Counsel for Mr. Franks*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
GAINESVILLE DIVISION**

DAVID SCOTT FRANKS,	:	CIVIL ACTION NO.
Petitioner,	:	2:11-CV-0325-WBH
	:	
v.	:	DEATH PENALTY
	:	HABEAS CORPUS
CARL HUMPHREY, Warden	:	28 U.S.C. § 2254
Respondent.	:	

**ORDER**

**Scheduling Order**

Respondent has filed a motion, [Doc. 19], seeking a scheduling order that calls for Petitioner to file a final brief that addresses all of Petitioner's claims and arguments, including Petitioner's need to conduct discovery, the need to hold a hearing, whether cause and prejudice exists to excuse a procedural default, as well as Petitioner's claims for habeas corpus relief on their merits. Petitioner objects to this Court's imposition of such a schedule because it would purportedly "subvert the purpose of the fact-development procedures of discovery and evidentiary hearings, improperly shift Respondent's burden to establish the existence of his affirmative defenses to [Petitioner], and lead to inefficient litigation." [Doc. 20 at 2]. This Court disagrees with Petitioner's arguments.

From past experience in death penalty habeas corpus proceedings, this Court has discovered that determining, with respect to a particular claim for relief, the issues of (1) whether an evidentiary hearing or discovery is necessary, (2) whether a particular issue is procedurally defaulted, and/or (3) whether cause and prejudice exists to excuse a procedural default often requires an analysis of the merits of that claim, possibly in conjunction with an analysis of the merits of other claims. Accordingly, this Court prefers to address these procedural questions at the same time that it addresses the merits of Petitioner's claims. In this manner, this Court and the parties can focus any possible evidentiary development on the questions identified by the merits analysis, leading to a much more efficient process, and it is less likely that discovery or a hearing on a claim would be improperly denied because this Court will have a better understanding of Petitioner's claims and proper context to evaluate Petitioner's request for evidentiary development. Put simply – and contrary to Petitioner's argument that this approach "is premised upon the assumption that this Court will automatically deny any requests for evidentiary development," [Doc. 20 at 2] – this Court believes that the comprehensive (rather than piecemeal) approach is more likely to accord Petitioner a full and fair hearing of his claims.

Given the fact that the instant petition raises numerous discrete claims for relief (not to mention the many sub-claims), this Court is resolute in its belief that the best

approach is to address all of the aspects of all of Petitioner's claims at the same time because there is bound to be significant overlap in factual development and in the legal issues implicated. While the comprehensive approach may have the appearance of putting the cart before the horse by requiring Petitioner to argue the merits of his claim before he has had the opportunity to develop the record, in fact, this approach focuses everyone's attention on the potentially meritorious arguments that Petitioner may have raised and serves to filter out those claims that afford Petitioner no hope of relief.

Accordingly, Respondent's motion will be granted.

Petitioner will have ninety days from the date of this Order to file his final brief. In the final brief, Petitioner must raise **all** claims, issues, and arguments he wishes the Court to consider. If a matter is not in the final brief, this Court will not consider it.

With respect to each of Petitioner's grounds for relief, Petitioner must set forth:

- (1) Why Petitioner believes that the claim entitles him to relief.
- (2) If Petitioner seeks discovery and/or an evidentiary hearing with respect to the claim, Petitioner must explain in detail why the discovery and/or evidentiary hearing is necessary, including why Petitioner was unable to present his evidence in state court despite his diligent efforts. Further, with respect to those claims that Petitioner asserts require an evidentiary hearing, Petitioner must set forth with

particularity what evidence Petitioner intends to present at the hearing, which witnesses would present that evidence, and exactly what each of those witnesses would say.

(3) If the claim is among those that this Respondent alleges are procedurally defaulted, Petitioner should first present any argument as to the applicability of the procedural default and alternatively his allegations, if any, as to why cause and prejudice should excuse the default.

Respondent shall have forty-five days from his receipt of Petitioner's final brief to file his memorandum in response. Petitioner shall have thirty days thereafter to file his reply. Given the great volume of exhibits filed in this action, both parties are admonished that if they cite to or refer to exhibits in their briefs, citations must refer to the exhibits as filed by Respondent by giving the exhibit number and the page number(s).

### **Appointment of Counsel**

Petitioner seeks the appointment of Federal Defender Program, Inc., and John C. Kissinger, Jr., to represent him in this matter. While this Court has no problem with appointing two attorneys for Petitioner and the appointment of the Federal Defender is entirely appropriate, this Court has great reservations with appointing Mr.

Kissinger who resides and practices in New Hampshire. This Court understands that Mr. Kissinger represented Petitioner in his state habeas corpus proceeding and that certain efficiencies would inhere with permitting him to continue the representation. However, the experience of the judges of this Court is that those efficiencies are materially outweighed by the costs that arise when out-of-state lawyers represent death penalty petitioners. For example, in Greene v. Head, Case No. 1:01-cv-02893-CAP, the Honorable Charles A. Pannell, Jr., was forced to take the extraordinary step of removing two lawyers – one from Maine and the other from Massachusetts – from representing a death penalty petitioner on the basis that they were not competent to represent the petitioner in that case. As with this case, the out-of-town lawyers had represented the petitioner in the state habeas corpus proceedings. Nonetheless, Judge Pannell concluded that,

Taking all the above concerns together, the court must conclude that Petitioner is not receiving the representation to which he is entitled. While the court recognizes that there is a preference for the continued appointment of state post-conviction counsel when a case enters the federal system, the interests of justice and judicial and fiscal economy have not been served through the continued appointment of the state post-conviction counsel in this case. See Guidelines for the Administration of the Criminal Justice Act and Related Statutes, Section A, Chapter 6, Section 6.01(D). Rather, the court finds that these interests have been undermined through the continued appointment of state post-conviction counsel.

Id. Order of April 22, 2005 (Doc. 99).



Another death penalty case, Waldrip v. Terry, Case No. 2:06-CV-0062-WCO, included lawyers from New York City and Philadelphia whose ethical lapses so outraged the Honorable William C. O'Kelley that he dedicated four pages of his final order to a section entitled "the Conduct of Petitioner's Attorneys," in which he rejected the imposition of sanctions against counsel because the process would be too time-consuming.

Moreover, this Court does not believe that it would be appropriate to use Civil Justice Act funds to pay for repeated trips between New Hampshire and Georgia, and this Court is confident that there are plenty of well-qualified lawyers in Georgia who would happily represent Petitioner. Accordingly, this Court will not appoint Mr. Kissinger to represent Petitioner. However, to the degree that Mr. Kissinger wants to maintain a pro bono interest in this matter, he is welcome to do so. Petitioner is encouraged to seek in-state counsel for representation, and this Court is willing to offer whatever assistance would be appropriate in that endeavor.

### **Conclusion**


In summary,

**IT IS HEREBY ORDERED** that Respondent's corrected motion for a scheduling order, [Doc. 19], is **GRANTED** and the schedule as set forth above is

imposed. Respondent's earlier motion for a scheduling order, [Doc. 16], is **DENIED** as moot. Having determined that Petitioner is indigent and for good cause shown, Petitioner's application to proceed in forma pauperis, [Doc. 2], is **GRANTED**.

Petitioner's motion to appoint counsel, [Doc. 3], is **GRANTED IN PART AND DENIED IN PART**. Lindsay N. Bennett of the Federal Defender is **APPOINTED** but John C. Kissinger, Jr., is not.

**IT IS SO ORDERED**, this 7<sup>th</sup> day of February, 2012.

  
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WILLIS B. HUNT, JR.  
UNITED STATES DISTRICT JUDGE