

BLD-183

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 23-1840

OSCAR ALVARADO, Appellant

VS.

SUPERINTENDENT SOMERSET SCI, ET AL.

(E.D. Pa. Civ. No. 2:17-cv-03283)

Present: KRAUSE, PORTER, and MONTGOMERY-REEVES, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's request for a certificate of appealability is denied. Jurists of reason would not debate the District Court's decision to deny relief under Rule 60(b) of the Federal Rules of Civil Procedure. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Namely, Appellant, who advanced substantive claims in his Rule 60(b) motion, presented an unauthorized second or successive habeas petition, which the District Court lacked jurisdiction to consider. See Gonzalez v. Crosby, 545 U.S. 524, 530–32 (2005).

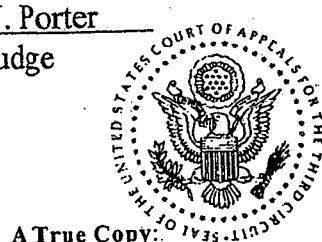
By the Court,

s/David J. Porter
Circuit Judge

Dated: August 11, 2023

JK/cc: Oscar Alvarado

All Counsel of Record



A True Copy:

Patricia S. Dodzuweit

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

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK



UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
Website: www.ca3.uscourts.gov

TELEPHONE
215-597-2995

August 11, 2023

Oscar Alvarado
Chester SCI
500 East 4th Street
Chester, PA 19013

Ronald Eisenberg
Office of Attorney General of Pennsylvania
1600 Arch Street
Suite 300
Philadelphia, PA 19103

RE: Oscar Alvarado v. Superintendent Somerset SCI, et al

Case Number: 23-1840

District Court Case Number: 2-17-cv-03283

ENTRY OF JUDGMENT

Today, **August 11, 2023** the Court issued a case dispositive order in the above-captioned matter which serves as this Court's judgment. Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:

14 days after entry of judgment.

45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:

3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).

15 pages if hand or type written.

Attachments:

A copy of the panel's opinion and judgment only.

Certificate of service.

Certificate of compliance if petition is produced by a computer.

No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very Truly Yours,

s/ Patricia S. Dodszuweit
Clerk

By: s/ James King
Case Manager
Direct Dial: 267-299-4958

cc: Mr. George V. Wylesol

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

OSCAR ALVARADO

Petitioner, pro se

CIVIL ACTION

NO. 17-3283

v.

TREVOR WINGARD, *et al.*

Respondents

ORDER

AND NOW, this 31st day of March 2023, upon consideration of Petitioner Oscar Alvarado's *motion for relief from judgment dated March 21, 2022 pursuant to Federal Rule of Civil Procedure 60(b)(1) to set aside or correct judgment*, [ECF 31], it is hereby ORDERED that the motion is DENIED.¹

¹ This matter was originally filed by Petitioner Oscar Alvarado ("Petitioner") as a *pro se* petition for a writ of *habeas corpus* under 28 U.S.C. § 2254 by a person in state custody following a second-degree murder conviction. [ECF 1]. In his *habeas* petition, Petitioner made various claims that his trial counsel provided ineffective assistance of counsel by failing to, *inter alia*, seek severance of his trial from that of his co-defendant, Cynthia Alvarado, object to the co-defendant's statement as a violation of his rights under the Confrontation Clause, and seek a mistrial. These claims were thoroughly addressed in the Report and Recommendation, [ECF 17], that was subsequently approved and adopted by this Court, [ECF 24]. On January 13, 2020, Petitioner appealed this Court's Order to the United States Court of Appeals for the Third Circuit (the "Third Circuit"). [ECF 25]. By Mandate issued by the Third Circuit, the appeal was dismissed, and this Court's Order was affirmed. [ECF 30]. The United States Supreme Court denied Petitioner's petition for a writ of *certiorari* on March 21, 2022. Seemingly in response to the Supreme Court's denial, Petitioner filed the underlying Federal Rule of Civil Procedure ("Rule") 60(b) motion.

In his Rule 60(b) motion, Petitioner now seeks an order setting aside his state-court conviction and argues one of the same claims of ineffective assistance of trial counsel asserted in his *habeas corpus* petition. Under Rule 60(b), the court may relieve a party from a final judgment, order, or proceeding for various limited reasons, including mistake, newly discovered evidence, fraud, or any other reason that justifies relief (the catch-all provision). Fed. R. Civ. P. 6(b)(1)–(5). Relief under the catch-all provision is appropriate only in "extraordinary circumstances, where, without such relief, an extreme and unexpected hardship would occur." *Sawka v. Healtheast Inc.*, 989 F.2d 138, 140 (3d Cir. 1993). It is well-settled, however, that a motion labeled a "Rule 60 motion" that contains one or more "claims" as used in 28 U.S.C. § 2244(b) "is in substance a successive habeas petition and should be treated accordingly." *Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005). A district court may not consider a second or successive habeas petition unless the appropriate court of appeals authorizes such consideration. 28 U.S.C. § 2244(b)(3).

BY THE COURT:

/s/ Nitza I. Quiñones Alejandro
NITZA I. QUIÑONES ALEJANDRO
Judge, United States District Court

As noted, in the underlying Rule 60(b) motion, Petitioner argues the same ineffective assistance of trial counsel claim he previously asserted. In doing so, Petitioner expressly challenges the disposition of his *habeas* petition by this Court and the Third Circuit. Such challenge constitutes a second or successive *habeas* "claim." *Gonzalez*, 545 U.S. at 532 ("A motion can also be said to bring a 'claim' if it attacks the federal court's previous resolution of a claim on the merits, since alleging that the court erred in denying *habeas* relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to *habeas* relief."). As such, this Court cannot consider this claim unless and until Petitioner receives authorization from the Third Circuit to file a second or successive *habeas* petition. Since Petitioner has not done so, his motion is denied.

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

OSCAR ALVARADO

Petitioner, pro se

CIVIL ACTION

NO. 17-3283

v.

TREVOR WINGARD, *et al.*

Respondents

ORDER

AND NOW, this 16th day of December 2019, upon consideration of the *pro se* petition for writ of *habeas corpus* filed by Petitioner Oscar Alvarado (“Petitioner”) pursuant to 28 U.S.C. § 2254, [ECF 1], Respondents’ response to the petition, [ECF 13], Petitioner’s reply, [ECF 16], the state court record, the *Report and Recommendation* (the “R&R”) issued by the Honorable Jacob P. Hart, United States Magistrate Judge (“the Magistrate Judge”), recommending that the Petition be denied, [ECF 17], and Petitioner’s *pro se* objections to the R&R, [ECF 22, 23], and after conducting a *de novo* review of the objections, it is hereby ORDERED that:

1. The *Report and Recommendation* is APPROVED and ADOPTED;
2. The objections to the R&R are without merit and are OVERRULED.¹

¹ Following a jury trial, Petitioner was found guilty of second-degree murder, robbery, and carrying a firearm without a license, and sentenced to a mandatory term of life imprisonment. In his *habeas* petition, Petitioner asserts multiple claims arising out of his trial and appellate counsels’ failure to adequately argue and/or preserve his challenge to the admissibility of a statement by a non-testifying co-defendant as violative of the Confrontation Clause. The Magistrate Judge issued a thoroughly well-reasoned twenty-nine page R&R, in which each of Petitioner’s claims were addressed and rejected. The Magistrate Judge found that the bulk of Petitioner’s claims were procedurally defaulted.

In his objections to the R&R, Petitioner focuses on the Magistrate Judge’s findings with respect to his *Bruton* claim. In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court held that the introduction of a statement of a non-testifying co-defendant which implicates the defendant by name violates the Confrontation Clause. *Id.* at 126. Though the Magistrate Judge found that Petitioner had adequately supported a *Bruton* claim, the Magistrate Judge concluded that, in light of the other overwhelming evidence of Petitioner’s guilt, the error was harmless and, therefore, Petitioner had not shown the actual prejudice necessary to overcome the procedural default of the claim. In now

3. Petitioner's petition for a writ of *habeas corpus*, [ECF 1], is **DENIED**; and
4. No probable cause exists to issue a certificate of appealability.²

The Clerk of Court is directed to mark this matter **CLOSED**.

BY THE COURT:

/s/ Nitza I. Quiñones Alejandro
NITZA I. QUIÑONES ALEJANDRO
Judge, United States District Court

challenging the Magistrate Judge's findings, Petitioner merely repeats and rehashes arguments made in his petition and original filings in support. As such, Petitioner's objections are nothing more than an attempt to re-litigate arguments raised in his original filings. This Court finds that the Magistrate Judge correctly concluded that the *Bruton* violation was harmless because the overwhelming evidence supported the jury's guilty verdict. This Court has reviewed the pertinent portions of the record *de novo* and finds that the Magistrate Judge committed no error in the analysis of Petitioner's claims. Accordingly, Petitioner's objections are overruled, and the R&R is adopted and approved in its entirety.

² A district court may issue a certificate of appealability only upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). A petitioner must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Lambert v. Blackwell*, 387 F.3d 210, 230 (3d Cir. 2004). For the reasons set forth, this Court concludes that no probable cause exists to issue such a certificate in this action because Petitioner has not made a substantial showing of the denial of any constitutional right. Petitioner has not demonstrated that reasonable jurists would find this Court's assessment "debatable or wrong." *Slack*, 529 U.S. at 484. Accordingly, there is no basis for the issuance of a certificate of appealability.

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FOR THE THIRD CIRCUIT

No. 23-1840

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Appellant

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SUPERINTENDENT SOMERSET SCI, ET AL.

(E.D. Pa. No. 2:17-cv-03283)

Present: KRAUSE, PORTER and MONTGOMERY-REEVES, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court, and no judge who concurred in the decision having asked for rehearing, the petition for rehearing by the panel is denied.

BY THE COURT,

s/ David J. Porter
Circuit Judge

Dated: May 8, 2024
JK/cc: Oscar Alvarado
All Counsel of Record