United States Court of Appeals
Fifth Circuit
F I L E D
March 13, 2006
Charles R. Fulbruge III
Clerk

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 05-70016

KENNETH EUGENE FOSTER,

Petitioner-Appellee-Cross-Appellant,

versus

DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellant-Cross-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(SA-02-CA-301-RF)

Before JONES, Chief Judge, and BARKSDALE and PRADO, Circuit Judges.

PER CURIAM:[*]

Kenneth Eugene Foster was convicted in Texas state court of capital murder during the course of a robbery and sentenced to death. The district court granted conditional relief for Foster's federal–habeas claims that his sentence is unconstitutional under the Eighth Amendment and ***Enmund v. Florida***, 458 U.S. 782, 797-800 (1982), because the jury did not make the requisite factual determination. For Foster's remaining 11 claims, the court denied

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[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

both relief and a certificate of appealability (COA). *See* 28 U.S.C. §§ 2253, 2254.

The State appeals the conditional habeas-grant; Foster seeks a COA in order to appeal on two jury-charge claims: (1) the jury should not have been instructed on conspiracy because he was *not* indicted for that crime; and (2) the trial court erred in refusing a lesser-included–offense instruction.

A COA is **DENIED**. A subsequent opinion will address the State's appeal from conditional habeas relief's being granted.

I.

On the evening of 14 August 1996, Foster and three others – Mauriceo Brown, DeWayne Dillard, and Julius Steen – embarked on armed robberies around San Antonio, Texas, beginning with Brown's announcing he had a gun and asking whether the others wanted to rob people: "I have the strap, do you all want to jack?". During the guilt/innocence phase of Foster's trial, Steen testified that he rode in the front seat, looking for potential victims, while Foster drove. Steen and Brown *both testified* to robbing two different groups at gunpoint; the four men divided the stolen property equally.

The criminal conduct continued into the early hours of the next day (15 August), when Foster began following a vehicle driven by Mary Patrick. At trial, Patrick testified as follows: she and Michael LaHood, Jr. were returning in separate cars to his house;

she arrived and noticed Foster's vehicle turn around at the end of the street and stop in front of Michael LaHood's house; Patrick approached Foster's car to ascertain who was following her; she briefly spoke to the men in the vehicle, then walked away towards Michael LaHood, who had reached the house and exited his vehicle; she saw a man with a scarf across his face and a gun in his hand exit Foster's vehicle and approach her and Michael LaHood; Michael LaHood told her to go inside the house, and she ran towards the door, but tripped and fell; she looked back and saw the gunman pointing a gun at Michael LaHood's face, demanding his keys, money, and wallet; Michael LaHood responded that Patrick had the keys; and Patrick heard a loud bang. Michael LaHood died from a gunshot wound to the head. The barrel of the gun was no more than six inches from Michael LaHood's head when he was shot; it was likely closer than that. Brown had similarly stuck his gun in the faces of some of the nights' earlier robbery victims.

Later that day, all four men were arrested; *each* gave a written statement to police *identifying Brown as the shooter*. In admitting being the shooter, Brown denied intent to kill. At trial, he testified that he approached Michael LaHood to obtain Patrick's telephone number and only drew his weapon when he saw what appeared to be a gun on Michael LaHood and heard what sounded to him like the click of an automatic weapon.

In May 1997, Foster and Brown were tried jointly for capital murder committed in the course of a robbery. The jury found each guilty of that charge and answered the special issues at the penalty phase to impose a death sentence for each.

On direct appeal, Foster contended, *inter alia*: application of Texas Penal Code § 7.02(b) (conspiracy party liability) violated the Sixth and Fourteenth Amendments to the Constitution; and the trial court erred in refusing a jury instruction on the lesser-included offense of aggravated robbery. The Court of Criminal Appeals affirmed Foster's conviction and sentence, holding, *inter alia*: a law–of–the–parties instruction under § 7.02(b) is appropriate when no such charge is in the indictment because the statute describes *attempt* to carry out, *not* the offense of, conspiracy; and a lesser-included–offense instruction was *not* warranted because nothing in the record would permit a rational jury to find Foster guilty only of aggravated robbery and not murder in the course of a robbery. *See* ***Foster v. State***, No. 72,853 (Tex. Crim. App. 30 June 1999) (unpublished) (***TCCA Opn.***). Three judges dissented, and would have held, *inter alia*, that Foster was entitled to a lesser–included–offense instruction. ***Id***. at 33 (Mansfield, J., dissenting). The Supreme Court of the United States denied a writ of *certiorari*. ***Foster v. Texas***, 529 U.S. 1057 (2000).

In April 1999, prior to the conclusion of his direct appeal, Foster filed for state–habeas relief. Foster did *not* present his § 7.02(b) or lesser-included–offense claims because they had been raised on direct appeal. *See* ***Ex parte Torres***, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997) (en banc) ("Generally, a claim which was previously raised and rejected on direct appeal is not cognizable on habeas corpus.").

After holding evidentiary hearings, the state habeas court issued findings of fact and conclusions of law, recommending denial of relief; the Court of Criminal Appeals denied relief in an unpublished order. ***Ex Parte Foster***, No. 50,823-01 (Tex. Crim. App. 6 Mar. 2002). The Supreme Court again denied a writ of *certiorari*. ***Foster v. Texas***, 537 U.S. 901 (2002).

Foster presented 14 claims in his federal habeas petition. On 3 March 2005, the district court ruled on the State's summary judgment motion, granting conditional relief as to sentencing for three claims and denying relief, as well as a COA, for the remaining 11. *See* ***Foster v. Dretke***, No. SA-02-CA-301-RF, 2005 U.S. Dist. LEXIS 13862 (S.D. Tex. 3 Mar. 2005) (***USDC Opn.***).

On 4 April 2005, Foster filed a notice of appeal and, even though the district court had denied *sua sponte* a COA on all claims for which it had denied relief, applied in district court for a COA on the § 702(b) conspiracy–liability issue. The State appealed the conditional habeas-grant on 7 April. On 11 April, the district

court denied a COA on the § 702(b) claim raised in Foster's COA application and also denied a COA on "[t]he implicit request" for a COA on the lesser–included–offense issue contained in Foster's notice of appeal. On 18 April, Foster requested a COA from our court on those two claims.

II.

Foster's 28 U.S.C. § 2254 habeas petition is subject to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (AEDPA). *See*, *e.g.*, ***Penry v. Johnson***, 532 U.S. 782, 792 (2001). Under AEDPA, Foster may not appeal the denial of habeas relief on an issue unless he first obtains a COA from either the district, or this, court. 28 U.S.C. § 2253(c); FED. R. APP. P. 22(b)(1); ***Slack v. McDaniel***, 529 U.S. 473, 478 (2000). Under Federal Rule of Appellate Procedure 22(b)(1), the district court must first decide whether to grant a COA before one can be requested here. As noted, the district court twice denied a COA for the two claims for which Foster requests a COA here.

Obtaining a COA requires "a substantial showing of the denial of a constitutional right". 28 U.S.C. § 2253(c)(2); *e.g.*, ***Miller-El v. Cockrell***, 537 U.S. 322, 336 (2003); ***Slack***, 529 U.S. at 483. For that requisite showing, Foster must demonstrate "reasonable jurists could debate whether (or, for that matter, agree that) the [federal habeas] petition should have been resolved

in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further'". ***Miller-El***, 537 U.S. at 336 (quoting ***Slack***, 529 U.S. at 484). In determining whether to grant a COA, this court is, *inter alia*, limited "to a threshold inquiry into the underlying merit of [Foster's] claims". ***Id***. at 327. "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims." ***Id***. at 336. Instead, the court must make "an overview of the claims in the habeas petition and a general assessment of their merits". ***Id***. Because Foster was convicted of capital murder and received the death penalty, "any doubts as to whether a COA should issue must be resolved in [his] favor". ***Hernandez v. Johnson***, 213 F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 966 (2000).

For purposes of the mandated threshold inquiry, we recognize that, in ruling on the merits, the district court was required by AEDPA to defer, with limited exceptions, to the state court's resolution of Foster's claims. The exceptions provided by AEDPA turn on the character of the state court's ruling.

First, such deference is mandated both for questions of law and for mixed questions of law and fact, unless the state court's "decision ... was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States". 28 U.S.C. § 2254(d)(1); *see* ***Hill v. Johnson***, 210 F.3d 481, 488 (5th Cir. 2000), *cert.*

denied, 532 U.S. 1039 (2001). A state court's decision is "contrary to clearly established federal law" under § 2254(d)(1) "if it reaches a legal conclusion in direct conflict with a prior decision of the Supreme Court or if it reaches a different conclusion than the Supreme Court based on materially indistinguishable facts". ***Miniel v. Cockrell***, 339 F.3d 331, 337 (5th Cir. 2003), *cert. denied*, 540 U.S. 1179 (2004).

Second, such deference is required for the state court's "decision [unless it] was based on an unreasonable determination of the facts in [the] light of the evidence presented in the State court proceeding". 28 U.S.C. § 2254(d)(2). On the merits, pursuant to AEDPA, the state court's factual findings are presumed correct; in district court, Foster had "the burden of rebutting [that] presumption ... by clear and convincing evidence". 28 U.S.C. § 2254(e)(1).

This threshold inquiry is considered against the elements for Foster's claims. Again, it is but one of the procedures mandated by AEDPA for deciding whether a COA should be granted.

A.

Having raised the claim at trial, on direct appeal, and in his federal habeas petition, Foster seeks a COA for his claim that the trial court's instructing the jury under § 7.02(b) (conspiracy party liability) at the guilt/innocence phase violated his right to adequate information of the charges against him because the

indictment did *not* charge conspiracy. Instead, it charged Foster with "intentionally and knowingly caus[ing] the death of an individual, namely: MICHAEL LaHOOD, Jr. ... by SHOOTING the said MICHAEL LaHOOD JR. WITH A DEADLY WEAPON, NAMELY: A FIREARM, and ... intentionally caus[ing] the death of ... MICHAEL LaHOOD ... while in the course of committing and attempting to commit the offense of ROBBERY upon ... MICHAEL LaHOOD". The jury charge, *inter alia*, defined conspiracy under Texas law and described, under Texas' law of the parties, the two theories of liability under which Foster, as the driver, could be guilty of capital murder for Brown's shooting Michael LaHood: §§ 7.02(a) and 7.02(b), described *infra*.

Over Foster's objection, the jury was instructed to find Foster guilty of capital murder if it found *Brown* intentionally killed Michael LaHood in the course of robbing, or attempting to rob, him *and also found*:

> [1] from the evidence beyond a reasonable doubt that ... Foster, acting with the intent to promote or assist in the commission of the offense of capital murder, did encourage, aid, or attempt to aid, ... Brown in the commission of the offense, by driving the car

(the § 7.02(a) instruction), or

> [2] though [Foster] may have had no intent to commit the offense [of capital murder] ... [he nevertheless] entered into a conspiracy, as herein defined, with ... Brown and/or [the other passengers in the car] to commit the offense [of] robbery, and ... in an attempt to carry out this conspiracy, if any, ... Brown did ... intentionally cause the death of Michael LaHood ... while in the course of

> committing or attempt[ing] to commit robbery, if such offense was committed in furtherance of the unlawful purpose to commit robbery, and *was an offense that should have been anticipated as a result of the carrying out of the conspiracy if any*

(the § 7.02(b) instruction) (emphasis added). Concerning this instruction, Foster objected at trial that, *inter alia*, "conspiracy is alleged as a separate offense in the penal code".

Foster does *not* contend the indictment failed to provide notice that he would be tried under the § 7.02(a) instruction. Instead, as he does here, Foster contended, both on direct appeal and for federal habeas relief, that the § 7.02(b) instruction allowed him to be tried for conspiracy, a crime *not* charged in the indictment, in violation of his Sixth, through the Fourteenth, Amendment right to fair notice of the charges against him. *See, e.g.*, ***Jackson v. Virginia***, 443 U.S. 307, 314 (1979) (holding due process violated when conviction based on charge not made or tried).

On direct appeal, the Court of Criminal Appeals declined "to accept [Foster's] invitation" to overturn its decision in ***Montoya v. State***, 810 S.W.2d 160, 165 (Tex. Crim. App. 1989), *cert. denied*, 502 U.S. 961 (1991). The court ruled that its decision in ***Montoya*** held, in direct contradiction to Foster's contentions, that a § 7.02(b) instruction did not instruct as to a separate offense of conspiracy, but defined "how an actor can be held criminally

responsible for an offense committed by another when the actor does not have the specific intent to carry out that offense". ***TCCA Opn.*** at 23 (footnotes omitted). The Court of Criminal Appeals held Foster had ample notice he was being charged under a party-liability theory *because he knew Brown admitted shooting Michael LaHood*.

On federal habeas review, the district court held Foster had *not* shown the state–court decision "was ... contrary to, or involved an unreasonable application of, clearly established Federal law". ***USDC Opn.*** at *57 (quoting 28 U.S.C. § 2254(d)(1)). In the light of several of our own decisions upholding a Texas capital-murder conviction using a § 7.02(b) law–of–the–parties instruction, *see, e.g.,* ***Montoya v. Scott***, 65 F.3d 405, 415 (5th Cir. 1995), *cert. denied*, 517 U.S. 1133 (1996); ***Jacobs v. Scott***, 31 F.3d 1319, 1329 (5th Cir. 1994), *cert. denied*, 513 U.S. 1067 (1995), the district court held there was no federal legal principle prohibiting a conviction for capital murder under a party-liability theory. Further, the district court concluded that, even if such a principle existed, its application to Foster's case would be precluded under the non-retroactivity principle announced in ***Teague v. Lane***, 489 U.S. 288, 310 (1989).

In his COA application here, Foster reiterates the contentions made to the state and district courts: the § 7.02(b) instruction is "wholly dependent upon the actor's guilt under Section 15.02 of

the Penal Code" (defining the inchoate crime of conspiracy) and "introduce[s] a new and different crime [(conspiracy)] from that ... alleged in the indictment" (murder); and § 7.02(b) may only be used to hold one charged with conspiracy liable for other felonies committed by co-conspirators in the course of the planned crime. In this regard, Foster contends ***Jacobs***, 31 F.3d at 1329, wrongly held it was not error to first indict a defendant as a principal and then convict using the § 7.02(b) instruction.

The State responds by pointing to consistent Texas and federal precedent holding that, as a matter of state law, a jury can convict a defendant for capital murder using the § 7.02(b) instruction, even though the defendant was not indicted for conspiracy. *See* ***Montoya***, 65 F.3d at 415; ***Jacobs***, 31 F.3d at 1329; ***Montoya***, 810 S.W.2d at 165; ***Flores v. State***, 681 S.W.2d 94, 97-98 (Tex. App. 1984), *aff'd*, 690 S.W.2d 281 (Tex. Crim. App. 1985) (en banc); ***English v. State***, 592 S.W.2d 949, 955 (Tex. Crim. App.), *cert. denied*, 449 U.S. 891 (1980).

The State further contends the jury was never permitted to *convict* Foster for conspiracy; the § 7.02(b) instruction "merely stated the extent to which co-defendants may be held jointly responsible under Texas law". Foster knew Brown admitted to being the shooter; therefore, when Foster was indicted as a principal, he was necessarily on notice that the State would attempt to convict

him on a theory of party liability. The State also asserts ***Teague*** prohibits Foster's § 7.02(b) claim.

For COA purposes, as on the merits, we are bound by our precedent. Pursuant to the AEDPA standard for whether to grant a COA, and in the light of controlling state and federal precedent, reasonable jurists would *not* debate that, under AEDPA, the district court concluded correctly that: (1) the state court's rejection of Foster's § 7.02(b) claim was *not* contrary to, or an unreasonable application of, federal law, ***Slack***, 529 U.S. at 478; and (2) this claim is not "adequate to deserve encouragement to proceed further", ***id***. at 484 (internal quotation omitted). (Because we deny a COA for the foregoing reasons, we need *not* address the ***Teague*** issue.)

B.

For his other COA request, having raised the claim at trial, on direct appeal, and in his federal habeas petition, Foster maintains he was entitled to a jury instruction on the lesser-included offense of aggravated robbery.

The trial court refused that instruction because, *inter alia*, there was no evidence Michael LaHood's death was the result of an unintentional killing. On direct appeal, the Court of Criminal Appeals held *no* evidence could support a finding that, if Foster was guilty, he was guilty *only* of aggravated robbery. The court applied Texas' two-part test for determining whether a lesser-

included–offense instruction is warranted: "(1) [whether] the lesser-included offense is included within the proof necessary to establish the offense charged; and (2) [whether] some evidence exists in the record that would permit a jury to *rationally* find that[,] if the defendant is guilty, he is guilty *only* of the lesser offense". ***TCCA Opn.*** at 25 (emphasis added).

The court denied Foster relief on this direct–appeal claim because: (1) in statements to police (that were read to the jury), Foster denied participating in the earlier armed robberies; (2) Steen, one of the four persons in the vehicle Foster drove, testified he thought Brown was going to rob Michael LaHood when he saw Brown get out of the vehicle; (3) Patrick (who was meeting the victim at his house) and Steen both testified they heard Brown demand Michael LaHood's keys and wallet before shooting him; (4) Foster knew Brown had a gun and had brandished it in the robberies a few hours earlier; (5) Steen testified he thought there was a real possibility someone might die that night; (6) Foster drove the car, had a vote in the criminal behavior, and shared in the proceeds from the robberies; (7) instead of driving away after the shooting, Foster waited in the car for Brown; and (8) after Michael LaHood was murdered, Foster encouraged Brown to get rid of the gun. In addition, the court noted that the night began with Brown announcing he had a gun and asking whether the others wanted to commit robberies.

The court also stated: the nature of armed robbery suggests someone must give up his money or his life; such conduct necessarily raises the chance someone will be killed; the earlier robberies not having resulted in death in no way assisted Foster; and, because the final armed robbery resulted in Michael LaHood's death, no reasonable jury could find Foster guilty only of aggravated robbery. As noted *supra*, three judges dissented.

In rejecting Foster's federal–habeas claim, the district court recited the following well-settled rule: "[A] capital murder defendant is *constitutionally* entitled to an instruction on a lesser-included offense if the evidence would permit a jury *rationally* to find the defendant guilty of the lesser offense and *acquit* him of the greater". ***USDC Opn.*** at *58 (emphasis added). The district court ruled that, under AEDPA, the Court of Criminal Appeals neither unreasonably applied the above constitutional principle nor unreasonably determined the facts in the light of the evidence.

The district court independently reviewed the record before finding substantial, unchallenged evidence demonstrating Foster pursued Patrick and Michael LaHood to allow his co–conspirators to commit another robbery. The court relied on the fact that, regardless of whether Foster intended that Brown only rob Michael LaHood, he died from a gunshot wound inflicted during an attempted robbery by Foster's co–conspirator. The court held: because

"Foster's guilt relie[d] exclusively on his role as a co-conspirator, it is impossible ... for any rational jury to separate LaHood's fatal shooting from Brown's attempted armed robbery of LaHood". ***Id***. at *60-61.

In his COA application here, Foster claims "[t]he facts of this case fairly raise the lesser-included" aggravated–robbery instruction because his liability was based "solely on his role in the robbery"; thus, because a jury could have made "the rational inference that [Foster's] criminal liability was limited to robbery, *either as a party or a conspirator*" (emphasis added), the trial court should have given the aggravated–robbery instruction; because that instruction was refused, the jury was faced with the all-or–nothing choice between conviction of capital murder and acquittal, as forbidden by ***Hopper v. Evans***, 456 U.S. 605, 609 (1982), and ***Beck v. Alabama***, 447 U.S. 625 (1980). In addition, Foster claims not allowing the jury to consider whether he participated in the robberies, but did *not* participate in Brown's surprising murder of Michael LaHood, violated the ***Beck*** rule – that, in a capital case, where evidence would support a verdict on a lesser–included noncapital offense, the jury must be instructed on that lesser–included offense, ***Beck***, 447 U.S. at 627-29. Foster contends: essentially, the Court of Criminal Appeals and the district court held *any* participant in any way in a robbery that

results in a murder is guilty of capital murder; and this rationale improperly reduces a jury's ability to limit liability to robbery.

The State responds: (1) the jury was not presented with the ***Beck*** all-or-nothing dilemma because, although, during the guilt/innocence phase, the jury chose between conviction and acquittal, unlike the statutory scheme in ***Beck*** (mandating the death penalty if guilty), during the sentencing phase, it chose between life imprisonment and death; and (2) the evidence would *not* have permitted a rational jury to convict Foster of aggravated robbery but *not* felony murder. The State notes also that Texas law requires trial courts to give an instruction regarding a lesser-included offense if: "(1) the lesser-included offense is included within the proof necessary to establish the offense charged, and (2) some evidence necessarily exists on the record that would permit a jury to rationally find that the defendant is guilty *only* of the lesser offense". (Emphasis in original.)

Further, the State claims: to convict Foster, the jury had to find he "was 'criminally responsible' for Brown's actions, or that the crime was committed while attempting to carry out a conspiracy to commit a felony"; and Foster's claim that the state and district court rulings attach capital–murder liability to every participant in every robbery is incorrect because Foster never admitted to, or claimed, he took part in the robberies. Thus, according to the State, ***Beck*** is distinguishable, because there, the defendant

admitted participating in a robbery but denied killing, or intending to kill, the murder victim.

In addition, the State contends: had the jury credited Brown's testimony or Foster's statements given to police shortly after his arrest and read to the jury, it would have acquitted Foster, not convicted him of aggravated robbery. Thus, the State asserts, Foster was *not* entitled to a lesser-included–offense instruction because he: (1) willingly participated in the robberies; (2) agreed on the selection of the victims; (3) collected proceeds from the robberies; and (4) was with someone using a gun to intimidate and protect. Finally, the State claims that a lesser-included aggravated–robbery instruction could have harmed Foster by increasing the chance the jury would have convicted him of something *rather* than acquitting him.

As the district court opinion stated, a capital defendant is constitutionally entitled to a jury instruction on a lesser-included offense if the evidence would allow a *rational* jury to convict on the lesser charge *and* acquit on the greater. ***Hopper***, 456 U.S. at 611-12 (holding due process requires lesser-included instruction only when evidence supports the instruction); ***Beck***, 447 U.S. at 637-38 (holding state statute unconstitutional when it prohibited lesser-included instructions in capital cases); ***Cordova v. Lynaugh***, 838 F.2d 764, 767 (5th Cir.), *cert. denied*, 486 U.S. 1061 (1988).

Beck's fundamental concern is that, given the choice only between acquittal and conviction for capital murder, a jury may vote to convict simply to keep the defendant off the street, even if not convinced beyond a reasonable doubt that the defendant committed capital murder. ***Schad v. Arizona***, 501 U.S. 624 (1991). A lesser–included–offense instruction, however, is not constitutionally required in every case; it is only required when warranted by the evidence.

As the district court stated: "Foster's guilt relies exclusively on his role as a co-conspirator". ***USDC Opn.*** at *60-61. Therefore, it is impossible to separate Foster's guilt from Brown's conduct, which included killing Michael LaHood while attempting to commit a robbery. In denying a pre–AEDPA certificate of probable cause required for an appeal by a state prisoner (essentially the same standard as for an AEDPA COA), our court held a capital–murder defendant is *not* entitled to an aggravated–robbery instruction when no evidence suggests the defendant "participated in a robbery or attempted robbery but withdrew or somehow disassociated himself from the murder[]". ***Ransom v. Johnson***, 126 F.3d 716, 726 (5th Cir.), *cert. denied*, 522 U.S. 944 (1997). Likewise, there is *no* evidence Foster participated in the robberies but withdrew or disassociated himself from the murder of Michael LaHood.

In sum, pursuant to the AEDPA standard for whether to grant a COA, reasonable jurists would *not* find the district court's holding

on this issue debatable or wrong. *See* ***Slack***, 529 U.S. at 478. The same is true for its finding the issue did not deserve encouragement to proceed further. ***Id***. at 484.

III.

For the foregoing reasons, a COA is **DENIED**. A subsequent opinion will address the State's appeal from conditional habeas relief's being granted.

COA DENIED