

No. 18-7772
Capital Case

In the Supreme Court of the United States

ANTONIO S. FRANKLIN, Petitioner

v.

STATE OF OHIO, Respondent

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO*

BRIEF IN OPPOSITION

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This is a Capital Case

TABLE OF CONTENTS

REASONS FOR DENYING THE PETITION	1
STATEMENT OF THE CASE	1-4
I. Franklin has not set forth a colorable claim of ineffective assistance of appellate counsel.....	4-8
CONCLUSION	8

TABLE OF AUTHORITIES

Cases

<i>Barrett v. Secretary of Health & Human Services</i> , 840 F.2d 1259 (6th Cir.1987)	7
<i>Calderon v. Thompson</i> , 523 U.S. 538 (1998)	7
<i>Franklin v. Bradshaw</i> , No. 3:04-cv-187, 2009 WL 649581 (S.D.Ohio 2009) ...	2,3
<i>Franklin v. Bradshaw</i> , 695 F.3d 439 (6th Cir.2012)	3
<i>Franklin v. Jenkins</i> , 839 F.3d 465 (6th Cir.2016)	3, 6
<i>Franklin v. Jenkins</i> , 6th Cir. No. 15-3236, 2016 WL 10932998 (Dec. 19, 2016)	3,6
<i>Franklin v. Jenkins</i> , 137 S.Ct. 2188, 196 L.Ed2d 258 (2017)	3, 6
<i>Franklin v. Jenkins</i> , 138 S.Ct. 396, 199 L.Ed.2d 292 (2017), <i>rehearing denied</i> 138 S.Ct. 1046, 200 L.Ed.2d 306 (2018)	3, 6
<i>Franklin v. Ohio</i> , 539 U.S. 905 (2003)	2
<i>Franklin v. Robinson</i> , 569 U.S. 906 (2013), <i>petition for rehearing denied</i> 569 U.S. 1014 (2013)	3
<i>Franklin v. Robinson</i> , Case No. 3:04-cv-00187, 2014 WL 4211022 (S.D. Ohio Aug. 26, 2014)	3, 5
<i>Franklin v. Robinson</i> , Case No. 3:04-cv-187, 2015 WL 409796 (S.D. Ohio Jan. 29, 2015)	3, 5
<i>Franklin v. Robinson</i> , No. 3:12-cv-00312, 2015 WL 13215525	3
<i>Giasson Aerospace Science, Inc. v. RCO Engineering, Inc.</i> , 872 F.3d 336 (6th Cir.2017)	7
<i>In re Antonio Franklin</i> , 6th Cir. No. 16-3008 (Feb. 23, 2016)	3
<i>Mitchell v. Rees</i> , 651 F.3d 593 (6th Cir.2011)	7
<i>State v. Franklin</i> , 2d Dist. Montgomery No. 19041, 2002 WL 1000415	2

<i>State v. Franklin</i> , 97 Ohio St.3d 1, 776 N.E.2d 26 (2002)	2
<i>State v. Franklin</i> , 98 Ohio St.3d 1422, 782 N.E.2d 77 (2003)	2
<i>State v. Franklin</i> , 152 Ohio St.3d 1419, 93 N.E.3d 1001 (2018)	2, 4
<i>State v. Franklin</i> , 152 Ohio St.3d 1430, 94 N.E.3d 576 (2018)	1
<i>State v. Franklin</i> , 153 Ohio St.3d 1483, 108 N.E.3d 81 (2018)	4
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	1, 4

Rules

Fed.R.Civ.P. 60(b)	3, 5, 6
Fed.R.Civ.P. 60(d)	6, 7

Statutes

Ohio Rev. Code § 2953.23(A)	2
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REASONS FOR DENYING THE PETITION

Petitioner Antonio Franklin seeks a writ of certiorari because he is unhappy that the Ohio Supreme Court has set January 12, 2023, as his execution date. He blames his attorneys for not doing more to stop the execution date from being set and asks this Court to somehow intervene.

But beyond his broad assertion that his lawyers were “relässig and feckless” in their representation, Franklin offers no factual or legal basis for this Court to conclude that his counsels’ representation rises to the level of a legitimate ineffective-assistance-of-counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1984). The Ohio Supreme Court recognized that fact when, after it had set a date for Franklin’s execution, it denied Franklin’s pro se motion seeking “equity, equal opportunity, and equal footing.” *State v. Franklin*, 152 Ohio St.3d 1430, 94 N.E.3d 576 (2018). This case does not warrant further review.

STATEMENT OF THE CASE

A. INTRODUCTION: In August 1998, Antonio Franklin was convicted and sentenced to death in Montgomery County, Ohio, for the aggravated murders of his grandmother, his grandfather, and his uncle. Since then, he has pursued all available avenues of appeal and collateral review afforded under Ohio and federal law. Every court that has reviewed his case has upheld his conviction and death sentence. He has completed all federal and state litigation. For that reason, in an entry filed March 14, 2018, the Ohio Supreme Court set January 12, 2023, as

Franklin's execution date. *State v. Franklin*, 152 Ohio St.3d 1419, 93 N.E.3d 1001 (2018).

B. STATE COURT PROCEEDINGS: On the evening of April 17, 1997, Antonio Franklin murdered his grandparents and his uncle, set their house on fire, and drove from Dayton, Ohio, to Tennessee in his grandfather's car. When he was arrested in Nashville the next day, he was carrying his grandmother's jewelry and his grandfather's gun. A month later, the Montgomery County Grand Jury returned an indictment charging Franklin with several counts of capital murder and other offenses and specifications. He was tried and convicted by a jury, and the trial court adopted the jury's recommendation and sentenced Franklin to death.

The Ohio Supreme Court affirmed Franklin's conviction and sentence, and this Court declined further review. *State v. Franklin*, 97 Ohio St.3d 1, 776 N.E.2d 26 (2002); *Franklin v. Ohio*, 539 U.S. 905 (2003).

In 1999, Franklin filed a petition for post-conviction relief, which was denied by the trial court. The Second District Court of Appeals of Ohio affirmed. *State v. Franklin*, 2d Dist. Montgomery No. 19041, 2002 WL 1000415. The Ohio Supreme Court declined review. *State v. Franklin*, 98 Ohio St.3d 1422, 782 N.E.2d 77 (2003). The trial court has since denied two successive petitions for post-conviction relief under the authority of O.R.C. § 2953.23(A).

C. FEDERAL COURT PROCEEDINGS: In June 2004, Franklin filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Ohio. In 2009, the District Court denied the petition. *Franklin v.*

Bradshaw, No. 3:04-cv-187, 2009 WL 649581 (S.D.Ohio 2009). On September 19, 2012, the Sixth Circuit Court of Appeals affirmed. *Franklin v. Bradshaw*, 695 F.3d 439 (6th Cir.2012). This Court denied Franklin's petition for a writ of certiorari on April 1, 2013. *Franklin v. Robinson*, 569 U.S. 906 (2013), *petition for rehearing denied* 569 U.S. 1014 (2013).

On September 18, 2012, Franklin filed a successive petition for a writ of habeas corpus in the United States District Court for the Southern District of Ohio based upon a challenge to lethal injection. *Franklin v. Robinson*, No. 3:12-cv-00312, 2015 WL 13215525. The District Court transferred the case to the Sixth Circuit and, on February 23, 2016, the Sixth Circuit dismissed the case for want of prosecution. *In re Antonio Franklin*, 6th Cir. No. 16-3008 (Feb. 23, 2016).

In October 2013, Franklin filed both a counseled and a pro se motion for relief from judgment under Fed. R.Civ.P. 60(b). Both were denied. *Franklin v. Robinson*, Case No. 3:04-cv-00187, 2014 WL 4211022 (S.D. Ohio Aug. 26, 2014); *Franklin v. Robinson*, Case No. 3:04-cv-187, 2015 WL 409796 (S.D. Ohio Jan. 29, 2015). The Sixth Circuit upheld the district court's denial of his counseled Fed. R.Civ.P. 60(b) motion on October 7, 2016. *Franklin v. Jenkins*, 839 F.3d 465 (6th Cir.2016). It upheld the denial of his pro se motion on December 19, 2016. *Franklin v. Jenkins*, 6th Cir. No. 15-3236, 2016 WL 10932998 (Dec. 19, 2016). This Court denied Franklin's petitions for a writ of certiorari on May 30, 2017, and October 30, 2017, respectively. *Franklin v. Jenkins*, 137 S.Ct. 2188, 196 L.Ed2d 258 (2017); *Franklin v. Jenkins*, 138 S.Ct. 396, 199 L.Ed.2d 292 (2017), *rehearing denied* 138 S.Ct. 1046, 200 L.Ed.2d 306 (2018).

D. MOST RECENT PROCEEDINGS: Because Franklin exhausted all state and federal challenges to his conviction and sentence, the State of Ohio moved the Ohio Supreme Court to set a date for Franklin's execution. Franklin's counsel opposed the State's motion and, in a separately-filed pro se motion, Franklin too opposed the setting of an execution date. By entry filed March 14, 2018, the Ohio Supreme Court ordered that Franklin's sentence be carried into execution on January 12, 2023. *State v. Franklin*, 152 Ohio St.3d 1419, 93 N.E.3d 1001 (2018). Franklin subsequently filed a motion for reopening based upon a claim that he received ineffective assistance of counsel regarding his counsels' opposition to the State's motion to set an execution date. The Ohio Supreme Court denied the motion. *State v. Franklin*, 153 Ohio St.3d 1483, 108 N.E.3d 81 (2018).

Franklin's petition for writ of certiorari is now before this Court for consideration.

I. Franklin has not set forth a colorable claim of ineffective assistance of appellate counsel.

The two-pronged analysis found in *Strickland v. Washington*, 466 U.S. 668 (1984), is the appropriate standard to assess whether a criminal defendant has raised a genuine issue of ineffectiveness of appellate counsel. Thus, to prevail on his claim, Franklin must demonstrate that his appellate counsels' representation with respect to their written objection to the State's motion to set an execution date was constitutionally deficient and that in the absence of counsels' unprofessional

mistakes there is a reasonable probability that the Ohio Supreme Court would have reached a different result in deciding the State's motion to set an execution date.

In arguing that his appellate counsels' representation fell below an objective standard of reasonableness, Franklin makes two contentions: that his appellate counsel (1) failed to promptly notify him that the State had filed a motion requesting that an execution date be set; and (2) failed to advise the Ohio Supreme Court that he had, in fact, not exhausted all available legal challenges to his conviction. As to his first contention, whatever failures in communication that might exist between him and his counsel, Franklin has not demonstrated that it materially affected the quality of counsels' work or the effectiveness of their representation. As to his second contention, the additional challenges to his conviction that Franklin claims his counsel should have advised the Ohio Supreme Court he intended to pursue have already been raised and rejected in federal court and are no longer realistically available to him. His appellate counsel were not ineffective, therefore, for failing to make baseless arguments.

1. Fed.R.Civ.P. 60(b): Although not entirely clear, Franklin appears to contend that one of the remedies he still has available to him is a motion in federal court under Fed.R.Civ.P. 60(b). But in October 2013, Franklin filed both a counseled and a pro se motion for relief from judgment under Fed.R.Civ.P. 60(b), and both were denied. *Franklin v. Robinson*, Case No. 3:04-cv-00187, 2014 WL 4211022 (S.D. Ohio Aug. 26, 2014); *Franklin v. Robinson*, Case No. 3:04-cv-187, 2015 WL 409796 (S.D. Ohio Jan. 29, 2015). The Sixth Circuit upheld the district court's denial of both his counseled

and pro se Fed.R.Civ.P. 60(b) motions. *Franklin v. Jenkins*, 839 F.3d 465 (6th Cir.2016); *Franklin v. Jenkins*, 6th Cir. No. 15-3236, 2016 WL 10932998 (Dec. 19, 2016). And this Court denied Franklin's petitions for a writ of certiorari on May 30, 2017, and October 30, 2017, respectively. *Franklin v. Jenkins*, 137 S.Ct. 2188, 196 L.Ed2d 258 (2017); *Franklin v. Jenkins*, 138 S.Ct. 396, 199 L.Ed.2d 292 (2017), *rehearing denied* 138 S.Ct. 1046, 200 L.Ed.2d 306 (2018).

Here, Franklin has offered no reason to believe that a third 60(b) motion would suffer a better fate than two previous motions, nor has he offered any insight into what additional arguments he hopes to make in a third 60(b) motion that would reasonably justify a different result. As to his 60(b) argument, therefore, Franklin has failed to meet both the deficient-performance and prejudice prongs of *Strickland*.

2. Fed.R.Civ.P. 60(d): Franklin additionally contends that his appellate counsel were ineffective for failing to advise the Ohio Supreme Court that an additional remedy available to him in challenging his conviction is to file a motion under Fed.R.Civ.P. 60(d) because he's "actually innocent of these charges that he's been convicted of[.]" *Cert. Petition* at p. 7

As the Sixth Circuit has explained, the "indisputable elements" of an independent action under Fed.R.Civ.P. 60(d)(1) are:

- (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4)

the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.

Barrett v. Secretary of Health & Human Services, 840 F.2d 1259, 1263 (6th Cir.1987).¹ Such independent actions are available “only under unusual and exceptional circumstances to prevent a ‘grave miscarriage of justice.’ ” *Giasson Aerospace Science, Inc. v. RCO Engineering, Inc.*, 872 F.3d 336, 339 (6th Cir.2017). See also *Mitchell v. Rees*, 651 F.3d 593, 595 (6th Cir.2011), quoting *Barrett* at 1263 (“Relief pursuant to the independent action [under Fed.R.Civ.P. 60(d)] is available only in cases ‘of unusual and exceptional circumstances.’ ”). Moreover, when a motion under Rule 60(d) is filed in relation to a federal habeas corpus proceeding, “in order to establish that relief is required to prevent a grave miscarriage of justice, [a petitioner] must make a strong showing of actual innocence.” *Mitchell* at 596, citing *Calderon v. Thompson*, 523 U.S. 538, 557-58, (1998).

Here, other than alleging that he would have an available cause of action under Fed.R.Civ.P. 60(d), Franklin offers no explanation of the grounds upon which such a motion would be based or how the facts of his case qualify as “unusual or exceptional circumstances.” Simply professing that he is innocent is not enough—especially in light of the multitude of times his conviction and sentence has been upheld by every state and federal court that has reviewed it. On this issue as well, Franklin has failed to substantiate his claim of ineffective assistance of appellate counsel.

¹ Rule 60 was “restyled” in 2007, and former Part (b) was separated into Parts (b), (c), (d), and (e). Current Part (d) contains the exact language as was contained in former Part (b).

3. Other possible claims: The State of Ohio is not suggesting that Franklin is forever foreclosed from attempting to challenge his conviction and sentence. As history has shown, capital defendants frequently make valiant efforts to prevent their execution to the bitter end. No one can predict the future, and should a viable claim for relief arise between now and Franklin's scheduled execution date, Franklin is in no way foreclosed from pursuing such a claim. Nevertheless, given the current posture of Franklin's case, there was nothing that prevented the Ohio Supreme Court from setting a date for execution of Franklin's sentence and, more importantly to the current petition for writ of certiorari, nothing that demonstrates that Franklin's counsel have been deficient in their efforts to zealously defend him. Franklin is not entitled to relief.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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