DLD-098 January 11, 2018

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **17-3259**

CHARLES S. RENCHESKI, Appellant

VS.

SUPERINTENDENT COAL TOWNSHIP SCI, ET AL.

(W.D. Pa. Civ. No. 10-cv-00217)

Present: JORDAN, SHWARTZ and KRAUSE, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,
Clerk

ORDER

Appellant's request for a certificate of appealability is denied. See 28 U.S.C. § 2253(c). Jurists of reason would not debate that Appellant's Rule 60(b) motion was properly denied by the District Court. See generally Gonzalez v. Crosby, 545 U.S. 524 (2005); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Cox v. Horn, 757 F.3d 113, 125 (3d Cir. 2014).

To the extent that a certificate of appealability is not required to appeal the denial of Appellant's motion for recusal, we summarily affirm because Appellant has not shown that the District Court abused its discretion. See 3d Cir. LAR 27.4; 3d Cir. I.O.P. 10.6.

By the Court,

s/ Kent A. Jordan
Circuit Judge

Dated: January 23, 2018
ARR/cc: CSR

Certified as a true copy and issued in lieu of a formal mandate on 04/03/2018

Teste: Patricia A. Dodszuweit
Clerk, U.S. Court of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CHARLES S. RENCHENSKI, Petitioner,	:	
v.	:	Case No. 3:10-cv-217-KRG-KAP
DAVID A. VARANO, SUPERINTENDENT, S.C.I. COAL TOWNSHIP, Respondent	:	

Memorandum Order

Petitioner's Motion to Vacate at ECF no. 57 was referred to Magistrate Judge Keith A. Pesto in accordance with 28 U.S.C.§ 636(b)(3) and Local Rule 72 for Magistrate Judges.

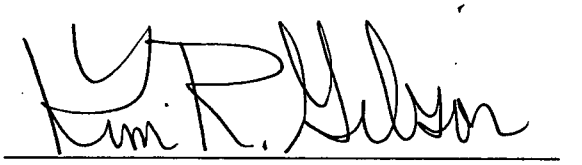
The Magistrate Judge filed a Report and Recommendation on June 7, 2017, ECF no. 62, recommending that the motion be denied. The parties were notified, pursuant to 28 U.S.C.§ 636(b)(1), that they had fourteen days to file written objections to the Report and Recommendation. The petitioner filed objections at ECF no. 63 that I have reviewed *de novo* and reject.

Upon *de novo* review of the record of this matter, the Report and Recommendation, and the objections thereto, the following order is entered:

AND NOW, this 29th day of September, 2017, it is

ORDERED that the petitioner's Motion to Vacate at ECF no. 57 is denied. The Report and Recommendation is adopted as the opinion of the Court.

BY THE COURT:



KIM R. GIBSON,
UNITED STATES DISTRICT JUDGE

Notice by ECF to counsel of record and by U.S. Mail to:

Charles S. Renchenski AP-8124
S.C.I. Coal Township
1 Kelley Drive
Coal Township, PA 17866-1021

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CHARLES S. RENCHENSKI, Petitioner,	:	
v.	:	Case No. 3:10-cv-217-KRG-KAP
DAVID A. VARANO, SUPERINTENDENT, S.C.I. COAL TOWNSHIP, Respondent	:	

Order and Report and Recommendation

Petitioner filed a petition for a writ of habeas corpus that was stayed pending exhaustion of state court remedies, re-opened, and ultimately denied. That judgment was entered in April 2015. ECF no. 50. The Court of Appeals denied a certificate of appealability in December 2105. Renchenski v. Superintendent, No. 15-2252 (3d Cir. December 4, 2015), ECF no. 55. The Supreme Court denied a writ of certiorari on October 17, 2016. Renchenski v. Mooney, 137 S. Ct. 338 (2016). Petitioner has at ECF no. 56 filed a motion to proceed *in forma pauperis*, and at ECF no. 57 a 150-page motion under Fed.R.Civ.P. 60(b)(6) to vacate the judgment (Motion). Within that pleading is a motion seeking my recusal and that of Judge Gibson.

Order

The motion to proceed *in forma pauperis* is denied as unnecessary and incomplete. It is not necessary to pay a fee to file or pursue the motion to vacate and, if it were, petitioner's

in forma pauperis motion does not comply with the Prison Litigation Reform Act.

The motion for my recusal contained in the Motion is denied. Between pages 7 and 36 of the Motion, petitioner describes many factual and legal errors he believes are in my Report and Recommendation, and also claims that I erred in denying appointment of counsel, in denying an evidentiary hearing, and in recommending that no certificate of appealability be issued. The relevant recusal statute, 28 U.S.C.§ 455(a) and (b)(1), asks whether a fully informed, rational observer would have reason to question the judge's impartiality based on something other than the judge's ruling against or in favor of a litigant. See In re Drexel Burnham Lambert Inc., 861 F.2d 1307, 1314 (2d Cir. 1988)(citing In re IBM, 618 F.2d 923, 929 (2d Cir.1980)). Erroneous rulings are corrected by appeal, not recusal.

Petitioner does assert one extrajudicial source of bias. In Motion at 8, petitioner writes that "M.J. Pesto rendered all of his decisions/conclusions with an eye of favoritism towards the State and went into the proceedings looking for any reason to deny federal review" because there were "ex parte communications" in which "the State prosecutor expressed a desire that [petitioner] remain incarcerated because the victim in this case was well known

Not True

among law enforcement personnel ... [and petitioner] heard while he was incarcerated in the county prison that the person killed was an undercover informant." If petitioner believes his own statement, that means that in 2017 he is disclosing for the first time that he thinks that in about 2010 I had multiple communications with an unnamed prosecutor who well in advance of exhaustion of petitioner's state court remedies urged me to make my eventual recommendation in this matter on the basis of the victim's status (which the petitioner learned from an unknown source in the county prison almost thirty years earlier) as a confidential informant. If petitioner put this belief into the form of allegations under oath, it would not be "a timely and sufficient affidavit" as required by 28 U.S.C.§ 144. It certainly does not gain weight by being included in a motion seeking recusal under 28 U.S.C.§ 455.

Recommendation

The motion to vacate should be denied.

Report

Gonzales v. Crosby, 545 U.S. 538 (2005), delineates the proper use of Rule 60 motions in habeas corpus practice under 28 U.S.C.§ 2254: a Rule 60 motion attacking the underlying state court conviction, whether by presenting a new claim, new evidence in support of a claim already litigated, or a purported change in the

substantive law, is a successive petition subject to 28 U.S.C.§ 2244(b). 545 U.S. at 531. On the other hand, a Rule 60 motion attacking only some defect in the court's ruling that precluded a determination on the merits, for instance that the petitioner failed to exhaust a claim, procedurally defaulted a claim, or brought the claim out of time (in Gonzalez v. Crosby, the defect was that the lower court allegedly misapplied AEDPA's statute of limitation) is a permissible motion. 545 U.S. at 532-33.

The Supreme Court further cautioned that Rule 60 motions, when permissible, still must satisfy the limitations of Rule 60(b), and in particular held that a Rule 60(b)(6) motion must show "extraordinary circumstance" that "rarely occur in the habeas context." 545 U.S. at 535. In Gonzalez v. Crosby, the Court assumed that the habeas petitioner correctly claimed that in light of a subsequent Supreme Court decision the lower court erred in holding that the original habeas petition was untimely. Nevertheless, that subsequent change in procedural law was not an extraordinary circumstance justifying re-opening of the petition. 545 U.S. at 538.

Applying Gonzalez v. Crosby, our Court of Appeals held in Cox v. Horn, 757 F.3d 113, 115 (3d Cir.2014), that a change in procedural law subsequent to a judgment, specifically the expanded

exception to the procedural default doctrine announced in Martinez v. Ryan, 566 U.S. 1 (2012), was not sufficient by itself to grant a Rule 60(b)(6) motion: the panel remanded for consideration whether the change wrought by Martinez v. Ryan, the diligence of petitioner, and the merits of the underlying ineffectiveness claim, when taken together, justified the "rare" grant of relief. 757 F.3d at 124-25.

Here, all but one of petitioner's specific attacks on the judgment are based on arguments that I committed legal error in my Report and Recommendation. That is the basis for an appeal, not a Rule 60(b)(6) motion. Petitioner's chief legal argument is that his trial, appellate, and PCRA counsel were ineffective and this court mis-applied Martinez v. Ryan when it did not excuse petitioner's procedural default of his claims based on PCRA's counsel's ineffectiveness. Motion at 6. Martinez v. Ryan, however, is not a **subsequent** decision that might, coupled with other factors, constitute extraordinary grounds for Rule 60(b)(6) relief, it is a 2012 decision that was part of the law already considered by this court and available to the Court of Appeals and the Supreme Court in reviewing this court's judgment.

I do not intend to address each argument in the Motion separately. What is extraordinary about this 150-page Motion is

petitioner's doggedness, if not monomania, in reviewing almost every line of my Report and Recommendation in light of his worldview that he cannot be guilty of murder because he believes that he killed the victim in response to provocation, or even that "it was possible that he had not killed her and some pervert saw a female laying there and did something and then killed her himself." Motion at 25. To give just one example, petitioner cites my use of the word "mutilate" in my Report and Recommendation to describe his actions towards the victim's body as a "blatant lie[]" and a "fraud on the court" that provide an extraordinary reason to vacate the judgment. Motion at 10-11. I think that my choice of that word was influenced by Judge Fuentes' use in Renchenski v. Williams, 622 F.3d 315, 320 (3d Cir.2010) of the same word to describe petitioner's actions, and I think it is a fair characterization of the transcript that I reviewed. But if I erred, it was an error available to be corrected by Judge Gibson or the Court of Appeals in the objections and appeal process, and not a basis to vacate the judgment. The same is true of petitioner's other assertions of legal and factual error in my Report and Recommendation.

The one argument that petitioner makes in support of the Rule 60(b)(6) motion that is not a renewed assertion that the

Report and Recommendation contained error is the argument that in conducting review of my Report and Recommendation under 28 U.S.C.§ 636 Judge Gibson could not have read "in excess of Ten-Thousand (10,000) pages [of the record] in **just one evening.**" Motion at 148. To make this argument petitioner assumes that the court must agree with him that the record was 10,000 pages long, that Judge Gibson was obliged to read all 10,000 pages to understand the issues raised in the petition and addressed in the Report and Recommendation and objections, and that Judge Gibson could or would only look at the record or at my Report and Recommendation once petitioner's objections were filed. There is no evidence to support any of those assumptions. Further, petitioner twice raised this same argument in the Court of Appeals, see Motion for Certificate of Appealability at 2 n.1, in Renchenski v. Superintendent, No. 15-2252 (3d Cir.), where petitioner asserted that the record that Judge Gibson (who petitioner repeatedly and incorrectly refers to as "she") must have ignored was 1835 pages; see also Petition for Rehearing En Banc and Before Original Panel at 6, in Renchenski v. Superintendent, No. 15-2252 (3d Cir.), where petitioner asserted that the record that Judge Gibson must have ignored was "approximately 2000 pages". The rejected argument does not on its third repetition become a basis for relief under Rule 60.

Pursuant to 28 U.S.C.§ 636(b)(1), the parties are given notice that they have fourteen days to serve and file written objections to this Report and Recommendation.

DATE: 7 June 2017

Keith A. Pesto,
United States Magistrate Judge

Notice to counsel of record by ECF and by U.S. Mail to:

Charles S. Renchenski AP-8124
S.C.I. Coal Township
1 Kelley Drive
Coal Township, PA 17866-1021

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SUPERINTENDENT COAL TOWNSHIP SCI, ET AL.

(W.D. Pa. Civ. No. 3-10-cv-00217)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, and BIBAS, Circuit Judges

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 and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is DENIED.

BY THE COURT

s/ Kent A. Jordan
Circuit Judge

DATED: March 26, 2018
ARR/cc: CSR