United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted February 24, 2023
Decided February 28, 2023

Before

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 22-1718

WILLIAM RICHTER,
Petitioner-Appellant,

v.

CHARLES TRUITT,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 16 C 7660

Martha M. Pacold,
Judge.

ORDER

William Richter has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

William J. Richter, (S11355),	)	
	)	
Petitioner,	)	
	)	Case No. 16 C 7660
v.	)	
	)	Judge Martha M. Pacold
	)	
Randy Pfister, Warden,	)	
Stateville Correctional Center,	)	
	)	
Respondent.	)	

ORDER

Petitioner's Rule 59(e) motion, [57], is denied. Petitioner's Rule 60(b) motions, [55], [66], and motions for court certification, [56], [65], are dismissed for lack of jurisdiction. The Clerk is directed to: (1) terminate Respondent Pfister from the docket; (2) add Petitioner's present custodian, David Gomez, Warden, Stateville Correctional Center, as Respondent; and (3) alter the case caption to *Richter v. Gomez.*

STATEMENT

Petitioner William J. Richter, a prisoner incarcerated at the Stateville Correctional Center, brought this counseled amended habeas corpus action pursuant to 28 U.S.C. § 2254 challenging his 2010 murder conviction from the Sixth Judicial Circuit Court, Macon County, Illinois. The court denied the petition on the merits and declined to issue a certificate of appealability. *Richter v. Pfister,* No. 16 CV 7660, 2021 WL 1225962 (N.D. Ill. Mar. 31, 2021).

In 2008, petitioner murdered the mother of his two children, with whom he had a seventeen-year relationship. *Illinois v. Richter*, 977 N.E.2d 1257, 1259 (Ill. App. Ct. 2012). According to testimony at trial, petitioner solicited Joe Hoffman, who shot and killed the victim. *Id.* at 1267. Hoffman and petitioner had met in 1991; Hoffman characterized petitioner as his "brother." *Id.* Hoffman, an alcoholic, lived on petitioner's property in a camper and worked with petitioner in an auto repair business; petitioner paid Hoffman for Hoffman's work by providing Hoffman a place to stay, supplying him food, beer, cigarettes, and cellular phone service, and driving him to various locations. *Id.* at 1265–68. Testimony at trial included that Hoffman complied with whatever petitioner directed him to do. *Id.* at 1268.

Petitioner murdered the victim because their relationship had soured and he was afraid that she would leave him and take their two minor children from him. *Id.* at 1267. Hoffman shot the victim while she was in her car in the driveway of the family home (out of which she had moved recently) to pick up one of the children to take the child to the child's sports game. *Id.* at 1266. Petitioner, who was in the home at the time of the shooting, played a game with the child in an apparent attempt to keep the child in the house. *Id.* at 1266–67. Petitioner's actions in playing the game with the child that early in the day were unusual for him, *id.* at 1266, and he did not approach the victim's car after the shooting or comfort the child when the child found the victim shot outside the home, *id.* at 1266, 1268.

Petitioner provided his truck (along with its title) and supplies for Hoffman to flee the state after the shooting. *Id.* at 1266–67. Hoffman implicated petitioner in the killing after Hoffman's arrest in Florida. *Id.* at 1267–68. Hoffman conceded that he initially did not name petitioner in the plot out of fear of petitioner, but later cooperated with the police after speaking to his sister, who told him he should tell the truth. *Id.* at 1267.

Multiple comments made by the victim to friends, family members, and coworkers—expressing the victim's concern for her personal safety and relating threats petitioner made against her in the days, weeks, and months before the shooting—were introduced at trial. *Id.* at 1259–65.

Additional evidence at trial included that before the shooting, petitioner spoke to the victim's adult son from a previous relationship, who was in prison, and expressed that if the victim moved out of the home, petitioner would die before he would lose custody of the children. *Id.* at 1264. Before the shooting, petitioner solicited a friend of petitioner's and Hoffman's to sell petitioner a gun that could not be traced back to its owner, but the friend refused because he did not want to get involved. *Id.* at 1268. Petitioner hired a person to burn Hoffman's camper on his property because petitioner "'did not want [the police] to tie him to anything.'" *Id.* (brackets in original).

Petitioner brought a *pro se* habeas corpus petition following the completion of his state court proceedings. *Richter*, No. 16 CV 7660, 2021 WL 1225962, at *3. The petition was superseded by a counseled amended petition filed by petitioner's privately retained attorney, Joel Brodsky. *Id.* Brodsky also filed the reply in support of the amended petition. *Id.*

While the amended petition was fully briefed and pending resolution by the court, the Executive Committee for the United States District Court for the

Northern District of Illinois suspended Brodsky from the practice of law before this court for one year due to misconduct in an unrelated case. *Id.* Additionally, Brodsky's Illinois law license was suspended by the Supreme Court of Illinois for two years. *Id.*

Petitioner wrote to the court expressing his difficulty in reaching Brodsky and providing a response from Brodsky to one of petitioner's letters, explaining that Brodsky had been suspended from practicing law and was prohibited from answering Richter's questions or otherwise discussing the case. *Id.* Petitioner then moved for the appointment of Andrea D. Lyon as a new attorney in this case. *Id.*

The court denied the appointment request and denied the amended habeas corpus petition on the merits. As to Brodsky, the court concluded that Brodsky was suspended after the amended petition had been fully briefed, Brodsky's misconduct resulting in his suspension had occurred in an unrelated case, and that there was no indication that the basis of the suspension was relevant to Brodsky's representation of Richter or performance in this case. *Id.* Further, on the point that Brodsky filed an amended petition that focused on a single issue instead of the multiple issues in the original *pro se* petition, the court concluded that reducing the number of claims may be a matter of litigation strategy and was not *per se* improper. *Id.* The court thus proceeded to adjudicate the petition based on the amended petition and the reply brief filed by Brodsky. *Id.* The court declined to appoint Lyon to represent petitioner, as appointing a new attorney would not change the outcome of this case. *Id.* at *10.

Petitioner initially filed three post-judgment motions: (1) a motion under Rule 59(e) of the Federal Rules of Civil Procedure, [57]; (2) a motion under Rule 60(b), [55]; and (3) accompanying the Rule 60(b) motion, a motion for certification by the court, [56]. Petitioner subsequently refiled the Rule 60(b) motion with additional attached pages (affidavits), [66], and an identical motion for certification, [65].[1]

[1] Petitioner initially filed the three motions on April 27, 2021. [55], [56], [57]. Later, on November 9, 2021, petitioner refiled the Rule 60(b) motion and the motion for certification, [65], [66], as well as a letter, [67], explaining that only 13 pages were filed on April 27, 2021 instead of 15 pages, and that all 15 pages were now being sent. The version of the Rule 60(b) motion filed November 9, 2021 ([66]) appears largely identical to the version filed April 27, 2021 ([55]), but includes additional pages (two affidavits from petitioner's children), *see* [66] at 12–13. The two motions for certification, [56], [65], are identical.

I. Rule 59(e) Motion

A Rule 59(e) motion is a "motion to alter or amend a judgment." "The Rule gives a district court the chance to rectify its own mistakes in the period immediately following its decision." *Banister v. Davis*, 140 S. Ct. 1698, 1703 (2020) (citation and internal quotation marks omitted). "In keeping with that corrective function, federal courts generally have used Rule 59(e) only to reconsider matters properly encompassed in a decision on the merits." *Id.* (citation, internal quotation marks, and brackets omitted).

"Rule 59(e) motions are not second or successive petitions, but instead a part of a prisoner's first habeas proceeding." *Banister*, 140 S. Ct. at 1708. Thus, a Rule 59(e) motion does not implicate 28 U.S.C. § 2244(b)'s restrictions on second or successive habeas corpus petitions. *Id.* at 1705–08.

The substance of the motion, not the label nor the timing of the filing of the motion in relation to the court's judgment, "determines the rule under which it should be analyzed." *Obriecht v. Raemisch*, 517 F.3d 489, 493 (7th Cir. 2008).

The Rule 59(e) motion here, [57], is a proper Rule 59(e) motion, and thus does not implicate § 2244(b), as it seeks reconsideration of the court's prior resolution of his arguments regarding Brodsky's representation of him in this case, and the denial of his motion for attorney representation (representation by Lyon after the amended petition filed by Brodsky had been fully briefed and Brodsky had been suspended).

Although the court has jurisdiction to hear the Rule 59(e) motion, the motion is not persuasive. "To establish relief under Rule 59(e), a movant must demonstrate a manifest error of law or fact or present newly discovered evidence." *Vesely v. Armslist LLC*, 762 F.3d 661, 666 (7th Cir. 2014) (citation and internal quotation marks omitted). "[A] Rule 59(e) motion is not to be used to rehash previously rejected arguments." *Id.* (citation and internal quotation marks omitted). "Rule 59(e) allows the movant to bring to the district court's attention a manifest error of law or fact, or newly discovered evidence. . . . It does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment." *Bordelon v. Chicago Sch. Reform Bd. of Trustees*, 233 F.3d 524, 529 (7th Cir. 2000) (citations and internal quotation marks omitted).

Here, the Rule 59(e) motion does not demonstrate a manifest error of law or fact. There is no right to counsel on federal habeas review. *Kitchen v. United*

States, 227 F.3d 1014, 1018 (7th Cir. 2000) ("once the direct appeal has been decided, the right to counsel no longer applies"); *United States ex rel. Haywood v. Williams*, No. 13 C 5362, 2015 WL 1184700, at *4 (N.D. Ill. Mar. 11, 2015). "Appointing counsel for pro se petitioners in habeas corpus cases is a power commended to the discretion of the district court in all but the most extraordinary circumstances." *Winsett v. Washington*, 130 F.3d 269, 281 (7th Cir. 1997) (quoting 18 U.S.C. § 3006A(a)(2)(B) ("Whenever . . . the court determines that the interests of justice so require, representation may be provided for any financially eligible person who . . . is seeking relief under section 2241, 2254, or 2255 of title 28."), and *LaClair v. United States*, 374 F.2d 486, 489 (7th Cir. 1967) ("[A]ppointment of counsel for indigents in habeas corpus and section 2255 proceedings rests in the sound discretion of district courts unless denial would result in fundamental fairness impinging on due process rights.")).

Brodsky, the attorney whom petitioner retained, filed both the amended petition and a reply in support of the petition before Brodsky's suspension. Thus, the petition had been fully briefed before the suspension. Brodsky then informed petitioner of the suspension when petitioner wrote to him.

As the court noted in the prior opinion, reducing the number of claims (which Brodsky did in filing the amended petition, relative to the original pro se petition) may be a matter of litigation strategy and was not *per se* improper. *Richter*, 2021 WL 1225962, at *3. The choice of which legal arguments to pursue is a matter of litigation strategy and the exercise of the attorney's judgment. *Cf. Coleman v. Thompson*, 501 U.S. 722, 753 (1991) ("in 'our system of representative litigation . . . each party is deemed bound by the acts of his lawyer-agent'") (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 634 (1962)). Although the Confrontation Clause argument was ultimately unsuccessful, Brodsky's choice of that argument was reasonable. Further, as explained in the court's prior opinion, from the Seventh Circuit and district court decisions regarding Brodsky's suspension, there is no indication that the basis of the suspension was relevant to Brodsky's representation of Richter or performance in this case. *Richter*, 2021 WL 1225962, at *3 (citing *Twyman v. S & M Auto Brokers, Inc.*, 748 F. App'x 705 (7th Cir. 2019); *Twyman v. S&M Auto Brokers*, No. 16-cv-4182, 2018 WL 1519159 (N.D. Ill. Mar. 28, 2018)); *see also* [34] (Executive Committee order in *In re Brodsky*, No. 18 D 10 (Apr. 11, 2019)). Under these circumstances, the petition was adequately briefed without the appointment of additional counsel.

Petitioner contends in the Rule 59(e) motion that Brodsky had S&M Auto, Brodsky's client in the *Twyman* litigation (the litigation from which the sanctions against Brodsky stemmed) tow petitioner's car as collateral for attorney's fees, and that even though petitioner paid Brodsky's fees, S&M refused to release the car to

petitioner. This does not suggest that the *Twyman* litigation was related to this case or that the basis of the suspension was relevant to Brodsky's representation of Richter or performance in this case.

Petitioner attaches numerous affidavits on reply in support of the Rule 59(e) motion, [64] at 11–53, but offers no reason why the affidavits could not have been presented earlier.

The Rule 59(e) motion does not demonstrate a manifest error of law or fact and thus is denied.

II. Rule 60(b) Motions and Motions for Court Certification

A Rule 60(b) motion seeks relief from a final judgment, order, or proceeding. A Rule 60(b) motion for relief from a final judgment denying habeas relief is considered to bring a "claim," and thus is subject to § 2244(b)'s restrictions on second or successive habeas applications, when the motion "seeks to add a new ground for relief" or attacks the court's prior resolution of a claim on the merits. *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). As to second or successive habeas petitions, "A state prisoner may not file such a petition without precertification by the court of appeals that the petition meets certain stringent criteria." *Id.* at 528 (citing § 2244(b)). However, a Rule 60(b) motion that does not address the substance of the court's resolution of the claims on the merits, but instead alleges a "defect in the integrity of the federal habeas proceedings," is not considered a second or successive habeas application. *Id.* at 532.

The Rule 60(b) motions here, [55], [66], raise new claims that the Illinois statute allowing the introduction of the victim's hearsay statements violates due process as unconstitutionally vague and ambiguous. Again, the substance of the motions, not the label nor the timing of the filing of the motions in relation to the court's judgment, controls the court's treatment of the motions, *Obriecht*, 517 F.3d at 493; but the motions are not Rule 59(e) motions as there is no request for reconsideration of the court's prior ruling. Rather, the motions raise new claims, implicating § 2244(b)'s restrictions on second and successive habeas corpus petitions (including the requirement of authorization by the Court of Appeals, § 2244(b)(3)). Thus, the motions must be dismissed for lack of jurisdiction. *Curry v. United States*, 507 F.3d 603, 605 (7th Cir. 2007); *Smith v. Neal*, No. 16-3978, 2017 WL 5897589, at *1 (7th Cir. Jan. 20, 2017).

In addition to the Rule 60(b) motions raising claims regarding the constitutionality of the Illinois statute, petitioner filed accompanying motions that the court certify (under 28 U.S.C. § 2403(b)) to the Office of the Illinois Attorney

General that the constitutionality of the Illinois statute has been drawn in question. [56], [65]. Since the Rule 60(b) motions (containing the claims regarding the constitutionality of the Illinois statute) are dismissed for lack of jurisdiction, the accompanying motions for court certification are also dismissed for lack of jurisdiction.

Date: March 31, 2022 /s/Martha M. Pacold

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted March 16, 2023
Decided April 3, 2023

Before

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 22-1718

WILLIAM RICHTER,
Petitioner-Appellant

v.

CHARLES TRUITT, Warden,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:16-cv-7660

Martha M. Pacold, *Judge.*

ORDER

Plaintiff-appellant filed a petition for rehearing and rehearing en banc on March 16, 2023. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing and rehearing en banc is therefore **DENIED**.

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