

On February 14, 2000, Petitioner filed the instant pro se petition for writ of habeas corpus attacking the constitutionality of his state court sentence. By Order dated March 8, 2000, the court recognized that Petitioner had not complied with Rule 9.3 of the Local Rules for Civil Procedure, which requires that all petitions for writ of habeas corpus "shall be filed on forms provided by the Court and shall contain the information called for by such forms." The court ordered the Clerk of Court to furnish Petitioner with said forms and ordered Petitioner to complete them within thirty days.

Instead of doing so, Petitioner filed a Motion to Alter, Amend or Vacate the Order dated March 8, 2000 and a Motion for Court Appointed Counsel, Alternatively, to Waive Local Rule 9.3.²

¹(...continued)
petition for habeas corpus that was denied on procedural grounds, as Petitioner did not raise his claims on direct appeal. Pet'r's Mot. to Alter, Amend or Vacate at unnumbered p. 1; Hendel, 1998 WL 470159, at *5.

² Petitioner framed his motion as a motion to alter, amend or vacate, apparently under Rule 60 of the Federal Rules of Civil Procedure. Rule 60(b)(6) reads in material part as follows:

On motion and upon such terms as are just, the court may relieve the party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time. . . .

Rule 60(b)(6) Fed. R. Civ. P. The court notes that Rule 7.1(g) of the Local Rules of Civil Procedure for the Eastern District of Pennsylvania, governing motion practice, allows a party to make a motion for reconsideration. "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or
(continued...)

Through his motions, Petitioner asserts that the court made a "manifest error of law" in determining that the instant habeas petition was filed pursuant to 28 U.S.C. § 2254.³ (Pet'r's Mot. to Alter, Amend or Vacate at unnumbered p. 1.) Because this is Petitioner's second habeas corpus petition, he states that the court may dismiss it as successive if it determines that 28 U.S.C. § 2254 applies. (Pet'r's Mot. to Alter, Amend or Vacate at unnumbered p. 1.) See 28 U.S.C. § 2244(b)(1) (stating that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed"); see also Schlup v. Delo, 513 U.S. 298, 320 n.34 (1995) (defining successive and abusive petitions).

Section 2254 habeas proceedings are used to collaterally attack the "validity" or "legality" of a conviction and sentence. See, e.g., McIntosh v. United States Parole Comm'n, 115 F.3d 809, 811-12 (10th Cir. 1997) (citations omitted). In contrast, § 2241 proceedings are used to attack the "execution" or manner of a

²(...continued)
to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985). Courts will reconsider an issue only "when there has been an intervening change in the controlling law, when new evidence has become available, or when there is a need to correct a clear error or prevent manifest injustice." NL Industries, Inc. v. Commercial Union Ins. Co., 65 F.3d 314, 324 n. 8 (3d Cir. 1995).

³ Section 2254 applies to "an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

sentence. Id. Thus, Section 2241 claims concern a prisoner's incarceration after the fact of trial and sentencing, including continued incarceration after the scheduled release date, parole hearing issues and misconduct within the prison system. Diaz v. Olsen, No.CIV.A.00-980, 2000 WL 1160799 (D.N.J. July 19, 2000) (citations omitted). Here, Petitioner is in custody pursuant to the judgment of a state court and he seeks a remedy in federal court, alleging that his custody is in violation of the Constitution. (Pet. for Writ of Habeas Corpus ¶¶ 3, 7 & 26.) Through his petition, Petitioner asserts, inter alia, that his trial counsel was ineffective and that consequently, his due process rights were denied. See Pet. for Writ of Habeas Corpus ¶ 11 (stating that Petitioner's counsel did not read or review presentence investigation report); ¶¶ 12 & 13 (alleging judicial bias); ¶¶ 16, 17 & 25 (asserting ineffective assistance of counsel). Thus, as Petitioner is attacking the validity of his sentence, section 2254 applies.

Petitioner next asserts that a second petition under § 2254 would be "futile." (Mot. to Alter, Amend or Vacate at unnumbered p.1.) In certain limited circumstances, if a state habeas petitioner's remedy under § 2254 is deemed "inadequate or ineffective," he may file a petition under § 2241. Gray v. Sobina, No.CIV.A.97-4978, 1998 WL 167279, at *2 (E.D. Pa. April 13, 1998) (stating that "[s]ection 2241 is only available if the § 2254 remedy is procedurally barred and the court's failure to afford relief would amount to a 'complete miscarriage of

justice'") (citing In re Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997)). However, a remedy under § 2254 is not inadequate or ineffective simply because the petitioner has already been denied relief, because he has been denied permission to file a second or successive motion, or because he has allowed the statute of limitations to expire. See Charles v. Chandler, 180 F.3d 753, 756-58 (6th Cir. 1999) (construing § 2255).

Petitioner nonetheless argues that a complete miscarriage of justice would result if the bar on successive petitions were to prevent the court from addressing his claim of "actual innocence." (Mot. to Alter, Amend or Vacate at unnumbered pp. 1-2.) Thus, Petitioner asserts that he is actually innocent and that the court should therefore find that his claim arises under § 2241 rather than § 2254. (Pet. for Writ of Habeas Corpus ¶ 29; Pet'r's Mot. to Alter, Amend or Vacate at unnumbered pp. 1-2.) Petitioner supports his assertion of actual innocence with his Motion for Leave to Supplement. This motion states that Petitioner's arrest record for arrests on May 20, 1993 and June 8, 1993 for theft by deception and theft by receiving stolen property, which were nolle prossed on motion of the District Attorney on April 24, 1995, were expunged by the Court of Common Pleas of Montgomery County, Pennsylvania Criminal Division on June 15, 2000. (Mot. for Leave to Supplement Ex. P-1.)

However, as the court stated in its Memorandum and Order responding to Petitioner's first habeas petition, "[t]he fundamental miscarriage of justice exception is only granted in

extraordinary situations, such as where it is shown that the constitutional violations probably resulted in the conviction of one who is actually innocent." Hendel, 1998 WL 470159, at *4 (citing Murray v. Carrier, 477 U.S. 478, 496 (1986)). The court added:

If a petitioner presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial, the petitioner will be allowed to argue the merits of his claim. Actual innocence is the same as factual innocence. That is, Petitioner must show that he did not commit the crime, rather than that some error in procedure occurred. See Hull v. Freeman, 991 F.2d 86, 91 n.3 (3d Cir. 1993). This exception does not apply to those whose guilt is conceded or plain. Schlup v. Delo, 513 U.S. 298, 321 (1995). Petitioner conceded his guilt when he pled guilty.

Id. The court added that "Petitioner may also fall into the second category, that is, his guilt is plain." Id. at n.6. A mere assertion of actual innocence does not change the court's analysis. Petitioner seems to allege that some error in sentencing occurred, rather than that a constitutional violation probably resulted in the conviction of one who is actually innocent. See Mot. for Leave to Supplement ¶ 2 (stating that court relied on expunged arrests for theft when sentencing Petitioner for aggravated assault and unlawful restraint).

Petitioner also moved for appointment of counsel. "The court may request an attorney to represent any person unable to afford counsel." 28 U.S.C. § 1915(e)(1). However, there is no constitutional or statutory right to the appointment of counsel in a civil action. Parham v. Johnson, 126 F.3d 454, 456-57 (3d Cir. 1997). Thus, the court's power to appoint counsel is

discretionary. Id. In exercising its discretion, the district court is to determine whether the plaintiff's claim has some merit in fact and law. Id. at 457. If the court so finds, it should then consider several factors:

- (1) the plaintiff's ability to present his or her own case;
- (2) the complexity of the legal issues;
- (3) the degree to which factual investigation will be necessary and the ability of the plaintiff to pursue such investigation;
- (4) the amount a case is likely to turn on credibility determinations;
- (5) whether the case will require the testimony of expert witnesses;
- (6) whether the plaintiff can attain and afford counsel on his own behalf.

Id. at 457-58. This list of factors is not exhaustive. Id. at 458.

As a preliminary matter, the plaintiff's claim must have some merit in fact and law. Petitioner asserts that because he injured his right hand, he is physically unable to fill out the forms required by Local Rule 9.3, therefore he requests court appointed counsel.⁴ (Pet'r's Mot. for Court Appointed Counsel, Alternatively, to Waive Local Rule 9.3 ¶¶ 4, 7, 8 & 10.) Because

⁴ The court notes that after filing this motion, Petitioner filed three subsequent motions in this case that were typed or handwritten by, or on behalf of, Petitioner.

"volunteer lawyer time is a precious commodity," the court must be cautious in appointing counsel. Tabron v. Grace, 6 F.3d 147, 157 (3d Cir. 1993) (quotations omitted). Petitioner's asserted injury provides no basis for the court to appoint counsel.⁵

Even if the court were to assume, for the sake of argument, that Petitioner's action had some merit in law and fact, consideration of the factors discussed in Parham would not lead to the appointment counsel. Based on Petitioner's numerous filings, he seems capable of presenting his own case. Petitioner appears to be literate and educated, and to have access to the prison library. The case does not appear to be so complex that Petitioner cannot present the relevant issues to the court. No extraordinary credibility issues necessitate appointment of counsel, nor is the testimony of an expert witness required. Finally, "the ever-growing number of prisoner civil rights actions filed each year in the federal courts; the lack of funding to pay appointed counsel; and the limited supply of competent lawyers who are willing to undertake such representation without compensation" add practical restraints to appointing counsel. Tabron, 6 F.3d at 157.

⁵ The court also notes that the state court appointed counsel for Petitioner when he filed a pro se petition for relief under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. § 9541 et seq., on February 23, 1995. Hendel, 1998 WL 470159, at *2. Petitioner argued that his guilty plea was involuntarily and unlawfully induced and that trial counsel rendered ineffective assistance. Id. Petitioner's PCRA counsel filed a "no merit" letter with the court, certifying that counsel had reviewed the record and found no issue of arguable merit. Id. n.3.

For the reasons set forth above, IT IS ORDERED that:

1. Petitioner's Motion to Alter, Amend or Vacate the Order dated March 8, 2000 is DENIED;
2. Petitioner's Motion for Court Appointed Counsel, Alternatively, to Waive Local Rule 9.3 is DENIED;
3. Petitioner's Motion for Leave to Supplement is DENIED AS MOOT;
4. Petitioner's Motion to Expedite is DENIED AS MOOT;
5. Petitioner's Second Motion to Expedite is DENIED AS MOOT;
6. the Clerk of Court shall furnish Petitioner with forms for filing a petition pursuant to 28 U.S.C. § 2254 and bearing the above-captioned civil action number; and
7. Petitioner shall complete these forms and return them to the Clerk of Court within thirty (30) days or this action will be dismissed.

LOUIS C. BECHTLE, J.