BLD-252 August 19, 2021

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **21-1753**

JOSEPH ELLIOTT, Appellant

VS.

SECRETARY PENNSYLVANIA DEPARTMENT OF CORRECTIONS; ET AL.

(E.D. Pa. Civ. No. 2-16-cv-02076)

Present: AMBRO, SHWARTZ, and PORTER, Circuit Judges

Submitted are:

(1) Appellant's application for a certificate of appealability pursuant to 28 U.S.C. § 2253(c); and

(2) Appellant's motion to accept the application for a certificate of appealability in excess of the word limit

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's motion to accept his application for a certificate of appealability (COA) that is in excess of the word limit is granted. The request for a COA is denied because Appellant has not made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). For substantially the reasons provided by the District Court, jurists of reason would not debate the District Court's conclusion that Appellant's trial counsel was not ineffective. See Miller-El v. Cockrell, 537 U.S. 322, 327 (2003); Strickland v. Washington, 466 U.S. 668, 687 (1984). Specifically, with respect to his "failure to meet" claim, reasonable jurists would not debate that "the surrounding circumstances" here did not "justify a presumption of ineffectiveness." United States v.

Cronic, 466 U.S. 648, 662 (1984). Jurists of reason would also agree that counsel was not ineffective for failing to retain a medical expert, or to further combat the medical examiner's testimony as to the victim's time of death. In particular, Appellant failed to show that the scientific evidence in his proposed expert witness's report was available at that time of Appellant's trial. See Strickland, 466 U.S. at 689 (recognizing that counsel's performance must be assessed based on the circumstances at the time of trial); Horsley v. Alabama, 45 F.3d 1486, 1495 (11th Cir. 1995) (holding that to prove prejudice from counsel's failure to present an expert witness, a petitioner must demonstrate a reasonable likelihood that ordinarily competent counsel "would have found an expert similar to the one eventually produced"). Nor is it debatable that Appellant failed to show a reasonable probability that the outcome of the trial would have been different had his counsel further investigated the prior bad acts evidence. See Strickland, 466 U.S. at 694. And even assuming that Appellant's rights under the Confrontation Clause were violated, jurists of reason would not debate that the error was harmless, given the strength of the evidence against Appellant aside from that establishing the time of the victim's death. See Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986) (holding that Confrontation Clause errors are subject to harmless error analysis). Finally, reasonable jurists would not debate that the alleged errors mentioned above, even when considered in the aggregate, did not have "a substantial and injurious effect or influence in determining the jury's verdict." Fahy v. Horn, 516 F.3d 169, 205 (3d Cir. 2008) (citation omitted).

By the Court,

s/ David J. Porter
Circuit Judge

Dated: August 24, 2021
Cc: All counsel of record

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
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August 24, 2021

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RE: Joseph Elliott v. Secretary PA Dept Corrections, et al
Case Number: 21-1753
District Court Case Number: 2-16-cv-02076

ENTRY OF JUDGMENT

Today, **August 24, 2021** the Court issued a case dispositive order in the above-captioned matter which serves as this Court's judgment. Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.
Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,
Patricia S. Dodszuweit, Clerk

By: s/Marianne/AMR
Case Manager
267-299-4957