

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

No. 12-1244

---

ROBERT K. GARVEY,  
Appellant

v.

WARDEN PERRY PHELPS;  
ATTORNEY GENERAL OF THE  
STATE OF DELAWARE

---

SUR PETITION FOR PANEL REHEARING

---

Present: SCIRICA SMITH, and CHAGARES, Circuit Judges

Upon consideration of the petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court, it is hereby

ORDERED AND ADJUDGED that the petition for panel rehearing is GRANTED. The Order dated June 13, 2012, is VACATED.

It is further ORDERED that the application for a certificate of appealability is denied because appellant has not shown that jurists of reason would debate the District Court's denial of his claims. See 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In particular, jurists of reason would not debate the District Court's conclusions that appellant's claims are procedurally defaulted and that he showed neither the cause and prejudice nor the miscarriage of justice necessary to excuse the default. In addition to the reasons given by the

District Court, we note that appellant's legal arguments on the basis of *Chao v. Delaware*, 604 A.2d 1351 (Del. 1992), and *Williams v. Delaware*, 818 A.2d 906 (Del. 2003), were available to him before his trial and that, in any event, neither decision holds that a conviction of first-degree felony murder under former 11 Del. Code § 636(a)(6) (2003) could not be premised on a criminally negligent killing, as the statute expressly provided. We further note that the prosecution proved, and that appellant has not disputed, that appellant intentionally fired the shot that led to the death "in furtherance of" the felony of robbery. Thus, jurists of reason would not debate whether appellant is innocent of first-degree felony murder under former 11 Del. Code § 636(a)(6), as that statute was interpreted in *Williams*. The United States Supreme Court's recent decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), does not apply to appellant's underlying claims, which are not claims of ineffective assistance at trial and which he could have asserted on direct appeal.

BY THE COURT:

/s/D. Brooks Smith  
Circuit Judge

DATED: July 16, 2012  
CLW/cc: Mr. Robert K. Garvey  
Gregory E. Smith, Esq.



*Marcia M. Waldron*

Marcia M. Waldron, Clerk