FILED
United States Court of Appeals
Tenth Circuit

July 11, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

PEDRO J. "PETE" AMARO,

Petitioner - Appellant,

v.

ATTORNEY GENERAL FOR THE STATE OF NEW MEXICO; R.C. SMITH, Warden,

Respondents - Appellees.

No. 19-2064
(D.C. No. 1:17-CV-00898-WJ-LF)
(D. New Mexico)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **BRISCOE**, **McHUGH**, and **MORITZ**, Circuit Judges.

Mr. Pedro Amaro, proceeding pro se,[1] seeks a certificate of appealability ("COA") to appeal the district court's denial of his petition for a writ of habeas corpus under § 2254 of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). We deny a COA and dismiss his appeal.

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

[1] Because Mr. Amaro is pro se, "we liberally construe his filings, but we will not act as his advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

App. A

I. BACKGROUND

Mr. Amaro was convicted of various crimes in New Mexico state court. After an appeal to the New Mexico Supreme Court, his conviction became final in November 2005. Other than filing two motions for records and transcripts from the state criminal proceedings, Mr. Amaro took no action to challenge his conviction until he filed a state post-conviction petition in April 2015. That petition was denied later that same month, and his petition for a writ of certiorari to the New Mexico Supreme Court was denied in 2017. In August 2017, Mr. Amaro filed a § 2254 petition in federal court.

Mr. Amaro styled his petition as a class action habeas petition, "collaterally attack[ing]" all convictions issued in the "Ninth Judicial District" of New Mexico from "'1979' to approximately 2012/2013." R. at 5. Specifically, he alleged that the convictions "were/are void" due to, among other things, prosecutorial misconduct, judicial misconduct and bias, miscarriage of justice, and ineffective assistance of counsel. R. at 5, 13 (emphasis omitted). The district court dismissed Mr. Amaro's class claims because "a pro se litigant cannot represented or act on behalf of others," R. at 203 (emphasis omitted), and ordered Mr. Amaro show cause "why his § 2254 petition should not be dismissed as untimely," R. at 205. After receiving Mr. Amaro's response, the district court dismissed his petition as untimely and denied him a COA. Mr. Amaro filed a motion to reconsider, but that too was denied.

Mr. Amaro timely appealed and now seeks a COA.

II. ANALYSIS

Mr. Amaro argues that both the district court's rulings—dismissing his class claims because he is proceeding pro se and dismissing his individual claims and § 2254 petition as untimely—are wrong. But before reaching the merits of Mr. Amaro's arguments, we must first address the threshold question of our own jurisdiction. Because the district court denied a COA, we lack jurisdiction over Mr. Amaro's appeal unless we issue a COA of our own. *See* 28 U.S.C. § 2253(c)(1)(A); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When, as here, "the district court denies a habeas petition on procedural grounds," the petitioner may obtain a COA by "show[ing], at least, 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). Mr. Amaro cannot satisfy this standard.

A. *Class Claims*

Mr. Amaro claims the "district court erred and violated [his] due process" rights when it "dismiss[ed] the class action claims . . . on grounds that a pro se litigant cannot represent or act on behalf of others." Pet'r's Br. at 16 (quotation omitted). But Mr. Amaro bases his argument on the rules that govern AEDPA, not on due process. He contends that "Habeas Rule 2(e) clearly allows an individual, advocate, and/or advocacy organization to submit a habeas petition on behalf of a person or person whose [r]ights have been denied." *Id.* But Rule 2(e) says no such thing. Rather, it says only that a "petitioner who seeks relief from judgments of more than one state court must file a

separate petition covering the judgment or judgments of each court." 28 U.S.C. § 2254, Rule 2(e). Nevertheless, the habeas rules are relevant here. Rule 12 provides that "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules." 28 U.S.C. § 2254, Rule 12. So the question is whether Federal Rule of Civil Procedure 23, which governs class actions in federal court, permits Mr. Amaro to bring these class action claims. The district court held it did not.

"One or more members of a class may sue . . . as representative parties on behalf of all members only if . . . the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). We have read this rule to exclude pro se class representatives: "A litigant may bring his own claims to federal court without counsel, but not the claims of others." *Fymbo v. State Farm Fire & Cas. Co.*, 213 F.3d 1320, 1321 (10th Cir. 2000). "This is so because the competence of a layman is 'clearly too limited to allow him to risk the rights of others.'" *Id.* (quoting *Oxendine v. Williams*, 509 F.2d 1405, 1407 (4th Cir. 1975)).

Because Mr. Amaro is proceeding pro se, he cannot adequately represent the interests of the putative class. Rule 23 thus forecloses him from bringing an action on the class's behalf. The district court held as much, and that holding is beyond debate.

B. *Timeliness*

We now turn to Mr. Amaro's individual claims. "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1). Relevant here, the one-year

limitation period "run[s] from the latest of . . . the date on which the judgment became final," or the date on which "the factual predicate of the claim . . . presented could have been discovered through the exercise of due diligence." *Id.* § 2244(d)(1)(A), (D).

Although Mr. Amaro's conviction became final in November 2005, he argues his petition was still timely because "the underlying cause of action [for Mr. Amaro's] stated claims [was] not discoverable" until the Supreme Court of New Mexico issued its decision in *De Leon v. Harley*, 316 P.3d 896 (N.M. 2013). Pet'r's Br. at 23. There the court held that an indictment must be quashed where a district attorney, rather than the trial judge, was permitted to excuse grand jurors. *De Leon*, 316 P.3d at 901. This argument is unavailing.

As the district court noted, § 2244(d)(1)(D) tolls the limitation period until "the date on which the *factual* predicate of the claim . . . could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D) (emphasis added). The factual predicate of any claim of "irregularities in the grand jury process" that Mr. Amaro might bring could have been discovered as early as when Mr. Amaro was indicted. *See De Leon*, 316 P.3d at 901. *De Leon* provided the *legal*, not factual, basis for Mr. Amaro's claim. Section 2244(d)(1) does provide tolling for new legal rules but only does so for legal rules recognized by the *United States* Supreme Court. *See* 28 U.S.C. § 2244(d)(1)(C) (permitting tolling until "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review").

Mr. Amaro makes one final timeliness argument: actual innocence. "[A] credible showing of actual innocence may allow a prisoner to pursue his constitutional claims . . . on the merits notwithstanding" the one-year limitations period. *See McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013); *see also Laurson v. Leyba*, 507 F.3d 1230, 1232 (10th Cir. 2007) ("A claim of actual innocence may toll the AEDPA statute of limitations."). But this exception applies only in the "extraordinary case," *Lopez v. Trani*, 628 F.3d 1228, 1231 (10th Cir. 2010), where the petitioner "presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Schlup v. Delo*, 513 U.S. 298, 316 (1995). Only when a petitioner "support[s] his allegations of constitutional error with new reliable evidence . . . that was not presented at trial" will he "be allowed to pass through the gateway [of timeliness] and argue the merits of his underlying claims." *Id.* at 316, 324.

Before the district court, Mr. Amaro attempted to "support[] his actual innocence claim" by addressing the "legal sufficiency of his convictions," but he offered no new evidence that was not "presented to the jury." R. at 314. Mr. Amaro does no better on appeal. Although he makes a number of disturbing allegations, all of them address the legal issues or are facts known at the time of trial. These allegations do not establish Mr. Amaro's actual innocence.

No fairminded jurist could disagree with, let alone debate, the district court's determination that Mr. Amaro's § 2254 petition was untimely.

III. CONCLUSION

For the reasons stated, we deny Mr. Amaro a COA and dismiss his appeal.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

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

PEDRO J. "PETE" AMARO,

Petitioner,

v. No. 1:17-cv-00898 RJ/LF

R.C. SMITH, *Warden*,
ATTORNEY GENERAL FOR
THE STATE OF NEW MEXICO,

Respondents.

MEMORANDUM OPINION AND ORDER

Before the Court is Pedro Amaro's Class Action Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus. (Doc. 1). Amaro asks the Court to vacate all criminal judgments entered in New Mexico's Ninth Judicial District Court between 1979 and 2012/2013. (Doc. 1, p. 1). Amaro also appears to challenge his state court murder conviction based on, inter alia, judicial misconduct, prosecutorial misconduct, and ineffective assistance of counsel. (Doc. 1, p. 9). As discussed below, the Court will dismiss all "class action" claims and require Amaro to show cause why his own habeas petition should not be dismissed as untimely.

BACKGROUND

Amaro was convicted of first degree murder, tampering with evidence, and burglary in New Mexico's Ninth Judicial District Court, case no. D-905-CR-2001-00182.[1] Judgment on his conviction was entered no later than 2004. *See* NTC: Entry of Judgment entered April 20, 2004 in D-905-CR-2001-00182. Amaro filed a direct appeal from the criminal judgment, which was

[1] The Court took judicial notice of the state court criminal docket. *See United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007) (courts have "discretion to take judicial notice of publicly-filed records ... and certain other courts concerning matters that bear directly upon the disposition of the case at hand"); *Stack v. McCotter*, 2003 WL 22422416 (10th Cir. 2003) (unpublished) (finding that a state district court's docket sheet was an official court record subject to judicial notice under Fed. R. Evid. 201).

App. B

affirmed on August 19, 2005. *See* Mandate/Affirmed entered August 19, 2005 in D-905-CR-2001-00182. Amaro's conviction and sentence therefore became final by November of 2005, when the "ninety-day time period for filing a certiorari petition with the United States Supreme Court expired." *Harris v. Dinwiddie,* 642 F.3d 902, 906 n. 6 (10th Cir. 2011) (addressing finality in § 2254 cases). Nearly twelve years later on August 30, 2017, Amaro filed the federal § 2254 petition. *See* Doc. 1.

DISCUSSION

1. Class Action Claims

As an initial matter, Amaro seeks to vacate the judgments of thousands of prisoners convicted over the course of about 32 years. He argues that all judgments entered in New Mexico's Ninth Judicial District Court between 1979 and 2012/2013 "are void for lack of jurisdiction" because they were "procured by fraud...." (Doc. 1, p. 1). Even if § 2254 afforded this type of relief - which it does not - a *pro se* litigant cannot represent or act on behalf of others. As the Tenth Circuit pointed out, "the competence of a layman is clearly too limited to allow him to risk the rights of others." *Fymbo v. State Farm Fire and Cas. Co.*, 213 F.3d 1320, 1321 (10th Cir. 2000) (quoting *Oxendine v. Williams*, 509 F.2d 1405, 1407 (4th Cir. 1975)). Amaro's "class action" claims purporting to challenge the convictions of other unidentified prisoners will therefore be dismissed.

2. Timeliness of Amaro's Habeas Claims

Petitions for a writ of habeas corpus by a person in state custody must generally be filed within one year after the defendant's conviction becomes final. 28 U.S.C. § 2244(d)(1)(A). The one-year limitation period can be extended:

(1) While a state habeas petition is pending, § 2244(d)(2);

(2) Where unconstitutional state action has impeded the filing of a federal habeas petition, § 2244(d)(1)(B);

(3) Where a new constitutional right has been recognized by the Supreme Court, § 2244(d)(1)(C); or

(4) Where the factual basis for the claim could not have been discovered until later, § 2244(d)(1)(C).

Equitable tolling may also available "when an inmate diligently pursues his claims and demonstrates that the failure to timely file was caused by extraordinary circumstances beyond his [or her] control." *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000).

It appears that the one-year limitation period had expired over a decade before Amaro filed his § 2254 petition. Amaro argues equitable tolling applies based on the State's alleged "concealment of the misconduct." (Doc. 1, p. 10). He states:

> The ... statute of limitations period for individual cases was equitably tolled by the State's improper concealment of the misconduct (initially 1 and covert abuse of the Grand Jury process and its procedures though collusion and 'Good ol' Boy' culture of secrecy, where Petitioner and members of the Class were prevented from obtaining knowledge about the cause of action and availability of a "Procedural Default" defense until a former 9th Judicial District district attorney (Kirk E. Chavez) opted to 'blow-the-whistle' on the issue(s) in a public forum on behalf of a client.

Id. This information, without more, is not enough to establish equitable tolling. The doctrine only applies "if a petitioner is able to show *specific facts* to support his claim of extraordinary circumstances and due diligence." *See Yang v. Archuleta*, 525 F.3d 925, 928 (10th Cir. 2008) (emphasis added). The Court will therefore require Amaro to provide more information within thirty (30) days of entry of this Order about why his § 2254 petition should not be dismissed as untimely. Failure to timely respond to this order or otherwise show cause may result in dismissal

of the § 2254 action without further notice. *See Hare v, Ray*, 232 F.3d 901 (10th Cir. 2000) (unpublished) (the district court may *sua sponte* dismiss an untimely § 2254 petition where the petitioner fails to identify circumstances that would support tolling).

IT IS THEREFORE ORDERED that Amaro's "class action" claims purporting to challenge the convictions of other unidentified prisoners are DISMISSED with prejudice.

IT IS FURTHER ORDERED that, within thirty (30) days of entry of this Order, Amaro must file a response showing cause, if any, why his § 2254 petition should not be dismissed as untimely.

12-5-17

UNITED STATES DISTRICT JUDGE

United States District Court
District of New Mexico
Office of the Clerk
Document Summary Page

Date: December 05, 2017 02:45 PM MST

To: Pedro J. Amaro

Case: Amaro v. Horton et al

From: Office of the Clerk, District of New Mexico

CM/ECF Support Number: (505) 348-2075

CM/ECF Support Email: cmecf@nmcourt.fed.us

Comments: Case#1:17-cv-00898-RJ-LF Document#10 Filed:12/05/2017

Job: e8ab2475-ac7e-4b83-98ab-a7ab1eaaab81

MEMORANDUM OPINION AND ORDER by District Judge Robert A. Junell; Amaro's "class action" claims are dismissed with prejudice; within 30 days, Amaro must file a response showing cause why his 2254 petition should not be dismissed. (mjr)

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

PEDRO J. "PETE" AMARO,

Petitioner,

v. No. 1:17-cv-00898 MCA/LF

R.C. SMITH, *Warden*,
ATTORNEY GENERAL FOR
THE STATE OF NEW MEXICO,

Respondents.

MEMORANDUM OPINION AND ORDER DISMISSING HABEAS PETITION

THIS MATTER is before the Court on Pedro Amaro's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus ("Petition"). (Doc. 1). Also before the Court are various motions to proceed *in forma pauperis*; appoint counsel; expand the record; pursue class action claims; require the State of New Mexico to comply with due process; and for summary judgment. (Docs. 2-6, 11, 17-19, and 22). For the reasons set out below, the Court will dismiss the Petition as untimely and deny as moot all other pending motions.

BACKGROUND

Amaro was convicted of first degree murder, tampering with evidence, and burglary in New Mexico's Ninth Judicial District Court, case no. D-905-CR-2001-00182.[1] Judgment on his conviction was entered no later than 2004. *See* NTC: Entry of Judgment entered April 20, 2004 in D-905-CR-2001-00182. Amaro filed a capital appeal to the New Mexico Supreme Court (NMSC), which affirmed the criminal judgment on August 19, 2005. *See* Mandate/Affirmed

[1] This Court took judicial notice of the State Court criminal docket. *See Stack v. McCotter,* No. 02-4157, 2003 WL 22422416, at *391 (10th Cir. Oct. 24, 2003) (unpublished) (finding that a state district court's docket sheet was an official court record subject to judicial notice under Fed. R. Evid. 201); *United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007) (same).

App. C

Rcvd 5/30/18 9AM

entered in D-905-CR-2001-00182. Amaro's conviction and sentence therefore became final by November of 2005, when the "ninety-day time period for filing a certiorari petition with the United States Supreme Court expired." *Harris v. Dinwiddie,* 642 F.3d 902, 906 n. 6 (10th Cir. 2011) (addressing finality in § 2254 cases).

Between 2005 and 2007, Amaro filed two motions in the state criminal case requesting records and transcripts. *See* Motions entered October 25, 2005 and May 1, 2007 in D-905-CR-2001-00182. There was no other case activity until April 3, 2015, when Amaro filed a state habeas petition. The State Court dismissed the petition on April 16, 2015. *See* Order Summarily Dismissing Petition for Writ of Habeas Corpus entered in D-905-CR-2001-00182. Amaro filed a petition for writ of certiorari with the NMSC, which was denied on July 28, 2017. *See* NCJ: Disposition Order in D-905-CR-2001-00182.

On August 30, 2017, Amaro filed the present federal § 2254 Petition. (Doc. 1). The Petition seeks to vacate all criminal judgments entered in New Mexico's Ninth Judicial District Court between 1979 and 2012/2013. (Doc. 1, p. 1). It also appears to challenge his State Court convictions based on, inter alia, judicial misconduct, prosecutorial misconduct, and ineffective assistance of counsel. (Doc. 1, p. 9). By a Memorandum Opinion and Order entered December 5, 2017, the Court dismissed all "class action" claims after noting that *pro se* parties cannot act on behalf of others. (Doc. 10). The Court also directed Amaro to show cause why his individual § 2254 claims should not be dismissed as untimely. *Id.*

ANALYSIS

1. Time Limitations on Habeas Proceedings

Petitions for a writ of habeas corpus by a person in state custody must generally be filed within one year after the defendant's conviction becomes final. 28 U.S.C. § 2244(d)(1)(A). The

one-year limitation period can be extended:

(1) While a state habeas petition is pending, § 2244(d)(2);

(2) Where unconstitutional state action has impeded the filing of a federal habeas petition, § 2244(d)(1)(B);

(3) Where a new constitutional right has been recognized by the Supreme Court, § 2244(d)(1)(C); or

(4) Where the factual basis for the claim could not have been discovered until later, § 2244(d)(1)(D).

Amaro filed his federal § 2254 Petition nearly twelve years after his criminal judgment became final. However, in his forty-three-page show-cause response, Amaro maintains the Petition is still timely because he was "impeded, thwarted, and prevented" from "perfecting a habeas petition." (Doc. 12, p. 10). The factual grounds for tolling are summarized as follows:

- The State Court failed to timely respond to Amaro's motions in 2005 and 2007 requesting records and transcripts, which meant he initially lacked access to the case file and trial transcripts. (Doc. 12, p. 4). When he finally obtained the "limited case-related materials" in 2012, he had to "translate each cassette in an environment filled with noise, cell-mates, and interruptions . . . ." (Doc. 12, p. 8).

- He was nearly poisoned by carbon monoxide on December 28, 2012 and experienced other health issues, such as thyroid disease, during his incarceration. (Doc. 12, p. 7-8).

- He began drafting the habeas petition in 2013, but he could not obtain counsel to provide assistance. (Doc. 12, p. 8).

- He did not "discover" his habeas claims until the NMSC issued *De Leon v. Hartley,*

2014-NMSC-005, 316 P.3d 896, in which it held that an indictment must be quashed where a district attorney is permitted to excuse grand jurors. Specifically, Amaro argues that "knowledge of the factual predicate for his claim presented itself only when ... Kirk Chavez"—who was counsel of record for the petitioner in *De Leon*—"blew the whistle" on grand jury irregularities. (Doc. 12, p. 4, 17).

2. Analysis of Tolling Arguments

Amaro's arguments are insufficient to toll the one-year limitation period for filing a § 2254 petition, for several reasons. First, the late filing is not traceable to unconstitutional state action as required by 28 U.S.C. § 2244(d)(1)(B). "The unconstitutional state-created impediment referenced in [that section] relates to an impediment that prevents the filing of a federal court action." *Corson v. Colorado*, No. 17-1204, 2018 WL 718605, at *2 (10th Cir. Feb. 6, 2018) (internal quotation marks and citation omitted). The State Court may have been slow to respond to certain document requests in 2005 and 2007, but Amaro has failed to explain why he could not timely file his § 2254 Petition without that information. Further, Amaro had at least some of the critical documents, such as trial transcripts, by 2012. Even if the one-year limitation period started running in 2012, the Petition would still be untimely because Amaro filed it in 2017.[2]

The show-cause response also fails to demonstrate grounds for equitable tolling based on Amaro's health issues and lack of counsel. Equitable tolling "is only available when an inmate diligently pursues [the] claims and demonstrates that the failure to timely file was caused by extraordinary circumstances beyond [the inmate's] control." *Marsh v. Soares,* 223 F.3d 1217,

[2] The Court also notes that Amaro's 2015 state habeas petition does not change the result. The filing of a state habeas petition after the expiration of the one-year limitation period does not restart that period or otherwise immunize an untimely federal petition. *See Gunderson v. Abbott*, No. 05-8125, 2006 WL 752038, at *809 (10th Cir. Mar. 24, 2006) (unpublished) ("A state court [habeas] filing submitted after the ... deadline does not toll the limitations period."). Amaro's 2015 state habeas petition therefore does not change the result

1220 (10th Cir. 2000). "[A]n inmate bears a strong burden to show specific facts to support [a] claim of extraordinary circumstances . . . ." *Yang v. Archuleta,* 525 F.3d 925, 928 (10th Cir. 2008) (internal quotation marks and citation omitted). The inmate must provide "specificity regarding the alleged lack of access and the steps he took to diligently pursue his federal claims." *Miller v. Marr,* 141 F.3d 976, 978 (10th Cir.1998).

It is well established that the lack of legal assistance is not extraordinary. *Id.; see also Marsh*, 223 F.3d at 1220 (holding: "ignorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing" (internal quotation marks and citation omitted)). Our Tenth Circuit has also declined to apply equitable tolling where, as here, the petitioner referenced his medical issues but did not otherwise explain his multiple-year delay in seeking federal relief. *See Garza v. Kansas*, No. 11-3283, 2011 WL 5966919, at *736 (10th Cir. Nov. 30, 2011) (unpublished) (rejecting tolling argument where the petitioner made "a passing reference to [a] medical history" without describing how the alleged "condition would have prevented him from timely asserting his claims"). Accordingly, this case does not present one of those "rare and exceptional circumstances in which the untimely filing of a federal habeas petition should be excused" on equitable grounds. *Id.*

Finally, *De Leon* does not afford relief under 28 U.S.C. § 2244(d)(1)(D). That section tolls the limitation period until "the date on which the *factual* predicate of the claim . . . could have been discovered through the exercise of due diligence." (emphasis added). *De Leon* made Amaro aware of the potential *legal* basis for his claims, namely that a judge may violate the defendant's constitutional rights by allowing the district attorney to excuse grand jurors. *De Leon,* 2014-NMSC-005, ¶ 20. The Court also notes that, as a State Supreme Court ruling, *De Leon* does not trigger the commencement of a new one-year limitation period under the exception for rights

that are "newly recognized by the [United States] Supreme Court." 28 U.S.C. § 2244(d)(1)(C). Amaro has therefore not established grounds for tolling under Section 2244(d) or principles of equity.

3. Actual Innocence

Amaro also claims that he is actually innocent of the underlying crimes. A "credible showing of actual innocence" may "overcome" the one-year limitation period on filing a habeas petition. *McQuiggin v. Perkins*, 569 U.S. 383, 391 (2013); *see also Lopez v. Trani*, 628 F.3d 1228, 1231 (10th Cir. 2010) ("Where . . . a petitioner argues that . . . he is actually innocent, . . . the petitioner need make no showing of cause for the delay."); *Laurson v. Leyba*, 507 F.3d 1230, 1232 (10th Cir. 2007) ("A claim of actual innocence may toll the AEDPA statute of limitations."). The Tenth Circuit has "stress[ed] that this actual innocence exception is rare and will only be applied in the extraordinary case." *Lopez*, 628 F.3d at 1231 (internal quotation marks and citation omitted). "Actual innocence" in this context refers to factual innocence and not mere legal sufficiency. *Bousley v. U.S.*, 523 U.S. 614, 623-624 (1998).

To take advantage of the "actual innocence" exception, a habeas petitioner must "present[ ] evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error . . . ." *Schlup v. Delo*, 513 U.S. 298, 316 (1995). The petitioner must "support his [or her] allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Id.* at 324. Moreover, this new evidence must be sufficient to "show that it is more likely than not that no reasonable juror would have convicted [the petitioner] in light of the new evidence." *Id.* at 327; *see also House v. Bell*, 547 U.S. 518, 536–37 (2006) (discussing the showing necessary under

the "actual innocence" exception).

The majority of Amaro's arguments supporting his actual innocence claim challenge the legal sufficiency of his convictions. He argues the trial was "riddled with ... constitutional errors" such as: (1) conflicts of interest; (2) *Brady* violations; (3) grand jury issues; (4) illegal search and seizure; (5) improper warrantless arrest; (6) double jeopardy; (7) perjured testimony by an ex-girlfriend who was a "known liar;" (8) Fifth Amendment violations; (9) "inflammatory" crime scene photos; and (10) unspecified police errors during the investigation. (Doc. 12, p. 10-13, 20-21, 24, 30). These alleged procedural irregularities do not speak to whether Amaro committed the underlying crime.

Further, the facts that address the murder charges do not establish Amaro's innocence. Amaro asserts it was "medically impossible" for him to have murdered the victim because the eye witness testimony purportedly conflicted with the testimony by the Medical Examiner. (Doc. 12, p. 25-26). At trial, the Medical Examiner opined that the victim died after 2:26 p.m. on April 21, 2001, while the eye witness testified she saw Amaro slit the victim's throat about twelve hours earlier than that timeframe. *Id.* Amaro also argues the victim's wounds undermined the witness' testimony about the attack, and that the witness changed her testimony about the murder weapon. *Id.* at p. 26, 28, 35, 36, and 38. None of this information constitutes "strong," "reliable" evidence of innocence, and none of it is new. *See Schlup*, 513 U.S. at 316, 324. The Petition indicates the evidence was presented to the jury, who considered it and found that Amaro was guilty of murder. Amaro's actual innocence claim therefore fails, and the Court will dismiss the § 2254 Petition as untimely. The Court will also deny a certificate of appealability under Habeas Corpus Rule 11(a), as Amaro has failed to make a substantial showing that he has been denied a constitutional right.

4. Pending Motions

In addition to the Petition, Amaro filed the following motions:

- A Motion to Appoint Counsel to assist him in the federal habeas proceeding (Doc. 2);
- A Motion for Class Certification, which seeks to certify a class of federal habeas petitioners (Doc. 6);
- Three Motions to Expand the Record, which seek leave to present additional evidence and case law to support Amaro's habeas claims (Docs. 3, 11, and 22);
- A Motion for Order to Show Cause, which seeks an order directing the State of New Mexico to file an answer to the habeas petition (Doc. 4);
- A Motion for Summary Judgment on the habeas claims (Doc. 5);
- Two Motions for Leave to Proceed *In Forma Pauperis,* which were filed after Amaro paid the $5.00 filing fee in full (Docs. 17, 18); and
- A Motion for Rulings and Order of Dismissal Regarding Class Action Claims, which seeks entry of a final judgment so that Amaro can appeal the dismissal of the class action habeas claims (Doc. 19).

Having carefully reviewed each Motion, the Court finds that dismissal of the § 2254 Petition as untimely renders the above requests moot. All pending motions will therefore be denied.

CONCLUSION

Based on the foregoing, **IT IS ORDERED** that Pedro Amaro's Class Action Petition Under 28 U.S.C. § 2254 and Fed. R. Civ. P. 23 For Writ of Habeas Corpus by a Person in Custody (Doc. 1) is **DISMISSED** with prejudice; a certificate of appealability is **DENIED**; and judgment

will be entered.

IT IS FURTHER ORDERED that all pending motions (Docs. 2, 3, 4, 5, 6, 11, 17, 18, 19, and 22) are **DENIED** as moot.

SO ORDERED this 24th day of May, 2018.

UNITED STATES DISTRICT JUDGE

United States District Court
District of New Mexico
Office of the Clerk
Document Summary Page

Date: May 24, 2018 09:09 PM MDT

To: Pedro J. Amaro

Case: Amaro v. Horton et al

From: Office of the Clerk, District of New Mexico

CM/ECF Support Number: (505) 348-2075

CM/ECF Support Email: cmecf@nmcourt.fed.us

Comments: Case#1:17-cv-00898-MCA-LF Document#23 Filed:05/24/2018

Job: 342ce5b6-6079-4044-ae4d-4e8834757267

MEMORANDUM OPINION AND ORDER DISMISSING HABEAS PETITION by District Judge M. Christina Armijo. Based on the foregoing, IT IS ORDERED that Pedro Amaros Class Action Petition Under 28 U.S.C. § 2254 and Fed. R. Civ. P. 23 For Writ of Habeas Corpusby a Person in Custody (Doc. 1) is DISMISSED with prejudice; a certificate of appealability is DENIED; and judgment will be entered. IT IS FURTHER ORDERED that all pending motions (Docs. 2, 3, 4, 5, 6, 11, 17, 18, 19,and 22) are DENIED as moot. (kg)

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

PEDRO J. "PETE" AMARO,

Petitioner,

v. No. 1:17-cv-00898 MCA/LF

R.C. SMITH, *Warden*,
ATTORNEY GENERAL FOR
THE STATE OF NEW MEXICO,

Respondents.

FINAL JUDGMENT

Pursuant to Fed. R. Civ. P. 58(a), and consistent with the Memorandum Opinion and Order filed contemporaneously herewith, the Court issues its separate judgment finally disposing of this case.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Pedro Amaro's Class Action Petition Under 28 U.S.C. § 2254 and Fed. R. Civ. P. 23 For Writ of Habeas Corpus by a Person in Custody (Doc. 1) is **DISMISSED** with prejudice

UNITED STATES DISTRICT JUDGE

Rcvd 5/30/18 9AM

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

PEDRO J. "PETE" AMARO,

Petitioner,

v. No. 1:17-cv-00898 WJ/LF

R.C. SMITH, *Warden, et al*,

Respondents.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Pedro Amaro's *Pro Se* Motion for Reconsideration (Motion) (Doc. 25). Amaro asks the Court to reconsider the dismissal of his 28 U.S.C. § 2254 habeas petition. Having considered the Motion, the record, and applicable law, the Court will deny the Motion.

BACKGROUND

In 2004, Amaro was convicted of first degree murder, tampering with evidence, and burglary in New Mexico's Ninth Judicial District Court, case no. D-905-CR-2001-00182. Amaro filed a capital appeal to the New Mexico Supreme Court (NMSC), which affirmed the conviction and sentence on August 19, 2005. About ten years later, Amaro filed a state habeas petition. The state court dismissed the petition, and the NMSC denied certiorari review. On August 30, 2017, Amaro filed a "Class Action Habeas Petition" under 28 U.S.C. § 2254. He sought habeas relief on behalf of every single prisoner sentenced in New Mexico's Ninth Judicial District Court between 1979 and 2012/2013.

By a Memorandum Opinion and Order entered December 5, 2017, the Court dismissed all "class action" claims and directed Amaro to show cause why his individual § 2254 claims should

App. D Rcvd 4.1.19

not be dismissed as untimely. *Id.* The Court noted the limitation period expired in 2006, one year after the defendant's conviction becomes final. *See* 28 U.S.C. § 2244(d)(1)(A). In his show-cause response, Amaro argued the one-year limitation period was tolled for at least nine years because: (1) the state prevented him from filing a habeas petition; (2) he experienced health issues in 2012; (3) he could not obtain counsel; and (4) he did not "discover" the facts supporting his habeas claims until the NMSC issued *De Leon v. Hartley,* 2014-NMSC-005, 316 P.3d 896. Alternatively, Amaro argued the one-year limitation period did not apply because he was actually innocent of the crime. By a Memorandum Opinion and Order entered May 24, 2018, the Court determined tolling did not apply and dismissed the untimely habeas petition. Amaro filed the Motion to Reconsider three weeks later.

DISCUSSION

Amaro moves for reconsideration under Fed. R. Civ. P. 59(e), which applies to motions filed within 28 days of entry of the final judgment. Grounds for reconsideration include: "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). A motion to reconsider is also "appropriate where the court has misapprehended the facts, a party's position, or the controlling law." *Id. See also Barber ex rel. Barber v. Colo. Dep't of Revenue*, 562 F.3d 1222, 1228 (10th Cir. 2009) (a motion to reconsider can be granted when the Court errs with respect to the facts or law).

Although Amaro does not cite any new law or evidence, he alleges the Court erred in a variety of ways. He contends:

- The Court "ignored" the fact that the Ninth Judicial District Court violated the rights

of every prisoner sentenced over a 32 year period;

- The Court inappropriately treated the petition as a "run of the mill" civil habeas matter instead of applying Fed. R. Civ. P. 23 (addressing class action lawsuits);
- The Court inappropriately focused on whether Amaro's petition was timely, instead of looking at whether any class member could submit a timely petition;
- The Court applied "pretend rules" (*i.e.*, 28 U.S.C. §§ 2244 and 2254, which address the timeliness of habeas petitions) in order to "callously ... affirm the state's wrongful convictions;"
- The petition was timely based on the arguments previously raised in the show-cause response (*i.e.*, state-impediment to filing; equitable tolling; and actual innocence);
- The Court should have appointed counsel;
- The Court should not have taken judicial notice of state court judgments;
- The Court issued a dispositive Memorandum Opinion and Order without asking the Magistrate Judge to weigh in with recommendations and a proposed disposition; and
- The Court denied Amaro's due process rights by failing to reach the merits of his untimely petition.

At best, the Motion rehashes Amaro's original arguments on timeliness, which were carefully considered and rejected in connection with the earlier ruling. *See Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (A "motion for reconsideration ... is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing."). Otherwise, Amaro's arguments are frivolous. It is well established that a petitioner "he must show that he can satisfy the procedural requirements of" 28 U.S.C. §§ 2244 and 2254 before the Court will "address the merits of [his] claim." *United States v. Greer*, 881 F.3d 1241,

1244 (10th Cir. 2018). The Motion to Reconsider will therefore be denied.

IT IS ORDERED that Pedro Amaro's *Pro Se* Motion for Reconsideration (Motion) (Doc. 25) is **DENIED**.

SO ORDERED.

WILLIAM P. JOHNSON
CHIEF UNITED STATES DISTRICT JUDGE

FILED
United States Court of Appeals
Tenth Circuit

August 1, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PEDRO J. "PETE" AMARO,

Petitioner - Appellant,

v.

ATTORNEY GENERAL FOR THE STATE OF NEW MEXICO, et al.,

Respondents - Appellees.

No. 19-2064

ORDER

Before **BRISCOE**, **McHUGH**, and **MORITZ**, Circuit Judges.

Appellant's "Motion for Rehearing," construed as a petition for rehearing is denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

App. E

Rcvd 8/5/19

FILED
United States Court of Appeals
Tenth Circuit

April 16, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PEDRO J. "PETE" AMARO,

Petitioner - Appellant,

v.

ATTORNEY GENERAL FOR THE STATE OF NEW MEXICO, et al.,

Respondents - Appellees.

No. 19-2064
(D.C. No. 1:17-CV-00898-WJ-LF)
(D. N.M.)

ORDER

Before **BACHARACH** and **PHILLIPS**, Circuit Judges.

This matter is before the court on its own initiative following opening of the appeal and review of the district court's docket. Appellant Pedro J. Amaro—a New Mexico state prisoner proceeding *pro se*—seeks to appeal the district court's dismissal of Mr. Amaro's petition for 28 U.S.C. § 2254 habeas relief as untimely. The district court denied a certificate of appealability ("COA") as to the dismissal. [ECF No. 23 at 8]. Mr. Amaro subsequently moved for reconsideration of the dismissal under Fed. R. Civ. P. 59(e), and the district court denied that motion [ECF No. 30 at 3], but did not address whether to issue a COA with respect to the denial of reconsideration.

Mr. Amaro must obtain a certificate of appealability (COA) to proceed on appeal with respect to either the dismissal of his petition or the denial of his request for

App. F

Rcvd 4/18/19

reconsideration. *See* 28 U.S.C. § 2253(c)(1)(B); *United States v. Parada*, 555 F. App'x 763, 765 (10th Cir. 2014) ("The Antiterrorism and Effective Death Penalty Act (AEDPA) requires a petitioner to obtain a COA before he can appeal the denial of any final order in a habeas corpus proceeding, including a motion for reconsideration under Rule 59(e).").

In light of this court's decision in *United States v. Higley*, No. 17-1111 (10th Cir. Sep. 29, 2017) (unpublished) (stating that the district court must ordinarily decide, in the first instance, whether to issue a COA), the court directs a limited remand to the district court to consider whether to issue a COA with respect to its denial of Mr. Amaro's motion for reconsideration. Mr. Amaro shall file a written report advising the court of the status of the district court proceedings on the earlier of: (1) May 16, 2019; or (2) five days after he receives notice of the district court's order regarding COA. The court directs the Clerk of the district court to supplement the preliminary record when the district court issues its decision.

Pending the district court's decision regarding COA for its denial of Mr. Amaro's motion for reconsideration, this court abates this proceeding.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: Lisa A. Lee
Counsel to the Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

PEDRO J. "PETE" AMARO,

Petitioner,

v. No. 1:17-cv-00898 WJ/LF

R.C. SMITH, *Warden, et al,*

Respondents.

ORDER GRANTING *IN FORMA PAUPERIS* APPLICATION AND DENYING CERTIFICATE OF APPEALABILITY

This matter is before the Court on Pedro Amaro's *Pro Se* Motion for Leave to Appeal *In Forma Pauperis* (Motion) (Doc. 32). Amaro seeks to appeal the dismissal of his 28 U.S.C. § 2254 petition without prepaying the $505 appellate filing fee. Amaro's financial information demonstrates he is without sufficient funds to prepay the fee. (Doc. 32). Having otherwise determined the appeal is taken in good faith, the Court will grant the Motion.

Also before the Court is the Tenth Circuit's Order abating Amaro's appeal while the Court considers whether to grant a certificate of appealability on the Order denying Amaro's Motion to Reconsider (Doc. 30). Based on the Notice of Appeal (Doc. 31), it does not appear Amaro seeks to appeal that Order. However, to the extent Amaro seeks an additional certificate of appealability, the request is denied. As the Court explained in the original dismissal opinion (Doc. 23), Amaro failed to make a substantial showing that he has been denied a constitutional right, or that reasonable jurists would differ as to any ruling.

IT IS THEREFORE ORDERED that Pedro Amaro's Motion for Leave to Appeal *In Forma Pauperis* (Doc. 32) is **GRANTED**; but his request for a certificate of appealability in

App-6

connection with the Order denying his Motion for Reconsider (Doc. 30) is **DENIED**.

IT IS FURTHER ORDERED that the Clerk's Office shall send a copy of this Order to Amaro and the Tenth Circuit Court of Appeals.

SO ORDERED.

CHIEF UNITED STATES DISTRICT JUDGE

FILED
United States Court of Appeals
Tenth Circuit

May 7, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PEDRO J. "PETE" AMARO,

Petitioner - Appellant,

v.

ATTORNEY GENERAL FOR THE STATE OF NEW MEXICO, et al.,

Respondents - Appellees.

No. 19-2064

ORDER

Before **TYMKOVICH**, Chief Judge.

Appellant, who is proceeding without the assistance of counsel in this appeal, has filed a motion asking this court to appoint an attorney to represent him at public expense. The motion is denied. The court will not consider the possibility of appointing counsel for the appellant until the case has been fully briefed and the court has had an opportunity to consider the appellant's own statement of his arguments on appeal.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

App. H

Rcvd 5/14/19

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
Office of the Clerk
Byron White United States Courthouse
Denver, Colorado 80257
(303) 844-3157

Elisabeth A. Shumaker
Clerk of Court

Chris Wolpert
Chief Deputy Clerk

May 7, 2019

Pedro J. "Pete" Amaro
#44726
Guadalupe County Correctional Facility
P.O. Bo 520
Santa Rosa, NM 88435

Re: *Amaro v. Attorney General for the State of New Mexico, et al.*, No. 19-2064

Dear Mr. Amaro:

The court has received the documents you captioned "Appellant's Written Report Advising the Court of the Status of the District Court Proceedings Regarding COA" and "Appellant's Petition for Writ of Mandamus Upon United States District Court District of New Mexico." These documents appears to have crossed in the mail with: (1) this court's April 24, 2019 order, which acknowledged the district court's April 3, 2019 order, lifted the abatement of this proceeding, and relieved you of the obligation to file a written report regarding the status of the district court's determination of COA; and (2) this court's April 24, 2019 letter, setting your combined opening brief and application for a COA due on June 3, 2019 and providing a form you should use for purposes of that submission.

The court accepts the status report you submitted as filed. As set forth in the April 24, 2019 order, you need not file any additional status reports. The court will separately issue an order regarding the request for counsel you include in your status report.

We note that the relief you seek in the mandamus submission appears to mirror the relief you seek through this proceeding. Accordingly, the Clerk has received that document on the docket such that it is available to the panel of judges who will decide whether to issue you a COA but will not take any additional action regarding it. Please be advised that you must present any arguments regarding whether this court should grant you a COA in your combined opening brief and application for a COA. You should include in your brief any arguments you wish to make regarding the merits of your appeal and any errors you believe the district court made.

App. I

Rcvd 5/14/19

Failure to timely file a combined opening brief and COA application may result in the dismissal of this appeal without further notice. *See* 10th Cir. R. 42.1. Once the court has received your combined opening brief and COA application, it will then submit the case to a panel of judges to determine whether to issue a COA on any one or more of the issues set forth in your brief.

Very truly yours,
ELISABETH A. SHUMAKER, Clerk

by: Lisa A. Lee
Counsel to the Clerk

FILED
United States Court of Appeals
Tenth Circuit

January 11, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PEDRO J. AMARO,

Petitioner - Appellant,

v.

R. C. SMITH, Warden; ATTORNEY GENERAL FOR THE STATE OF NEW MEXICO,

Respondents - Appellees.

No. 18-2001
(D.C. No. 1:17-CV-00898-RJ-LF)
(D. N.M.)

ORDER

Before **LUCERO**, **PHILLIPS**, and **McHUGH**, Circuit Judges.

This court lacks jurisdiction because no appealable order has been entered by the district court.

This court has jurisdiction to review only final decisions, 28 U.S.C. § 1291, and specific types of interlocutory orders not applicable here. A final decision is one that disposes of all issues on the merits and leaves nothing for the court to do but execute the judgment. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521 (1988).

The case is still proceeding in the district court. The court dismissed the class action claims, and ordered the petitioner to show cause why his individual claims should not be dismissed because the petition was filed beyond the one-year limitations set forth in 28 U.S.C. § 2244. Thus, the petitioner's individual claims have not been adjudicated.

App. J

Because no final order or otherwise appealable order has been entered this appeal is **DISMISSED**.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk
Ellen Rich Reiter
by: Ellen Rich Reiter
Jurisdictional Attorney

P. 1
Portales News Tribune

Contact: Senior writer Christina Calloway
356.4481 or ccalloway@pntonline.com

Grand juries focus of legal controversy

BY ROBIN FORNOFF
CMI content managing editor
rfornoff@cnjonline.com

At issue: Grand juries and how the secret panels are selected in Curry and Roosevelt counties.

On one side, the defense lawyers who make a living challenging the system.

On the other side, District Court Chief Judge Teddy Hartley and District Attorney Matt Chandler who say the system is fair.

The defense lawyers say dozens of pending criminal cases could be in jeopardy because the district court has failed to follow state law for excusing grand jurors.

Among the cases in question, the high profile murder trial of longtime and recently recaptured fugitive Noe Torres.

Hartley says he is confident the lawyers are wrong. The lawyers, however, are betting the question will soon be before the state's appellate courts for a final determination.

Attorney Kirk Chavez said he's had "numerous" inquiries from defense lawyers across the state interested in challenging the grand jury system in Curry and Roosevelt counties. He contends state law is clear on the central question of whether anyone but the court may excuse grand jurors from service.

Yet, for years — until the system was changed this summer — 9th Judicial District Attorney staff have been excusing grand jurors. Chandler and Hartley say it was being done only in a clerical capacity. The defense lawyers say it crossed the line.

"This is a very serious violation of the grand jury rules and will likely lead to a lot of litigation in the near future," said Matthew Coyte, a spokesman for the New Mexico Criminal Defense Lawyers Association. Coyte is the attorney who successfully sued Curry County, winning $450,000 for the abuse of Orlando Salas while being held at Clovis' juvenile detention center.

Coyte is joined by Clovis lawyers Dan Lindsey and Chavez.

Court, Page 11

App K 1

P. 2

Court FROM PAGE 1

"Although the grand jury is the tool of the prosecutor," said Lindsey, "it must be done fairly, and the law requires that (only) a district judge excuse grand jurors ... the law was clearly not complied with."

Lindsey recently convinced Hartley to throw out a grand jury's vehicular homicide indictment against former Clovis police officer Stephen Gallegos. Hartley ruled Chandler interfered with the grand jury in that case.

The grand jury originally submitted a verdict of "no probable cause" on the vehicular homicide charge, but changed its vote after Chandler began to "impermissibly ask and answer questions," about their deliberations, Hartley ruled.

Chandler said he didn't believe he did anything wrong.

Chavez is a former deputy district attorney who worked for Chandler. He charges Chandler's staff has been hand-picking grand jurors from groups impaneled by the court. Stacking the deck, Chavez said in a recent interview, to turn the grand jury from a tool into an unofficial arm of Chandler's office.

allegation and the court has supported him.

Indeed, Chavez was hit with three contempt of court citations while trying to argue the point in a recent hearing before Hartley.

"I was disrespectful and perhaps unprofessional," Chavez said. "And for that I apologize. It doesn't change what has been happening."

Chandler says his staff contacted grand jurors only to let them know when to meet and excused them if a juror faced a hardship. It is a practice conducted by district attorneys in Curry and Roosevelt counties since 1979, according to Chandler.

"It is common practice across the state for district attorneys' offices or district court clerks to excuse grand jurors that cannot serve due to a hardship," Chandler wrote in a recent email responding to questions about the issue. "If a grand juror is excused, then the next alternate on the random list is called and asked to come to the hearing."

It may be common practice for court clerks to excuse grand jurors, said all three defense lawyers, because the clerks work for the court. It isn't common practice for a district attorney or his staff to excuse grand jurors for any reason, according to Lindsey.

any district where this was taking place or something would have happened by now," said Lindsey. "It's going to be scrutinized very heavily by the supreme court."

Said Coyte: "It would be inappropriate for a district attorney to pick and choose grand jurors. You would totally destroy the usefulness of the grand jury system."

New Mexico's Supreme Court has ruled repeatedly that grand juries are an arm of the court, not the district attorney's office.

"A supervisory duty not only exists, but is imposed upon the court, to see that its grand jury and its process are not abused, or used for purposes of oppression and injustice," the court's justices wrote in a unanimous landmark 2009 decision recently cited by Hartley. The decision goes on to note U.S. Supreme Court rulings that establish "The grand jury is not meant to be the private tool of a prosecutor..." and "The grand jury does not function as an arm of the prosecution."

Grand juries serve one function in criminal cases: determining probable cause.

"Their primary purpose is to make a charging decision," said Barbara Bergman, professor of law, an associate dean at the University of

Rc 3

New Mexico and chairperson of the New Mexico Supreme Court's evidence rules committee.

Bergman said many district attorneys in New Mexico prefer using a grand jury because it is quicker and easier than going through a preliminary examination hearing in open court.

Although the target of a grand jury investigation must be notified, they are not allowed to be present or to confront accusers. Only the district attorney is allowed to present evidence to a grand jury.

Without a defendant and their attorney involved in the process, "It can be done pretty quickly, and pretty easily," Bergman said.

Unlike a jury at criminal trial, a grand jury may also consider and vote to indict using inadmissible hearsay evidence "because no one controls them," Bergman said.

Grand juries and their deliberations are secret by law. Jurors take an oath not to disclose evidence, testimony or the final vote from cases they review. There are stiff penalties provided for jurors who violate the oath and anyone who attempts to solicit such information from a grand juror.

In New Mexico, a grand jury is impaneled by a district judge every three months. They meet sporadically and as often as the need arises during those three months — basically when the district attorney seeks criminal indictments.

A panel consists of 12 people and a sufficient number of alternates to replace those who must be excused for reasons such as work conflicts or illness. And that is where the conflict has surfaced in Curry and Roosevelt counties.

For years "as is the custom in Curry County and in the 9th Judicial District," according to Hartley, the job of notifying grand jurors of when to meet, excusing them and replacing

P.4

them from among a list of alternates was given to the district attorney's staff.

When Chavez challenged that process in February by filing a motion to quash client Enrique Deleon's murder indictment, Hartley ruled against him.

Hartley said his decision was based on a similar case heard by the state supreme court. Hartley noted while the appellate court "did not condone" the practice of anyone other than a judge excusing grand jurors, it refused to throw out the indictment simply based on a technicality.

He also ruled that in order for an indictment to be quashed, there had to be a showing of fraud or prejudice.

"The Court," Hartley wrote in his ruling, "finds that there was no showing of fraud or prejudice to this defendant (Deleon) in the conduct of the grand jury proceeding."

Nonetheless, days after Hartley's ruling on Feb. 27, the judge summoned Chandler and District Court Clerk Manager Shelly Burger and her staff to a meeting and ordered the grand jury procedure changed immediately.

Hartley said he ordered the change out of concerns raised from the Deleon case; specifically, he said, that grand jurors were being excused by someone other than the court.

Burger said there has been a transition period to ease into the change, but effective July 1, only the court clerk's office contacts grand jurors to let them know when to meet or excuse them from a session for hardship reasons. The clerk's office also selects the alternate to replace any excused juror from a list approved by Hartley.

Hartley said he is confident his ruling in the Deleon case will stand up to any appeal. But Chavez said that is the twist in all this legal maneuvering — there might not be any appeal.

Chavez asked Hartley if he could appeal his ruling while the Deleon case was pending. Hartley denied that request, based on case law that only permits such a procedure in extreme situations.

The problem, said Chavez, is once there is a decision in the case — guilty or not — there is no appeal on the issue of a grand jury indictment.

The grand jury only determines probable cause, Chavez said. A decision by a court makes that issue moot.

Grand-jury indictments returned

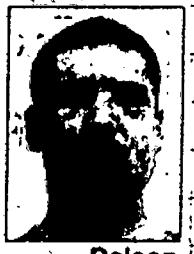
DA says double-homicide case against Enrique Deleon will be presented again.

ENJ FEB 28, 2013 Thursday
Front Page

By Robin Fornoff
CMI CONTENT MANAGING EDITOR
rfornoff@cnjonline.com

The New Mexico Supreme Court has tossed out grand jury murder indictments against a man accused of killing a Clovis couple during a 2011 backyard barbecue that erupted in gunfire.

The court ordered the double murder indictment of Enrique Deleon quashed during a hearing Wednesday, according to Supreme Court Chief Clerk Joey Moya. The court, however, left the door open for a new grand jury to consider the same charges against Deleon, who remains in the Curry County jail, according to 9th Judicial District Attorney Matt Chandler.



Deleon
Being held in the Curry County jail

"The defendant will remain in custody and has a new grand jury setting already scheduled for next Friday," Chandler said.

Deleon was charged in the September 2011 shooting deaths of Joe Valero, 44, and Lupita Casteneda, 25, of Clovis during a backyard barbecue at their home in the 1000 block of Prince Street.

INDICTMENTS/Page 5

From P...

Police said the shooting was the culmination of an argument about gangs. Deleon has remained in jail awaiting trial since the homicides. His jury trial has been postponed at least three times.

Deleon's attorney, Kirk Chavez, challenged the indictments for murder, alleging among other reasons that the 9th Judicial District Court had violated state law by delegating Chandler's office to notify grand jurors when to assemble.

District Court Chief Judge Teddy Hartley later issued an order specifying that only court staff could summon or excuse grand jurors from service.

Moya said the Supreme Court's decision and the reasons cited by justices won't likely be published until sometime Thursday.

Phil Sisneros, communications director for Attorney General Gary King, said attorneys from King's office represented District Court Chief Judge Teddy Hartley in the hearing and, "The ruling was the quashing of the grand jury indictment."

App. K2

De Leon v. Hartley, 2014-NMSC-005, 316 P. 3d 896

BOSSON, Justice.

{1} On the eve of his trial, Defendant petitioned this Court for a writ of superintending control that would direct the district court to quash his indictment because of irregularities in the selection of his grand jury. Agreeing with Petitioner that the integrity of the grand jury process was undermined by the manner in which grand jurors had been selected in this case, we issued a writ of superintending control directing the district court to quash the indictment without prejudice to the State's right to reinstate new criminal proceedings against Petitioner. We now issue this opinion to explain the reasons for our decision to quash the indictment.

I. FACTUAL AND PROCEDURAL BACKGROUND

{2} Petitioner filed a motion to quash his indictment arguing that the district court improperly enlisted the aid of the district attorney's office in the selection of the grand jury panel that indicted Petitioner. Before ruling on the motion, the district court held an evidentiary hearing to take testimony concerning the process that was used for the selection of the grand jury.

{3} The testimony before the district court revealed that the initial convening of potential grand jurors began with the receipt by the district court of a list of 100 potential grand jurors generated through a randomized process in Santa Fe, New Mexico. Upon receipt of the list of potential grand jurors, the district court jury clerk testified that she deleted some names from the list based upon hardship reports she received. Those remaining on the list were convened by the district court grand jury judge on July 6, 2011, for an orientation session and to be sworn in. After the initial orientation and swearing in of the grand jurors, the process of selecting and excusing jurors for individual grand jury sessions was transferred to the 898*898 district attorney's office with no apparent further involvement by the district court.

{4} For its part, a staff member of the district attorney's office testified that she received from the district court the list of those grand jurors who were sworn in at the July 6, 2011, orientation session and used that list to call prospective grand juror members to appear at sessions of the grand jury scheduled and conducted by the district attorney's office. The district attorney staff member also testified that she accepted phone calls and voice mail messages from potential grand jurors who indicated they would not be able to attend scheduled sessions. She further testified that she would only register the receipt of such information to note that certain jurors would not be present and would advise the district attorney of those instances. But the staff member testified that at no time did she excuse any prospective jurors or make any comment to prospective or selected grand jurors about the cases that were to be presented to the grand jury.

{5} While the staff member denied any involvement in excusing grand jurors, the list of those grand jurors who were called for the session of the grand jury that indicted Petitioner reflects that several grand jurors were excused — though by whom is unclear. Indeed, the list of grand jurors used by the district attorney's office contains many notations suggesting active involvement by someone within the district attorney's office in deciding who would ultimately serve at the session of the grand jury that indicted Petitioner.

{6} Despite the role that the district attorney's office played in convening the grand jury that indicted Petitioner, the district court found that there was no fraud or prejudice to Petitioner in the conduct of the grand jury proceeding that resulted in his indictment. The district court therefore denied Petitioner's motion to quash the indictment. Two days later Petitioner filed a motion with the district court asking that its order denying the motion to quash the indictment be certified for interlocutory appeal, which the district court also denied. Almost nine months later, Petitioner renewed his motion for interlocutory appeal based on an opinion this Court had issued just a few weeks before. See State v. Bent, 2012-NMSC-038, 289 P.3d 1225. But once again, the district court denied Petitioner's motion for an interlocutory appeal.

{7} Left with no other options for review of the district court's order denying his motion to quash the trial and on the eve of his trial based on that indictment, Petitioner filed his petition for a writ of superintending control with this Court. While the writ we issued directing the district court to quash the indictment provided Petitioner with all the relief to which he was entitled, we issue this opinion now to explain why the grand jury selection process used in this case was inappropriate and to also reiterate the need for correcting grand jury irregularities promptly brought to the attention of the district court before a matter goes to trial.

App. K3

II. THE PROPER FUNCTIONING OF THE GRAND JURY REQUIRES THE DISTRICT COURT TO MAINTAIN COMPLETE CONTROL OVER THE SELECTION OF GRAND JURORS

{8} As this Court has previously recognized, the grand jury is not simply a tool of the prosecution. See Jones v. Murdoch, 2009-NMSC-002, ¶ 12, 145 N.M. 473, 200 P.3d 523 (cautioning against conflating "the role of the prosecuting attorney as an aide to the grand jury with the role of the grand jury itself" and noting that the grand jury is not an arm of prosecution). The grand jury does, of course, serve as one method for initiating criminal proceedings against someone accused of a crime. See N.M. Const. art. II, § 14 (providing that "[n]o person shall be held to answer for a capital, felonious or infamous crime unless on a presentment or indictment of a grand jury or information"). But as a constitutional entity distinct from the district attorney, the grand jury plays an important role in serving to buffer against unfounded accusations. See State v. Ulibarri, 1999-NMCA-142, ¶ 10, 128 N.M. 546, 994 P.2d 1164 (noting the duty of the grand jury to protect citizens against unfounded accusations), aff'd on other grounds, 2000-NMSC-007, 128 N.M. 686, 997 899*899 P.2d 818; see also United States v. Calandra, 414 U.S. 338, 343, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) (recognizing that the grand jury is responsible for protecting citizens from unfounded criminal prosecutions). Some may question the degree to which the grand jury truly is able to serve as a check on an overzealous prosecutor, even when the system operates as it should. But if the grand jury is to play any role at all as a credible, independent entity charged with determining whether the prosecution has probable cause to go forward with criminal charges against the accused, the grand jury must remain free of the taint that would come from being perceived to be under the complete and absolute control of the prosecutor.

{9} Notwithstanding the necessarily close relationship between the prosecutor and grand jury, our state constitution has assigned the district court judge the responsibility for convening the grand jury as prescribed by law. See N.M. Const. art. II, § 14. And in keeping with that constitutional command, our Legislature has recognized the need for maintaining some degree of separation between the grand jury itself and the prosecution by providing for the district court's direct involvement in the entire process of assembling the grand jury. See NMSA 1978, § 31-6-1 (1983). For example, as required by the constitution, it is the district court who "may convene one or more grand juries at any time, without regard to court terms." Id. It is also the district court who "shall summon and qualify as a panel for grand jury service such number of jurors as [the court] deems necessary." Id. And finally, it is the district court who "may discharge or excuse members of a grand jury and substitute alternate grand jurors as necessary." Id. Nowhere in that process is it the prerogative of the district attorney to decide who shall serve as a grand juror and who may be excused from service.

{10} In his response to Petitioner's motion to quash the indictment, the district attorney made much of a provision in NMSA 1978, § 31-6-7(A) (2003), which provides that "[t]he district court shall assign necessary personnel to aid the grand jury in carrying out its duties." Because the district court has supervisory control over the grand jury, see Rule 5-302A(F)(1) NMRA, we have no quarrel with a statutory provision recognizing the duty of the district court to ensure that the grand jury has the staff support it needs to carry out its functions. We also recognize the role the district attorney plays in assisting the grand jury once it is seated to decide on particular indictments. But we completely disagree with the notion that Section 31-6-7(A) authorizes the district court to assign personnel outside of the court to carry out the district court's own supervisory responsibilities over the grand jury.

{11} It is for the district court, and the district court alone, to decide who shall serve as grand jurors. To permit the district attorney to take over that role is to sacrifice any perception that the grand jury is an entity distinct from the prosecutor that is capable of serving as a barrier against unwarranted accusations. We therefore reject any interpretation of Section 31-6-7(A) that would allow the district court to delegate its supervisory role over the selection of the grand jury to the district attorney's office.

III. THE INDICTMENT MUST BE QUASHED BECAUSE PETITIONER PROMPTLY BROUGHT THE DEMONSTRATED IRREGULARITY IN THE SELECTION AND EXCUSAL OF GRAND JURORS TO THE ATTENTION OF THE COURT WELL IN ADVANCE OF TRIAL

{12} Allowing the district attorney to play such a pivotal role in the selection of grand jury panels was condemned twenty-six years ago by our Court of Appeals. See State v. Apodaca, 1987-NMCA-033, ¶ 18, 105 N.M. 650, 735 P.2d 1156 (refusing to "condone the practice of prosecutors discharging grand jurors or selecting alternates"), overruled on other grounds by

State v. Garcia, 1990-NMCA-065, ¶¶ 8, 12, 110 N.M. 419, 796 P.2d 1115. So it is no small irony that the district court actually relied on Apodaca to deny Petitioner's motion to quash the indictment since the district court found no

showing of fraud or prejudice related to the manner in which Petitioner's grand jury was 900*900 selected. But as we recently explained in State v. Bent, 2012-NMSC-038, ¶ 37, 289 P.3d 1225, the Court of Appeals in Apodaca was dealing with the appropriate remedy for a grand jury irregularity brought to its attention after the defendant was already convicted. In such circumstances, it may well make sense to require a showing of fraud or prejudice before a conviction resulting from an error-free trial is nonetheless overturned because of an irregularity at the grand jury stage. But here, the accused challenged the grand jury proceeding in a timely manner before trial. Indeed, it is difficult to imagine what more Petitioner could have done given that he filed his motion to quash the indictment almost immediately after being indicted and twice asked the district court to permit an interlocutory appeal of the issue.

{13} In light of the language in Apodaca suggesting that the statutory provisions for excusing grand jurors are merely directory, it is certainly understandable why the district court declined to grant relief by focusing on whether Petitioner had established fraud or prejudice flowing from the district attorney's involvement in the actual selection or excusal of the grand jurors who indicted Petitioner. While Apodaca did not condone the practice of prosecutors becoming involved in the process of selecting grand jurors, the Court of Appeals nonetheless refused to reverse the district court's decision not to dismiss the indictment because there was "no showing of actual prejudice suffered by defendant." Apodaca, 1987-NMCA-033, ¶ 18, 105 N.M. 650, 735 P.2d 1156. The Court of Appeals reached that conclusion because it had already determined, relying on State v. Gunthorpe, 1970-NMCA-027, 81 N.M. 515, 469 P.2d 160, that the statutory provisions for selecting and excusing grand jurors were directory rather than mandatory. Id., ¶¶ 9-10. We question, however, Apodaca's reliance on Gunthorpe to characterize the district court's statutory role in selecting and excusing jurors as merely directory.

{14} In Gunthorpe, the Court was only dealing with the method by which the district court selected and excused grand jurors. And it bears emphasizing that it was the district court itself who was deciding whom to select and excuse. As such, we believe the Court of Appeals in Gunthorpe was correct to characterize the statutory procedures by which the district court was to choose grand jurors as merely directory because there was no question that the process used by the district court did not compromise the impartiality of the proceeding nor did it expose the process to the possibility of unfair influences. See Gunthorpe, 1970-NMCA-027, ¶ 9, 81 N.M. 515, 469 P.2d 160 (recognizing that "`[s]tatutory provisions which relate to the number and qualifications of jurors, or which are designed to secure impartiality or freedom from unfair influences, are ordinarily deemed to be mandatory; while those which prescribe mere details as to the manner of selection or drawing are usually regarded as directory'" (quoting 4 Ronald A. Anderson, Wharton's Criminal Law and Procedure, § 1698 (1957))).

{15} In contrast, Apodaca was addressing a situation in which the district court had transferred its oversight of the selection process to the district attorney. The Court of Appeals viewed the relevant statutes as directory because they "merely provide details as to the procedure to be followed in selecting grand jurors." Apodaca, 1987-NMCA-033, ¶ 18, 105 N.M. 650, 735 P.2d 1156. While Apodaca relied on Gunthorpe to characterize the district court's role as merely directory, we disagree with that conclusion. The entity charged with the actual selection and excusal of grand jurors is of paramount importance to the process. As such, the statutory provisions assigning that role to the district court should be seen as mandatory, not directory, because they are critical to ensuring that the process of impaneling a grand jury is impartial and free of unfair influences. See Gunthorpe, 1970-NMCA-027, ¶ 9, 81 N.M. 515, 469 P.2d 160.

{16} Given the mandatory nature of the district court's role in selecting grand jurors, we disagree with the assessment in Apodaca that the district court was correct in refusing to quash the indictment in the absence of an actual showing of fraud or prejudice by the accused. While the result in Apodaca was correct because the irregularities in the grand jury process had been rendered moot 901*901 by the error-free trial that resulted in the defendant's conviction, see State v. Bent, 2012-NMSC-038, ¶ 37, 289 P.3d 1225, when the improper involvement of the district attorney in the excusal of grand jurors is brought to the attention of the district court well before trial is set to begin the district court should take steps to remedy the irregularity irrespective of whether any actual fraud or prejudice is established when the improper involvement of the district attorney in the excusal of grand jurors is brought to the attention of the district court. To the extent that Apodaca can be read to suggest otherwise, it should not be followed.

{17} The manner in which grand jurors are selected and excused goes to the very heart of how the public views the integrity of the grand jury system. The fact that anyone even casually acquainted with our grand jury system has

heard of the indictment of the proverbial ham sandwich demonstrates the need to enforce those few provisions that ensure at least some degree of separation between the prosecutor and the grand jury. U.S. v. Laurent, 861 F.Supp.2d 71, 89-90 (E.D.N.Y.2011) (restating the 1985 public summary by the Chief Judge of New York State "that a grand jury would indict a 'ham sandwich' if asked to do so by the prosecutor"). While there was no evidence presented in this case that the district attorney abused the control that he had over the selection and excusal of those grand jurors who ultimately indicted Petitioner, it would have been an almost insurmountable burden for Petitioner given that there was virtually no record made of the informal excusal process that the district attorney apparently used. And as explained above, the district court's reliance on Apodaca to require such a showing of prejudice by Petitioner, while understandable, was misplaced. Petitioner having established that the district attorney was in control of the actual selection and excusal of the grand jurors and having brought that fact to the attention of the district court well before trial, the district court should have quashed the indictment and erred by refusing to do so.

{18} While the selection of grand jurors can be a straightforward process, the important role the district court has to play in that process should not be minimized. Delegating the selection and excusal of grand jurors to the prosecution only invites suspicion and guarantees challenges to a process that must be above reproach. We will not countenance a process that causes the diversion of scarce resources to investigate a process that can be easily structured to avoid even the hint of prosecutorial overreaching. The informality that may often accompany the process of excusing grand jurors at the last minute who present a compelling enough reason for not attending a particular session of the grand jury, is exactly why the district court — not the district attorney — must oversee the process.

{19} The district court is the constitutionally and statutorily designated neutral entity that is assigned the responsibility for determining which grand jurors sit in any particular case to decide the question of indictment. Without the district court actively involved in the entire grand jury process, public confidence in the integrity of the process is at risk. And if the integrity of the grand jury is called into question, there is little hope that the public at large, or the accused in particular, will view the grand jury as capable of returning well-founded indictments or serving as a realistic barrier to an overzealous prosecution.

{20} We therefore reiterate that the district courts in this state must not delegate their core supervisory responsibilities over grand jury proceedings. And when undeniable irregularities in the grand jury process are brought to the court's attention well in advance of trial, as was the case here, a grand jury indictment resulting from that flawed process must be quashed.

{21} IT IS SO ORDERED.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Respondent,

vs.

S. Ct. No. 28,219

PEDRO AMARO,

Defendant-Petitioner.

APPEAL FROM THE NINTH JUDICIAL DISTRICT COURT

CURRY COUNTY, NEW MEXICO

HONORABLE STEPHEN K. QUINN, PRESIDING

DEFENDANT-PETITIONER'S BRIEF IN CHIEF

JOHN BIGELOW
Chief Public Defender

Laurel A. Knowles
Assistant Appellate Defender
301 N. Guadalupe Street
Santa Fe, NM 87501
(505) 827-3909

Attorneys for Defendant-Petitioner

App. L

SUMMARY OF PROCEEDINGS

A. Nature of the Case

From the beginning, Mr. Amaro complained to the court that he was the victim of prosecutorial harassment in this case. (Tr. Vol. 2/2; R.P. 1-8). At an early hearing requested by0 Mr. Amaro to replace his public defender, Mr. Amaro told the court that the charges against him—first-degree murder and nine related theft and tampering offenses—were part of some 60 or more charges the prosecutor had brought against him in the past year. (Tr. Vol. 2/2). He said he did not know what the prosecutor had against him—although the prosecutor later noted that Mr. Amaro claimed he had had an affair with the prosecutor's wife and that was why he was being prosecuted. Mr. Amaro told the court that he intended to sue the district attorney's office for this harassment, and in addition, that he thought he met the necessary requirements to obtain a "Motion to Quash all prosecutions against my person, due to the biasness, due to the frivolity, due to the harassment I have suffered at the hands of the prosecutors." The exact legal basis for this motion was not expressed. (Tr. Vol. 2/2-3, 13; Vol. 3/6).

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
July 24, 2017

NO. S-1-SC-35965

PEDRO J. AMARO,

Petitioner,

v.

VINCENT HORTON, Warden,

Respondent.

ORDER

WHEREAS, this matter came on for consideration by the Court upon petition for writ of certiorari filed under Rule 12-501 NMRA, and the Court having considered the petition and being sufficiently advised, Justice Edward L. Chávez, Justice Charles W. Daniels, and Justice Barbara J. Vigil concurring;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari is DENIED.

IT IS SO ORDERED.

WITNESS, the Honorable Judith K. Nakamura, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 24th day of July, 2017.

Joey D. Moya, Clerk of Court
Supreme Court of New Mexico

By Madeline Garcia
Chief Deputy Clerk

I CERTIFY AND ATTEST:
A true copy was served on all parties or their counsel of record on date filed.
Madeline Garcia
Clerk of the Supreme Court
of the State of New Mexico

App. M Rcvd July 26 2017

NINTH JUDICIAL DISTRICT COURT
COUNTY OF CURRY
STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff,

vs. No. D-0905-CR-200100182

PEDRO J. AMARO,

Petitioner.

ORDER DENYING PETITIONER'S PETITION FOR CLARIFICATION OF CASE STATUS AND ORDER DENYING PETITIONER'S MOTION FOR CLASS CERTIFICATION AND ORDER CLOSING THIS MATTER

THIS MATTER having come before the Court on Petitioner's pro se Petition for Clarification of Case Status filed October 13, 2015 and Petitioner's pro se Motion for Class Certification filed on April 18, 2016, and the Court being fully advised, enters its sua sponte order and FINDS:

This Court was assigned to this matter on May 20, 2016. A review of the file shows that Petitioner filed a Petition for Writ of Habeas Corpus on April 13, 2015. Judge Stephen K. Quinn denied Petitioner's Petition and entered an Order Summarily Dismissing Petition for Writ of Habeas Corpus on April 16, 2015. A close review of Petitioner's Petition filed April 13, 2015 shows that Petitioner attempted to use the Petition to file a class action lawsuit. Due to the styling of the pleading, his Petition was filed in the above referenced cause number. This Court notes that it is not the proper procedure to file a class action lawsuit within a defendant's criminal case and, therefore, Judge Quinn addressed the Petition as it related solely to Petitioner. Petitioner has since filed a

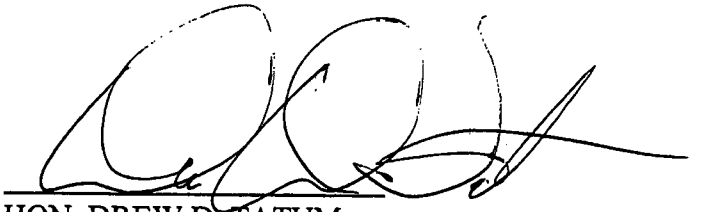
App. M Rcvd June 6, 2016

Petition for Classification of Case Status on October 13, 2015; a Motion for Class Certification on April 18, 2016; and a Request for Ruling on April 18, 2016.

In his Petition for Clarification of Case Status, Petitioner states that he is aware that his class action lawsuit is a civil matter. Petitioner may have desired that the matter be filed as a civil case, however, as presented, it was filed in his criminal case.

This Court finds that any attempt to file a class action lawsuit in the above referenced cause number is procedurally incorrect. This Court is unable to advise Petitioner on how to proceed with a class action lawsuit other than to instruct the Petitioner that he will need to file a separate civil matter and discontinue filing class action pleadings in the above referenced cause number. This Court will take no further action related to class action filings in this matter.

THEREFORE, after examining the Motion, prior proceedings, and based on the above discussed reasons, Petitioner's Petition for Clarification of Case Status filed October 13, 2015 is denied. Petitioner's Motion for Class Certification filed on April 18, 2016 is denied. The above referenced cause number is closed.



HON. DREW D. TATUM
District Judge, Division II

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

May 13, 2015

NO. 35,224

PEDRO J. "PETE" AMARO,

Petitioner,

v.

NINTH JUDICIAL DISTRICT COURT CLERK'S OFFICE and HON. STEPHEN K. QUINN, District Court Judge,

Respondents.

ORDER

WHEREAS, this matter came on for consideration by the Court upon petition for writ of mandamus, and the Court having considered said pleading and being sufficiently advised, Justice Petra Jimenez Maes, Justice Edward L. Chavez and Justice Charles W. Daniels concurring;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of mandamus hereby is **DENIED.**

WITNESS, The Hon. Barbara J. Vigil, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 13th day of May, 2015.

(SEAL)

Amy Mayer

Amy Mayer, Deputy Clerk

App. O

Rcvd 5/18/15

NINTH JUDICIAL DISTRICT COURT
COUNTY OF ROOSEVELT
STATE OF NEW MEXICO

NINTH JUDICIAL DISTRICT COURT
FILED IN MY OFFICE
2015 APR 16 AM 10:50

STATE OF NEW MEXICO,
Plaintiff,

vs.

PEDRO J. AMARO,
Defendant/Petitioner,

vs.

STATE OF NEW MEXICO,
Plaintiff/Respondent.

No. ***D-905-CR-2001-00182***

ORDER SUMMARILY DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

THIS MATTER having come before the Court on Pedro Amaro's Petition for Writ of Habeas Corpus, and the Court being fully advised, **FINDS**:

Petitioner was convicted on March 10, 2003, pursuant to jury verdicts of guilty accepted and recorded by the Court of the following crimes:

Count I:	Murder in the first (1st) degree, a capitol offense;
Count II:	Robbery, a third (3rd) degree felony;
Count III:	Burglary (Dwelling house);
Count IV:	Burglary (Dwelling house);
Count V:	Arson (under $100), a petty misdemeanor;
Count VI:	Tampering with Evidence, a fourth (4th) degree felony;
Count VII:	Tampering with Evidence, a fourth (4th) degree felony;
Count IX:	Larceny (over $250) a fourth (4th) degree felony;
Count X:	Receiving Stolen Property (Over $250) a fourth degree felony

The Court found Defendant to be an habitual offender with two (2) prior convictions.

App. P

Petitioner was sentenced to a term of life imprisonment for first degree murder as to Count I. Count II was merged with Count I and dismissed without prejudice. Count III and IV were each enhanced by a term of four (4) years pursuant to the Habitual Offender Act for a total of seven (7) years. As to Count V, Defendant was sentenced to six (6) months. In Counts VI and VII, Petitioner was sentenced to one and a half (1 ½) years plus the four (4) years enhancement for a total of five and a half (5 ½) years in each count. The Court merged Count VIII with Count VI and it was dismissed without prejudice. Petitioner was sentenced to five and a half (5 ½) years in Count IX which included the four (4) year habitual offender enhancement. In Count X, the Court merged that fourth degree felony with Count IX and Count X was dismissed without prejudice.

All counts were run consecutive one to another for a total term of imprisonment in the New Mexico Department of Corrections of life plus thirty-one (31) years.

Petitioner appealed his convictions and in a sixteen (16) page decision issued on July 25, 2005, the New Mexico Supreme Court affirmed Petitioner's convictions.

In his Petition, Petitioner raises the following issues:

1. State's witness Patricia McFeeley, MD, expert in forensic pathology testified that she performed the autopsy on the body of the victim Kenneth Smith. During her testimony, she referred to a toxicology report prepared by lab personnel not present at the trial. Petitioner claims he was prejudiced by the testimony because he was unable to cross examine the toxicologist.

2. Petitioner objects to prosecutor's voir dire inquiries as to whether any potential jurors would be biased against him if he chose not to testify.

3. Petitioner objects to an instruction on the elements of an offense which present options to the jury. He argues the instruction is an order by the Court to find the Petitioner guilty.

4. Petitioner objects to what he characterized as "the improper and prejudicial selection of the jury pool by the District Attorney's Office and not the District Court."

5. 6. 12. Petitioner complains that the capital murder guilty verdict in Count 1 was based on facts that amount to a "medically impossible theory" and that the evidence presented by Dr. McFeeley, the autopsy report, and witness Valerie Duhon do not prove he killed the victim, Kenneth Smith. Petitioner argues that witness Duhon was a known and documented liar who committed perjury and the State knowingly presented false testimony at the grand jury and at trial.

7. 8. The Petitioner argues that when defense counsel Gerald Baca raised the issue of her competency, the Court should have suspended the proceedings and ordered an evaluation.

9. Petitioner complains that the State's relying on "multiplicitous" (sic) citing of crimes alleged unduly prejudiced him, and the State's improperly citing of charges possibly related to basic allegations (Poss. Of Stolen Property and Burglary of same property) also constitutes improper and prejudicial citing of "trumped-up" charges and "double counting of an act as an element of the crime and an aggravated circumstance violates double jeopardy implicit in the 5th and 14th Amendments.

10. Petitioner complains that he should have been re-indicted after the State changed its original theory of the crime.

11. Petitioner claims the prosecution used inadmissable evidence before the grand jury. He claims the evidence was the fruits of an illegal search due to search warrants issued based on falsified affidavits.

13. Petitioner claims the prosecution unlawfully and prejudicially violated grand jury procedure in the following manner when instead of a judge, it:

a. Selected and summoned persons they desired for the panel.
b. Convened the grand jury.
c. Convened the grand jury after hours.
d. Qualified members of the grand jury.
e. Dismissed and/or excluded grand jurors.
f. Invited prohibited persons to observe the work of the grand jury.
g. Charged the panel with grand jury service instead of a judge.

As to Petitioner's issues, the Court concludes as follows:

1. Petitioner's objections to Dr. McFeeley's testimony about a toxicology report is based on the Confrontation Clause, U.S.C.A. Const. Amend. 6. Petitioner was convicted March 10, 2003 and Crawford vs. Washington 541 U.S. 36 (2004) was decided a year later. Thereafter a series of New Mexico appellate cases followed Crawford and these holdings don't apply to Petitioner's case.

2. The Court determines that voir dire questions touching on juror bias against a defendant asserting the right to remain silent are appropriate.

3. Petitioner's objection about an instruction is not specific as to which count, but none of the Court's instructions amounted to an order that the jurors must find Petitioner guilty of anything.

4. As to an allegation that the district attorney alone selected the jury pool, or the jury in this case, there is no evidence any of this is true. The jury pool is determined by voter and driver license records in Santa Fe. The petit jury is selected by the State and Defendant after voir dire prior to the commencement of trial.

5. 6. 12. The Supreme Court in its Decision considered the sufficiency of the evidence and concluded there was sufficient evidence to support a conviction of deliberate intent murder. Decision para. 27. Further, Petitioner claims witness Valerie Duhon was a "known and documented liar" without facts to support this claim. At trial she was thoroughly cross examined about three statements she gave the police.

7. 8. Another issue decided by the Supreme Court in its Decision was that this Court was correct in refusing to grant the Petitioner's request for a mental examination because the evidence "established a conflict between Defendant and his counsel rather than good cause for a mental examination." Decision para. 23.

9. As to his issue #9, Petition alleges double jeopardy, but his examples do not show it.

10. The State amended its charges to conform to the evidence, as it is entitled to do. The Petitioner has shown no prejudice in this issue.

11. Petitioner claims evidence presented to the grand jury was obtained through an illegal

search. He does not claim that the evidence was used at trial. His objection is not timely at this stage in the proceedings nor is he specific about this issue.

12. Petitioner claims the prosecution selected and excluded grand jurors. He also claims the prosecution invited outsiders to observe the grand jury in progress. He offers no evidence to support this claim however. In De Leon vs. Hartley and State of New Mexico 2014 N.M.S.C. 005, the New Mexico Supreme Court quashed an indictment without prejudice finding that in that case, members of the grand jury had been excused by an employee of the District Attorney's Office. The Opinion held that "the district court is the constitutional and statutorily designated neutral entity that is assigned the responsibility for determining which grand jurors sit in any particular case to decide the question of indictment." Petitioner offers no facts that any grand jurors were improperly excused in this case.

DECISION AND DISMISSAL

After examining the court record and based on the above reasons, this Court finds the Petitioner is not entitled to relief as a matter of law. Therefore, in accordance with N.M.R.A., Rule 5-802 (E)(1), the Petitioner for Writ of Habeas Corpus is summarily dismissed.

Stephen K. Quinn,
District Judge, Div. I

SKQ/es

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