

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

JOHN GALICZYNSKI, : CRIMINAL NO. 98-263-1
 :
 v. :
 :
 UNITED STATES OF AMERICA, : CIVIL NO. 05-4718

ORDER - MEMORANDUM

AND NOW, this **6th** day of **March, 2007**, upon review of petitioner's Motion for Reconsideration (doc. no. 125) and the Government's response thereto (doc. no. 130), it is hereby **ORDERED** that petitioner's Motion for Reconsideration (doc. no. 125) is **DENIED** for the reasons that follow.

A motion for reconsideration can succeed only where: (1) an intervening change in the law has occurred; (2) new evidence not previously available has emerged; or (3) the need to correct a clear error of law or prevent a manifest injustice arises. See NL Indus., Inc. v. Commercial Union Ins. Co., 65 F.3d 314, 324 n. 8 (3d Cir. 1995); Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985); U.S. v. Cabiness, 278 F. Supp. 2d 478, 483-84 (E.D. Pa. 2003) (Robreno, J.).

In his motion for reconsideration, the petitioner does not allege an intervening change in law or the existence of new, previously unavailable, evidence. Therefore, in order to succeed, the petitioner must show that reconsideration is necessary in order to remedy a clear error of law or to prevent a manifest injustice. Petitioner does not meet this standard and

the motion for reconsideration will be denied.

A brief procedural history of Mr. Galiczynski's habeas petitions will aid in the understanding of his current motion for reconsideration. On November 29, 2001, Galiczynski filed his first § 2255 petition (doc. no. 106), which he entitled "Pursuant to Rules of Criminal Procedure, Rule 36 & Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct the Sentence of a Person in Federal Custody." As it was filed 20 months after his conviction became final - that is when it was affirmed by the Third Circuit - it was denied as untimely (doc. no. 112). Even so, the Court proceeded to consider the merits and state that it would nevertheless be dismissed.

On August 31, 2005, Galiczynski filed a second § 2255 petition. It appears that the Court may have received more than one copy, one of which was unsigned. Ruling upon the unsigned motion, on September 8, 2005, the Court ordered (doc. no. 114) that the petition be denied without prejudice as unsigned. Subsequently, due to an administrative oversight, the Court ordered the Government to respond to the denied petition (doc. no. 115). This may have misled petitioner into thinking that he had to reply to the Government's response, which he did in his Motion of Rebuttal (doc. no. 117).

On or about January 8, 2007, a signed copy of the petition was located in the Court's files as being received on

August 31, 2005. To remedy the situation and in the interest of justice, the Court decided, sua sponte, to vacate its Order dated September 8, 2005, denying without prejudice petitioner's § 2255 petition and proceed to consider the petition on the merits of his petition. In doing so, the Court dismissed the petition as it was barred by the AEDPA's second or successive rule, Galiczynski previously having filed a § 2255 petition that was dismissed with prejudice after the Court considered the merits (despite its untimely filing).

Galiczynski now motions for reconsideration of the Order denying his second § 2255 petition and denying as moot his "Motion of Rebuttal". He argues that his § 2255 motion was characterized as such without being warned of the ramifications of such a characterization.

He cites three cases in support of his motion, United States v. Thomas, 221 F.3d 430 (3d Cir. 2000), United States v. Miller, 197 F.3d 644 (3d Cir. 1999), and Martin v. Perez, 319 F.3d 799 (6th Cir. 2003). None of these cases provides grounds for reconsideration.

In Thomas, 221 F.3d 430, the Third Circuit held that an amendment to a timely filed § 2255 petition may relate back to the date of the petition for purposes of the AEDPA's one year time period for filing. Id. at 437. Thomas is inapplicable here. No timely petition has ever been filed by Galiczynski in

this case. It appears that he may be arguing that his "Motion of Rebuttal" submitted in response to the Government's opposition to his second § 2255 petition, should somehow relate back to his second § 2255 petition. This is illogical as his second petition was not timely filed.

Second, Galiczynski relies on United States v. Miller, 197 F.3d 644 (3d Cir. 1999). Noting the tension between the AEDPA's strict second or successive rule and the district courts' practice of recharacterizing inartfully drafted post-conviction motions as § 2255 petitions, in Miller the Third Circuit held that district courts, before ruling on § 2255 motions, must issue a form notice to petitioners regarding the effect of a § 2255 petition in light of the AEDPA's second or successive rule. Id. at 646.

It is unclear whether Galiczynski ever received such a notice before the Court ruled upon his first § 2255 petition in 2003. However, even assuming, arguendo, he did not, Galiczynski is not entitled to relief because Miller does not operate to save untimely petitions. See United States v. Chew, 284 F.3d 468, 471 (3d Cir. 2002) (district court not required to provide defendant with proper Miller form for filing § 2255 petition where defendant's motion was already time-barred).

The reasoning underlying the prophylactic measure set out in Miller is sound; it protects persons unaware of the AEDPA's second or successive rule from filing an "incomplete"

habeas petition and then being barred from later filing additional claims.

This policy consideration, however, is not implicated in Mr. Galiczynski's case. His first § 2255 petition was not timely filed under the AEDPA. No form notice warning him of the AEDPA's second or successive rule would have cured this fatal defect. In fact, providing such notice would have been an "exercise of futility." Chew, 284 F.3d at 471.

Finally, basis for reconsideration is not provided by the third case cited by Galiczynski, Martin v. Perez, 319 F.3d 799, 805 (6th Cir. 2003), which, like Miller, held that the court will not deem a mislabeled motion as a "section 2255 motion unless the movant has been warned about the consequences of his mistake."

Therefore, even assuming Galiczynski never received the form notice warning him of the ramifications of the § 2255 petition when he filed his first § 2255 petition in 2003, Miller does not provide a basis for reconsideration because Miller does not operate to cure untimely petitions, such as those filed by Galiczynski. As Petitioner has shown no a clear error of law or manifest injustice, the motion for reconsideration must be denied.

AND IT IS SO ORDERED.

S/Eduardo C. Robreno
EDUARDO C. ROBRENO, J.