

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 13 2018

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

JOHN H. ROSKY,

Petitioner-Appellant,

v.

QUENTIN BYRNE; ATTORNEY  
GENERAL FOR THE STATE OF  
NEVADA,

Respondents-Appellees.

No. 18-15521

D.C. No. 3:16-cv-00156-MMD-VPC  
District of Nevada,  
Reno

ORDER

7/13 -> 14 = 7/27/18 -> 7/29/18

Before: HAWKINS and SILVERMAN, Circuit Judges.

The motion to exceed a page limit (Docket Entry No. 7) is granted.

The request for a certificate of appealability (Docket Entry No. 8) is denied

because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

**DENIED.**

APPENDIX 'A'

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5 UNITED STATES DISTRICT COURT  
6 DISTRICT OF NEVADA

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8 JOHN H. ROSKY, Case No. 3:16-cv-00156-MMD-VPC  
9 Petitioner,  
10 v. ORDER  
11 QUENTIN BYRNE, *et al.*,  
12 Respondents.

13 This is a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254,  
14 filed by a Nevada state prisoner. Currently pending before the Court are several motions,  
15 including the respondents' motion to dismiss the petition as untimely. In opposition,  
16 petitioner has argued, among other things, that his petition should be considered timely  
17 pursuant to *Schlup v. Delo*, 513 U.S. 298 (1995) because he is actually innocent.

18 Under 18 U.S.C. § 3006A(a)(2)(B), the court may appoint counsel for a petitioner  
19 seeking relief under 28 U.S.C. § 2254 if the petitioner is financially eligible and the court  
20 determines that the interests of justice require appointment of counsel. In light of the  
21 issues presented in connection with petitioner's gateway claim of actual innocence, the  
22 Court believes that appointment of counsel in this matter is in the interests of justice. The  
23 Court takes judicial notice of an application to proceed *in forma pauperis* filed by petitioner  
24 with the Ninth Circuit Court of Appeals (Docket No. 17-72652) and concludes based  
25 thereon that petitioner is financially eligible for appointment of counsel.

26 Accordingly, it is hereby ordered that counsel is appointed to represent petitioner  
27 in all federal proceedings related to this matter, including any appeals or certiorari  
28 proceedings, unless allowed to withdraw.

1        It is further ordered that the Federal Public Defender will be provisionally appointed  
2 as counsel and will have thirty (30) days to undertake direct representation of petitioner  
3 or to indicate to the Court the office's inability to represent petitioner in these proceedings.  
4 If the Federal Public Defender is unable to represent petitioner, the Court then will appoint  
5 alternate counsel.

6        It is further ordered that the Clerk send a copy of this order to the Federal Public  
7 Defender and the CJA Coordinator for this division.

8        It is further ordered that the pending motion to dismiss (ECF No. 16) is denied  
9 without prejudice. A deadline for filing an amended petition, or, if none, for respondents  
10 to renew their motion to dismiss will be set after counsel has entered an appearance.

11       It is further ordered that petitioner's motion for summary judgment (ECF No. 32)  
12 and "Motion Noticing the Court that Petitioner Vehemently Objects Respondents'  
13 Intention to Violate his Due Process Rights" (ECF No. 35) are denied. Respondents will  
14 have the opportunity to file an answer addressing all of the petitioner's claims after the  
15 Court decides any motion to dismiss, and the merits of the petition will not be considered  
16 by the Court until the answer and any reply thereto have been filed. Respondents' intent  
17 to file an answer after any motion to dismiss does not violate the petitioner's due process  
18 rights.

19       DATED THIS 10<sup>th</sup> day of January 2018.



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21       MIRANDA M. DU  
22       UNITED STATES DISTRICT JUDGE  
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7 UNITED STATES DISTRICT COURT  
8 DISTRICT OF NEVADA

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10 JOHN H. ROSKY, Case No. 3:16-cv-00156-MMD-VPC  
11 v. Petitioner,  
12 QUENTIN BYRNE, et al., ORDER  
13 Respondents.  
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16 On January 10, 2018, the Court *sua sponte* granted petitioner counsel in this  
17 matter and denied without prejudice the pending motion to dismiss. (ECF No. 40.)  
18 Petitioner has objected to the appointment of counsel by way of an emergency motion for  
19 reconsideration. (ECF No. 41.)

20 In light of petitioner's desire to proceed in this action *pro se*, it is therefore ordered  
21 that petitioner's motion for reconsideration (ECF N. 41) is granted, and that part of the  
22 Court's order of January 10, 2018, appointing petitioner counsel is hereby vacated.

23 It is further ordered that the provisional appointment of the Federal Public Defender  
24 to represent petitioner is withdrawn. It is further ordered that the Clerk send a copy of this  
25 order to the Federal Public Defender.

26 It is further ordered that that part of the Court's order of January 10, 2018, denying  
27 without prejudice the respondents' motion to dismiss (ECF No. 16) is vacated, and the  
28 motion will be shown as a pending motion.

1        In this action, petitioner asserts a gateway claim of actual innocence that relies, in  
2 part, on an audio tape recording between himself and the victim. Petitioner has not  
3 provided the Court with a copy of that audio recording but has provided a transcript dated  
4 March 18, 2004, that purports to be of the recording. (See ECF No. 2-1 at 37-40.)

5        It is therefore further ordered that petitioner must, within thirty (30) days of the date  
6 of this order, provide the Court with a copy of the audio recording he relies on for his claim  
7 of actual innocence, along with any and all evidence, and/or citation to evidence already  
8 in the record, that petitioner has establishing that the recording is an authentic and valid  
9 recording of an alleged telephone conversation between petitioner and the victim and  
10 establishing the date on which it was recorded. Petitioner must also provide any and all  
11 evidence establishing that the transcript dated March 18, 2004, is an authentic and valid  
12 transcription of the subject audio recording.

13       It is further ordered that within fifteen (15) days of the petitioner's response to this  
14 order respondents must file a reply addressing the petitioner's actual innocence  
15 argument.

16       DATED THIS 19<sup>th</sup> day of January 2018.

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19       MIRANDA M. DU  
20       UNITED STATES DISTRICT JUDGE

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4 UNITED STATES DISTRICT COURT

5 DISTRICT OF NEVADA

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7 JOHN H. ROSKY,

Case No. 3:16-cv-00156-MMD-VPC

8 Petitioner,

ORDER

9 v.

10 QUENTIN BYRNE, *et al.*,

11 Respondents.

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13 Before the Court is petitioner's motion for reconsideration (ECF No. 45) of the  
14 Court's order of January 19, 2018, directing petitioner to provide evidence or citation to  
15 evidence authenticating the audio tape and transcript of the audio tape on which he relies  
16 to make his gateway claim of actual innocence and directing respondents to respond to  
17 petitioner's gateway claim. The Court would note that in order to make a gateway claim  
18 of actual innocence, petitioner must introduce new, *reliable* evidence. Absent proper  
19 authentication by petitioner, the Court cannot conclude that the audio tape on which he  
20 relies is reliable. Further, the Court in its discretion believes that a response to petitioner's  
21 gateway claim of actual innocence is necessary in order for the Court to properly evaluate  
22 petitioner's claim. Accordingly, petitioner's motion for reconsideration of the Court's order  
23 dated January 19, 2018 (ECF No. 45) is hereby denied.

24 DATED THIS 1<sup>st</sup> day of February 2018.

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MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE

**FILED**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEC 18 2017

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

In re: JOHN H. ROSKY.

No. 17-72652

JOHN H. ROSKY,

D.C. No.  
3:16-cv-00156-MMD-VPC  
District of Nevada,  
Reno

Petitioner,

ORDER

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEVADA,  
RENO,

Respondent,

ATTORNEY GENERAL FOR THE STATE  
OF NEVADA and QUENTIN BYRNE,

Real Parties in Interest.

Before: TASHIMA, PAEZ, and IKUTA, Circuit Judges.

The petition for a writ of mandamus is denied without prejudice to the filing of a new petition if the district court has not ruled on the motions pending in petitioner's habeas action by February 28, 2018.

The motion to proceed in forma pauperis is denied as moot.

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FILED

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JOHN H. ROSKY,

Petitioner-Appellant,

v.

QUENTIN BYRNE; ATTORNEY  
GENERAL FOR THE STATE OF  
NEVADA,

Respondents-Appellees.

No. 18-15521

D.C. No. 3:16-cv-00156-MMD-VPC  
District of Nevada,  
Reno

ORDER

Before: GRABER and M. SMITH, Circuit Judges.

The request for extension of time (Docket Entry No. 13) is granted.

The motion for reconsideration (Docket Entry No. 14) is denied. *See* 9th  
Cir. R. 27-10.

No further filings will be entertained in this closed case.