No. 21-5860

In the Supreme Court of the United States

ANTONIO S. FRANKLIN,

Petitioner,

v.

TIM SHOOP, Warden

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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CAPITAL CASE
EXECUTION DATE: JANUARY 12, 2023

QUESTION PRESENTED

Did the Sixth Circuit properly hold that it lacked jurisdiction to hear Antonio Franklin's interlocutory appeal of the District Court's refusal to appoint new counsel?

LIST OF PARTIES

The Petitioner is Antonio S. Franklin, an inmate at the Chillicothe Correctional Institution.

The Respondent is Tim Shoop, the Warden of the Chillicothe Correctional Institution.

LIST OF DIRECTLY RELATED PROCEEDINGS

Franklin's list of directly related proceedings is incomplete. It should include the following proceedings:

1. *State v. Franklin*, No. 97-CR-1139 (Ct. of Common Pleas, Montgomery County, Ohio) (conviction entered November 24, 1998)

2. *State v. Franklin*, No. 19041, 2002-Ohio-2370 (Ohio Ct. App., 2d Dist.) (judgment entered May 17, 2002)

3. *State v. Franklin*, No. 1998-0261, 97 Ohio St. 3d 1 (Ohio) (judgment entered Oct. 16, 2002)

4. *State v. Franklin*, No. 2002-1104, 98 Ohio St. 3d 1422 (Ohio) (appeal not accepted Jan. 29, 2003)

5. *Franklin v. Ohio*, No. 02-9823, 539 U.S. 905 (U.S.) (*certiorari* denied June 2, 2003)

6. *State v. Franklin*, No. 20716, 2005-Ohio-1361 (Ohio Ct. App., 2d Dist.) (judgment entered March 25, 2005)

7. *State v. Franklin*, No. 2005-0764, 106 Ohio St.3d 1464 (Ohio) (appeal not accepted July 13, 2005)

8. *Franklin v. Ohio*, No. 05-7830, 546 U.S. 1179 (U.S.) (*certiorari* denied Feb. 21, 2006)

9. *Franklin v. Ohio*, No. 2005-2249, 108 Ohio St.3d 1475 (Ohio) (appeal not accepted Feb. 22, 2006)

10. *Franklin v. Ohio*, No. 05-11796, 549 U.S. 878 (U.S.) (*certiorari* denied Oct. 2, 2006)

11. *Franklin v. Bradshaw*, Case No. 3:04-cv-187, 2009 WL 649581 (S.D. Ohio) (judgment entered Mar. 9, 2009)

12. *Franklin v. Bradshaw*, No. 09-3389, 695 F.3d 439 (6th Cir.) (judgment entered Sept. 19, 2012)

13. *Franklin v. Robinson*, No. 12-7849, 569 U.S. 906 (2013) (*certiorari* denied Apr. 1, 2013)

14. *Franklin v. Lazaroff*, No. 15-7581, 577 U.S. 1241 (U.S.) (*certiorari* denied March 28, 2016)

15. *Franklin v. Jenkins*, No. 15-3180, 839 F.3d 465 (6th Cir.) (judgment entered Oct. 7, 2016)

16. *Franklin v. Jenkins*, No. 15-3236, 2016 WL 10932998 (6th Cir.) (judgment entered Dec. 19, 2016)

17. *Franklin v. Jenkins*, No. 16-8009, 137 S. Ct. 2188 (U.S.) (*certiorari* denied May 30, 2017)

18. *Franklin v. Jenkins*, No. 17-5808, 138 S. Ct. 396 (U.S.) (*certiorari* denied Oct. 30, 2017)

19. *Franklin v. Ohio*, No. 18-7772, 139 S. Ct. 1552 (U.S.) (*certiorari* denied Apr. 15, 2019)

20. *Franklin v. Shoop*, No. 18-3368, 2019 U.S. App. LEXIS 29489 (6th Cir.) (judgment entered Sept. 30, 2019)

21. *Franklin v. Shoop*, No. 20-3943, 2021 WL 4142720 (6th Cir.) (judgment entered Mar. 30, 2021)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Rules

INTRODUCTION

Antonio Franklin has unsuccessfully petitioned this Court for a writ of *certiorari* at least eight times. *Franklin v. Ohio*, 139 S. Ct. 1552 (2019); *Franklin v. Jenkins*, 138 S. Ct. 396 (2017); *Franklin v. Jenkins*, 137 S. Ct. 2188 (2017); *Franklin v. Lazaroff*, 577 U.S. 1241 (2016); *Franklin v. Robinson*, 569 U.S. 906 (2013); *Franklin v. Ohio*, 549 U.S. 878 (2006); *Franklin v. Ohio*, 546 U.S. 1179 (2006); *Franklin v. Ohio*, 539 U.S. 905 (2003). This brief responds to his ninth petition. In that petition, he raises a slew of claims, even arguing that the appellate process itself constitutes cruel and unusual punishment in violation of the Eighth Amendment. *See* Pet. at i, 6–7. None of these issues, however, is properly before the Court. That is because the Sixth Circuit, in its decision below, correctly held that it lacked jurisdiction to hear Franklin's interlocutory appeal of an order denying him permission to proceed *pro se*. Because the Sixth Circuit correctly resolved that threshold jurisdictional issue, this case does not allow the Court to address any of the issues that Franklin purports to raise; even if the Court granted *certiorari*, there would be nothing left to do but affirm. The Court should therefore deny the petition for a writ of *certiorari*.

STATEMENT

Franklin brutally murdered his grandparents and an uncle. A jury convicted him of aggravated murder. A state trial court sentenced him to death. The Supreme Court of Ohio ultimately affirmed. *State v. Franklin*, 97 Ohio St.3d 1, 3 (2002), *reh'g denied*, 97 Ohio St.3d 1486 (2002), *cert. denied sub nom Franklin v. Ohio*, 539 U.S. 905 (2003).

Franklin has spent much of his time in the years since trying to upset that conviction. He first sought federal habeas relief in 2004. The District Court appointed counsel for him—the same experienced and diligent counsel who represents him today. After Franklin failed to win relief, *see Franklin v. Bradshaw*, 695 F.3d 439, 445 (6th Cir. 2012), *cert. denied sub. nom. Franklin v. Robinson*, 569 U.S. 906 (2013), he began trying to reopen his case with Rule 60(b) motions—sometimes with the help of an attorney, sometimes proceeding *pro se*.

Apparently dissatisfied with the work of his appointed counsel, Franklin moved in May 2020 to remove counsel and proceed *pro se*. *See* Pet.App.C-1. Franklin claimed that his attorneys were refusing his requests to file an "independent action under Fed. R. Civ. P. Rule 60(d)" or an "actual innocence" petition. Pet.App.C-3. The District Court solicited counsel's opinion on Franklin's competency to represent himself. Pet.App.C-1. Counsel expressed skepticism, noting that Franklin has a history of mental illness. Pet.App.C-3. The District Court ultimately denied Franklin's request, concluding that he "is not mentally competent to conduct this litigation." Pet.App.C-1. Franklin—notwithstanding an order forbidding him from making any further *pro se* filings without first asking counsel for assistance—filed *pro se* a motion for reconsideration. The District Court denied it. Pet.App.B.

At that point, Franklin appealed the denial of his motion to discharge counsel. The Sixth Circuit dismissed the case. Without expressing any "opinion on the question whether a petitioner with appointed counsel may take an appeal *pro se*," the circuit determined that it lacked jurisdiction to hear Franklin's appeal. Pet.App.A-1.

The court explained that, while parties can appeal the "final decisions of [a] district court," 28 U.S.C. §1291, Franklin's latest appeal did not qualify: it was an interlocutory appeal of a non-case-dispositive order. Pet.App.A–3 (quotation and citation omitted). The Sixth Circuit acknowledged a narrow exception to the prohibition on appealing from non-final decisions. Specifically, the "collateral-order doctrine" permits appellate courts to "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 case itself to require that appellate consideration be deferred until the whole case is adjudicated.'" *Id.* (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). But while this exception exists, "Franklin" did "not meet it." *Id.* "Fundamentally," the Sixth Circuit concluded, his case fell "outside the strictures of one of the doctrine's overarching principles," which is "that 'the justification for immediate appeal must … be sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes.'" Pet.App.A-4 (quoting *Swanson v. DeSantis*, 606 F.3d 829, 832–33 (6th Cir. 2010)) (alteration accepted). Franklin's desire to represent himself *pro se* (after already having "affirmatively availed himself of his right to appointed counsel") presented no issue in need of urgent resolution. *Id.*

REASONS FOR DENYING THE WRIT

The Sixth Circuit correctly held that it lacked jurisdiction to resolve Franklin's interlocutory appeal of an order denying his request to proceed *pro se*. Because the circuit court correctly dismissed the appeal for lack of jurisdiction, this case provides

the Court no opportunity for reaching the many constitutional issues Franklin hopes to litigate.

1. Federal law permits appellate courts to hear appeals of "*final decisions* of the district courts." 28 U.S.C. §1291 (emphasis added). This finality requirement means that "a party may not take an appeal under this section until there has been a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981) (quotation and citation omitted).

As is often true of general rules, this one comes with an exception. Under the "collateral-order doctrine," appellate courts may entertain a "small category" of interlocutory appeals *before* final judgment. *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 41–42 (1995). "That small category includes only decisions that": (1) "are conclusive"; (2) "resolve important questions separate from the merits"; and (3) "are effectively unreviewable on appeal from the final judgment in the underlying action." *Id.*

The Sixth Circuit correctly held that it lacked jurisdiction to hear Franklin's petition. The order from which he appeals—an order denying him the right to proceed *pro se* in this habeas case—is indisputably non-final. And the collateral-order doctrine, as the Sixth Circuit correctly recognized, does not permit an interlocutory appeal. Most importantly, the District Court's decision denying the motion to proceed *pro se* is not "effectively unreviewable on appeal from the final judgment." *Id.* If indeed the District Court erred in denying Franklin his claimed right to represent himself, and if the District Court rejects an attempt by Franklin to reopen the case

with a Rule 60 motion, he can raise the supposed error as a ground for reversal. For this reason alone, the collateral-order doctrine does not apply. *See, e.g.*, *id.*; *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 498 (1989); *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799–800 (1989); *Flanagan v. United States*, 465 U.S. 259, 268 (1984). And indeed, circuits across the country have refused to entertain appeals in analogous circumstances. *See e.g.*, *Pena-Calleja v. Ring*, 720 F.3d 988, 989 (8th Cir. 2013) (*per curiam*) (collecting cases denying immediate appeals of orders refusing appointment of counsel).

2. Because the Sixth Circuit correctly held that it lacked jurisdiction to hear Franklin's appeal, this case gives the Court no opportunity to reach the many other issues Franklin raises. In any event, Franklin's arguments are frivolous. He asserts, for example, that this Court's "[s]upervisory [p]ower" is needed because of unspecified departures from the "accepted and usual course of judicial proceedings." Pet. 6. He suggests that the appellate process itself is unconstitutionally cruel and unusual. *See* Pet.6, 7, 34. He complains that he "has to wait until his case has been completely decided before he can appeal." Pet. 33. He maintains that he is "engaged in a fight not just against the prosecution, but also against his own counsel, his magistrate judge, and the Sixth Circuit." Pet. 6, *see also* Pet. 2–3. And he asserts that his case presents unspecified questions of "exceptional importance" regarding "the appellate process of 28 U.S.C. §2254." Pet.6. None of these arguments would justify this Court's time even if this case were here following a final judgment.

CONCLUSION

The Court should deny Franklin's petition for a writ of *certiorari*.

Respectfully submitted,

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