

Appendix A,1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 11 2020

JOSH ALBRITTON,

Petitioner-Appellant,

v.

CHARLES L. RYAN,

Respondent,

and

ATTORNEY GENERAL FOR THE STATE
OF ARIZONA; DAVID SHINN, Director,
Director of the Arizona Department of
Corrections,

Respondents-Appellees.

Before: LEAVY and MILLER, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."

Slack v. McDaniel, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2);

Gonzalez v. Thaler, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

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

No. 19-17434

D.C. No. 4:18-cv-00119-JR
District of Arizona,
Tucson

ORDER

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Appendix A, 2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 11 2020

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

JOSH ALBRITTON,

Petitioner-Appellant,

v.

CHARLES RYAN, Director, State of
Arizona,

Respondent-Appellee.

No. 19-16311

D.C. No. 4:19-cv-00227-RCC-LCK
District of Arizona,
Tucson

ORDER

Before: LEAVY and MILLER, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling."

Slack v. McDaniel, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2);

Gonzalez v. Thaler, 565 U.S. 134, 140-41 (2012).

Any pending motions are denied as moot.

DENIED.

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JOSH ALBRITTON,
Petitioner.

No. 2 CA-CR 2017-0307-PR
Filed January 26, 2018

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Petition for Review from the Superior Court in Cochise County
No. CR201100236
The Honorable James L. Conlogue, Judge

REVIEW GRANTED;
RELIEF GRANTED IN PART AND DENIED IN PART

Josh Albritton, Tucson
In Propria Persona

STATE v. ALBRITTON
Decision of the Court

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Vásquez and Judge Eppich concurred.

ESPINOZA, Judge:

¶1 Josh Albritton seeks review of the trial court's orders summarily dismissing his request for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., and summarily denying his request for DNA¹ testing of evidence from his trial. We will not disturb those orders unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). We grant review and partial relief.

¶2 After a jury trial, Albritton was convicted of three counts of aggravated assault and eight counts of misconduct involving weapons. The trial court sentenced him to concurrent and consecutive prison terms totaling ninety years. We affirmed his convictions and sentences on appeal. *State v. Albritton*, No. 2 CA-CR 2013-0128, ¶ 1 (Ariz. App. Dec. 19, 2013) (mem. decision).

¶3 Albritton sought post-conviction relief, and appointed counsel filed a notice stating he had reviewed the record but found no colorable claims to raise under Rule 32. Although the trial court granted Albritton leave to file a pro se petition, he did not do so, and the court dismissed the proceeding in February 2015. Albritton did not seek review.

¶4 In March 2017, Albritton initiated a second Rule 32 proceeding, claiming his counsel had been ineffective and he had recently been diagnosed with post-traumatic stress disorder (PTSD), constituting newly discovered evidence. The trial court summarily dismissed the proceeding, noting Albritton's ineffective assistance claim could not be raised in an untimely proceeding, he had not provided any evidence supporting his claim of a recent PTSD diagnosis and, in any event, the diagnosis would not have changed the outcome of his trial or his sentence.

¹Deoxyribonucleic acid.

STATE v. ALBRITTON
Decision of the Court

¶5 Albritton also filed a motion requesting that the state be ordered to test "all sharp objects originally used as evidence in this case" for the victim's DNA, claiming it would show he did not assault the victim. The trial court summarily denied that request, stating Albritton "cites no[] authority . . . in support of his motion and the Court is unaware of any such authority." This petition for review followed.

¶6 In his petition, Albritton repeats his claim of ineffective assistance and his claims based on his purported recent PTSD diagnosis. He does not, however, address the trial court's conclusion that he is not permitted to raise his claim of ineffective assistance in an untimely proceeding. *See Ariz. R. Crim. P. 32.1(a), 32.4(a)(2)(A).* Nor does he dispute the court's conclusion that awareness of his PTSD diagnosis would not have changed the proceeding's outcome. *See Ariz. R. Crim. P. 32.1(e).*

¶7 Instead, his argument essentially appears to be that he was unable to raise various claims of trial error and ineffective assistance previously because he was medicated and placed in solitary confinement "throughout the Trial, Direct Appeal, and 1st Rule 32." To the extent Albritton argues there was error at his trial, that claim cannot be raised in this untimely proceeding. *Ariz. R. Crim. P. 32.4(a)(2)(A).* And his assertion that his ability to raise his claims post-conviction has been limited is not cognizable under Rule 32 because it does not implicate his conviction or sentence but, rather, concerns only the alleged post-trial denial of his rights. *See Ariz. R. Crim. P. 32.1.*

¶8 Albritton also reasserts his request for DNA testing of items in his case. As we noted above, the trial court rejected this claim on the basis that it was unaware of any provision for post-conviction DNA testing. The court apparently overlooked A.R.S. § 13-4240 and Rule 32.12, Ariz. R. Crim. P., which allow a convicted felon to request, and the court to order, DNA testing of evidence if certain conditions are met. We therefore remand the case to the trial court to consider Albritton's motion under § 13-4240 and Rule 32.12.

¶9 Upon review, we grant relief in part and remand the case to the trial court for consideration of Albritton's motion for DNA testing under the appropriate authority. Relief is otherwise denied.

Appendix B, 2

FILED BY CLERK

APR 17 2018

COURT OF APPEALS
DIVISION TWO

M A N D A T E

2 CA-CR 2017-0307-PR
Department B
Cochise County
Cause No. CR201100236

RE: STATE OF ARIZONA v. JOSH ALBRITTON

To: The Superior Court of Cochise County and the Hon. James L. Conlogue, Judge Pro Tempore, in relation to Cause No. CR201100236.

This cause was brought before Division Two of the Arizona Court of Appeals in the manner prescribed by law. This Court rendered its Memorandum Decision and it was filed on January 26, 2018.

No Motion for Reconsideration or Petition for Review was filed and the time for filing such has expired.

NOW, THEREFORE, YOU ARE COMMANDED to conduct such proceedings as required to comply with the accompanying Memorandum Decision of this Court.

I, Jeffrey P. Handler, Clerk of the Court of Appeals, Division Two, hereby certify the accompanying Memorandum Decision (see link below) to be a full and accurate copy of the decision filed in this cause on January 26, 2018.

To view the decision, please click on the following link:
<http://www.appeals2.az.gov/APL2NewDocs1/COA/754/3339196.pdf>

DATED: April 17, 2018

JEFFREY P. HANDLER
Clerk of the Court



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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Pending before the Court is Petitioner's Amended Motion for Summary Judgment (Doc. 36) and Motion to Strike Response to Motion for Summary Judgment (Doc. 37). In his Amended Motion for Summary Judgment, Petitioner asserts that, because Respondents did not respond to his request for admissions filed on December 11, 2018 (Doc. 33), all his proposed admissions should be deemed admitted and his requested habeas relief should be granted. However, as Respondents contend, there "is not federal right, constitutional or otherwise, to discovery in habeas proceedings as a general matter." *Campbell v. Blodgett*, 982 F.2d 1356, 1358 (9th Cir. 1993) (citing *Harris v. Nelson*, 394 U.S. 286, 296(1969)); *see also Bracy v. Gramley*, 520 U.S. 899, 904 (1997) ("A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course."); *Bittaker v. Woodford*, 331 F.3d 715, 728 (9th Cir. 2003) ("Parties in habeas cases, unlike those in ordinary civil cases, have no right to discovery."). Moreover, Rule 6(a), Rules Governing § 2254 Cases, provides that in order to conduct discovery, a party in a habeas proceeding must first obtain leave of court upon

Appendix C

1 a showing of good cause. Albritton has never requested or granted authorization from this
2 Court to conduct discovery. As such, the motion is denied.

3 Albritton also filed a motion to strike the Respondents' response to the motion for
4 summary judgment, asserting that the response is untimely because Respondents failed to
5 respond within 30 days to his request for admissions filed on December 11, 2018. As
6 discussed above, Respondents' were not required to respond to Petitioner's request for
7 admissions. Additionally, Respondents filed their response to the motion for summary
8 judgment on the same day Albritton filed his motion, rendering their response timely. *See*
9 Local Rules of Civil Procedure 56.1(d) (providing for 30 days for filing a response to a
10 motion for summary judgment).

11 Accordingly,

12 **IT IS ORDERED** that Petitioner's Amended Motion for Summary Judgment
13 (Doc. 36) and Motion to Strike Response to Motion for Summary Judgment (Doc. 37) are
14 denied.

15 Dated this 12th day of August, 2019.

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18 Honorable Jacqueline M. Rateau
19 United States Magistrate Judge
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JL

6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8
9 Josh Albritton,

No. CV 19-00227-TUC-RCC (LCK)

10 Petitioner,

11 v.

ORDER

12 Charles Ryan,

13 Respondent.

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15 On March 25, 2019, Petitioner Josh Albritton, who is confined in the Arizona State
16 Prison Complex-Tucson, filed a pro se Petition for Writ of Habeas Corpus pursuant to 28
17 U.S.C. § 2254 (Doc. 1) and an Application to Proceed In Forma Pauperis (Doc. 2) in the
18 United States District Court for the District of Columbia. On April 17, 2019, United States
19 District Judge Emmet G. Sullivan ordered the case to be transferred to this Court. On April
20 22, 2019, the Court received this case, and it was assigned to the undersigned. On May 24,
21 2019, Petitioner filed a Motion to Appoint Counsel (Doc. 6).

22 Petitioner was convicted in Cochise County Superior Court, case #CR201100236,
23 of three counts of aggravated assault, eight counts of misconduct involving weapons, and
24 one count of failing to provide a true name and was sentenced to an 80-year term of
25 imprisonment. In his Petition, Petitioner names Charles Ryan as Respondent.

26 Petitioner has previously filed a Petition for Writ of Habeas Corpus pursuant to 28
27 U.S.C. § 2254, which is currently pending before this Court. *See Albritton v. Ryan*, CV
28 18-00119-TUC-JR. Because Petitioner's pending habeas corpus petition seeks to

Appendix D

1 challenge the same convictions and sentences for which Petitioner seeks relief in this case,
2 the Court will dismiss this case without prejudice. If Petitioner wishes to assert additional
3 grounds for habeas corpus relief as to the convictions and sentences at issue in this case,
4 Petitioner must file a motion for leave to amend the Petition in CV 18-00119, his previously
5 filed case, and submit a proposed amended petition using the court-approved form petition.

6 **IT IS ORDERED:**

7 (1) Petitioner's Application to Proceed In Forma Pauperis (Doc. 2) and Motion
8 to Appoint Counsel (Doc. 6) are **denied as moot**.

9 (2) Petitioner's Petition for Habeas Corpus (Doc. 1) and this case are dismissed
10 **without prejudice** to Petitioner seeking leave to amend his petition in his previously filed
11 habeas corpus action, *Albritton v. Ryan*, CV 18-00119-TUC-JR.

12 (3) The Clerk of Court must enter judgment accordingly and close this case.

13 (4) Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, in the
14 event Petitioner files an appeal, the Court declines to issue a certificate of appealability
15 because reasonable jurists would not find the Court's procedural ruling debatable. *See*
16 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

17 Dated this 19th day of June, 2019.

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22 Honorable Raner C. Collins
23 Senior United States District Judge
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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Josh Albritton,

NO. CV-19-00227-TUC-RCC (LCK)

Petitioner,

JUDGMENT IN A CIVIL CASE

v.

Charles Ryan,

Respondent.

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order filed June 19, 2019, Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U. S. C. § 2254 and this case are dismissed without prejudice.

Brian D. Karth
District Court Executive/Clerk of Court

June 19, 2019

By s/ A Calderón
Deputy Clerk

Appendix E