UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MARCELLAS HOFFMAN, Petitioner, v. ANDRE MATEVOUSIAN, Respondent.	Case No. 1:15-cv-00122-EPG-HC ORDER DENYING CERTIFICATE OF APPEALABILITY FOR DENIAL OF SECOND MOTION FOR RECONSIDERATION (ECF No. 20)

Petitioner Marcellas Hoffman is a federal prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Per the Ninth Circuit's direction (ECF No. 29), the Court determines whether it will issue a certificate of appealability for the Court's denial (ECF No. 20) of Petitioner's second motion for reconsideration of the denial of his habeas petition (ECF No. 19). For the reasons below, the Court denies a certificate of appealability.

I. Procedural History

In his petition, Petitioner claimed that his sentence is contrary to Alleyne v. United States, 133 S. Ct. 2151 (2013), and that his attorney did not tell him about a plea offer, in violation of Missouri v. Frye, 132 S. Ct. 1399 (2012). (ECF No. 1). On February 11, 2015, the Court dismissed the petition.[1] (ECF No. 7). The Court found that Petitioner did not establish a claim of actual innocence and thus, failed to demonstrate that his petition qualified under the

[1] This order and all others prior to December 11, 2015, were issued by Magistrate Judge Gary S. Austin.

savings clause of 28 U.S.C. § 2255. As the petition was a disguised section 2255 motion, the Court did not have jurisdiction. The Court declined to issue a certificate of appealability for the dismissal of the petition, and Petitioner did not file an appeal of the Court's dismissal.

On May 18, 2015, Petitioner filed his first motion for reconsideration of the Court's order dismissing the petition. (ECF No. 17). Petitioner argued that: he is actually and factually innocent, he is entitled to relief pursuant to Descamps v. United States, 133 S. Ct. 2276 (2013), his counsel was ineffective for not contesting an illegal search, and he would have accepted a 25-year plea deal if he had known of the deal. On June 17, 2015, the Court denied Petitioner's motion for reconsideration. (ECF No. 18). The Court reviewed the motion pursuant to Federal Rule of Civil Procedure 60(b). The Court again found that Petitioner did not establish a claim of actual innocence and thus, failed to demonstrate that his petition qualified under the savings clause of 28 U.S.C. § 2255. The Court noted that if Petitioner wished to raise claims concerning Descamps, which were not included in the initial petition with this Court, he must do so in a new petition. (ECF No. 18 at 4). Petitioner did not file an appeal of the Court's order denying his first motion for reconsideration.

II. Petitioner's Second Motion for Reconsideration

On July 13, 2015, Petitioner filed a second motion for reconsideration, which is the motion presently at issue on remand. (ECF No. 19). Petitioner argued that the recently decided Supreme Court case of Johnson v. United States, 135 S. Ct. 2551 (2015), stands for the proposition that challenges to statutory law are always retroactive and adds support to Descamps. On July 30, 2015, the Court denied Petitioner's second motion for reconsideration, finding that it set forth arguments under Johnson to supplement and support Petitioner's Descamps claims that should be raised in a new petition. (ECF No. 20).

On December 17, 2015, the Court reopened the time for Petitioner to file an appeal of the Court's order denying his second motion for reconsideration because Petitioner was never served with said order. (ECF No. 25). Petitioner filed a notice of appeal and the appeal was processed to the Ninth Circuit Court of Appeals. (ECF Nos. 26, 27).

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III. Whether to Issue Certificate of Appealability

On January 8, 2016, citing to United States v. Winkles, 795 F.3d 1134, 1142 (9th Cir. 2015), the Ninth Circuit remanded the case to this Court for the limited purpose of granting or denying a certificate of appealability for the denial of Petitioner's second Rule 60(b) motion for relief from judgment. (ECF No. 29).

Winkles answered an open question in this circuit and held that a certificate of appealability "is required to appeal the denial of a [legitimate] Rule 60(b) motion for relief from judgment arising out of the denial of a section 2255 motion." Winkles, 795 F.3d at 1142. The Ninth Circuit noted that courts of appeals that have articulated standards for issuance of a certificate of appealability in this context relied on Slack v. McDaniel, 529 U.S. 473 (2000). Winkles, 795 F.3d at 1143. In Slack, the Supreme Court held that if a court denies habeas relief on procedural grounds without reaching the underlying constitutional claims, the court should issue a certificate of appealability when a petitioner shows "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." Slack, 529 U.S. at 484. Relying on Slack, the Ninth Circuit similarly held in Winkles that if a court denies a Rule 60(b) motion in a section 2255 proceeding, a certificate of appealability should only issue if "(1) jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 60(b) motion and (2) jurists of reason would find it debatable whether the underlying section 2255 motion states a valid claim of the denial of a constitutional right." Winkles, 795 F.3d at 1143. The Winkles standard applies to appeals of the denial of a "legitimate" Rule 60(b) motion for relief from judgment arising out of the denial of a section 2255 motion. Id. at 1139, 1141 (discussing Gonzalez v. Crosby, 545 U.S. 524 (2005), which held that a "legitimate" Rule 60(b) motion attacks some defect in the integrity of the federal habeas proceedings while a Rule 60(b) motion asserting a federal basis for relief from a judgment of conviction is treated as a second or successive habeas petition).

Here, Petitioner has not shown that jurists of reason would find it debatable whether the Court abused its discretion in denying his second Rule 60(b) motion for reconsideration. See

Towery v. Ryan, 673 F.3d 933, 940 (9th Cir. 2015) (quoting Gonzalez, 545 U.S. at 535) ("[R]elief under Rule 60(b)(6) requires the moving party to make a showing of 'extraordinary circumstances.' 'Such circumstances will rarely occur in the habeas context[.]'"). As both prongs of the standard must be satisfied and Petitioner has failed to meet one of them, Petitioner is not entitled to a certificate of appealability under Winkles.

To the extent that Petitioner's second motion for reconsideration is not a "legitimate" Rule 60(b) motion, see Gonzalez, 545 U.S. at 531-32, because it raised a new claim rather than challenging the integrity of the habeas proceedings, Petitioner still does not satisfy the standard set forth in Slack. Petitioner has not shown that jurists of reason would find it debatable whether the Court was correct in its procedural ruling that if Petitioner wishes to raise new claims concerning Johnson and Descamps, he must do so in a new petition. As both prongs of the standard must be satisfied and Petitioner has failed to meet one of them, Petitioner is not entitled to a certificate of appealability under Slack.

IV. Conclusion

Accordingly, the Court hereby DECLINES to issue a certificate of appealability.

The Clerk of the Court is DIRECTED to serve a copy of this order on the Ninth Circuit Court of Appeals.

IT IS SO ORDERED.

Dated: **January 13, 2016**

/s/ Eric P. Grosjean
UNITED STATES MAGISTRATE JUDGE