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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

DAVID BOLLINGER,

v.

WILLIAM GITTERE, et al.,

Petitioner,

Respondents.

Case No. 2:98-cv-01263-MMD-PAL

ORDER GRANTING MOTION FOR
RELIEF FROM JUDGMENT AND
MOTION FOR LEAVE TO
SUPPLEMENT PETITION
(ECF NOS. 270, 271)

In this habeas corpus action, brought by David Bollinger, a Nevada prisoner under sentence of death, the Court denied Bollinger’s habeas petition on March 4, 2015 (ECF No. 243), and judgment was entered on March 5, 2015 (ECF No. 244). Bollinger appealed, and the case is pending on appeal in the Ninth Circuit Court of Appeals.

On August 22, 2018, Bollinger filed a motion for leave to supplement his petition (ECF No. 256), along with the proposed supplement (ECF No. 257), and the following day, August 23, 2018, he filed a motion for relief from judgment (ECF No. 259).¹

In an order entered December 13, 2018 (ECF No. 269), the Court determined that, because the case was pending on appeal, it was without jurisdiction to grant the motions, and, therefore, denied the motions without prejudice to Bollinger renewing them if and when the action was remanded from the Court of Appeals. In the December 13 order, this Court included an indicative ruling, under Federal Rule of Civil Procedure 62.1, that Bollinger’s motion for relief from the judgment raises a substantial issue. (ECF No. 269 (order entered December 13, 2018).)

¹Respondents filed an opposition to each motion on October 29, 2018 (ECF Nos. 264, 265), and Bollinger filed replies on November 28, 2018 (ECF Nos. 267, 268).

1 On December 20, 2018, the Court of Appeals ordered a limited remand of this
2 case, pursuant to Federal Rule of Appellate Procedure 12.1(b), for this Court to consider
3 Bollinger's motion for relief from judgment. (See Order entered December 20, 2018,
4 Docket Entry No. 61, in Ninth Circuit Court of Appeals Case No. 15-99007.)

5 On February 19, 2019, Bollinger renewed his motion for relief from judgment (ECF
6 No. 270), and his motion for leave to supplement his petition (ECF No. 271). Respondents
7 filed oppositions to both motions on March 12, 2019 (ECF Nos. 273, 274), and Bollinger
8 filed replies on March 25, 2019 (ECF Nos. 276, 277).

9 Bollinger moves for relief from the judgment under Federal Rule of Civil Procedure
10 60(b)(6). He seeks to return to this Court, and have the judgment vacated, so that he can
11 assert what he characterizes as a new claim for habeas corpus relief, a claim that
12 "participation by the prosecuting agency in an investigation of the trial judge created an
13 intolerable risk of judicial bias." (ECF No. 257 at 2 (Supplement to Petition).) Bollinger
14 represents that, in 2017, he initiated a habeas action in state court, and the state court
15 held an evidentiary hearing, and as a result of that evidentiary hearing he discovered
16 evidence supporting his new judicial bias claim, as well as evidence supporting an
17 argument that there was cause for any procedural default of the claim. (ECF No. 259 at
18 3, 7-9, 11, 15 (Motion for Relief from Judgment).)

19 Bollinger's third amended habeas petition already includes a claim of judicial bias,
20 in which he asserts that the trial judge, Judge Jerry Whitehead, "could not act with the
21 impartiality and fairness required under the due process clause because he was subject
22 to intense media scrutiny related to an ethics inquiry during the Bollinger proceedings."
23 (ECF No. 168 at 127-34 (Third Amended Petition).) Bollinger's new claim, Claim 7D, in
24 his proposed supplement to his third amended petition, appears to be substantially
25 different: in Claim 7D, Bollinger asserts that "[p]articipation by the prosecuting agency in
26 an investigation of the trial judge created an intolerable risk of judicial bias." (ECF No. 257
27 at 3 (Supplement to Petition for Writ of Habeas Corpus).) Bollinger cites *Rippo v. Baker*,
28 137 S. Ct. 905 (2017), and *Echavarria v. Filson*, 896 F.3d 1118 (9th Cir. 2018), among

1 other cases, as legal support for his new claim. (ECF No. 257 at 6 (Supplement to Petition
2 for Writ of Habeas Corpus).) Bollinger summarizes the factual basis for his new claim as
3 follows:

4 While prosecuting Mr. Bollinger for capital murder, the Washoe
5 County District Attorney's office (WCDA) was assisting in investigations into
6 Washoe County District Judge Jerry Whitehead. Despite this fact, Judge
Whitehead presided over Mr. Bollinger's trial.

7 Throughout his post-conviction proceedings, Mr. Bollinger has
8 insisted that Judge Whitehead was biased against him. But his initial state
9 post-conviction counsel also represented Judge Whitehead during the
various investigations, and they convinced Mr. Bollinger to abandon his
claim accusing their far more powerful client of bias.

10 (ECF No. 270 at 3 (Motion for Relief from Judgment).) More specifically, referring to the
11 transcript of the state court evidentiary hearing held November 2, 2017 (ECF No. 258-1
12 (Petitioner's Exh. 371)), Bollinger describes as follows the information he claims to have
13 discovered for the first time by means of that evidentiary hearing:

14 First, former Washoe County Deputy District Attorney Larry Sage
15 testified that (1) around the time of Mr. Bollinger's trial, Mr. Sage was
16 actively participating in the federal criminal investigation into Judge
17 Whitehead, ECF No. 258-1 at 148-52; (2) that participation included Mr.
18 Sage testifying against Judge Whitehead before a federal grand jury, id. at
19 149-52; and (3) Judge Whitehead was so concerned about the federal
20 criminal investigation that he and his attorney, Mr. [John] Ohlson,
21 confronted Mr. Sage in an attempt to intimidate him into changing his
testimony, id. at 152-55, 158-62. Mr. Sage additionally admitted at the
November 2017 hearing that he had never before told anyone about his
federal grand jury testimony or his confrontation with Judge Whitehead. Id.
at 166-67. Mr. Bollinger had not mentioned Mr. Sage in any of his previous
federal pleadings because he did not know about this information until the
investigation leading to the 2017 evidentiary hearing. Mr. Sage's testimony
is newly discovered evidence.

22 Second, former Washoe County DA Dorothy Nash Holmes testified
23 about the WCDA's involvement in the federal criminal investigation into
24 Judge Whitehead. ECF No. 258-1 at 80, 92-93. Mr. Bollinger previously had
25 only scattered news items suggesting the WCDA's participation in the
26 federal investigation. See ECF No. 258-3. Ms. Holmes's sworn testimony
confirming those news items is newly discovered evidence. See *Guest v.*
McCann, 474 F.3d 926, 930 (7th Cir. 2007) (rejecting state's argument that
"scattered news items and court filings" were sufficient "to put [petitioner] on
notice" of facts supporting judicial bias claim).

27 Third, Mr. Springgate [John Springgate, who, along with John
28 Ohlson, of the firm of Ohlson and Springgate, represented Bollinger in his
first state habeas action] testified that he knew that his law partner, Mr.

1 Ohlson, had represented Judge Whitehead, but he did not remember
2 informing Mr. Bollinger of the resulting conflict. ECF No. 258-1 at 105-07,
3 118. And, he added, that failure occurred despite regularly consulting with
4 Mr. Ohlson on cases—including on Mr. Bollinger’s. Id. at 108-12. Finally,
5 Mr. Springgate testified that Mr. Bollinger had requested he raise a claim of
6 judicial bias, which Mr. Springgate did initially, but counsel—both Mr.
7 Ohlson and Mr. Springgate—persuaded Mr. Bollinger to omit the claim from
8 the amended state post-conviction petition. Id. at 113-18. Before the 2017
9 state evidentiary hearing, Mr. Bollinger had only some suggestions from
10 billing records that Mr. Ohlson and Mr. Springgate had collaborated on his
11 case. This sworn testimony—concerning Mr. Bollinger’s insistence on a
12 judicial bias claim, how that claim came to be omitted from the amended
13 petition, and counsel’s failure to inform Mr. Bollinger of a known conflict—is
14 all newly discovered.

8 (ECF No. 277 at 5-7 (Reply in Support of Motion for Relief from Judgment); see also ECF
9 No. 276 at 7 (Reply in Support of Motion for Leave to Supplement Petition) (“[I]t was not
10 until the evidentiary hearing in November 2017 when Mr. Bollinger learned for the first
11 time (1) the full extent of the WCDA’s cooperation with the federal investigation, (2) Judge
12 Whitehead’s attempts to intimidate a WCDA employee into changing his testimony to a
13 federal grand jury, and (3) Mr. Ohlson’s participation in Judge Whitehead’s intimidation
14 scheme.”).)

15 Federal Rule of Civil Procedure 60(b)(6) “permits reopening when the movant
16 shows ‘any ... reason justifying relief from the operation of the judgment’ other than the
17 more specific circumstances set out in Rules 60(b)(1)-(5).” *Gonzalez v. Crosby*, 545 U.S.
18 524, 528-29 (2005) (first citing *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S.
19 847, 863 n. 11 (1988), then citing *Klapprott v. United States*, 335 U.S. 601, 613 (1949)
20 (opinion of Black, J.)). Relief under Rule 60(b)(6) requires a showing of “extraordinary
21 circumstances.” *Gonzalez*, 545 U.S. at 536.

22 The Court determines that Bollinger’s discovery of evidence suggesting that the
23 district attorney who prosecuted him prompted, and actively participated in, an
24 investigation of the judge who presided over his case, and, while presiding over his case,
25 the judge and the judge’s attorney—who was appointed by the judge to represent
26 Bollinger in his first state habeas action, in which claims of judicial bias were not
27 pursued—attempted to pressure a deputy district attorney into changing testimony
28 relative to the investigation, is an extraordinary circumstance warranting relief from the

1 judgment in this case under Rule 60(b). There is no showing that Bollinger has been less
2 than diligent in discovering the new evidence described above and asserting his new
3 judicial bias claim. The Court will, therefore, grant Bollinger's motion for relief from the
4 judgment (ECF No. 270), and will vacate the judgment in this case so that Bollinger may
5 pursue, in this action, his new Claim 7D, a claim of judicial bias set forth in Bollinger's
6 Supplement to Petition for Writ of Habeas Corpus (ECF No. 257). In the further
7 proceedings in this action, the Court does not intend to revisit any of the claims in
8 Bollinger's third amended habeas petition that have already been adjudicated.

9 The Court will also grant Bollinger's motion for leave to supplement his petition
10 (ECF No. 271) to include Claim 7D in his third amended petition. Under the Federal Rules
11 of Civil Procedure, courts are to "freely" grant leave to amend "when justice so requires."
12 Fed. R. Civ. P. 15(a)(2); see also *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Waldrip v.*
13 *Hall*, 548 F.3d 729, 732 (9th Cir. 2008). Here, given the nature of the new evidence
14 allegedly discovered for the first time by Bollinger by means of the November 2017 state
15 court evidentiary hearing, the Court finds that the interests of justice weigh in favor of
16 granting leave to amend, that the proposed amendment would not necessarily be futile,
17 that there is no showing that Bollinger's request to amend is in bad faith, that the State
18 will not suffer undue prejudice if amendment is allowed, and that there is no showing that
19 Bollinger could have amended in this manner earlier. See *Foman*, 371 U.S. at 182
20 (providing considerations in ruling on motions for leave to amend); *Waldrip*, 548 F.3d at
21 732 (same).

22 Under Federal Rule of Civil Procedure 15, the proposed "supplement" to
23 Bollinger's petition is in fact an amendment, not a supplement, as the events described
24 in the new claim occurred before the date of the original petition. See Fed. R. Civ. P.
25 15(d). However, under the circumstances here, in the interests of judicial economy and
26 conserving the parties' resources, the Court will waive the requirements of Local Rule LR
27 15-1 ("The proposed amended pleading must be complete in and of itself without
28 reference to the superseded pleading..."). Bollinger's Third Amended Petition for Writ of

1 Habeas Corpus (ECF No. 168) will be considered amended to include Claim 7D, which
2 is set forth in Bollinger's Supplement to Petition for Writ of Habeas Corpus (ECF No. 257).

3 In granting Bollinger's motion for relief from judgment and his motion for leave to
4 supplement his petition, the Court intends to convey no opinion whatsoever regarding the
5 procedural viability of Claim 7D, with respect to the statute of limitations, exhaustion,
6 procedural default, or any other procedural issue, and no opinion whatsoever regarding
7 the merits of Claim 7D. Those issues will be adjudicated through further proceedings in
8 this action.

9 Moving forward, it appears that the question of the exhaustion of state court
10 remedies with respect Claim 7D should be addressed first, before other procedural issues
11 and before the merits of the claim. (ECF No. 274 at 4-5 (Opposition to Motion for Relief
12 from Judgment) (expressing concerns regarding reopening of this action relative to
13 interests of comity).) As the Court understands it, Bollinger has a habeas action pending
14 in state court, in which he has asserted a claim like the one in his new Claim 7D in this
15 case; apparently the state district court has denied relief in that case on procedural
16 grounds, and the case is now on appeal before the Nevada Supreme Court. (ECF No.
17 270 at 16-17 (Motion for Relief from Judgment); ECF No. 273 at 2 (Opposition to Motion
18 for Leave to Supplement Petition).) If that is so, there may be an issue whether this action
19 should be stayed pending completion of that state court proceeding. The Court will
20 entertain briefing regarding this issue as a first matter. Bollinger will be granted an
21 opportunity to notify the Court, by means of a notice or motion, of his position regarding
22 the exhaustion of Claim 7D and the question whether this case should be stayed pending
23 completion of the state court proceeding. Respondents will be granted an opportunity to
24 respond, and then Bollinger to reply.

25 It is therefore ordered that Petitioner's motion for relief from judgment (ECF No.
26 270) is granted. The judgment entered in this action on March 5, 2015 (ECF No. 244) is
27 vacated. This action will be reopened for adjudication of Petitioner's Claim 7D, which is
28 set forth in Petitioner's Supplement to Petition for Writ of Habeas Corpus (ECF No. 257).

1 It is further ordered that the Clerk of Court is directed to administratively reopen
2 this action.

3 It is further ordered that Petitioner's motion for leave to supplement petition (ECF
4 No. 271) is granted. Petitioner's Third Amended Petition for Writ of Habeas Corpus (ECF
5 No. 168) will be treated as amended to include Claim 7D, which is set forth in Petitioner's
6 Supplement to Petition for Writ of Habeas Corpus (ECF No. 257).

7 It is further ordered that Petitioner will have 30 days from the date of this order to
8 notify the Court, by means of a notice or motion, of his position regarding the exhaustion
9 of Claim 7D and the question whether this case should be stayed pending completion of
10 the state court proceeding. Respondents will have 30 days to respond, then Petitioner will
11 have 15 days to reply.

12 It is further ordered that the Clerk of Court is directed to transmit a copy of this
13 order to the Ninth Circuit Court of Appeals, with reference to Case No. 15-99007 in that
14 court.

15 It is further ordered that, pursuant to Federal Rule of Civil Procedure 25(d), the
16 Clerk of Court is directed to substitute Aaron D. Ford for Adam Paul Laxalt as the
17 respondent Nevada Attorney General on the docket for this case.

18 DATED THIS 7th day of June 2019.



MIRANDA M. DU,
UNITED STATES DISTRICT JUDGE

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