UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 18 2019

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

JERRY ELLIS, AKA Jerry Leonard Ellis, Petitioner-Appellant, v. STEVEN LITTLE, Southern Idaho Correctional Institute, Respondent-Appellee.	No. 19-35838 D.C. No. 1:15-cv-00515-BLW District of Idaho, Boise ORDER

Before: FARRIS and McKEOWN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 3) is denied because appellant has not shown "that (1) jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 60(b) motion and, (2) jurists of reason would find it debatable whether the underlying section [2254 petition] states a valid claim of the denial of a constitutional right." *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 2462 (2016); *see also* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (order).

Any pending motions are denied as moot.

DENIED.

APPENDIX A

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

JERRY LEONARD ELLIS,

Petitioner,

v.

STEVEN LITTLE, Warden, Southern Idaho Correctional Institution,

Respondent.

Case No. 1:15-cv-00515-BLW

ORDER

On January 27, 2017, the Court dismissed Claims 1, 2, and 6 through 22 of Petitioner's habeas corpus petition as procedurally defaulted without legal excuse. (Dkt. 53.) In doing so, the Court declined to consider Respondent's alternative argument that those claims were also barred by the one-year statute of limitations. (*Id.* at 10 n.3; *see also* Dkt 39-1 at 6-12 (arguing untimeliness).)

Petitioner then filed numerous meritless, abusive, or duplicative motions, resulting in the Court's order prohibiting any additional motions prior to the resolution of Petitioner's remaining claims. (Dkt. 98.) On December 11, 2018, the Court denied Petitioner's remaining claims on the merits and entered final judgment. (Dkt. 99, 100.) Petitioner appealed to the Ninth Circuit and later retained counsel in this case. (Dkt. 101, 103.)

On April 17, 2019, Petitioner filed a Motion for an Indicative Ruling under Rule 62.1 of the Federal Rules of Civil Procedure. (Dkt. 104.) In that motion, Petitioner asks

APPENDIX B

that the Court consider Plaintiff's Rule 60(b) Motion for Relief from Judgment, which he filed the same day. (Dkt. 105.)

After Petitioner filed his post-judgment motions, but before briefing was completed, the Ninth Circuit denied Petitioner's request for a certificate of appealability. (Dkt. 106.)

For the following reasons, Petitioner's Motion for Indicative Ruling and Motion for Relief from Judgment will be denied.

1. Petitioner Is Not Entitled to Relief from Judgment

Petitioner requests, pursuant to Rule 60(b)(1), (2) and (6), that the Court reconsider its analysis and conclusion that Claim 2 is procedurally defaulted without legal excuse. (Dkt. 105; Dkt. 105-1 at 7-14.) The Court may grant Petitioner relief from final judgment if Petitioner shows the following:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); [or]
>
> ....
>
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b).

Petitioner argues that, pursuant to the narrow exception set forth in *Martinez v. Ryan*, 566 U.S. 1 (2012), ineffective assistance of his initial post-conviction counsel

constitutes cause and prejudice to excuse the procedural default of Claim 2.[1] Claim 2 alleges ineffective assistance of trial counsel, with respect to Petitioner's warrantless blood draw, under *Strickland v. Washington*, 466 U.S. 668 (1984).[2]

In arguing that his *trial* attorney rendered ineffective assistance, Petitioner relies on *Missouri v. McNeely*, in which the United States Supreme Court held that the natural metabolization of alcohol in a person's bloodstream does not present a "per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." 569 U.S. 141, 145 (2013). In support of his argument that his *initial post-conviction* attorney rendered ineffective assistance, Petitioner relies on a state-court declaration from that attorney, which states that the attorney learned of the relevant case law regarding warrantless blood draws in late 2014 but "did not consider amending" Petitioner's post-conviction petition. (Ex. A to Dkt. 105-2, Pierce Decl., ¶ 5.) Petitioner has also submitted his own declaration,

[1] *Martinez* permits a federal habeas court to reach the merits of a procedurally-defaulted claim of trial counsel ineffectiveness in the following circumstances: (1) the underlying claim of ineffective assistance of counsel must be a "substantial" claim; (2) the "cause" for the procedural default consists of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" collateral review proceeding where the ineffective assistance of trial counsel claim could have been brought; and (4) state law requires that an ineffective assistance of counsel claim be raised in an initial-review collateral proceeding, or by "design and operation" such claims must be raised that way, rather than on direct appeal. *Trevino v. Thaler*, 569 U.S. 416, 423, 429 (2013)

[2] One subsection of Claim 2, subsection (7), alleges ineffective assistance of *appellate* counsel. (*See* Dkt. 88 at 1-3.) However, Petitioner does not move for relief from judgment as to that aspect of Claim 2, and the *Martinez* exception does not apply to such claims in any event. *See Davila v. Davis*, 137 S. Ct. 2058, 2063 (2017).

explaining that he learned of *McNeely* in September 2015—while his post-conviction petition was on appeal—and recounting his efforts to pursue his *McNeely* argument:

> I called Doug Pierce immediately after learning of *McNeely*. I asked him what I needed to do to get this claim before the courts. Rather than telling me to file an amended or successive post-conviction petition, or a motion for relief from judgment, he told me to file a federal habeas corpus petition. So, I did that while the appeal from my post-conviction petition was still pending. Eventually, the post-conviction appeal was dismissed.

(Dkt 105-2, Ellis Decl., ¶¶ 6-10.) Petitioner asserts that, under *Martinez*, the Court should reach the merits of his claim that his trial counsel rendered ineffective assistance and that such assistance resulted in Petitioner's guilty plea.

Respondent argues that (1) Petitioner has not met the standards for a motion for relief from judgment, (2) Petitioner has not established cause and prejudice for the default of Claim 2, and (3) Claim 2 is untimely in any event. (Dkt. 109 at 6, 8-20.) The Court agrees.

Petitioner has not established that his failure to present the declarations before final judgment—for which he blames the Court's filing restriction (*see* Dkt. 98)—resulted from any mistake or excusable neglect as required by Rule 60(b)(1). Instead, Petitioner's inability to present the evidence stemmed from his own abusive motion practice, in which he persisted despite the Court's previous warning. (*See* Dkt. 88.) Rule 60(b)(1) offers no relief.

Petitioner has also failed to show reasonable diligence with respect to the newly-presented evidence as required by Rule 60(b)(2). He learned of *McNeely* in September

2015, before he even filed the instant habeas petition. Petitioner does not sufficiently explain why he could not have obtained his initial post-conviction attorney's declaration then (or relatively soon thereafter), even though Petitioner acknowledges that he was in contact with that very attorney at that time. Nor has Petitioner shown that, had the evidence been presented earlier, it likely would have affected the disposition of Claim 2. *See Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878 (9th Cir. 1990) (Rule 60(b)(2) requires that a showing that "the evidence (1) existed at the time of the trial, (2) could not have been discovered through due diligence, and (3) was of such magnitude that production of it earlier would have been likely to change the disposition of the case.") (internal quotation marks omitted).

Claim 2 is insubstantial and, therefore, provides no avenue for relief under *Martinez*. It was not ineffective assistance for Petitioner's trial attorney not to predict the Supreme Court's decision in *McNeely*, which was issued years after Petitioner pleaded guilty. *See Sophanthavong v. Palmateer*, 378 F.3d 859, 870 (9th Cir. 2004) ("*Strickland* does not mandate prescience, only objectively reasonable advice under prevailing professional norms. Counsel was not required to predict accurately how the Oregon courts would resolve the question whether the evidence was legally sufficient to support a conviction for aggravated murder if the matter had gone to trial.") (internal quotation citation omitted). Because Claim 2 is not substantial, the limited exception articulated in *Martinez* does not apply.

Moreover, Petitioner does not contest Respondent's renewed argument that Claim 2 is untimely. (*See* Dkt. 111.) Even if Petitioner could show cause and prejudice under

the limited exception articulated in *Martinez v. Ryan*, he still has not established that Claim 2 is timely under AEDPA. Had the Court reached the statute of limitations issue at the motion-to-dismiss stage of this litigation, it would have dismissed Claim 2 on that basis as well. Petitioner is not entitled to relief under Rule 60(b)(2) because Claim 2 was still subject to dismissal on that alternative ground. *See Jones*, 921 F.2d at 878.

Finally, Petitioner has not shown "manifest injustice" or "extraordinary" circumstances that would justify relief under on the catch-all provision of Rule 60(b)(6). *Lal v. California*, 610 F.3d 518, 524 (9th Cir. 2010).

ORDER

IT IS ORDERED:

1. The parties' motions for extensions of time (Dkt. 107, 110) are GRANTED.
2. Petitioner's Motion for an Indicative Ruling (Dkt. 104) is DENIED.
3. Petitioner's Motion for Relief from Judgment (Dkt. 105) is DENIED.
4. The Court does not find its resolution of Petitioner's post-judgment motions to be reasonably debatable, and a certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c); Rule 11 of the Rules Governing § 2254 Cases.

DATED: August 26, 2019

B. Lynn Winmill
U.S. District Court Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 19 2019

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

JERRY ELLIS, AKA Jerry Leonard Ellis, Petitioner-Appellant, v. STEVEN LITTLE, Southern Idaho Correctional Institute, Respondent-Appellee.	No. 19-35838 D.C. No. 1:15-cv-00515-BLW District of Idaho, Boise ORDER

Before: TALLMAN and NGUYEN, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 5) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

APPENDIX C

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