

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

BERNARD BENNETT : CIVIL ACTION
 :
 v. :
 :
 JOHN A. PALAKOVICH : NO. 06-3717

MEMORANDUM AND ORDER

McLaughlin, J.

September 6, 2006

This civil action is a motion for reconsideration filed pro se by a prisoner convicted of first degree murder in state court. The plaintiff seeks reconsideration of the June 2, 2003, Order of this Court denying his petition for writ of habeas corpus. The prior proceedings concerning the plaintiff's prior petition for habeas relief were docketed as a separate matter: Bennett v. Varner, No. 03-3213.

Although the plaintiff has sought to bring this motion as one for reconsideration under Rule 60(b) of the Federal Rules of Civil Procedure, his claim may still be required to meet the restrictive procedural requirements for a second or successive habeas corpus petition set out in the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"), codified at 28 U.S.C. § 2244(b). A motion for reconsideration of a habeas order must comply with the requirements of the AEDPA if it presents the types of claims traditionally included in a habeas petition. Gonzalez v. Crosby, 545 U.S. 524, 125 S. Ct. 2641, 2647-48

(2005). Claims that are traditionally included in a habeas petition and therefore subject to the restrictions of the AEDPA include those that seek to add a new ground for relief or that try to attack the court's previous resolution of a claim on the merits. Id. Claims that are not typically included in a habeas petition and therefore not subject to the AEDPA are those that attack the procedural integrity of the federal habeas proceedings or contest a ruling that precluded relief on the merits, such as a denial for procedural default or on statute of limitations grounds. Id.

Here, the plaintiff's motion for reconsideration seeks to raise a new claim based on newly discovered evidence. His motion alleges he was deprived of his right to a fair jury trial because of the Philadelphia District Attorney's Office's "pattern and practice" of discriminating against African-Americans. Motion at 4. In support, the plaintiff relies on what he describes as "newly disclosed" notes from a 1990 training lecture to assistant district attorneys. Motion at 2.

This claim was not included in the plaintiff's original habeas petition. As found in the Magistrate Judge's Report and Recommendation, adopted by the Court in its Order of June 2, 2003, the plaintiff's original petition raised five claims: insufficient evidence to support the jury's verdict; trial court error in failing to find ineffective assistance of counsel for

failing to object to the admission of a weapon into evidence; prosecutorial conduct for making prejudicial statements; trial court error in admitting a co-conspirator's inflammatory statement; and trial court error in referring to the plaintiff as a "getaway driver" and in improperly charging the jury. Magistrate's Report and Recommendation at 4-5; see also Motion at 2-3 (describing the plaintiff's claims in his habeas petition). There are no allegations in the original habeas petition concerning the alleged improper striking of jurors on racial grounds.

As the plaintiff here is seeking to use a motion for reconsideration to raise a new claim based on allegedly newly discovered evidence, his claim must comply with the requirements of the AEDPA. A claim like this one that seeks to have the court rule on a new ground for relief is exactly the type of claim ordinarily brought as a habeas petition and therefore subject to the restrictions of the AEDPA. Gonzales at 2648 (holding that a motion seeking to add a "new ground for relief" is "of course" the type of claim subject to the AEDPA).

Having determined that the plaintiff's motion must comply with the AEDPA's restrictions on second and successive filings, the Court must now consider whether these requirements have been met. The threshold inquiry for this Court is whether the plaintiff has moved in the U.S. Court of Appeals for the

Third Circuit for an order authorizing the district court to consider his application, as required by 28 U.S.C.

§ 2244(b)(3)(A). This requirement is jurisdictional and unless it is met, the Court has no authority to proceed further: "When a second or successive habeas petition is erroneously filed in a district court without the permission of a court of appeals, the district court's only option is to dismiss the petition or transfer it to the court of appeals pursuant to 28 U.S.C. § 1631." Robinson v. Johnson, 313 F.3d 128, 139 (3d Cir. 2002).

Here, the plaintiff has not moved in the Court of Appeals for permission to file a second or successive complaint, and the Court therefore lacks jurisdiction to consider the Motion. Accordingly, the Court will dismiss the Motion without prejudice to the plaintiff's ability to seek such permission in U.S. Court of Appeals for the Third Circuit.

An appropriate Order follows.

