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

UNITED STATES OF AMERICA	**:**	**CRIMINAL ACTION**
	:	**NO. 84-97**
v.	**:**	
	:	**CIVIL ACTION**
LEO F. SCHWEITZER, III	**:**	**NO. 07-5561**

DuBOIS, J. **August 30, 2010**

M E M O R A N D U M

I. INTRODUCTION

On July 13, 1985, petitioner, Leo F. Schweitzer, III, was convicted of fourteen separate counts involving mail fraud and the making of false statements to a government agency, in violation of 18 U.S.C. §§ 1341 and 1001. See United States v. Schweitzer, 84-0097, 1988 WL 115774, at *1 (E.D. Pa. Oct. 26, 1988). Despite the denial on the merits of a habeas petition he filed in 1987 ("first habeas petition"), Schweitzer filed a second habeas petition in January 2008 ("second habeas petition"). (Document No. 172, filed January 14, 2008.) In his second habeas petition, Schweitzer argued that under United States v. Gaudin, 515 U.S. 506 (1995), decided approximately ten years after his conviction, the district court erred in not submitting to the jury the issue of whether his false statements were material under 18 U.S.C. § 1001. The second habeas petition was dismissed by Memorandum and Order dated August 15, 2008, on the ground that the Court did not have subject matter jurisdiction pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). See 28 U.S.C. 2244(b)(3)(A); Court's Memorandum and Order of August 15, 2008.

Schweitzer now seeks reconsideration of the Court's Order of August 15, 2008, or in the alternative, a certificate of appealability. For the reasons set forth below, the Court denies

Schweitzer's Motion for Reconsideration and his alternative Motion for Certificate of Appealability.

II. BACKGROUND

The procedural history of this case is complicated, and needless to say, quite lengthy. It is repeated here, only to the extent necessary to place the Court's ruling in appropriate context.

On July 13, 1985, Schweitzer was convicted by jury on a variety of counts involving mail fraud and the making of false statements to a government agency. See Schweitzer, 1988 WL 115774, at *1. These charges arose from Schweitzer's business dealings with the Department of Defense. Id. The government alleged that Schweitzer filed false statements with a government agency in violation of 18 U.S.C. § 1001, and that in furtherance of a scheme to defraud the Department of Defense, Schweitzer used the United States Mails in violation of 18 U.S.C. § 1341. Id.

Following his conviction, and an unsuccessful appeal to the Third Circuit, United States v. Schweitzer, No. 85-1665 (3d Cir. Aug. 27, 1986), Schweitzer filed his first habeas petition under 28 U.S.C. § 2255 on December 21, 1987. In his first petition, Schweitzer raised the following grounds for habeas relief: "(1) the restitution ordered by the court was excessive, (2) the mail fraud counts in the indictment were defective and the court erred in its jury charge on mail fraud, (3) his sentence [was] excessive under applicable sentencing guidelines," (4) the government withheld exculpatory evidence, and (5) "the indictment . . . was tainted by statements made by an Assistant U.S. Attorney at the grand jury proceedings." Schweitzer, 1988 WL 115774, at *1. In a Memorandum and Order dated October 26, 1988, the Court considered the merits of the first petition, granting the petition to the extent that it sought a reduction in

restitution, and denying the petition in all other respects. See id., at *8.

Schweitzer filed a second habeas petition pursuant to 28 U.S.C. § 2255 on January 14, 2008, alleging, *inter alia*, that his 1985 conviction was constitutionally infirm under the Supreme Court's decision in Gaudin, 515 U.S. 506, because the element of materiality of false statements under 18 U.S.C. § 1001 was considered by the judge rather than the jury. Schweitzer did not seek relief on this ground in his first habeas petition. See Schweitzer, 1988 WL 115774, at *1. By Memorandum and Order dated August 15, 2008, the Court dismissed the second habeas petition, finding that Schweitzer had previously filed a habeas petition in the case and was thus barred from filing a successive petition under the gatekeeping provisions of AEDPA. See Court's Memorandum and Order of August 15, 2008. Specifically, the Court concluded that it did not have subject matter jurisdiction over the petition because Schweitzer did not first obtain authorization from the appropriate court of appeals to file a second or successive habeas petition, as required by 28 U.S.C. § 2244(b).[1] Id.

Schweitzer subsequently filed the instant motion, seeking reconsideration of the Court's Order of August 15, 2008, or in the alternative, a certificate of appealability. The lengthy memorandum of law accompanying Schweitzer's Motion for Reconsideration focuses solely on the Gaudin claim outlined above. After considering the parties' original briefing on the motion, the Court issued an Order dated April 8, 2009, directing the parties to file supplemental memoranda of law on the issues of: "(1) whether petitioner's second motion for relief under 28

[1] 28 U.S.C. § 2244(b)(3)(A) provides: "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A).

U.S.C. § 2255 would have been barred as a repetitive motion constituting an abuse of the writ under the pre-AEDPA standard explained in McCleskey v. Zant, 499 U.S. 467, 493–95 (1991) (cause and prejudice or a fundamental miscarriage of justice) and (2) whether petitioner has yet to serve a term of incarceration or any portion of a term of supervised release imposed by judgment dated July 13, 1985." See Court's Order of April 8, 2009. Both Schweitzer and the government thereafter filed supplemental briefs addressing these issues.

III. DISCUSSION

A. Custody Requirement

1. Legal Standard

A petitioner must be in "custody" in order to properly file a habeas petition. See Jones v. Cunningham, 371 U.S. 236, 238 (1963). Custody includes more than physical imprisonment; parole and probation also qualify as custody as they "involve[] significant restraints on petitioner's liberty . . . ." Id. at 242; accord United States ex rel. Wojtycha v. Hopkins, 517 F.2d 420, 424 (3d Cir. 1975) ("[P]robation [is] sufficient to constitute custody under § 2255."). "The 'in-custody' jurisdictional requirement is determined as of the date the petition is filed in the district court." Hopkins, 517 F.2d at 423 n.6 (citing Carafas v. La Vallee, 391 U.S. 234 (1968)).

2. Analysis

The government and Schweitzer take opposing positions on whether petitioner is still in custody for purposes of filing a habeas petition. The government alleges that Schweitzer had completed both his term of imprisonment and his term of supervised release for his 1985 conviction as of 1999. (Govt. Suppl. Opp'n. at 9.) Schweitzer, on the other hand, claims that he is "subject to the 1985 . . . judgment until 2011, and even then depending on your interpretation,

subject to an additional term of probation." (Pet'r's Traverse at 2.) Neither party provides any factual basis or cites to any official record to support its contention.

According to a Sentence Computation Summary prepared by the Federal Bureau of Prisons, the "expiration full term date" relating to petitioner's 1985 conviction is April 18, 2012.[2] On the basis of this record, the Court determines that Schweitzer is in custody on the 1985 conviction.

B. Second or Successive Habeas Petition

1. Legal Standard

As discussed *supra*, AEDPA contains a gatekeeping provision applicable to second or successive habeas petitions. 28 U.S.C. § 2244(b)(3)(A) provides that "[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."

In United States v. Roberson, 194 F.3d 408, 410 (3d Cir. 1999), the Third Circuit examined the question of "whether applying AEDPA's gatekeeping provisions to a 28 U.S.C. § 2255 motion filed after AEDPA's effective date would have an impermissible retroactive result if the movant filed his first § 2255 motion prior to AEDPA's enactment." Analyzing the statutory text, the Roberson court noted that the gatekeeping provisions relevant to § 2255 motions are part of AEDPA's chapter 153 amendments. Id. at 412 (citation omitted). The court then determined that "Congress did not provide unambiguous evidence of its intent to apply

[2] A copy of the relevant portion of the Federal Bureau of Prisons's Sentence Computation Summary shall be docketed by the Deputy Clerk.

AEDPA's chapter 153 amendments to cases in which a prisoner filed his first § 2255 or § 2254 motion prior to AEDPA's effective date." Id.

Without such congressional guidance, the Roberson court conducted a "case-specific analysis of whether applying AEDPA's [gatekeeping provisions to Roberson's second § 2255 motion] would have a genuine retroactive effect by attach[ing] new legal consequences to events completed before [AEDPA's] enactment." Id. at 412–13 (quoting In re Minarik, 166 F.3d 591, 599 (3d Cir. 1999)) (alterations in original) (internal quotation marks & further citations omitted). In this case-specific analysis, the court first analyzed the treatment of Roberson's second § 2255 motion under pre-AEDPA law.

Before the effective date of AEDPA, April 24, 1996, "federal courts denied second or successive § 2255 motions if the government could demonstrate that the motion constituted an abuse of the writ." Id. at 410 (citation omitted). Pre-AEDPA, a second or successive petition would be deemed an abuse of the writ unless "(1) the applicant could establish cause and prejudice—i.e., that 'some objective factor external to the defense impeded counsel's efforts' to raise the claim earlier and that 'actual prejudice result[ed] from the errors of which he complain[ed]'; or (2) the applicant could demonstrate that 'a fundamental miscarriage of justice would result from a failure to entertain the claim.'" Id. (quoting McCleskey v. Zant, 499 U.S. 467, 493–95 (1991)). To prove that a case implicated a "fundamental miscarriage of justice," an applicant needed to establish that he was "actually innocent" — that, "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." Id. at 413 n.3 (quoting Bousley v. United States, 523 U.S. 614, 622 (1998); Murray v. Carrier, 477 U.S. 478, 496 (1986)); Bousley, 523 U.S. at 623 (internal quotation marks omitted).

The Roberson court held that if the second or successive § 2255 motion would have been barred under pre-AEDPA standards, "applying AEDPA's gatekeeping provisions to [the] second § 2255 motion cannot work an impermissible retroactive effect." Id. at 419. The court then applied pre-AEDPA standards and determined that Roberson could not demonstrate cause and prejudice or a fundamental miscarriage of justice, resulting in the application of AEDPA's new substantive standards to Roberson's second § 2255 motion. Id. at 413–14, 413 n.3, 419. "Under AEDPA's new 'gatekeeping provisions,' an applicant seeking to file a second or successive § 2255 motion must obtain from 'the appropriate court of appeals . . . an order authorizing the district court to consider the application' . . . ." Id. at 411 (quoting 28 U.S.C. § 2244(b)(3)(A); see also 28 U.S.C. § 2255(h). The appellate court may grant such permission only if the motion contains newly discovered evidence or is based on a new rule of constitutional law made retroactive to cases on collateral review. 28 U.S.C. § 2255(h). As Roberson conceded that he could not satisfy these new standards, the court denied Roberson's request for authorization to file a second § 2255 motion. Roberson, 194 F.3d at 413, 419.

2. Analysis

In the instant case, as in Roberson, petitioner's § 2255 motions straddle the effective date of AEDPA, April 24, 1996. Petitioner filed his first § 2255 motion on December 21, 1987 and his second § 2255 motion on January 14, 2008. Accordingly, the Roberson case-by-case analysis applies to this case, and the Court must determine whether petitioner's second § 2255 motion would have been barred under the pre-AEDPA "abuse of the writ" doctrine. The Court therefore analyzes whether Schweitzer can establish either (1) "cause and prejudice" or (2) "a fundamental miscarriage of justice", e.g., "actual innocence." Roberson, 194 F.3d at 410, 413 n.3.

At the core of Schweitzer's second habeas petition is his contention that the district court erred in failing to submit the issue of the materiality of his false statement to the jury, and instead made its own determination of materiality.[3] In United States v. Gaudin, the Supreme Court held that criminal defendants have a federal constitutional right to a have a jury decide the materiality of false statements charged under 18 U.S.C. § 1001.[4] See Gaudin, 515 U.S. 506, 522-24 (1995).

Schweitzer correctly points out that, since the Supreme Court's ruling in Gaudin post-dates his conviction by a decade and his first habeas petition by seven years, he could not have reasonably raised this ground for relief in his first petition. For purposes of deciding petitioner's Motion for Reconsideration, the Court will assume that Schweitzer satisfies the "cause" element of the "cause and prejudice" exception. See Roberson, 194 F.3d at 414 (finding that petitioner had "cause" for not raising ground for relief in his first § 2255 motion, where relevant law was amended after his conviction, and petitioner had "no duty to anticipate changes in the law"). However, even assuming the Schweitzer has properly averred cause for his failure to raise the materiality issue in his first habeas petition, his second petition is nonetheless barred because he cannot establish prejudice.[5]

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[3] Schweizter raised other unrelated, and difficult to discern, grounds for relief in the second habeas petition, but addresses only the Gaudin materiality issue in his Motion for Reconsideration. As such, the Court will limit its discussion to that ground for relief. See Panda Herbal Int'l, Inc. v. Luby, No. 05-2943, 2006 WL 446075, at *1 n.1 (E.D. Pa. Feb. 21, 2006).

[4] It should be noted that at the time of Schweitzer's trial, "the controlling [T]hird [C]ircuit precedent that materiality in a [S]ection 1001 case was a question of law for the Court." See United States v. Friedberg, No. 92-183-2, 1997 WL 36997, at *1 (E.D. Pa. Jan. 30, 1997) (citing United States v. Greber, 760 F.2d 68, 73 (3d Cir. 1985)).

[5] Petitioner's repeated citation to Young v. Vaughn, 83 F.3d 72 (3d Cir. 1996), to support his contention that the Court has jurisdiction to rule on his second habeas petition, is inapposite. In Young, the Third Circuit held that a habeas petitioner may attack an expired conviction by

In an Order denying petitioner a certificate of appealability following the Court's Memorandum and Order of August 15, 2008, the Third Circuit concluded that reasonable jurists would not debate whether the Court was correct in its procedural ruling. See United States v. Schweitzer, 08-3930 (3d Cir. Mar. 19, 2009). In so holding, the Third Circuit observed in a parenthetical that "the rule that materiality must be proved beyond a reasonable doubt [under Gaudin v. United States, 515 U.S. 506 (1995)] does not apply retroactively on collateral review." Id. (brackets in original) (quoting United States v. Mandanici, 205 F.3d 519, 531 (2d Cir. 2000)). Nevertheless, because of the way in which the issue was addressed and decided by the Third Circuit in its March 19, 2009 Order, this Court analyzes the issue in greater detail.

A new rule of constitutional law, such as that expounded in Gaudin, is "not 'made retroactive to cases on collateral review' unless the [Supreme] Court itself holds it to be retroactive." In re Turner, 267 F.3d 225, 228 (3d Cir. 2001) (quoting Tyler v. Cain, 533 U.S. 656, 663 (2001)). The Supreme Court has not expressly held that Gaudin is to be applied retroactively. Moreover, as one court observed in United States v. Gibbs, 125 F. Supp. 2d 700, 706 n.8 (E.D. Pa. 2000), "[w]hile our Court of Appeals has not addressed the issue, several circuits have held that the new rule announced in Gaudin requiring materiality to be determined by the jury does not apply retroactively to cases on collateral review." In its analysis of the issue, the Second Circuit explained that the Gaudin rule "merely shift[ed] the determination of

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habeas petition in a subsequent case, where the sentence being served by the petitioner in that subsequent case was a collateral result of the expired conviction. Id. at 73-74. Schweitzer does not seek to challenge an expired conviction which predates the case at issue in his habeas petition. Nor does the fact that the conviction in this case may have affected the length of his later criminal sentences have any bearing on whether Schweitzer can demonstrate cause and prejudice under the "abuse of the writ" doctrine.

materiality from the judge to the jury" and there is "little reason to believe that juries will have substantially different interpretations of materiality than judges." Bilzerian v. United States, 127 F.3d 237, 241 (2d Cir. 1997); see also Mandanici, 205 F.3d at 525; United States v. Shunk, 113 F.3d 31, 32 (5th Cir. 1997); United States v. Swindall, 107 F.3d 831 (11th Cir. 1997); United States v. Friedberg, No. 92-183-2, 1997 WL 36997, at *3 (E.D. Pa. Jan. 30, 1997).

In light of this precedent, and the Third Circuit's March 19, 2009 Order, discussed above, the Court concludes that Gaudin rule does not apply retroactively with respect to the Court's review of Schweitzer's Section 2255 petition. Because the Gaudin rule is not retroactively applicable, it necessarily follows that Schweitzer cannot establish the required prejudice to trigger the first exception to the pre-AEDPA "abuse of the writ" doctrine. See Roberson, 194 F.3d at 417 (petitioner could not establish prejudice where relevant change in law was not retroactively applicable).

Nor can Schweitzer demonstrate a "a fundamental miscarriage of justice," in order to satisfy the second exception. While he makes conclusory claims of "actual innocence," nowhere in any of the briefs submitted to the Court does Schweitzer set forth new or additional evidence establishing that "it is more likely than not that no reasonable juror would have convicted him," as required under the exception. See Bousley, 523 U.S. at 623 (internal quotation marks omitted). Therefore, the Court concludes that petitioner cannot avail himself of the second exception to the pre-AEDPA "abuse of the writ" doctrine.

Since Schweitzer's second habeas petition would have been barred under pre-AEDPA standards, applying AEDPA's gatekeeping provisions to the second petition would not "work an impermissible retroactive effect." See Roberson, 194 F.3d at 419. To file a second or successive

§ 2255 motion under those provisions, Schweitzer must first obtain from "the appropriate court of appeals . . . an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A); see also 28 U.S.C. § 2255(h). Section 2255(h) provides that the appellate court may grant such permission only if the motion contains "newly discovered evidence" or a "new rule of constitutional law, made retroactive to cases on collateral review . . . ." 28 U.S.C. § 2255(h). As the Court's Memorandum and Order dated August 15, 2008 correctly concluded, petitioner has not obtained such permission from the Third Circuit, and the Court therefore lacks subject matter jurisdiction to rule on his second habeas petition. See Court's Memorandum and Order of August 15, 2008. Accordingly, Schweitzer's Motion for Reconsideration of the Court's Memorandum and Order of August 15, 2008 is denied.

IV. CERTIFICATE OF APPEALABILITY

"AEDPA, as codified at 28 U.S.C. § 2253, governs the issuance of a certificate of appealability for appellate review of a district court's disposition of a habeas petition." Millimaci v. Sobina, No. 08-70ERIE, 2010 WL 2636077, at *2 (W.D. Pa. June 28, 2010). Section 2253 provides that "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." In Slack v. McDaniel, the Supreme Court held that "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." 529 U.S. 473, 484 (2000). Applying this standard to the instant case, jurists of reason would not find it

debatable whether Schweitzer's second habeas petition is barred as a second or successive petition under AEDPA's gatekeeping provisions. Roberson, 194 F.3d 408. Accordingly, a certificate of appealability will not issue.

V. CONCLUSION

For the foregoing reasons, the Court denies petitioner's Motion for Reconsideration and his alternative Motion for Certificate of Appealability.

An appropriate order follows.

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O R D E R

AND NOW, this 30th day of August, 2010, upon consideration of petitioner's Motion for Reconsideration of Order of August 18, 2008 [sic], or in the Alternative, Certificate of Appealability (Document No. 178, filed January 5, 2009); Notes & Exhibits [in Support of Motion for Reconsideration] (Document No. 179, filed January 20, 2009); Note 6—Exhibit in Support of Motion for Reconsideration, or in the Alternative, Motion for Issuance of Certificate of Appealability (Document No. 184, filed March 10, 2009); the Government's Opposition to Petitioner's *Pro Se* Motion for Reconsideration of the Court's Order Denying Petitioner's Second Request for Relief Under 28 U.S.C. § 2255 (Document No. 186, filed April 2, 2009); Schweitzer's 1985 Habeas Petition Analysis Under McClesky v. Zant – Cause and Prejudice / Abuse of the Writ, dated May 5, 2009;[6] the Government's Supplemental Opposition to Petitioner's *Pro Se* Motion for Reconsideration of the Court's Order Denying Petitioner's Second Request for Relief Under 28 U.S.C. § 2255 (Document No. 188, filed May 6, 2009);

[6] A copy of Schweitzer's 1985 Habeas Petition Analysis Under McClesky v. Zant – Cause and Prejudice / Abuse of the Writ, dated May 5, 2009, shall be docketed by the Deputy Clerk.

Schweitzer's Reply to the Government's Supplemental Opposition to the Motion for Reconsideration (Document No. 189, filed June 9, 2009); Traverse – Government's Opposition to Reconsideration (Document No. 192, filed June 18, 2009); and petitioner's letter dated August 18, 2009;[7] for the reasons set forth in the Memorandum dated August 30, 2010, **IT IS ORDERED** as follows:

1. Petitioner's Motion for Reconsideration is **DENIED**;

2. Petitioner's alternative Motion for Certificate of Appealability is **DENIED**; and

3. The Clerk of Court shall mark the case **CLOSED**.

BY THE COURT:

/s/ Jan E. DuBois
JAN E. DUBOIS, J.

[7] A copy of petitioner's letter dated August 18, 2009, shall be docketed by the Deputy Clerk.