No. 20-3943

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTONIO FRANKLIN,

Petitioner-Appellant,

v.

TIM SHOOP, Warden,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

ORDER

Before: COLE, Chief Judge; BOGGS and GIBBONS, Circuit Judges.

Antonio Franklin, an Ohio death-row prisoner acting pro se, appeals two district court orders: the first, denying his motion to discharge current counsel; the second, striking his motion to reconsider the first order. Franklin moves for a certificate of appealability, *see* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b)(1)–(2), and for permission to proceed in forma pauperis.

We express no opinion on the question whether a petitioner with appointed counsel may take an appeal pro se. We focus entirely on the question of jurisdiction. We do not have it. Franklin has appealed prematurely—again.

Franklin has already completed one round of federal habeas corpus proceedings. His 28 U.S.C. § 2254 petition was filed in 2004. The district court denied it. *Franklin v. Bradshaw*, No. 3:04-cv-187, 2009 WL 649581 (S.D. Ohio Mar. 9, 2009). We affirmed. *Franklin v. Bradshaw*, 695 F.3d 439 (6th Cir. 2012), *cert. denied*, 569 U.S. 906 (2013). He returned to district court and, acting pro se, filed an affidavit to disqualify the magistrate judge presiding over the case. The magistrate judge denied the request. Although Franklin appealed, we dismissed the appeal for lack of jurisdiction: Franklin had appealed prematurely. *Franklin v. Shoop*, No. 18-3368 (6th Cir. Sept. 30, 2019) (order).

Appendix "A"

The present matter started soon thereafter. Back in district court, Franklin on December 4, 2019, filed a pro se motion to terminate current counsel's services. This was by no means his first such attempt. His efforts to discharge these habeas attorneys began ten years earlier, about three months after the district court denied and dismissed his § 2254 petition. *See Franklin v. Warden*, No. 3:04-cv-187 (S.D. Ohio June 10, 2009) (order denying substitution of counsel). There have been recurrences since. After one of those recurring attempts, the magistrate judge gave Franklin a choice:

> The Court wishes to make certain that Franklin understands the consequences of his choices. If he persists in his desire to discharge present counsel, the Court will honor that request. However, the discharge will be for all purposes and Franklin's decision to proceed *pro se* will be permanent: the Court will not thereafter appoint substitute counsel under 18 U.S.C. § 3599.

Franklin v. Robinson, No. 3:04-cv-187, slip op. at 6–7 (S.D. Ohio Feb. 6, 2014) (order). At the time, Franklin withdrew his motion to discharge counsel.

But after failing here in his attempt to disqualify the magistrate judge, Franklin returned to district court and filed the aforementioned December 4, 2019, motion to terminate current counsel's services. The magistrate judge denied it by notation order that same day. On February 10, 2020, Franklin filed another pro se motion to terminate current counsel's services. Again, the magistrate judge denied it by notation order the same day. On May 5, 2020, Franklin—still acting pro se—filed a "RE-RENEWED Motion To Terminate Current Counsel's Service." He explained that he wanted current counsel "to have absolutely NOTHING to do with any of his future endeavors aimed at overturning his unjust conviction." According to Franklin, there were at least two legal vehicles he was thinking of using to help him obtain his freedom—a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(d) and an actual-innocence petition—"neither of which his current counselors are willing to handle." In return for being allowed to rid himself of them, Franklin wrote, he was now willing to accept the magistrate judge's conditions: he would "forego both currently appointed counselors" *and* "any future appointment of counsel from [the district court]."

The next day, the magistrate judge ordered Franklin's current counsel to provide him their opinion of Franklin's competence to waive representation. *Franklin v. Robinson*, No. 3:04-cv-187 (S.D. Ohio May 6, 2020) (order). Counsel did so, as did the Warden. Even Franklin did so. The magistrate judge concluded that Franklin "[wa]s not mentally competent to conduct this litigation" and denied his re-renewed motion to terminate current counsel's services. *Franklin v. Robinson*, No. 3:04-cv-187 (S.D. Ohio Aug. 5, 2020) (order). The magistrate judge also ordered this: If Franklin wished to request additional relief in the district court, he was first to ask his counsel to file the motion on his behalf. If they refused, "he may by motion request the Court to allow him to file it *pro se*. Any such request must have the proposed filing attached so that the Court can determine if it presents a colorable claim." *Id.*, slip op. at 6.

Franklin moved for reconsideration. By notation order, the magistrate judge struck the reconsideration motion because it was filed pro se without the court permission that the previous order had specifically required. Franklin appealed but, as before, prematurely.

The jurisdiction of federal courts of appeals is limited "to appeals from 'final decisions of the district court.'" *Flanagan v. United States*, 465 U.S. 259, 263 (1984) (quoting 28 U.S.C. § 1291). "This final judgment rule requires 'that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits.'" *Ibid.* (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)).

There is an exception—the collateral-order doctrine—but Franklin does not meet it. We may exercise jurisdiction over appeals from the "small class" of decisions that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *see also Swanson v. DeSantis*, 606 F.3d 829, 832–33 (6th Cir. 2010) (articulating the collateral-order test under *Cohen* and its progeny).

We lack jurisdiction to consider Franklin's appeal because the district-court decision here does not fit within the "narrow confines" of the collateral-order doctrine. *See Swanson*, 606 F.3d

at 833. Fundamentally, it lies outside the strictures of one of the doctrine's overarching principles, that "[t]he justification for immediate appeal must . . . be sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes." *Ibid.* (second alteration in original) (quoting *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009)). Here, Franklin has affirmatively availed himself of his right to appointed counsel under 18 U.S.C. § 3599. Having elected to proceed with the assistance of counsel, his right (if any) under 28 U.S.C. § 1654 to revert back to proceeding pro se does not present a justification "sufficiently urgent" to overcome Congress's express disfavor for piecemeal litigation, especially in the federal habeas context. *Cf. Swanson*, 606 F.3d at 833 (citing *Rhines v. Weber*, 544 U.S. 269, 277 (2005)); *see also Mohawk*, 558 U.S. at 106–07.

Accordingly, we **DISMISS** this appeal and **DENY** Franklin's pending motions as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Activity in Case 3:04-cv-00187-MRM Franklin v. Warden, Mansfield Correctional Institution Order on Motion for Reconsideration

From: cmecfhelpdesk@ohsd.uscourts.gov (cmecfhelpdesk@ohsd.uscourts.gov)

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Date: Wednesday, September 2, 2020, 9:10 PM EDT

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U.S. District Court

Southern District of Ohio

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The following transaction was entered on 9/2/2020 at 9:09 PM EDT and filed on 9/2/2020

Case Name: Franklin v. Warden, Mansfield Correctional Institution

Case Number: 3:04-cv-00187-MRM

Filer:

WARNING: CASE CLOSED on 03/10/2009

Document Number: 264(No document attached)

Docket Text:

Notation ORDER striking [263] Motion for Reconsideration because it was filed pro se without court permission as required by ECF No. 262. Counsel shall provide a copy of this Notation Order to Petitioner. Signed by Magistrate Judge Michael R. Merz on 9/2/2020. (MRM)

3:04-cv-00187-MRM Notice has been electronically mailed to:

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Appendix "B"

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 PETITIONER'S RE-RENEWED MOTION TO TERMINATE CURRENT COUNSEL

This capital habeas corpus case is before the Court on Petitioner Antonio Franklin's *pro se* "Re-Renewed Motion to Terminate Current Counsel's Service" filed May 5, 2020, (ECF No. 250). Because Franklin's mental competency has been an issue in this case from its inception in the Common Pleas Court of Montgomery County, Ohio, the Court asked Petitioner's appointed counsel, S. Adele Shank and James Fleisher, for their opinion on Franklin's competency to represent himself in this case (ECF No. 251). They have responded (ECF No. 255) and the Court has conducted a hearing on the matter (Minutes, ECF No. 259).

Because the Court concludes Petitioner is not mentally competent to conduct this litigation, his motion is DENIED.

Appendix "C"

Litigation History and Status

Antonio Franklin was indicted by the Montgomery County, Ohio, Grand Jury for murdering his grandmother, grandfather, and uncle and then burning the home where he had lived with them. A jury found him guilty and recommended imposition of a death sentence, despite his claims that he was not guilty by reason of insanity and mentally incompetent to stand trial. Because the crimes occurred after January 1, 1995, Franklin appealed directly to the Supreme Court of Ohio, which affirmed the conviction and death sentence. *State v. Franklin*, 97 Ohio St. 3d 1 (2002). On Franklin's behalf, the Ohio Public Defender moved this Court to appoint counsel on February 20, 2004 (ECF No. 2). The Court then appointed Ms. Shank as trial attorney and Mr. Fleisher as co-counsel on March 18, 2004 (ECF No. 6), and they have remained as counsel for the succeeding sixteen years. During that time, they have vigorously litigated this case on Franklin's behalf through an evidentiary hearing in this Court, appeal to the Sixth Circuit, and a number of post-judgment matters. In addition, they have represented Franklin in the consolidated 42 U.S.C. § 1983 method of execution challenge, *In re Ohio Lethal Injection Protocol Litig.*, Case No. 2:11-cv-1016.

The United States Court of Appeals for the Sixth Circuit affirmed this Court's denial of habeas corpus relief. *Franklin v. Bradshaw*, 695 F.3d 439 (6th Cir. 2012), *cert. den. sub. nom. Franklin v. Robinson*, 569 U.S. 906 (2013). Franklin's efforts at filing a second habeas corpus petition in were rejected in 2016 (Case No. 3:12-cv-312, ECF No. 28), and he failed to file an appeal. He now has an execution date set for January 12, 2023.[1] By practice, the Ohio Governor's Office will not commence clemency proceedings until much closer to the scheduled execution

[1] https://www.drc.ohio.gov/execution-schedule (last accessed Aug. 4, 2020).

date. Also, because counsel continue to question Franklin's competency to be executed, proceedings under *Ford v. Wainwright*, 477 U.S. 399 (1986), will need to be conducted much closer to the scheduled execution date.

Franklin's Present Motion

Franklin has repeatedly asked this Court to replace Ms. Shank and Mr. Fleisher, beginning June 5, 2009 (ECF Nos. 121, 152, 165) which the Court has repeatedly denied, finding no fault with counsel's representation. Franklin's present Motion seeks to have the Court discharge Ms. Shank and Mr. Fleisher and permit him to proceed *pro se*. As reasons to discharge present counsel, Franklin argues they have been ineffective (Motion, ECF No. 250, PageID 12071-72), but he gives no reasons why and asserts the Court's opinion to the contrary is immaterial. *Id.* at PageID 12072. He asserts he has two avenues available to attempt to gain relief: an independent action under Fed.R.Civ.P. 60(d) and an actual innocence petition. *Id.* at n.4. He asserts current counsel will not file these actions and he wants to consult with independent attorneys about them, but other attorneys will not speak to him while he has appointed counsel.

Ms. Shank and Mr. Fleisher respond in several ways. First, they note Franklin has a long history of diagnosed mental illness (Response, ECF No. 255, PageID 12092-94). Second, they note that many of his *pro se* filings in this Court and in the state courts reflect "a clear inability to to understand or accept the requirements of the law." *Id.* at PageID 12094 (citations omitted). Through their personal observations of him over the many years of their representation, they have seen his unwillingness to accept or inability to understand legal concepts and suggest that many of his *pro se* filings reflect assistance from other persons. *Id.* at PageID 12096. His illnesses manifest

themselves in delusions, in any ability to conform his behavior to ordinary social expectations, and in difficulties communicating.

Various social interests must be balanced in deciding the instant Motion. The first of these is the social interest in fair administration of the criminal justice system. That interest is reflected foremost in the constitutional requirement that indigent defendants be furnished with defense counsel at the State's expense. *Powell v. Alabama*, 287 U.S. 45 (1932) (capital cases); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (felony cases); *Argersinger v. Hamlin,* 407 U.S. 25 (1972) (misdemeanor cases where imprisonment is a possibility); *Alabama v. Shelton,* 535 U.S. 654 (2002) (even if sentence is suspended). That constitutional right is exhausted with a first appeal of right. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Ross v. Moffitt*, 417 U.S. 600 (1974). But "death is different" and Congress has provided authority for appointment of two qualified attorneys in habeas corpus to represent those sentenced to death. 18 U.S.C. § 3599. Like many areas of the law, death penalty representation has become quite specialized. The two attorneys appointed in this case, whatever Franklin may think of them, have become learned in this area of the law and have represented other death row inmates. Because of the impact on American society as a whole of the death penalty, it is important that the interests of death row inmates be competently represented, particularly when the inmate may not be personally competent to evaluate the representation he is receiving.

Balanced against this social interest is the inmate's interest in personal autonomy. That interest is reflected in the statutory right of persons to conduct their own cases in federal court.

> In the federal courts, the right of self-representation has been protected by statute since the beginning of our Nation. Section 35 of the Judiciary Act of 1789, 1 Stat 73, 92, enacted by the First Congress and signed by President Washington one day before the Sixth Amendment was proposed, provided that "in all the courts of the United states, the parties may plead and manage their own causes

> personally or by the assistance of . . . counsel. The right is currently codified in 28 U.S.C. § 1654.

Faretta v. California, 422 U.S. 806, 812-13 (1975). *Faretta* recognized the constitutional dimensions of the right to represent oneself at trial; denial of self-representation at trial requires careful inquiry into a defendant's understanding of the counsel waiver involved and his or her willingness to abide by court rules. The right of self-representation is not absolute and may be denied where the defendant is not competent to represent himself or herself. *Indiana v. Edwards*, 554 U.S. 164 (2008). Here Franklin strongly asserts his right to self-representation, albeit not at trial.

The third interest which must be balanced in the public's interest in judicial economy. However important getting the right result is in a capital case, society does not have infinite resources to commit to that end.

> [A] defendant wishing to represent himself may not use the right for the purpose of disrupting the proceedings, and must be willing to follow courtroom procedure and protocol. *Faretta*, 422 U.S. at 834 n.46; *United States v. Lopez-Osuna*, 232 F.3d 657, 665 (9th Cir. 2000) (holding defendant's request to represent himself may be denied when he is unable or unwilling to adhere to rules of procedure and courtroom protocol); *United States v. Frazier-El*, 204 F.3d 553, 559 (4th Cir. 2000) (stating that "the *Faretta* right to self-representation is not absolute, and the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer"); *United States v. Brock*, 159 F.3d 1077, 1079 (7th Cir. 1998) (finding that "when a defendant's obstreperous behavior is so disruptive that the trial cannot move forward, it is within the trial judge's discretion to require the defendant to be represented by counsel").

Ahmed v. Houk, No. 2:07-cv-658, 2014 U.S. Dist. LEXIS 81971, *101-102 (S.D. Ohio Jun. 16, 2014) (Merz, Mag. J.), *appeal dismissed sub. nom. at Ahmed v. Shoop*, No. 18-3292, 2018 U.S. App. LEXIS 11015 (6th Cir Apr. 27, 2018).

In the present situation, we are not faced with possible disruption of courtroom

proceedings, but rather with the possibility of repetitive or meritless filings. Even civil litigants who pay their own filing fees may eventually be completely barred from further filings because of the burden they impose on the system. *See Sassower v. Mead Data Central, Cossett v. Federal Judiciary; In Re Phillip E. (Bo) Guess*, General Order No 95-3 (Eastern Div., 3/13/95); and *In re Sassower,* 510 U.S. 4 (1993).

To recognize these three interests and balance them as best it can in this case, the Court hereby orders:

1. The motion to discharge Ms. Shank and Mr. Fleisher is DENIED.
2. If Mr. Franklin wishes to file a request for some additional relief in this Court (e.g. his proposed independent action under Fed.R.Civ.P. 60(d) or his actual innocence petition), he shall first request counsel to file it on his behalf. If they decline to do so, he may by motion request the Court to allow him to file it *pro se*. Any such request must have the proposed filing attached so that the Court can determine if it presents a colorable claim.

August 5, 2020.

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

S. ADELE SHANK
LAW OFFICE

3380 TREMONT ROAD
COLUMBUS, OH 43221

TELEPHONE: 614-326-1217
TELEFAX: 614-326-1028

June 5, 2009

Antonio Sanchez Franklin
Inmate #A363374
Ohio State Penitentiary
878 Coitsville-Hubbard Road
Youngstown, Ohio 44505

Re: Certificate of Appealability (COA)

Dear Sanchez:

When we met last week, you were very concerned over the fact that we have not asked for a COA on various issues that you raised in your Murnahan pleadings. As a result, Jim and I have reviewed the issues again. Following is a summary of our assessment of each issue. Sections of this come from my notes. References to ASF are obviously references to you. IAC means ineffective assistance of counsel.

Appellate counsel were ineffective for not raising a claim on appeal of prosecutor misconduct because the prosecutor called Kim Stookey as a witness and elicited an opinion on ASF's sanity at the time of the offenses.

Your lawyers objected to Stookey's testimony and the judge limited Stookey to testifying about what was in her pre-trial report on sanity. He then instructed the jury to disregard Stookey's testimony about your sanity at the time of the events. Your trial counsel cross-examined Stookey and used some of her findings to support Dr. Cherry's conclusions.

In the testimony she gave before the objection was granted Stookey summarized information about the events on the night of the murders, that she said she got from Dr. Cherry's and Dr. Martin's reports, as support for her opinion that you knew what you were doing at the time of the events and that you knew it was wrong. Your trial counsel moved to strike this testimony. When the trial judge instructed the jury to disregard all of Stookey's testimony that related to the time of the events, the evidence to be disregarded was the testimony based on Cherry's and Martin's reports. The court also prohibited Stookey from expressing her opinion on sanity because she had failed to provide the court with a report of her changed findings on this point. The judge allowed her to testify about those things that were in her report that was provided to the court and counsel before trial. In that report she said she could not reach a conclusion as to your sanity at the time of the offense. Your lawyers got the remedy they requested. Normally, you cannot appeal a matter when you have gotten the relief for which you asked. Only later, at the

Appendix "D"

conclusion of the guilt phase, did your lawyers move for a mistrial. Tr. Vol. 13 of 15, p. 1470. The judge ordered that his earlier ruling and admonition would stand.

During deliberations, the jurors asked a question about the limitation on considering Stookey's testimony and the judge again told them they could only consider her opinion of your mental status before the day of, but not at the time of the crimes. Trial counsel objected to the answer to the question. arguing that the jurors would bootstrap the admissible evidence regarding mental illness into a conclusion that you were not insane on the day of the crime. Tr. Vol. 14 of 15, p. 1695. Stookey's testimony concerning her assessment of your mental state prior to the day of the crime was rebuttal to Dr. Cherry's account of the development of your mental illness in the weeks and months before the crimes. In the preceding discussion, trial counsel acknowledged the "great cautionary instruction" given earlier.

The court's answer to the question, p.1694-95, allowed the jurors to consider what you reported to Stookey as it contributed to her conclusions about your mental condition before the date of the crime and prohibited its use for the determination of guilt.

After the trial, your lawyers filed a motion for new trial due to the prosecutor's misconduct. The trial judge denied the motion and said that he had precluded Stookey's testimony at trial because the prosecutor had violated the state's discovery obligations.

Under these circumstances, it is extremely unlikely that appellate counsel will be viewed as ineffective for not raising this claim.

Appellate lawyers were ineffective for not raising a separate claim that ASF's trial lawyers were ineffective because they did not object to the prosecutor's argument that ASF's tattoos should be viewed as bragging or trophies. Tr. p. 22, 1577, 1631-32.

The second matter that you felt should be part of a certificate of appealability request is the claim that your appellate lawyers were ineffective for not raising a separate claim that your trial lawyers were ineffective because they did not object to the prosecutor's argument that your tattoos should be viewed as bragging or trophies.

The photos of the tattoos were admitted without objection. The admission of the photos was challenged on appeal. The Ohio Supreme Court found that any error in the admission of the evidence was waived and found no plain error. It went on to find that the tattoos were relevant and admissible evidence. The habeas court found the claim procedurally defaulted based on the Ohio Supreme Court's ruling.

Jim and I understand that the tattoos were not meant to be bragging but as a recoginition of your family members' passing. Even so, there is no realistic expectation that your appellate counsel would be found ineffective for not raising a claim that your lawyers should have objected to the prosecutor's argument. First, the state's argument was not extreme. Second, your lawyers argued that the R.I.P. tattoo was evidence of insanity. Tr. Vol. 14 of 15, p. 1615. Third, the Ohio Supreme Court found the photos admissible to rebut defense arguments and specifically to "demonstrate a manifestation of bravado." Fourth, the character of the remarks, even if objected

to at trial and raised on appeal, is not of the type that generally warrants relief. Having found the prosecutor's argument relevant and persuasive, it is unlikely that the appellate court would have found it prejudicial.

Appellate lawyers were ineffective for not raising claim of IAC of trial counsel for not arguing the fact that ASF was wearing a coat in hot weather, carrying useless keys and other items at the time of his arrest as evidence of insanity.

The heavy coat and useless items could arguably be some evidence of mental disease but they do not have any direct bearing on the ability to understand right and wrong. Furthermore, if the reason for wearing the coat became an issue it would have opened the door for the prosecutor to argue that wearing the jacket was not an indication of mental illness but a plan to conceal/keep close the gun and items taken from his grandparents' house that ASF was carrying. See Apx. Vol. 12 of 15, p.1220-21.

ASF says he was wearing the coat because he thought it would identify him to the "No Limit Soldiers." Apx. Vol. 13 of 17 p. 108. The other items were taken because ASF thought music told him to do it. Apx. Vol. 18 of 22, p. 42-43. Even if he gave these explanations to his trial attorneys it is doubtful that it could have been used at trial. Trial counsel said that Antonio gave many different explanations for his actions. They felt that they could not put him on the stand because there was no way to know what was true or what he would say at any given moment. None of this information, standing alone, gives rise to an inference of insanity.

Appellate lawyers were ineffective for not raising claim of IAC of trial counsel for failing to voir dire about insanity defense.

A general claim on IAC for in voir dire was raised in the Ohio Supreme Court although this specific issue was not raised. A voir dire issue was raised in post conviction but this was not included in it.

At trial, the Court allowed three of the five defense questions regarding psychiatry/psychology to be included in the juror questionnaire. Decision, Order, Entry July 23, 1998. There was also some voir dire about insanity although it was mainly focused on the burden of proof.

The content of voir dire questions is typically left to the discretion of the trial counsel. "[C]ounsel is accorded particular deference when conducting voir dire,". . . "[a]n attorney's actions during voir dire are considered to be matters of trial strategy." *Hughes v. United States*, 258 F.3d 453, 457 (6th Cir. 2001).

Appellate lawyers were ineffective for not raising claim of IAC of trial counsel because trial counsel did not object to experts using information from other experts' reports.

Stookey's testimony based on Cherry's and Martin's reports was stricken when trial counsel objected to its admission. Tr. 1362. Martin testified that though he read the reports of Cherry and Stookey he did not rely on them. Tr. p. 1313-14, 1317. Furthermore, the defense did not object to

Martin's use of Stookey's and Cherry's reports but was trying to use the facts in Stookey's report to help ASF's case.

Appellate lawyers were ineffective for not raising claim that Martin and Stookey were qualified as experts "by law but not by skill" because they did not recognize ASF's schizophrenia.

Both Stookey and Martin were qualified as experts. Differing opinions do not disqualify experts. Stookey was qualified at Apx Vol. 13 of 15, p. 1327. Martin was qualified at Apx. Vol. 12 of 15, p. 1246.

Appellate lawyers were ineffective for not raising Brady claim.

Materials alleged not to have been provided:

Brian Dallas interview – prisoner who did ASF's tattoos - Vol. 13 of 17, p. 108, Ex. 46-X p. 245 – This interview, in ASF's view, is supposed to counter the prosecutor's argument that ASF got his tattoos in order to brag about the murders. The Dallas interview has no comment on why ASF wanted the tattoos.

Defendant's notes written while he was incarcerated in Tenn. Apx. Vol. 13 of 17, p. 118 –ASF says theses notes show he was insane – any basis for admission is questionable - ASF says he has the notes and appended some of them to his pro se pleadings – since he has them there is no Brady claim. See Ex 46-W Apx. Vol 13 of 17, p. 177-186. The notes are not part of the trial record so appellate counsel could not have used them.

Info from defendant's family – pros. told family not to talk to defense Vol. 13 of 22, p. 36. The court held a pre-trial hearing on this and ASF's family testified that the prosecutor told them they could talk if they wanted to. Vol. 1 of 15,Motion Hrg. 8/29/97 p. 47-48.

Appellate lawyers were ineffective for not raising a claim that trial counsel failed to impeach Dr. Martin for not doing a full evaluation of ASF.

Counsel cross-examined Martin very successfully on his failure to do any testing and his failure to do a social history. It appears that defense counsel's success in cross-examining Martin may be the reason that the state to decide to bring in Stookey. Vol. 12 p. 15, p. 1280-92.

Appellate lawyers were ineffective for not raising a claim that the court improperly restricted voir dire.

This claim was raised on appeal. The Ohio Supreme Court found the issue waived because trial counsel did not object to the trial court's restrictions.

Appellate lawyers were ineffective for not raising claim of IAC of trial counsel because trial counsel did not object to prosecutor misconduct.

This claim was raised on appeal. The Ohio Supreme Court found waiver for failure to object at trial and found no plain error on the actual misconduct claim. The court also found no IAC.

In conclusion, we have explained all of these things to you in the past. We went through them again with you last week. Because of your strong feelings, we have reviewed them all again. We are hoping that by putting our assessment in writing you will be better able to understand. In short, although we understand that many of these things felt wrong to you, the legal perspective on them is different. We have not ignored your feelings or your arguments. At this point it is important to put forward those claims that have a good chance of success. We are confident that the issues on which you have any real chance of success have been raised, preserved, argued, and litigated fully in your habeas proceedings and are the issues upon which we have sought a certificate of appealability.

Please remember that you are reading brief summaries of our assessments. If you have questions, please write.

Sincerely,

S. Adele Shank

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

ANTONIO FRANKLIN,

Plaintiff,

Case No. 1:04-mc-00019

District Judge Sandra S. Beckwith
Magistrate Judge Michael R. Merz

-vs-

WARDEN, MANSFIELD
CORRECTIONAL INSTITUTION,

Defendant.

CONSENT TO MAGISTRATE JUDGE JURISDICTION

The undersigned as a party to the above-captioned action pursuant to Fed. R. Civ. P. 73(b), hereby consents to the exercise of civil jurisdiction in this case by United States Magistrate Judge Michael R. Merz under 28 U.S.C. § 636(c). Such jurisdiction shall include all pre-trial matters, whether or not dispositive, trial, whether to the Court or by Jury, the entry of judgment and any post-trial matters.

S. Adele Shank
Signature of Party or Counsel

S. Adele Shank
Please Print Name

Appendix "E"

[redacted]

Antonio Franklin
P.O. Box 5500
Chillicothe, Oh 45601
October 11th, 2012

To: ALL CIRCUIT JUDGES of the 6th Cir.

Greetings, my name is Antonio Franklin and I'm writing because you just made a ruling in my case on the 19th of September, 2012. And while I don't agree with the ruling that was issued in my case, I understand that, ultimately, it is final and I can deal with that. However, what I can't deal with is my current representation.

I intend to have a Rule 60 (b) filed on my behalf, in accordance to **Martinez v. Ryan,** (2012), 132 S. Ct. 1309 alleging constitutional violations that I incurred at the trial level that I --- while operating in a pro se manner --- previously proffered to the state courts in an attempt to have adjudicated[1]. The state courts ruled that my claims were procedurally defaulted and thereby never reached the merits on any of the issues, which preserves them for federal review, according to **Martinez.**

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[1] In the state court I filed both a successor of petition (Sept. 16, 2003: Trial Ct.) and a petition requesting a vehicle akin to **Murnahan** for *"POSTCONVICTION"* (July 28, 2005: Ct. Of App.)

The reason(s) in which I seek to have my current counsel precluded from further

Appendix "F"

representation of my cause to attempt to overturn my conviction is detailed in both the district court's and the 6th Circuit's decision denying relief of my federal habeas petition.

In the district court's decision, Judge Merz profusely bestowed upon my counsel's performance in his court **inadequacies** and **shortcomings;** most of which being of a serious nature. In fact, I have taken the time to list a few here:

1. They failed to offer evidence of my incompetence to assist my attorneys on postconviction at the Evid. Hearing and didn't even attempt to address the state court's reason for denying my claim. **Franklin v. Bradshaw,** 2009 U.S. Dist. LEXIS 23715 At [*55].

2. They omitted citations to the record that would show that the lower court ignored evidence it had before it. **Id.** At [*71].

3. They failed to provide cause for my default. **Id.** At [*72].

4. They completely ignored the Ohio Supreme Court's discussion of a claim and offered "nothing" to meet the standards of the AEDPA. **Id.** At [*73].

5. They omitted the satiation requirement of AEDPA. **Id.** At [*74].

6. They offered only unsupported conclusions as it pertains to the improper arguments concerning my tattoos and alleged that my constitutional rights were somehow violated. **Id.** At [*79].

7. They omitted citations to the comments the prosecution made about my tattoos, and failed to meet the AEDPA standards. **Id.** At [*78-79].

8. They failed to specify just what evidence was irrelevant, inflammatory, and prejudicial as it pertains to my 13th ground for relief. **Id.** [*80].

9. They failed to demonstrate prejudice from my trial counsel's failure to object to the prosecutor's comments about my tattoos. **Id.** At [*80].

10. They failed to identify any specific testimony the court might consider, didn't refer to the state court record, didn't satiate the AEDPA standard, and never sought permission to present evidence that would bolster claim at the Evid. Hearing. Id. At [*81].

11. They alleged that remarks made by the prosecution improperly characterized me, but failed to reveal just what they characterized me as. **Id.** At [*82].

12. They failed to request an Evidentiary Hearing to present evidence to support their allegations. **Id.** [*83].

13. They provided no specificity in their pleadings, didn't make citations to the state court records, and failed to demonstrate a satiation of the AEDPA. **Id.** At [*83].

14. They failed to litigate the sixth and seventh sub-claims in the traverse. **Id.** At [*84].

15. They failed to identify the prosecution's offending comments, or where they might be found in the record, thereby prompting the court to inform my counsel that it (the district court) isn't required to search the record in order to find support for my claims. **Id.** At [*84].

16. They omitted cause for default and incurred prejudice. **Id.** At [*85].

17. They failed to seek permission to present evidence at Evid. Hearing. **Id.** At [*86].

18. They compelled the court to inform the defense that its tenth ground for relief doesn't conform to Rule 2 (c)(2), as they failed to state facts to which would support this particular claim. **Id.** [*106-107].

19. They didn't come nowhere near meeting the burden imposed upon a petitioner by the federal habeas statutes and rules, as they utilized a faulty method of incorporating "by reference" my other federal habeas claims, as with claims raised in the state courts. **Id.** At[*107-108].

20. They compelled the court to state that it wasn't inclined to supply a reason of its own making as to how this particular claim is related to my ineffective assistance of counsel claim. **Id.** At [*110].

21. They provided no specificity, no citations to the record, and failed to cite federal case law. **Id.** At [*116].

22. They set forth claim, *"as is,"* in one sentence in habeas petition containing no citation to the record or federal law, and defended against assertion of procedural default with three sentences, and apparently intended to incorporate "by reference" my state claims. **Id.** At [*117].

23. They (in my opinion) missed an opportunity to mesh my pro se, vior dire claim with " this" claim regarding INSANITY, as it would have dovetailed perfectly with " this" ground for relief. **Id.** At [*125].

24. They failed to advance an argument as to why or how the state court's application was unreasonable or erroneous, and failed to support this particular sub-claim with evidence at the Evid. Hearing. **Id.** [*126].

25. They (in my opinion) missed an opportunity to mesh my pro se, voir dire claim regarding pretrial publicity, as it would have dovetailed perfectly with "this" ground for relief. **Id.** At [*131].

26. They omitted pretrial publicity and the effect it had on my community. **Id.** At [*132].

27. They failed to explain how I was prejudiced by my trial counsel's failures. **Id.** At [*137].

28. They failed to address Respondent's argument in Traverse. **Id.** At [*146].

29. They provided no citations to any of the alleged failures by my trial counsel; made bare, conclusory accusations without citing any support in law or fact; and failed to satiate the AEDPA standards. **Id.** At[*147].

30. They failed to set forth specifics in my Traverse. **Id.** At [*154].

31. They failed to render citations to the record. **Id.** At [*155].

32. They offered no basis upon which I may be forgiven for my procedural default. **Id.** At [*156].

33. They stated that the Ohio Supreme Court's decision was unreasonable without supporting argument, or citation of law. **Id.** At [*158-159].

34. They alleged that the state court's findings were unreasonable, but failed to cite any authority to bolster their claim. **Id.** At [*160].

35. They failed to demonstrate how the rejection of my Rule 26 (B) was contrary to, or an unreasonable application of federal law. **Id.** At [*276-277].

And in the 6th Cir. they didn't fare any better as they continued with their rendering of disservices, as they exhibited more of the same inadequacies and insufficiencies as they did in the federal district court. They ***repeatedly*** failed to show *cause* "or" *prejudice,* satiate the AEDPA standard, and/or show that the state court's and/or the district court's rulings were contrary to, or an unreasonable application of state or federal law. They also made these following mistakes:

1. They ambiguously filed a claim that is "*not clear*" as to whether or not it was filed in my federal habeas petition. **Franklin v. Bradshaw**, 2012 U.S. App. LEXIS 19633. At [*13].

2. They failed to reply to the Respondent's default argument. **Id.** At [*13].

3. They failed to argue cause, prejudice and/or a fundamental miscarriage of justice. **Id.** At [*14].

4. They failed to show that the trial court was *clearly* wrong in believing the State's expert, and that the district court's finding was an unreasonable determination of the facts in light of the evidence presented. **Id.** At [*14].

5. They failed in their obligatory duty to take the newly discovered evidence that was revealed at the Evid. Hearing pertaining to my "competency to stand trial claims" back to the state court so that they could re-review it, as pursuant to **Collen v. Pinholster**. 131 S. Ct. 1388 (2011). **Id.** At [*20].

6. They failed in their obligatory duty to take *other* newly discovered evidence that

was revealed at the Evid. Hearing pertaining to the "denial of a requested continuance" back to the state court so that they could re-review it, as is mandated by **Pinholster.** **Id.** At [*23].

As evinced, *both* the District Court's and the 6th Circuit's decisions are indeed replete with references of inadequacies bestowed upon myself by the remiss nature of my counsel. The mistakes were literally too numerous to list, as nearly every claim is flawed in one manner or another. And personally, I think it quite unfair to be made to have to continue to be represented by these attorneys when they do nothing for me or my interest but obliterate ***any*** chance of success that I "might" be able to obtain. And as such, I very respectfully request that you remove my current counsel off my case and appoint new counsel to assist me in my attempt to exhaust whatever remaining remedies that I have left unto me as it pertains to **Martinez v. Ryan**.

I do ***not*** want them to ruin these future proceedings with their *refusal* or inability to cite proper legal authority and/or transcript records (as with their page number and just where the information in question can be located), and their inability to satiate the AEDPA standard. They have done away with enough of my appeals already; and hopefully you will permit me new counsel so that the onslaught will stop.

And speaking of onslaught, I'm not even certain whether or not they did, or did not file for a rehearing in en banc – which would be ***"ideal"*** as my issues were very meritorious and were (***I'm convinced***) denied because of weak litigation. What harm could it do, and what reason could they possibly have for ***not*** presenting my issues of

"competency" (as with the rest of my issues) to the entire panel in an attempt to have them reheard and voted on by all nine members of the bench? I Know that you may counter with a "legal strategy" response, but it's more like a ***LACK OF DILIGENCE,*** teetering along the edge of laziness. And in fact, their entire representation of me and my cause has been just that...a lack of diligence. There's no two ways about it.

How does one explain two professional attorneys that's been practicing law for years and years, thereby making them well versed and adept in the law and its procedures -- ***especially*** appellant procedures, as they are operating as just that, appeals attorneys -- **HABITUALLY** failing or forgetting to address state court's reason for denying a claim; habitually omitting citations to the record; habitually omitting citations to legal authority; habitually failing to satiate the AEDPA standard; habitually failing to show *"cause"* and *"prejudice;"* habitually failing to request an Evid. Hearing for issues that clearly needed it to fully develop the issue and the record before the federal court; habitually failing to request permission to present evidence at the Evid. Hearing that would help to bolster issues; habitually failing to take newly discovered evidence form the Evid. Hearing back to the state courts, thereby affording them the opportunity to review the issue in light of the ***"new evidence"*** as pursuant to **Cullen v. Pinholster,** 131 S. Ct. 1388 (2011); and on at least two occasions, compelling the district court to inform them (my counsel) that it is not obligated to hunt and search the record for evidence that would support their claim, due to their repeated failure to cite transcript records and their fondness for providing unsupported

conclusions and claims that lack specificity; and habitually omitting their client's meritorious, pro se issues. One cannot rationally explain away these disservices by merely advancing an argument of "legal strategy" for their many, many failures and shortcomings while representing my interests in the federal courts. And as such, I would greatly appreciate it if you would acknowledge the futileness of their ***"continued"*** representation of my cause, and ***promptly*** remove them from my case and replace them with actual ***"professional performing"*** counsel that I might actually be able to meet the case of the prosecution in my future, legal endeavors.

Thank you for your time and consideration in this matter.

Yours truly,

Antonio Franklin

Antonio Franklin

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