

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Sep 24, 2019

SEAN F. MCAVOY, CLERK

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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

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8 LYNN L. JACKSON,

9 Petitioner,

10 v.

11 JEFFREY A. UTTECHT,

12 Respondent.

No. 2:18-cr-00108-SAB

13 **ORDER DENYING MOTION**
14 **FOR RECONSIDERATION AND**
15 **MOTION FOR APPOINTMENT**
16 **OF COUNSEL**

17 Before the Court are Petitioner's Motion for Reconsideration, ECF No. 13,
18 and Motion for Appointment of Counsel, ECF No. 12. Having considered both the
19 motions, the Court denies both the Motion for Reconsideration and the Motion for
20 Appointment of Counsel.

21 **I. Background**

22 The underlying facts and state court procedural history in this case are
23 extensively laid out in the Court's previous order denying Petitioner habeas corpus
24 relief. *See* ECF No. 10 at 1-5. After he exhausted his state court appeals process,
25 Petitioner timely filed a petition for federal habeas relief under 28 U.S.C. § 2254 in
26 this Court. The Court denied Petitioner federal habeas relief. *See* ECF No. 10. The
27 Court concluded that Petitioner was given a full and fair opportunity litigate his
28 Fourth Amendment claims in state court, and therefore had no basis for that claim.
ECF No. 10 at 9. The Court also denied Petitioner's Fifth and Fourteenth

ORDER DENYING MOTION FOR RECONSIDERATION AND
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1 Amendment claims under *Miranda*. ECF No. 10 at 12. The Court concluded
2 Petitioner failed to show that the Court of Appeals’ decision that he was not “in
3 custody” was not contrary to or an unreasonable application of clearly established
4 federal law. *Id.* The Court further concluded that Petitioner’s false evidence claim
5 and prosecutorial misconduct claim were entirely speculative and were, therefore,
6 not appropriate for federal habeas review. *Id.* Finally, the Court concluded that
7 Petitioner failed to establish either prong of an ineffective assistance of counsel
8 claim under *Strickland* and the Court of Appeals’ decision was not contrary to or
9 an unreasonable application of clearly established federal law. *Id.* Accordingly, the
10 Court dismissed Petitioner’s Petition for Writ of Habeas Corpus and further denied
11 a certificate of appealability. Shortly thereafter, Petitioner filed the instant motions
12 for reconsideration and for appointment of counsel.

13 **II. Analysis**

14 **A. Motion for Reconsideration**

15 Although there is no specific rule governing a motion for reconsideration in
16 the Federal Rules of Civil Procedure, a court will treat a motion filed within 28
17 days of judgment as filed under Rule 59(e) and a motion filed more than 28 days of
18 judgment as a Rule 60(b) motion. *Am. Ironworks & Erectors, Inc. v. N. Am. Const.*
19 *Corp.*, 248 F.3d 892, 898-99 (9th Cir. 2001). Reconsideration is a drastic remedy
20 and should be used sparingly “in the interests of finality and conservation of
21 judicial resources.” *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890
22 (9th Cir. 2000). A motion for reconsideration is not appropriate if used to revisit
23 issues already addressed by the Court or to advance new arguments that could have
24 been raised in prior briefing. *Am. Ironworks*, 248 F.3d at 898-99. Instead, a motion
25 for reconsideration should be granted, “absent highly unusual circumstances,” only
26 if the court is: (1) presented with new evidence; (2) committed clear error; or (3) if
27 there is an intervening change in the controlling law. *Kona Enterprises*, 229 F.3d at
28 890. Whether or not to grant reconsideration is committed to the sound discretion

1 of the court.” *Navajo Nation v. Confederated Tribes and Bands of the Yakama*
2 *Indian Nation*, 331 F.3d 1041, 1046 (9th Cir. 2003).

3 In the context of a motion for reconsideration of a court’s denial of federal
4 habeas corpus relief, the court must first determine whether the motion should be
5 construed as a successive habeas petition under the Anti-Terrorism and Effective
6 Death Penalty Act (AEDPA). *Rishor v. Ferguson*, 822 F.3d 482, 492 (9th Cir.
7 2016). If the motion for reconsideration seeks to raise an argument or ground for
8 relief that was not raised in the initial habeas petition, it may be a successive
9 habeas petition. *Id.* AEDPA bars prisoners from successive habeas petitions unless
10 the claim falls into one of two categories. 28 U.S.C. § 2244(b)(2). First, a
11 successive petition will not be barred if the new claims rely on new rules of
12 constitutional law made retroactive to cases on collateral review by the Supreme
13 Court. *Id.* Alternatively, AEDPA will not bar a successive petition if the new claim
14 is based on facts that could not have been previously discovered through due
15 diligence and the underlying facts would be sufficient to establish that no
16 reasonable factfinder would have found the petitioner guilty of the underlying
17 offense. *Id.* If a petitioner raises a new claim that is not within these two
18 categories, the district court should dismiss the new claims without prejudice to
19 allow the petitioner to move the Court of Appeals for permission to file a
20 successive habeas petition. *Rishor*, 822 F.3d at 492. “However, the district court
21 may proceed to the merits of a [motion to reconsider] that is filed within 28 days
22 and asks the court to correct errors of fact or law.” *Id.*

23 Petitioner’s motion raises five claims in his motion for reconsideration. Four
24 of these issues—violations of the Fourth Amendment; invalid consent in violation
25 of the Fifth and Fourteenth Amendments; prosecutorial misconduct in his criminal
26 trial; and ineffective assistance of counsel—were also raised in Petitioner’s
27 original petition for habeas corpus relief. *See* ECF No. 10 at 8. Because these are
28 not new claims, they are not automatically barred by AEDPA and the Court may

1 consider the merits of the motion as to these claims. However, Petitioner does not
2 present any new evidence, nor does he argue that the Court made any errors in law
3 or fact or demonstrate any subsequent changes in the law. Instead, Petitioner
4 merely repeats claims that were already addressed—and rejected—by this Court
5 without anything new. Because Petitioner fails to show that the Court’s order was
6 based on manifest errors of law or fact or will result in manifest injustice to him,
7 the Court denies Petitioner’s motion for reconsideration as to these four claims.

8 Petitioner’s fifth claim in his motion for reconsideration is a new claim.
9 Petitioner essentially posits that the judge in his criminal trial did not have the
10 appearance of being fair and impartial, thus violating his right to a fair trial. ECF
11 No. 13 at 2. However, this claim is barred by AEDPA because it raises a new
12 ground for habeas relief and does not fall into either of the two exceptions. The
13 claim is not based on a retroactive rule of constitutional law, nor does it allege
14 facts that would prevent a reasonable trier of fact from finding him guilty of the
15 underlying offense. *See Rishor*, 822 F.3d at 492. Because it appears that Petitioner
16 has not sought permission to file a successive habeas petition from the Ninth
17 Circuit Court of Appeals, this claim cannot be grounds to grant a motion for
18 reconsideration.

19 Because Petitioner does not raise any issues of law or fact that are
20 cognizable under a motion for reconsideration, the Court denies Petitioner’s
21 motion for reconsideration as to the first four claims in his motion. As to the claim
22 that Petitioner was denied the right to a fair trial, the Court dismisses Petitioner’s
23 claim, without prejudice, so that he may seek permission from the Ninth Circuit
24 Court of Appeals to file a successive habeas petition.

25 B. Motion for Appointment of Counsel

26 Petitioner has also moved for the appointment of counsel. Petitioner argues
27 that he needs the assistance of counsel because of the complex constitutional issues
28

1 raised in his case and because he has difficulty reading and writing for prolonged
2 periods of time due to eye problems. ECF No. 12 at 1.

3 As a general rule, there is no constitutional right to appointment of counsel
4 in collateral attacks on a state court criminal conviction. *Pennsylvania v. Finley*,
5 481 U.S. 551, 555 (1987). However, a petitioner may have a statutory right to
6 appointment of counsel. A petitioner seeking habeas relief under § 2254 may be
7 appointed counsel if the district court judge determines that the petitioner is
8 financially unable to obtain counsel and the interests of justice so require. 18
9 U.S.C. § 3006A(a)(2)(B). Under this provision, counsel should be appointed when
10 the “difficulties involved in presenting a particular matter are such that a fair and
11 meaningful hearing cannot be had without the aid of counsel.” *Dillon v. United*
12 *States*, 307 F.2d 445, 447 (9th Cir. 1962). However, the decision of whether to
13 appoint of counsel is generally within the district court’s discretion; appointment is
14 mandatory only if necessary to prevent due process violations. *Chaney v. Lewis*,
15 801 F.2d 1191, 1196 (9th Cir. 1986).

16 The Court denies his Motion for Appointment of Counsel. Because the
17 Court is denying Petitioner’s Motion for Reconsideration, there is no point in
18 appointing Petitioner counsel because his case will be closed. Even if Petitioner’s
19 case were to remain open, he has failed to show that appointment of counsel would
20 be necessary to prevent due process violations or to ensure that he is provided with
21 a fair and meaningful hearing. Accordingly, the Court denies Petitioner’s Motion
22 for Appointment of Counsel.

23 **III. Certificate of Appealability**

24 A petitioner seeking post-conviction relief under § 2254 may appeal a
25 district court’s adverse ruling on his federal habeas petition only after obtaining a
26 certificate of appealability from a district or circuit judge. A certificate of
27 appealability may issue only where a petitioner has made “a substantial showing of
28 the denial of a constitutional right.” 28 U.S.C. § 2253(c)(3). A petitioner satisfies

1 this standard when “reasonable jurists could debate whether (or, for that matter,
2 agree that) the petition should have been resolved in a different manner or that the
3 issues presented were adequate to deserve encouragement to proceed further.”
4 *Boyer v. Chappell*, 793 F.3d 1092, 1106 (9th Cir. 2015) (quoting *Miller-El v.*
5 *Cockrell*, 537 U.S. 322, 336 (2003)) (internal quotation marks omitted). Petitioner
6 has not made such a showing.

7 Accordingly, **IT IS HEREBY ORDERED:**

- 8 1. Petitioner’s Motion for Reconsideration, ECF No. 13, is **DENIED**.
- 9 2. Plaintiff’s claim that he was denied the right to fair trial is **DISMISSED**
10 **WITHOUT PREJUDICE** as a second or successive habeas claim
11 pursuant to 28 U.S.C. § 2244(b)(2).
- 12 3. Petitioner’s Motion for Appointment of Counsel, ECF No. 12, is
13 **DENIED**.
- 14 4. The Certificate of Appealability is **DENIED**.

15 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
16 file this Order, provide copies to counsel, and close the file.

17 **DATED** this 24th day of September 2019.



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23 Stanley A. Bastian
24 United States District Judge
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