

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 16-3555

RONALD JONES,
Appellant

v.

ADMINISTRATOR NEW JERSEY STATE PRISON;
COMMISSIONER NEW JERSEY DEPARTMENT OF CORRECTIONS

(D.C. Civ. No. 1-13-cv-05185)

SUR PETITION FOR PANEL REHEARING

Present: McKEE, VANASKIE and SCIRICA, 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, it is hereby O R D E R E D that the petition for rehearing by the panel is denied.

BY THE COURT,

s/ Theodore McKee

Circuit Judge

Appendix A.

Dated: 31 May 2018
AWI/CC: RJ

ALD-081

December 21, 2017

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 16-3555

RONALD JONES, Appellant

v.

ADMINISTRATOR NEW JERSEY
STATE PRISON; ET AL.

(D.N.J. Civ. No. 1-13-cv-05185)

Present: MCKEE, VANASKIE and SCIRICA, Circuit Judges

Submitted are:

- (1) By the Clerk for possible dismissal due to jurisdictional defect; and
- (2) Appellant's notice of appeal, which may be treated as a request for a certificate of appealability pursuant to 28 U.S.C. § 2253(c),

in the above-captioned case.

Respectfully,

Clerk

ORDER

The District Court entered an order denying Appellant's motion pursuant to Federal Rule of Civil Procedure 60(b) on January 26, 2016. On or about September 2, 2016, Appellant filed a notice of appeal. To the extent Appellant sought to appeal the order entered January 26, 2016, the notice of appeal is untimely and we lack jurisdiction to review it. See Fed. R. App. P. 4(a)(1)(A) (requiring a notice of appeal in a civil case to be filed within 30 days after entry of the order appealed from); Bowles v. Russell, 551 U.S. 205, 209 (2007) (the taking of an appeal within the prescribed time is jurisdictional). This appeal is thus dismissed for lack of jurisdiction. Appellant's request for a certificate of appealability is denied as moot. To the extent Appellant sought to appeal the August

3, 2016 order issued in D.N.J. Civ. No. 12-cv-05823, the notice of appeal was also filed in that action and Appellant's request for a certificate of appealability was denied. See C.A. No. 16-3554.

By the Court,

s/ Theodore A. McKee
Circuit Judge

Dated: 6 March 2018
AWI/CC: RJ

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

RONALD JONES,

Petitioner,

v.

PAUL K. LAGANA, et al.,

Respondents.

HONORABLE JEROME B. SIMANDLE

Civil Action
No. 13-5185 (JBS)

OPINION

SIMANDLE, Chief Judge:

I. INTRODUCTION

Before the Court is Petitioner Ronald Jones' ("Petitioner") motion for relief from this Court's order dismissing his Petition for Writ of Habeas Corpus. Fed. R. Civ. Pro. 60(b); (Docket Entry 8). For the reasons set forth below, the motion is denied.

II. BACKGROUND

Petitioner was convicted in the Superior Court of New Jersey, Law Division, Cumberland County, of kidnapping, aggravated sexual assault, and possession of a weapon for an unlawful purpose. On October 19, 1981, the trial court imposed an aggregate term of 55 years of imprisonment, with 25 years of parole ineligibility. After several unsuccessful 28 U.S.C. § 2254 petitions, see *Jones v. Lagana*, No. 12-5823, 2015 WL 851500, at *1 (D.N.J. Feb. 26, 2015) (reviewing history of

Petitioner's § 2254 filings); *Jones v. New Jersey Parole Bd.*, No. 09-2510, 2011 WL 2923705, at *1-2 (D.N.J. July 18, 2011) (same), a new § 2254 proceeding challenging Petitioner's convictions was filed on August 29, 2013. (Docket Entry 1).

By Order entered on August 7, 2015, this Court dismissed the petition for lack of jurisdiction as Petitioner was not "in custody" for habeas purposes, and the petition was a second or successive petition. (Docket Entries 4 & 5). Petitioner filed a notice of appeal with the Court of Appeals for the Third Circuit. (Docket Entry 6); see also *Jones v. Warden N. State Prison*, No. 15-3186 (3d Cir. docketed Sept. 11, 2015). He thereafter filed his motion for relief from judgment under Federal Rule of Civil Procedure 60(b) on October 16, 2015. (Docket Entry 8).

III. DISCUSSION

Petitioner brings this motion under Federal Rule of Civil Procedure 60(b)(1), alleging that the Court erred when it dismissed his habeas petition for lack of jurisdiction. He asserts that he had originally filed his § 2254 petition while incarcerated in Northern State Prison under Civil Action No. 12-5823. (Docket Entry 8 ¶¶ 1-2). He states he submitted a memorandum of law upon his release from custody, which was inadvertently assigned a new civil action number, 13-5186, instead of being filed in action 12-5823. (Docket Entry 8 ¶ 5).

He states it was therefore error for the Court to dismiss his petition for lack of jurisdiction as he was "in custody" at the time he filed his petition in 12-5823.

As Petitioner has filed an appeal of this Court's order dismissing his petition, (Docket Entry 6), the Court must first assess whether it has jurisdiction over this motion due to the pendency of the appeal. "As a general rule, the timely filing of a notice of appeal is an event of jurisdictional significance, immediately conferring jurisdiction on a Court of Appeals and divesting a district court of its control over those aspects of the case involved in the appeal." *Venen v. Sweet*, 758 F.2d 117, 120 (3d Cir. 1985); see also *Ingram v. Warden*, No. 10-4151, 2011 WL 318300, at *1 (D.N.J. Jan. 24, 2011). ("Simply put, [a litigant] cannot 'hedge his bets' by hoping that either continuing proceedings before this Court or his appeal before the Court of Appeals for the Third Circuit would yield a favorable result; rather, [he] is obligated to make an exclusive election."). District courts retain the ability to consider and deny, or certify to the court of appeals its inclination to grant a timely filed motion for relief from judgment, however. *Thomas v. Ne. Univ.*, 470 F. App'x 70, 71-72 (3d Cir. 2012).

Rule 60(b)(1) permits a court to relieve a party from a final judgment or order for "mistake, inadvertence, surprise, or excusable neglect." Petitioner asserts the Court erred by

determining he was not in custody at the time he filed the petition due to the opening of new habeas proceeding instead of filing his petition in another case, *Jones v. Lagana*, No. 12-5823 (D.N.J. Feb. 26, 2015). He then asks the Court to reopen the case he contends never should have been opened in the first place.

Any error in opening a new proceeding did not prejudice Petitioner such that relief under Rule 60(b) would be warranted. In dismissing the petition, the Court specifically noted that in addition to lacking jurisdiction because Petitioner was not "in custody," the Court lacked jurisdiction over the petition as the petition was barred under 28 U.S.C. § 2244(b) as a second or successive petition. (Docket Entry 4 at 5). Thus, even if the Court had determined Petitioner was "in custody," the petition still would necessarily have been dismissed as a second or successive petition.¹ Petitioner is not entitled to relief under Rule 60(b).

¹ The Honorable Noel L. Hillman, D.N.J., dismissed Petitioner's petition in Civil Action 12-5823 as a second or successive petition as well. *Jones*, No. 12-5823 (D.N.J. Feb. 26, 2015). As both courts reached identical conclusions, it is clear the result of that proceeding would not have changed if the memorandum had been filed in that action.

V. CONCLUSION

For the reasons stated above, Petitioner's motion to reopen the case and for relief from this Court's August 7, 2015 judgment is denied.

An accompanying order follows.

January 25, 2016
Date

s/ Jerome B. Simandle
JEROME B. SIMANDLE
Chief U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

RONALD JONES,

Petitioner,

v.

PAUL K. LAGANA, et al.,

Respondents.

HONORABLE JEROME B. SIMANDLE

Civil Action
No. 13-5185 (JBS)

ORDER

This matter having come before the Court on Petitioner's Motion to Reopen the Case and for Relief from this Court's August 7, 2015 judgment (Docket Entry 8); and the Court having considered the Petitioner's submissions; and for the reasons explained in the Opinion of today's date; and for good cause shown;

IT IS this 25th day of January, 2016, hereby

ORDERED that the Motion to Reopen the Case and for Relief from this Court's August 7, 2015 judgment (Docket Entry 8) is DENIED; and it is finally

ORDERED that the Clerk of the Court shall serve a copy of this Opinion and Order upon Petitioner by regular U.S. mail.

s/ Jerome B. Simandle
JEROME B. SIMANDLE
Chief U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

RONALD JONES,

Petitioner,

v.

PAUL K. LAGANA, et al.,

Respondents.

HONORABLE JEROME B. SIMANDLE

Civil Action
No. 13-5185 (JBS)

OPINION

SIMANDLE, Chief Judge:

I. INTRODUCTION

Before the Court is Petitioner Ronald Jones' ("Petitioner") Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254. (Docket Entry 1). He has also filed an amended application to proceed *in forma pauperis* and motion for the appointment of counsel, (Docket Entry 3). For the reasons set forth below, the petition will be dismissed for lack of jurisdiction, and the motions will be dismissed as moot.

II. BACKGROUND

Petitioner was convicted in the Superior Court of New Jersey, Law Division, Cumberland County, of kidnapping, aggravated sexual assault, and possession of a weapon for an unlawful purpose. On October 19, 1981, the trial court imposed an aggregate term of 55 years of imprisonment, with 25 years of parole ineligibility.

Petitioner has filed several petitions under § 2254 challenging his convictions and sentence. See *Jones v. Lagana*, No.

12-5823, 2015 WL 851500, at *1 (D.N.J. Feb. 26, 2015) (reviewing history of Petitioner's § 2254 filings); *Jones v. New Jersey Parole Bd.*, No. 09-2510, 2011 WL 2923705, at *1-2 (D.N.J. July 18, 2011) (same). In the instant petition, he asserts he received ineffective assistance of counsel during his trial and appeal, the prosecution failed to disclose favorable, material evidence, the state courts inappropriately applied a time-bar to his post-conviction relief application, and he was denied due process when the post-conviction relief hearing was held in his absence. (Docket Entry 1 at 12-13). Prior to filing this petition on August 29, 2013, Petitioner was released from prison. (Docket Entry 1 at 1). As part of his sentence, Petitioner is required to register as a sex offender. (Docket Entry 1 at 6).

III. STANDARD OF REVIEW

Petitioner brings this Petition for a Writ of Habeas Corpus as a pro se litigant. A pro se pleading is held to less stringent standards than more formal pleadings drafted by lawyers. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Haines v. Kerner*, 404 U.S. 519, 520 (1972). A pro se habeas petition and any supporting submissions must be construed liberally and with a measure of tolerance. See *Royce v. Hahn*, 151 F.3d 116, 118 (3d Cir. 1998); *Lewis v. Attorney General*, 878 F.2d 714, 721-22 (3d Cir. 1989); *United States v. Brierley*, 414 F.2d 552, 555 (3d Cir. 1969), cert. denied, 399 U.S. 912 (1970).

A federal district court must dismiss a habeas corpus petition if it appears from the face of the petition that the petitioner is not entitled to relief. 28 U.S.C. § 2254 Rule 4; see also *McFarland v. Scott*, 512 U.S. 849, 856 (1994); *Siers v. Ryan*, 773 F.2d 37, 45 (3d Cir. 1985), cert. denied, 490 U.S. 1025 (1989).

IV. ANALYSIS

Federal courts have jurisdiction to entertain applications for a writ of habeas corpus from persons who are "in custody pursuant to the judgment of a State court" 28 U.S.C. § 2254(a). "While the 'in custody' requirement is liberally construed for purposes of habeas corpus, for a federal court to have jurisdiction, a petitioner must be in custody under the conviction he is attacking at the time the habeas petition is filed." *Obado v. New Jersey*, 328 F.3d 716, 717 (3d Cir. 2003). At the time Petitioner filed this petition, he had served his entire sentence and was no longer incarcerated. (Docket Entry 1 at 6).¹

The Court's custody determination does not end there, however. "The term 'custody' extends beyond physical confinement, and encompasses other "significant restraints on . . . liberty' that are 'not shared by the public generally.'" *Leyva v. Williams*, 504 F.3d 357, 363 (3d Cir. 2007) (quoting *Jones v. Cunningham*, 371 U.S.

¹ Petitioner's assertion that his habeas petition was filed while he was incarcerated is contradicted by the fact that the cover page of the petition and the return address on the envelope lists Petitioner's address as being in Delaware. (Docket Entry 1 at 1, 55).

236, 242, 240 (1963)). Custody, however, does not include non-punitive "collateral consequences" of a conviction. See *Maleng v. Cook*, 490 U.S. 488, 492 (1989) (noting "once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack upon it").

Petitioner asserts he is "restrained of [his] liberty" due to his obligation to register as a sex offender pursuant to New Jersey's Megan's Law, N.J. STAT. ANN. § 2C:7-1 et seq., therefore satisfying the custody requirement. (Docket Entry 1 at 6). Though the Court of Appeals for the Third Circuit has not yet addressed whether such requirement suffices for purposes of 28 U.S.C. § 2254, every federal circuit court to have addressed this question has found the registration requirements for sexual offenders insufficient to satisfy the "in custody" requirement. See, e.g., *Calhoun v. Attorney General*, 745 F.3d 1070, 1074 (10th Cir. 2014), cert. denied sub nom *Calhoun v. Suthers*, 135 S. Ct. 376 (2014) (collecting cases); *Wilson v. Flaherty*, 689 F.3d 332, 336 (4th Cir. 2012), cert. denied, 133 S. Ct. 2853 (2013); *Virsnieks v. Smith*, 521 F.3d 707, 718 (7th Cir. 2008), cert. denied, 555 U.S. 868 (2008); *Leslie v. Randle*, 296 F.3d 518 (6th Cir. 2002); *Williamson v. Gregoire*, 151 F.3d 1180, 1183 (9th Cir. 1998), cert. denied, 525 U.S. 1081 (1999)). This Court, however, cannot determine whether the registration requirement under the State of New Jersey's

Megan's Law meets the "in custody" requirement of federal habeas relief because it lacks jurisdiction to do so.

Even if Petitioner could satisfy the "in custody" requirement, the Court would still lack jurisdiction over this petition as it is barred under 28 U.S.C. § 2244(b) as a second or successive petition. None of the grounds raised in the instant petition are grounds that could not have been raised in any one of Petitioner's prior petitions. Where a petition raises a claim that was or could have been raised in an earlier habeas petition decided on the merits, that claim clearly is "second or successive." *Benchoff v. Colleran*, 404 F.3d 812, 817 (3d Cir. 2005) (citing *McCleskey v. Zant*, 499 U.S. 467, 493-95 (1991); *Wise v. Fulcomer*, 958 F.2d 30, 34 (3d Cir. 1992)). Absent an order from the Third Circuit, this Court lacks jurisdiction over the petition.

Pursuant to 28 U.S.C. § 2253(c), unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken from a final order in a proceeding under 28 U.S.C. § 2254. A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*,

537 U.S. 322, 327 (2003). The present case fails to meet this standard, therefore no certificate of appealability will be issued.

V. CONCLUSION

Petitioner Jones seeks to challenge his state conviction and sentence, which he has finished serving. As this is a successive § 2254 petition, barred by § 2244(b), this Court must dismiss the petition for lack of jurisdiction. No certificate of appealability will be issued. Petitioner's application to proceed *in forma pauperis* and motion for the appointment of counsel are dismissed as moot. An accompanying Order will be entered.

August 6, 2015
Date

s/ Jerome B. Simandle
JEROME B. SIMANDLE
Chief U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

RONALD JONES,

Petitioner,

v.

PAUL K. LAGANA, et al.,

Respondents.

HONORABLE JEROME B. SIMANDLE

Civil Action
No. 13-5185 (JBS)

ORDER

This matter having come before the Court on Petitioner's application for writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Docket Entry 1), application to proceed in forma pauperis and motion for the appointment of counsel, (Docket Entry 3); and the Court having considered the Petitioner's submissions; and for the reasons explained in the Opinion of today's date; and for good cause shown;

IT IS this 6th day of August, 2015, hereby

ORDERED that Petitioner's 28 U.S.C. § 2254 Petition (Docket Entry 1) is DISMISSED for lack of subject matter jurisdiction; and it is further

ORDERED that a certificate of appealability shall not issue; and it is further

ORDERED that Petitioner's application to proceed *in forma pauperis* and motion for the appointment of counsel (Docket Entry 3) are DISMISSED AS MOOT; and it is finally

ORDERED that the Clerk of the Court shall serve a copy of this Opinion and Order upon Petitioner by regular U.S. mail and mark this action CLOSED.

s/ Jerome B. Simandle
JEROME B. SIMANDLE
Chief U.S. District Judge