

September 19, 2019

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUITC.A. No. 19-1832

GEORGE M. DURHAM, Appellant

v.

ATTORNEY GENERAL PENNSYLVANIA

(W.D. Pa. Civ. No. 2-17-cv-00662)

Present: CHAGARES, RESTREPO and SCIRICA, Circuit Judges

Submitted are:

- (1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1); and
- (2) By the Clerk for possible dismissal due to a jurisdictional defect in the above-captioned case.

Respectfully,

Clerk

ORDER

The foregoing request for a certificate of appealability is denied because Appellant has failed to demonstrate that jurists of reason would debate that he was not entitled to relief under Federal Rule of Civil Procedure 60(b). See Slack v. McDaniel, 529 U.S. 473, 484 (2000); Morris v. Horn, 187 F.3d 333, 340-41 (3d Cir. 1999). To the extent that Appellant challenged the manner in which his habeas judgment was procured, he failed to make a substantial showing of error by the District Court. See Gonzalez v. Crosby, 545 U.S. 524, 531-32 (2005); Pridgen v. Shannon, 380 F.3d 721, 727 (3d Cir. 2004). To the extent that Appellant sought to attack his underlying conviction and sentence, his Rule 60(b) motion is properly viewed as an unauthorized second or successive 28 U.S.C.

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§ 2254 petition over which the District Court lacked jurisdiction absent prior authorization from this Court. See Gonzalez, 545 U.S. at 531-32; Pridgen, 380 F.3d at 727.

By the Court,

s/Anthony J. Scirica  
Circuit Judge

Dated: October 8, 2019  
Sh/cc: George M. Durham  
All Counsel of Record



A True Copy:

*Patricia S. Dodsweit*

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

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

GEORGE R. DURHAM, HN-4394, )  
Petitioner, )  
v. ) 2:17-cv-662  
ATTORNEY GENERAL OF PENNSYLVANIA, )  
Et al., )  
Respondents. )

REPORT and RECOMMENDATION

I. Recommendation:

It is respectfully recommended that the Rule 60(b) motion filed in the above captioned case (ECF No.17) be dismissed as being without a jurisdictional basis and that a certificate of appealability be denied.

II. Report:

George R. Durham, an inmate at the State Correctional Institution-Fayette has presented a second Rule 60(b) motion seeking "relief from Judgment of Magistrate Judge Robert C. Mitchell of this Court denying petitioner's habeas corpus petition" as a result of the Supreme Court's decision in McQuiggin v. Perkins, 569 U.S. 383 (2013).

Historically, Durham filed a habeas petition at 2:11-cv-719 challenging his conviction and life sentence imposed at No. 1860 of 2007 in the Court of Common Pleas of Beaver County, Pennsylvania. That petition was dismissed on the merits on August 24, 2015 (ECF No. 73). On May 5, 2016 a certificate of appealability was denied by the Court of Appeals (ECF No. 82). On June 27, 2016, Durham filed a Rule 60(b) motion (ECF No. 83) and on July 5, 2016 relief was denied (ECF No. 88). On December 5, 2016, a certificate of appealability was denied by the Court of Appeals based on a lack of showing of "extraordinary circumstances where, without [Rule 60(b)] relief, an extreme and unexpected hardship would occur."<sup>1</sup>

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<sup>1</sup> United States Court of Appeal for the Third Circuit Docket No. 16-3453.

Durham next filed for leave of the Court of Appeals to file a successive habeas corpus at that Court's Docket No. 17-1466. Leave was denied on March 28, 2017.

Undeterred, on May 22, 2017, Durham submitted a habeas corpus petition in this Court which was docketed at the instant case number in which he once again seeks to challenge this same state conviction (ECF Nos. 1 and 4). That petition was dismissed on September 6, 2017 as a successive petition for which leave to proceed had not been granted by the Court of Appeals (ECF Nos. 5 and 7). Durham then filed a Rule 60(b) motion for relief from judgment (ECF. No. 9) which was denied on November 16, 2017 (ECF No. 12) and a certificate of appealability was denied by the Court of Appeal on February 14, 2018 (ECF. No.16). In the guise of a Rule 60(b) motion (ECF No.9), Durham seeks to challenge the latest ruling of the Court of Appeal denying him a certificate of appealability. Durham relies on McQuiggin which he contends was a change in relevant decisional law and permits the review of the "extraordinary circumstance" which justify relief under F.R.Civ.P. 60(b)(6).<sup>2</sup> In McQuiggin at p. 399 the Court held,

To invoke the miscarriage of justice exception to AEDPA's statute of limitations, we repeat, a petitioner "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Unexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing... As we stated in Schlup, "[a] court may consider how the timing of the submission and the likely credibility of [a petitioner's] affiants bear on the probable reliability of ... evidence [of actual innocence]."<sup>3</sup> (internal citations omitted).

Petitioner now contends that "the District Court should have adjudicated petitioner's claim of actual innocence and ineffective assistance of counsel in petitioner's 2254 writ of habeas corpus [filed in this case]."<sup>3</sup>

These issues were raised in the original petition filed here on June 14, 2017, dismissed twice and leave to appeal was denied by the Court of Appeals on February 14, 2018 at which time the Court wrote:

The foregoing request for a certificate of appealability is denied. See 28 U.S.C. § 2253. Reasonable jurists would not debate the District Court's denial of appellant's motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure on the ground that it lacked

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<sup>2</sup> See: Motion at ¶ 19.

<sup>3</sup> Id. at ¶ 25.

jurisdiction to consider appellant's challenge to this Court's March 28, 2017 order denying his application pursuant to 28 U.S.C. § 2244 to file a second or successive § 2254 petition. Reasonable jurists would not debate that appellant failed to make a substantial showing, see 28 U.S.C. § 2253(c), of "*extraordinary circumstances where, without [Rule 60(b)] relief, an extreme and unexpected hardship would occur.*" Cox v. Horn, 757 F.3d 113, 120 (3d Cir. 2014) (emphasis added).<sup>4</sup>

As observed by the Court of Appeals<sup>5</sup>, the record in this case fails to demonstrate any basis upon which to conclude that an innocent person has been convicted other than the self-serving declarations of the petitioner. At best, in this case as well as the prior case filed at 2: 11-cv-719, the record demonstrates that the trial contained disputed issues which were resolved by the jury adversely to the petitioner.

Accordingly, there is no basis upon Rule 60(b) relief can be granted, and it is recommended that the motion be dismissed, and that certificate of appealability be denied.

Litigants who seek to challenge this Report and Recommendation must seek review by the district judge by filing objections within fourteen (14) days of this date and mailing them to United States District Court, 700 Grant Street, Pittsburgh PA 15219-1957. Failure to file timely objections will waive the right to appeal.

Respectfully submitted,  
s/ Robert C. Mitchell  
United States Magistrate Judge

Filed: August 16, 2018

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<sup>4</sup> Interestingly, the petitioner places reliance of Satterfield v. District Attorney, 872 F.3d 152, 155 (3d Cir. 2017) wherein the Court wrote "McQuiggin, implicates the fundamental principle of avoiding the conviction of an innocent man and attempts to prevent such a mistake through the fundamental miscarriage of justice exception. If Satterfield can make the required credible showing of actual innocence to avail himself of the fundamental miscarriage of justice exception had McQuiggin been decided when his petition was dismissed, equitable analysis would weigh heavily in favor of deeming McQuiggin's change in law, as applied to Satterfield's case an exception circumstance justifying Rule 60(b)(6) relief." We observe that the Court of Appeal's decision of this case on April 14, 2018 was written after Satterfield was decided.

<sup>5</sup> In this case as well as in 2:11-cv-719.

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

GEORGE R. DURHAM, )  
Petitioner, ) Civil Action No. 17-662  
v. ) Judge Cathy Bissoon  
THE ATTORNEY GENERAL OF ) Magistrate Judge Robert C. Mitchell  
THE STATE OF PENNSYLVANIA, *et al.*, )  
Respondents. )

**MEMORANDUM ORDER**

This case has been referred to United States Magistrate Judge Robert C. Mitchell for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. §§ 636 and Local Rule of Civil Procedure 72.

On August 16, 2018, the Magistrate Judge issued a Report and Recommendation ("Report," Doc. 18) recommending that Petitioner George R. Durham's Second Motion for Relief from Judgment under Federal Rule of Civil Procedure 60(b)(6) (Doc. 17) be dismissed as being without a jurisdictional basis. The Report was served on the parties, and Petitioner filed timely Objections (Doc. 19).

Petitioner objects on two grounds. First, he objects that the Report incorrectly characterizes the evidence he has put forward to demonstrate his innocence as "self-serving declarations of the Petitioner" when Petitioner rather claims that the evidence of his innocence is the testimony of several witnesses at his trial who testified to facts that would demonstrate a

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complete alibi.<sup>1</sup> (Objections ¶¶ 3-5.) Second, Petitioner objects that his Rule 60(b)(6) Motion should not have been treated as a successive habeas petition because, under Satterfield v. District Attorney of Philadelphia, 872 F.3d 152 (3d Cir. 2017), he is claiming actual innocence and there has been a relevant change in decisional law by virtue of the Supreme Court's decision in McQuiggin v. Perkins, 569 U.S. 383 (2013). (Objections ¶¶ 6-7.)

The Court has conducted a *de novo* review of the pleadings and documents in the case, the procedural history of Petitioner's related actions, the Report, and the Objections. The Court fully agrees with the Report's conclusion that Petitioner is, once again, attempting to relitigate the merits of claims that have been previously adjudicated; reaching the merits of these claims would require reviewing the Court of Appeals' orders denying Petitioner's applications for certificates of appealability (see Doc. 16 ("Reasonable jurists would not debate the District Court's denial of [Durham's] motion pursuant to Rule 60(b) . . . on the ground that it lacked jurisdiction"); Civil Action No. 11-719, Doc. 82 ("[R]easonable jurists would not debate that (a) [Durham]'s trial counsel acted reasonably in not pursuing an alibi defense, and (b) foregoing such a defense did not prejudice [Durham] in light of the weighty evidence against him.")). As such a defense did not prejudice [Durham] in light of the weighty evidence against him.")). As this Court lacks jurisdiction to review the Court of Appeals' decisions, and as Petitioner has again made no substantial showing that extreme and unexpected hardship would occur without Rule 60(b) relief, Cox v. Horn, 757 F.3d 113, 120 (3d Cir. 2014), the Court enters the following

Order:

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<sup>1</sup> Petitioner claims that trial counsel was ineffective for failing to "connect the dots concerning this testimony," failing to argue the correct timeline to the jury, and failing to conduct an adequate pretrial investigation. (Objections ¶¶ 3-5.)

Petitioner's Second Rule 60(b) Motion (Doc. 17) is **DISMISSED** with prejudice as lacking a jurisdictional basis, and a certificate of appealability is **DENIED**. The Magistrate Judge's Report (Doc. 18) is adopted as the Opinion of the District Court.

IT IS SO ORDERED.

February 4, 2019

s/Cathy Bissoon  
Cathy Bissoon  
United States District Judge

cc (via ECF email notification):

All counsel of record

cc (via First-Class, U.S. Mail):

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