

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ANTONIO SIERRA- PETITIONER- PROSE
VS.

MR. JOSH SHAPIRO, ATTORNEY GENERAL OF PENNSYLVANIA, ET AL,

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENENICIES TO
PETITION FOR WRIT OF CERTIORARI

III

BY. /S/. 
/P/. MR ANTONIO SIERRA, PhD., DD.,

MAILING ADDRESS: MR. ANTONIO SIERRA,
IN CARE OF: MS. TUSDAY B. SIERRA
114 SHORT STREET
PHILIPSBURG PA 16866

ADDRESS OF RESTRAINT:
DEPARTMENT OF CORRECTIONS
SCI ALBION, PA.
PA. STATE ID. #. DV.0686
10745 STATE ROUTE 18
ALBION PA

TABLE OF APPENDICES

Section A.

11 SEPT 2018 - U.S.C.A. 3RD CIRCUIT - ORDER OF, 1-2

14 DEC. 2018 - U.S.C.A. 3RD CIRCUIT - ORDER OF, 3-4

02 NOV. 2017 - U.S.C.A. 3RD CIRCUIT - ORDER OF, 5-6

10 JAN. 2018 - U.S.C.A. 3RD CIRCUIT - ORDER OF, 7-

23 MAR. 2018 - U.S.C.A. 3RD CIRCUIT - ORDER OF, 8-9

SECTION B.

29 MAY 2018 - U.S.S.C. - ORDER OF, 1-

23 JULY 2018 - U.S.S.C. - ACTION OF, 2-

20 AUG 2018 - U.S.S.C. - ACTION OF, 3-

24 AUG 2018 - U.S.S.C. -[PET's AFFIAVIT] -4

SECTION C.

03 AUG 2017 - US.DC.WD.PA ORDER OF, 1-3

03 AUG 2017 - US.DC.WD.PA ORDER OF, 4

SECTION D.

07 DEC 2017 - US.DC.MD.PA ORDER OF, 1-10

01 MAR 2018 - US.DC.MD.PA ORDER OF, 11-15

APPENDIX A

CLD-273

July 26, 2018

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 18-2044

ANTONIO SIERRA, Appellant

VS.

ATTORNEY GENERAL OF THE COMMONWEALTH
OF PENNSYLVANIA, ET AL.

(M.D. Pa. Civ. No. 3-17-cv-01584)

Present: CHAGARES, GREENAWAY, JR., and FUENTES, Circuit Judges

Submitted is Appellant's Reply, which the court may wish to construe as a 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); Slack v. McDaniel, 529 U.S. 473, 484 (2000). 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, 529 U.S. at 484; Cox v. Horn, 757 F.3d 113, 125 (3d Cir. 2014). To the extent that Appellant's motion sought leave to amend his habeas petition to add new habeas claims, or to reargue his earlier claims, the motion was properly construed as an unauthorized second or successive habeas petition

that the District Court lacked jurisdiction to consider. See Gonzalez, 545 U.S. at 531–32; see also 28 U.S.C. § 2244(b); Burton v. Stewart, 549 U.S. 147, 153 (2007); Robinson v. Johnson, 313 F.3d 128, 139 (3d Cir. 2002).

By the Court,

s/Joseph A. Greenaway, Jr.
Circuit Judge

Dated: September 11, 2018
JK/cc: Antonio Sierra



A True Copy:

Patricia A. Dodszuweit

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

2 of 4

(A²)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2044

ANTONIO SIERRA,
Appellant

v.

ATTORNEY GENERAL PENNSYLVANIA, ET AL.

(M.D. Pa. No. 3-17-cv-01584)

SUR PETITION FOR REHEARING

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

Judge Fuentes's vote is limited to panel rehearing only.

Case: 18-2044 Document: 003113110023 Page: 2 Date Filed: 12/14/2018

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/Joseph A. Greenaway, Jr.
Circuit Judge

Dated: December 14, 2018
JK/cc: Antonio Sierra

*AMENDED
DLD-021

October 30, 2017
October 26, 2017

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 17-2988

ANTONIO SIERRA, Appellant

VS.

ATTORNEY GENERAL PENNSYLVANIA, ET AL.

(M.D. Pa. Civ. No. 3-17-cv-01584)

Present: JORDAN, SHWARTZ and KRAUSE, Circuit Judges

Submitted are:

- (1) By the clerk for possible dismissal due to a jurisdictional defect; and
- (2) Appellant's response

***(3) Appellant's supplemental response**

in the above-captioned case.

Respectfully,

Clerk

MMW/PJC/jw/cjg

ORDER

This Court's appellate jurisdiction is typically over "final decisions" by district courts. See 28 U.S.C. § 1291. The appeal has been taken from a pretrial order of a Magistrate Judge. See 28 U.S.C. § 636(b)(1)(A). Such an order must be appealed to the District Court Judge. See Siers v. Morrash, 700 F.2d 113, 114-15 (3d Cir. 1983).

Even if the order were entered by the District Court Judge, “[i]t is a well-established rule in this circuit (and generally) that orders transferring venue are not immediately appealable.” In re Federal-Mogul Global, Inc., 300 F.3d 368, 378 (3d Cir. 2002) (internal quotation marks and citations omitted); see also Carteret Savings Bank, FA v. Shushan, 919 F.2d 225, 228 (3d Cir. 1990). Furthermore, to the extent that we may construe the notice of appeal as a mandamus petition, we conclude that mandamus relief is not warranted in this case. See In re U.S., 273 F.3d 380, 385 (3d Cir. 2001).

Accordingly, the appeal is dismissed for lack of appellate jurisdiction.

By the Court,

s/ Kent A. Jordan
Circuit Judge

Dated: November 2, 2017

CJG/cc: Antonio Sierra
Michael E. Burns, Esq.



A True Copy
Marcia M. Waldron

Marcia M. Waldron, Clerk
Certified order issued in lieu of mandate.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 17-2988

ANTONIO SIERRA,
Appellant

v.

ATTORNEY GENERAL PENNSYLVANIA;
SUPERINTENDENT ALBION SCI;
DISTRICT ATTORNEY ERIE COUNTY

(M.D. Pa. No. 3-17-cv-01584)

SUR PETITION FOR REHEARING

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

DATE: January 10, 2018

CJG/cc: Michael E. Burns, Esq.
Antonio Sierra

APPENDIX
A

DLD-142

March 9, 2018

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 18-1150

ANTONIO SIERRA, Appellant

VS.

ATTORNEY GENERAL PENNSYLVANIA, ET AL.

(M.D. Pa. Civ. No. 3-17-cv-01584)

Present: JORDAN, SHWARTZ, and KRAUSE, Circuit Judges

Submitted are

- (1) Appellant's notice of appeal, which may be construed as a request for a certificate of appealability under 28 U.S.C. § 2253(c)(1);
- (2) Appellant's emergency motion to strike judgment; and
- (3) Appellant's document titled "Petition by Appellant for Expedited Consideration and Appeal Nunc Pro Tunc (COA in Error)," which the Court may wish to treat as a Motion to Expedite Appeal and 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); Slack v. McDaniel, 529 U.S. 473, 484 (2000). Jurists of reason would not debate that Appellant's habeas petition was properly dismissed by the District Court as an

unauthorized second or successive petition under 28 U.S.C. § 2254 that it lacked jurisdiction to consider. See 28 U.S.C. § 2244(b); Burton v. Stewart, 549 U.S. 147 (2007); Robinson v. Johnson, 313 F.3d 128, 139 (3d Cir. 2002). Appellant's remaining motions are denied.

By the Court,

s/Patty Shwartz
Circuit Judge

Dated: March 23, 2018

cc:

Antonio Sierra



A True Copy:

A handwritten signature in cursive ink that appears to read "Patricia S. Dodsweit".

Patricia S. Dodsweit, Clerk
Certified Order Issued in Lieu of Mandate

APPENDIX C

Recd
8-7-17
Sgt Moran

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

ANTONIO SIERRA,)
Petitioner,) Civil Action No. 17-01 Erie
)
v.)
) Magistrate Judge Susan Paradise Baxter
WARDEN NANCY GIROUX, et al.,)
Respondents.)

OPINION AND ORDER

The Petitioner, Antonio Sierra, is incarcerated at the State Correctional Institution Albion ("SCI Albion"). He is serving a sentence imposed on October 28, 1998, by the Court of Common Pleas of Lebanon County,¹ following a jury's verdict (reached on September 11, 1998) that he was guilty of numerous crimes, including three counts of criminal attempt to commit homicide and eight counts of robbery. See ECF No. 8; criminal docket sheet for Commonwealth v. Sierra, No. CP-38-CR-1239-1997; Sierra v. DiGuglielmo, No. 3:06-cv-0604, 2006 WL 2038391 (M.D. Pa. July 18, 2006). He has filed with this Court an amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in which he challenges the validity of convictions and sentence. (ECF No. 8). SCI Albion is located within the territorial boundaries of this District. Lebanon County is located within the territorial boundaries of the United States District Court for the Middle District of Pennsylvania. 28 U.S.C. § 118.

When a state prisoner files a petition for a writ of habeas corpus in a state like Pennsylvania, that contains two or more Federal judicial districts,

the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent

¹ This Court takes judicial notice of the docket sheet for the Petitioner's criminal case, as well as information available via the records department at SCI Albion, which is also available to the public. Those documents and records establish that the Petitioner is serving a judgment of sentence imposed by the Court of Common Pleas of Lebanon County. He is not serving a judgment of sentence imposed by the Court of Common Pleas of Erie County, and there is no detainer lodged against him for the future service of an Erie County sentence.

jurisdiction to entertain the application. **The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.**

28 U.S.C. § 2241(d) (emphasis added).

The Petitioner was tried, convicted, and sentenced in the Court of Common Pleas of Lebanon County and, therefore, most, if not all, of the relevant activity occurred within the Middle District of Pennsylvania. This Court finds that the furtherance of justice, as well as the convenience of the parties, would be better served by transferring this case to the Middle District Court. This decision is in accordance with the agreed practice of the United States District Courts for the Eastern, Middle, and Western Districts of Pennsylvania, which is to transfer habeas petitions filed by state prisoners in their respective districts to the district in which the county where the judgment of sentence was had is located.

An appropriate Order follows.

Dated: August 3, 2017

/s/ Susan Paradise Baxter
SUSAN PARADISE BAXTER
United States Magistrate Judge

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

ANTONIO SIERRA,)
Petitioner,) Civil Action No. 17-01 Erie
)
v.)
) Magistrate Judge Susan Paradise Baxter
WARDEN NANCY GIROUX, et al.,)
Respondents.)

ORDER

AND NOW, this 3rd day of August, 2017;

IT IS HEREBY ORDERED that the Clerk shall TRANSFER THIS CASE to the United States District Court for the Middle District of Pennsylvania. It is FURTHER ORDERED that the Clerk shall terminate Jack Daneri, Esq., who is the District Attorney of Erie County, as a respondent in this action because the judgment of sentence at issue was imposed by the Court of Common Pleas of Lebanon County. Therefore, District Attorney Daneri is not a proper respondent.

/s/ Susan Paradise Baxter
SUSAN PARADISE BAXTER
United States Magistrate Judge

Other Orders/Judgments1:17-cv-00001-SPB SIERRA v. KANE et al**U.S. District Court****Western District of Pennsylvania****Notice of Electronic Filing**

The following transaction was entered on 8/3/2017 at 4:35 PM EDT and filed on 8/3/2017

Case Name: SIERRA v. KANE et al

Case Number: 1:17-cv-00001-SPB

Filer:

WARNING: CASE CLOSED on 08/03/2017

Document Number: 9

Docket Text:

OPINION & ORDER that the Clerk shall TRANSFER THIS CASE to the United States District Court for the Middle District of Pennsylvania. It is FURTHER ORDERED that the Clerk shall terminate Jack Daneri, Esq., who is the District Attorney of Erie County, as a respondent in this action because the judgment of sentence at issue was imposed by the Court of Common Pleas of Lebanon County. Therefore, District Attorney Daneri is not a proper respondent. Signed by Magistrate Judge Susan Paradise Baxter on 8/3/17. (lrw)

1:17-cv-00001-SPB Notice has been electronically mailed to:

1:17-cv-00001-SPB Filer must deliver notice by other means to:

ANTONIO SIERRA
DV0686
SCI ALBION
10745 STATE ROUTE 18
ALBION, PA 16475

The following document(s) are associated with this transaction:

Document description: Main Document

Original filename: n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1098469114 [Date=8/3/2017] [FileNumber=5135111-0]
[1efd6e590b5a40af3c9d91c07f04507684f95be47fbc2150ce7dad1f5506f4792f9c
10c80146881a0710efb0ae31da4febe86455e1b2484b1e751f90544aebc8]]

APPENDIX D

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

ANTONIO SIERRA,

Petitioner : CIVIL ACTION NO. 3:CV-17-1584

v. : (Judge Caputo)

KATHLEEN KANE, et al.,

Respondents :

MEMORANDUM

I. Introduction

Antonio Sierra, a Pennsylvania state inmate proceeding *pro se* and *in forma pauperis*, initially filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Western District of Pennsylvania on January 3, 2017. (ECF No. 1.) The petition was transferred on August 3, 2017, pursuant to 28 U.S.C. § 2241(d). (ECF No. 9.)

Named as Respondents are former Pennsylvania Attorney General Kathleen Kane and, the former Superintendent of the Albion State Correctional Institution (SCI-Albion), Nancy Giroux. Mr. Sierra is housed at SCI-Albion in Albion,

Pennsylvania.¹ In his petition, Mr. Sierra challenges his 1998 state sentence in the Lebanon County Court of Common Pleas.

Preliminary review of the petition has been undertaken, see R. GOVERNING § 2254 CASES R. 4,² and for the reasons that follow, the petition will be dismissed as a successive petition filed without authorization from the United States Court of Appeals for the Third Circuit as required by 28 U.S.C. § 2244(b).

II. Background

On September 11, 1998, following a jury trial in the Lebanon County Court of Common Pleas, Mr. Sierra and a co-defendant were found guilty of the following offenses: criminal attempt to commit criminal homicide (three counts) graded in the third degree; aggravated assault (six counts); reckless endangerment (three counts), unlawful restraint (three counts); arson (three counts), theft (three counts), attempted theft (three counts), robbery (eight counts), and criminal conspiracy (one count). See *Commonwealth v. Sierra*, CP-38-CR-1239-1997 (Pa. Ct. Com. Pl. Lebanon Cty.)³ Mr. Sierra was sentenced to an aggregate term of twenty (20) to sixty (60)

¹ The only properly named respondent in a federal habeas corpus action is the applicant's custodial official. See 28 U.S.C. § 2242. Accordingly, SCI-Albion's Superintendent is Petitioner's custodial official for purposes of § 2242. Michael Clark is the current Superintendent of SCI-Albion.

² Rule 4 provides "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner." See R. GOVERNING § 2254 CASES R. 4.

³ The Court takes judicial notice of Mr. Sierra's criminal and appellate docket sheets available via Pennsylvania's Unified Judicial Docket System, docket research at <https://ujsportal.pacourts.us>.

years' imprisonment. On November 18, 1998, his post-sentence motions were denied.

Mr. Sierra filed a direct appeal to the Superior Court of Pennsylvania. See *Commonwealth v. Sierra*, 111 MDA 1999 (Pa. Super. Ct.). Shortly thereafter, Petitioner filed a motion under the Pennsylvania Post Conviction Relief Act (PCRA), 42 PA. CONS. STAT. § 9541 et seq., which was denied based on the status of his direct appeal. On October 13, 1999, the Superior Court dismissed Mr. Sierra's direct appeal due to his failure to file a brief.

On February 16, 2000, Petitioner filed a second PCRA petition. On May 12, 2000, the trial court granted Mr. Sierra leave to file an appeal *nunc pro tunc*. On May 2, 2001, the Superior Court affirmed Petitioner's conviction and sentence. See *Commonwealth v. Sierra*, 1409 MDA 2000 (Pa. Super. Ct.). Petitioner did not file an appeal to the Pennsylvania Supreme Court.

Mr. Sierra did not file any further pleadings until 2004 when he filed a petition to vacate. On March 23, 2004, the sentencing court summarily denied the petition. Mr. Sierra then filed an appeal with the Superior Court of Pennsylvania. See *Commonwealth v. Sierra*, 593 MDA 2004 (Pa. Super. Ct.). The Superior court denied relief on October 7, 2004, and the Pennsylvania Supreme Court denied Petitioner's request for allowance of appeal on April 19, 2005.

On September 12, 2005 Mr. Sierra filed a petition for writ of habeas corpus (first petition) in the United States District Court for the Eastern District of Pennsylvania. The matter was transferred to this Court on March 23, 2006. See *Sierra v. Diguglielmo*, Civ. No. 3:CV-06-0604 (M.D. Pa.). On July 18, 2006,

following a review of Mr. Sierra's petition and Respondents' response, the Petition was dismissed on the basis that it was untimely. By order dated January 25, 2007, the United States Court of Appeals for the Third Circuit denied Mr. Sierra's request for a certificate of appealability. See *Sierra v. Diguglielmo*, C.A. No. 06-3750 (3d Cir., Jan. 25, 2007).

On January 3, 2017, Mr. Sierra filed the present petition for writ of habeas corpus (second petition) with the United States District Court for the Western District of Pennsylvania. The Western District directed Mr. Sierra to file an amended habeas petition challenging either his judgment sentence imposed by the Court of Common Pleas of Erie County or Lebanon County, but not both in the same petition. (ECF No. 5.) Mr. Sierra filed an amended petition on February 16, 2017. (ECF No. 6). The Western District administratively closed the case advised Petition that should he file a proper Petition, the case would be reopened. (ECF No. 7.) On August 2, 2017, Mr. Sierra filed a second amended habeas petition (ECF No. 8) challenging his Lebanon County sentence. The Western District promptly transferred the matter to this Court pursuant to 28 U.S.C. § 2241(d). (ECF No. 9.)

Shortly thereafter Mr. Sierra filed a document entitled "Motion of Petitioner," (ECF No. 11) asking the Western District to process his second amended habeas petition and over three hundred and thirty pages of supporting exhibits. (*Id.*) Petitioner did not file a brief in support of his motion.

In his second amended habeas petition, Mr. Sierra contends that "no judgment of conviction [from the Lebanon County Court of Common Pleas] exists, and while restrained liberty of Sierra is apparent, whatever so be, all this from its

inception is without authority, void and reference to the same as it is anything flowing from the 1998 Jury verdict to this present petition does not serve to give the illegality any validation and is a nullity and void." (ECF No. 8, p. 2.) He challenges the legality of his conviction and sentence.

In addition, Mr. Sierra concedes that in 2006 he filed a prior § 2254 petition challenging his Lebanon County conviction, and that that petition was denied as untimely. He also acknowledges that the Third Circuit Court of Appeals denied his request for a certificate of appealability when he appealed that decision. (*Id.*, p. 9.)

III. Discussion

The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes stringent limits on a prisoner's ability to file a second or successive application for writ of habeas corpus. 28 U.S.C. §§ 2254(a), 2244(b)(1), (2); *Tyler v. Cain*, 533 U.S. 656, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001). Specifically, 28 U.S.C. § 2244(b)(3)(A) requires a petitioner to "move in the appropriate court of appeals for an order authorizing the district court to consider the application," before he may file a second or successive petition with the district court. Rule 9 of the rules governing § 2254 proceedings likewise requires that "[b]efore presenting a second or successive petition, the petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the petition." Absent authorization from the appropriate court of appeals, in this case the United States Court of Appeals for the Third Circuit, this Court lacks jurisdiction over a second or successive habeas petition. See 28 U.S.C. § 2244(b)(3)(A); *Burton v. Stewart*, 549 U.S. 147, 153, 127

S.Ct. 793, 797, 166 L.Ed.2d 628 (2007) (district court "never had jurisdiction to consider" petitioner's successive petition where he "did not seek or obtain authorization to file in the District Court"); *Williams v. Warden Allenwood USP*, 647 F. App'x 65, 67 (3d Cir. 2016) (the district court lacked jurisdiction to consider claim raised in "second or successive petition filed without the required Court of Appeals authorization"). If a petitioner erroneously files a second or successive habeas petition in a district court without first obtaining permission from the court of appeals, "the district court's only option is to dismiss the petition or transfer it to the court of appeals pursuant to 28 U.S.C. § 1631." *Robinson v. Johnson*, 313 F.3d 128, 139 (3d Cir. 2002). A habeas application is classified as second or successive within the meaning of § 2244 if: the prior application was decided on the merits, the prior and new applications challenge the same conviction, and the new application asserts a claim that could have been raised in a prior habeas application. *Benchoff v. Colleran*, 404 F.3d 812, 815-17 (3d Cir. 2005).

The instant petition is Mr. Sierra's second attempt to collaterally attack, in this federal court, his Pennsylvania state court conviction imposed by the Lebanon County Court of Common Pleas. This instant action is therefore, unquestionably a § 2254 action which under 28 U.S.C. § 2244 is "second or successive".⁴ Thus, under the AEDPA, Mr. Sierra is required to seek, and obtain, authorization from the Third Circuit Court of Appeals before pursuing his second habeas challenge. Mr. Sierra's

⁴ The dismissal of a first federal petition as untimely constitutes an adjudication on the merits, rendering any later-filed petition "second or successive." See, e.g., *McNabb v. Yates*, 576 F.3d 1028, 1030 (9th Cir.2009) ("We therefore hold that dismissal of a section 2254 habeas petition for failure to comply with the statute of limitations renders subsequent petitions second or successive for purposes of the AEDPA") (*cited with approval in Stokes v. Gehr*, 399 F. App'x 697, 699 n. 2 (3d Cir.2010))

submissions do not reveal that he has been granted leave to file a second or successive habeas petition by the United States Court of Appeals for the Third Circuit prior to filing the present petition. Because he did not do so, this Court is without jurisdiction to entertain it. See *Burton*, 549 U.S. at 153, 127 S.Ct. at 797; *Blystone v. Horn*, 664 F. 3d 397, 412 (3d Cir. 2011) ("A petitioner's failure to seek such authorization from the appropriate appellate court before filing a second or successive habeas petition acts as a jurisdictional bar").

Accordingly, Mr. Sierra's petition will be dismissed pursuant to 28 U.S.C. § 2243(b)(3) for lack of jurisdiction.

Based on this determination, the Court can either dismiss the petition, or under 28 U.S.C. § 1631, transfer it "in the interest of justice." Because the Court believes that Mr. Sierra's present petition does not: (1) rely on a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court, that was previously unavailable, or (2) present newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found him guilty of his 1998 Lebanon County convictions, the Court will dismiss the petition rather than transfer it to the Third Circuit Court of Appeals. The Court's decision not to transfer the petition has no effect on Mr. Sierra's right to apply to the Third Circuit Court of Appeals for approval to file a successive petition.

IV. Certificate of Appealability

Pursuant to 28 U.S.C. § 2253(c)(1)(A), a petitioner must obtain a certificate of appealability (COA) to appeal a final order denying a habeas corpus petition under 28 U.S.C. § 2254. A district court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." See 28 U.S.C. § 2253(c)(2). When a court denies a petitioner's habeas claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the claims debatable or wrong. See *Slack v. McDaniel*, 529 U.S. 473, 483-484, 120 S.Ct. 1595, 1604, 146 L.Ed.2d 542 (2000). However, when a district court denies a petition on procedural grounds, a COA should issue if: (1) jurists of reason would find it debatable whether the petition states a valid claim of denial of a constitutional right; and (2) jurists of reason would find it debatable whether the district court was correct in its procedural ruling. See *Slack, supra*.

Here, jurists of reason would not find it debatable that this Court was correct in its procedural ruling that Mr. Sierra's present petition is a second or successive petition filed without the authorization of the Third Circuit Court of Appeals. Consequently, no certificate of appealability will issue.

V. Conclusion

Based on the foregoing discussion, the Court will issue an order dismissing the petition for lack of jurisdiction. The order will also deny a certificate of appealability, based on the above analysis. However, Mr. Sierra is advised that he has the right for thirty (30) days to appeal our order denying his petition, see 28

U.S.C. § 2253(a); Fed. R. App. P. 4(a)(1)(A), and that our denial of a certificate of appealability does not prevent him from doing so, as long as he also seeks a certificate of appealability from the court of appeals. See Federal Rule of Appellate Procedure 22(b)(1).

An appropriate Order follows.

Date: December 7, 2017

/s/ A. Richard Caputo
A. RICHARD CAPUTO
United States District Judge

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

ANTONIO SIERRA,

Petitioner

CIVIL ACTION NO. 3:CV-17-1584

v.

(Judge Caputo)

KATHLEEN KANE, et al.,

Respondents

ORDER

AND NOW, this 7th day of DECEMBER, 2017, upon consideration of Mr. Sierra's Petition for Writ of Habeas Corpus (ECF No. 8) and for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

1. The petition for writ of habeas corpus (ECF No. 8) filed pursuant to 28 U.S.C. § 2254 is DISMISSED.
2. Mr. Sierra's pending motion (ECF No. 11) is DISMISSED as moot.
3. A certificate of appealability is DENIED. See 28 U.S.C. § 2253(c).
4. The Clerk of Court is directed to CLOSE this file.

/s/ A. Richard Caputo

A. RICHARD CAPUTO

United States District Judge

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

ANTONIO SIERRA,

Petitioner : CIVIL ACTION NO. 3:CV-17-1584

v. : (Judge Caputo)

KATHLEEN KANE, et al.,

Respondents :

M E M O R A N D U M

I. Introduction

Before the Court is Petitioner Antonio Sierra's "Motion in Chancery by Exigent Circumstances." (ECF No. 21.) The Court will construe his filing as a motion to alter or amend pursuant to Federal Rule of Civil Procedure 60(b), or, alternatively, seeking leave to supplement or amend his petition.

For the reasons that follow his motion will be denied.

II. Background

Petitioner, an inmate currently incarcerated at the State Correctional Institution in Albion, Pennsylvania, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his 1998 state sentence in the Court of Common Pleas for Lebanon County, Pennsylvania. Mr. Sierra's previously filed a §2254

petition, challenging his Lebanon County conviction, was dismissed as untimely filed on July 18, 2006. See *Sierra v. DiGuglielmo*, Civil No. 3:CV-06-0604, 2006 WL 2038391 (M.D. Pa. July 18, 2006). Mr. Sierra's present habeas corpus petition, filed on September 6, 2017 pursuant to 28 U.S.C. § 2254, was dismissed on December 7, 2017 as a successive petition filed without authorization from the United States Court of Appeals for the Third Circuit as required by 28 U.S.C. § 2244(b). (ECF Nos. 19 and 20.)

Petitioner filed his "Petition in Chancery by Exigent Circumstances" (ECF No. 21) on December 15, 2017. Two weeks later Mr. Sierra appealed the Court's December 7, 2017, Order dismissing his petition. (ECF No. 23.)

III. Discussion

A. Motion for Reconsideration

The scope of a motion for reconsideration is extremely limited. *Blystone v. Horn*, 664 F.3d 397, 415 (3d Cir. 2011). "Such motions are not to be used as an opportunity to relitigate the case; rather, they may be used only to correct manifest errors of law or fact or to present newly discovered evidence." (*Id.*) (citing *Howard Hess Dental Labs, Inc., v. Dentsply Int'l Inc.*, 602 F.3d 237, 251 (3d Cir. 2010)). Thus, a movant seeking reconsideration must show: (1) an intervening change in controlling law; (2) the availability of new evidence that was previously unavailable; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice. *Reisinger v. City of Wilkes-Barre*, 520 F. App'x 77, 81 (3d Cir. 2013). "New evidence" for the purpose of this inquiry "does not refer to evidence that a party ...

submits to the court after an adverse ruling. Rather, new evidence in this context means evidence that a party could not earlier submit to the court because that evidence was not previously available." *Howard Hess Dental Labs. Inc.*, 602 F.3d at 252.

Having reviewed the contents of Mr. Sierra's motion, the Court concludes that nothing contained in the submission alters the finding of the December 7, 2017 order denying his habeas petition for lack of jurisdiction after finding it an unauthorized second successive petition.

B. Motion to Supplement, or Amend, his Petition

"[W]hen a Rule 60(b) motion seeks to collaterally attack the petitioner's underlying conviction, the motion should be treated as a successive habeas petition." *Pridgen v. Shannon*, 380 F.3d 721, 727 (3d Cir. 2004). An amended habeas petition is a second or successive motion if it is filed after judgment has been issued on the original petition. *Peterson v. Brennan*, 196 F. Appx 135, 139 (3d Cir. 2006). The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) severely constrained the availability of habeas relief for prisoners. See *Pridgen*, 380 F.3d at 721. The relevant provisions of AEDPA provide that a second or successive habeas motion must be certified by a panel of the respective Court of Appeals and the petition must result from "newly discovered evidence" or "a new rule of constitutional law." 28 U.S.C. §§ 2244(b)(2)(A), (B) and (b)(3)(A).

Some of the grounds for relief Mr. Sierra presents in his motion to amend relate back to his original petition; others do not. It is not necessary for the Court to

wade through all fifty-five pages to determine that this Court must deny his motion as it is an attempt to collaterally attack his sentence and conviction. Thus, it amounts to a second motion under §2254. Since Mr. Sierra has not sought the Third Circuit Court of Appeal's authorization to file such a motion, the Court lacks jurisdiction to entertain it. *William v. Warden Allenwood USP*, 647 F. App'x 65, 67 (3d Cir 2016) (the district court lacked jurisdiction to consider claim raised in "second or successive petition filed without the required Court of Appeals authorization.")

IV. Conclusion

For the foregoing reasons, Petitioner's motion (ECF No. 21) will be denied insofar as it seeks relief from the Court's previous dismissal of the habeas petition. Likewise, to the extent his motion sought to supplement or amend his § 2254 petition, it will be denied.

An appropriate Order follows.

Date: March 1, 2018

/s/ A. Richard Caputo
A. RICHARD CAPUTO
United States District Judge

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

ANTONIO SIERRA,

Petitioner

CIVIL ACTION NO. 3:CV-17-1584

v.

(Judge Caputo)

KATHLEEN KANE, et al.,

Respondents

O R D E R

AND NOW, this 1st day of MARCH, 2018, upon consideration of Mr. Sierra's "Petition in Chancery by Exigent Circumstances" (ECF No. 21) and for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

1. Mr. Sierra's "Petition in Chancery by Exigent Circumstances" will be construed as a motion for reconsideration, or, in the alternative, motion for leave to file an amended petition.
2. Mr. Sierra's motion for reconsideration (ECF No. 21) is DENIED.
3. Mr. Sierra's motion for leave to file an amended petition (ECF No. 21) is DENIED.

/s/ A. Richard Caputo

A. RICHARD CAPUTO
United States District Judge

**Additional material
from this filing is
available in the
Clerk's Office.**