

DIVISION OF ST. THOMAS AND ST. JOHN

v.

Respondents.

CASE NO. ST-15-CV-277

³ See Amended Judgment and Commitment. In response to a September 15, 2009, Virgin Islands Supreme Court Opinion, this Court issued the Amended Judgment and Commitment, vacating the sentence imposed on Count IX, and dismissing that charge with prejudice.

in which Ward stated that he “really didn’t see who the person was who shot [him].” This Court denied Petitioner’s motion in an Opinion dated August 7, 2012, finding that Ward’s affidavit did not constitute “newly discovered evidence” because the content of the affidavit was not significantly different from, and actually corroborated, his testimony at trial.⁴ Petitioner filed a notice of appeal on September 26, 2012, but the appeal was dismissed for failure to prosecute by the Supreme Court of the Virgin Islands through an Order dated October 25, 2013.

Petitioner filed his petition for writ of habeas corpus on June 18, 2015, supported by an affidavit of fellow inmate Napoleon Harris who averred that Ward informed Harris that Ward lied at trial when he identified Petitioner as the shooter.

STANDARD

Section 3 of the Revised Organic Act of 1954 provides that “[a]ll persons shall have the privilege of the writ of habeas corpus and the same shall not be suspended except as herein expressly provided.”⁵ In addition, the Virgin Islands Legislature “enacted chapter 91 of title 5 of the Virgin Islands Code [to] establish a procedure for seeking habeas corpus relief under Virgin Islands law, [which] codifies the right to habeas corpus and explains the process through which it can be obtained.”⁶ Under the statute, “every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint.”⁷ The statute

⁴ The Court also addressed Petitioner’s “newly discovered evidence” in its March 29, 2012, Opinion wherein the Court denied Petitioner’s motion for a *Larrison* hearing.

⁵ 48 U.S.C. § 1561.

⁶ *Rivera-Moreno v. Government of the Virgin Islands*, 61 V.I. 279, 293-294, 2014 V.I. Supreme LEXIS 46, *13-15 (VI. 2014) (citing 5 V.I.C. §§ 1301-25).

⁷ *Id.*

also establishes the following “circumstances under which a petitioner may be discharged from custody”:

- (1) When the jurisdiction of such court or officer has been exceeded.
- (2) When the imprisonment was at first lawful, yet by some act, omission, or event which has taken place afterwards, the party has become entitled to a discharge.
- (3) When the process is defective in some matter of substance required by law rendering such process void.
- (4) When the process, though proper in form, has been issued in a case not allowed by law.
- (5) When the person having custody of the prisoner is not the person allowed by law to detain him.
- (6) Where the process is not authorized by any order, judgment or decree of any court, nor by any provision of law.
- (7) Where a party has been committed on a criminal charge without reasonable or probable cause.⁸

Discharge from custody is not a petitioner’s only remedy, however. “The habeas corpus statute recognizes that an incarcerated individual may not be entitled to immediate discharge from custody, yet may still be unlawfully imprisoned and entitled to relief.”⁹

“When presented with a petition for a writ of habeas corpus, [the Superior Court] must first determine whether the petition states a *prima facie* case for relief — that is, whether it states facts that, if true, entitle the petitioner to relief — and also whether the stated claims are for any reason procedurally barred.”¹⁰ “If the court determines that the petition does not state a *prima facie* case for relief or that the claims are all procedurally barred, the court will deny the petition outright,” but “if it appears that the writ ought to issue,” the Superior Court “shall grant [a writ of habeas corpus] without delay.”¹¹

⁸ *Rivera-Moreno*, 61 V.I. at 293-294 (citing 5 V.I.C. § 1314).

⁹ *Rivera-Moreno*, 61 V.I. at 295.

¹⁰ *Rivera-Moreno*, 61 V.I. at 311, (citing *People v. Romero*, 883 P.2d 388, 391 (1994) (explaining the habeas corpus procedure under California’s nearly identical statutes)).

¹¹ *Rivera-Moreno*, 61 V.I. at 311 (citing 5 V.I.C. § 1304).

ANALYSIS

Generally, only persons “in custody in violation of the Constitution or laws . . . of the United States have standing to pursue a habeas corpus action.”¹² “The ‘in custody’ requirement is satisfied if the petitioner suffers ‘substantial restraints’ not suffered by the general public.”¹³

Petitioner satisfied the “in custody” requirement when he filed his petition on June 18, 2015, because he was incarcerated in the Citrus County Detention Facility in Lecanto, Florida. However, Petitioner was released on parole on December 22, 2015.¹⁴ At that time, he was detained by immigration authorities and is subject to deportation because he was convicted of a felony charge.¹⁵

Petitioner’s habeas corpus action is not necessarily mooted by his release on parole, however. Under the “collateral consequences doctrine,” an “attack on a criminal conviction is not rendered moot by the fact that the underlying sentence has expired if substantial penalties remain after the satisfaction of the sentence.”¹⁶ The doctrine “prevents the extinguishment of a habeas corpus action in circumstances where the petitioner faces

¹² *Thompson v. Thalacker*, 950 F. Supp. 1440, 1446-1447, 1996 U.S. Dist. LEXIS 19681, *20-21 (N.D. Iowa 1996) (citing 28 U.S.C. § 2241(c)(3) and 28 U.S.C. § 2254(a)).

¹³ *Thompson*, 950 F. Supp. at 1447 (citing *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973) (a petitioner released on his own recognizance pending execution of a sentence was “in custody” for federal habeas corpus determination)).

¹⁴ Letter to the Presiding Judge of the Superior Court of the Virgin Islands, dated January 19, 2016, and filed in the Superior Court on February 10, 2016.

¹⁵ *Id.*

¹⁶ *Spencer v. Kemna*, 91 F.3d 1114, 1117 (8th Cir. 1996) (citing *Carafas v. LaVallee*, 391 U.S. 234, 237, (1968)). See also *Lane v. Williams*, 455 U.S. 624, 632 (1982).

significant immediate collateral consequences if the disputed conviction is allowed to stand.”¹⁷

Here, Petitioner faces the prospect of deportation because he was convicted of a felony. Given that Petitioner is subject to significant collateral consequences, the Court finds that Petitioner’s habeas action is not mooted by his release.¹⁸

In support of his petition, Petitioner asserts that Harris’ affidavit contains newly discovered evidence that proves his innocence and establishes that his conviction was illegal. The Government of the Virgin Islands argues that Stevens’ petition should be denied because he has not asserted a constitutional violation.

As a preliminary matter, the Court notes that, by ordering Respondents to respond to Petitioner’s petition on July 1, 2015, the Court did not implicitly grant the writ. Instead, the Court simply stated that it would consider Petitioner’s motion for writ of habeas corpus as a petition for a writ of habeas corpus. In the interest of clarity, the Court will vacate the portion of its July 1, 2015, Order that required a response to the petition, and the Court will strike the Government’s July 31, 2015, opposition to Stevens’ petition.

Turning to Stevens’ petition, the Court notes that, in the federal context, “[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.”¹⁹ “This rule is grounded in the principle that ...

¹⁷ *Thompson v. Thalacker*, 950 F. Supp. 1440, 1449 (N.D. Iowa 1996) (citing *Sibron v. New York*, 392 U.S. 40, 57 (1968) and *Carafas v. LaVallee*, 391 U.S. 234, 237-38 (1968)).

¹⁸ See, e.g., *United States v. Romero-Vilca*, 850 F.2d 177, 179 (3d Cir. 1988) (holding that prisoner’s motion to vacate his conviction was not mooted when he was released from custody, where he faced potential deportation as a collateral consequence of conviction).

¹⁹ *Herrera v. Collins*, 506 U.S. 390, 400-401 (1993).

habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution -- not to correct errors of fact.”²⁰

The Supreme Court of the Virgin Islands has determined that “Congress intended that the meaning of the habeas corpus provision it included in the Revised Organic Act would be consistent with the United States Supreme Court's interpretation of the habeas corpus provision of the United States Constitution.”²¹ Under Section 3 of the Revised Organic Act, the Superior Court is “required to provide a successful habeas corpus petitioner with redress in the form of a remedy that cures the constitutional violation, even if that remedy was not expressly authorized by a Virgin Islands statute.”²²

While a federal habeas corpus action must survive “numerous explicit procedural bars intended to limit the ability of prisoners — particularly those convicted of state and territorial crimes — to collaterally challenge their convictions in federal court, none of these provisions is found in the Virgin Islands habeas corpus statute.”²³ In addition, the Supreme Court of the Virgin Islands considers “as persuasive authority, decisions of the Supreme Courts of California and Puerto Rico interpreting the similar statutes on which the Virgin Islands habeas provisions are based.”²⁴ In California, “[p]ostconviction habeas corpus attack on the validity of a judgment of conviction is limited to challenges based on

²⁰ *Id.* (citing *Moore v. Dempsey*, 261 U.S. 86, 87-88 (1923) (Holmes, J.) (“What we have to deal with [on habeas review] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved”). See also *Hyde v. Shine*, 199 U.S. 62, 84 (1905) (“It is well settled that upon habeas corpus the court will not weigh the evidence”); *Ex parte Terry*, 128 U.S. 289, 305 (1888) (“As the writ of habeas corpus does not perform the office of a writ of error or an appeal, [the facts establishing guilt] cannot be re-examined or reviewed in this collateral proceeding”).

²¹ *Rivera-Moreno*, 61 V.I. at 297.

²² *Id.*, at 298.

²³ *Id.*, 61 V.I. at 303 (citing *Bryan v Fawkes*, 61 V.I. 201, 214 (VI. 2014)).

²⁴ *Id.* (citing *Bryan*, 61 V.I. at 214).

newly discovered evidence, claims going to the jurisdiction of the court, and claims of constitutional dimension.”²⁵

Here, Petitioner did not base his habeas corpus petition on a constitutional violation. As a result, Petitioner is procedurally barred from habeas relief under Section 3 of the Revised Organic Act, but his habeas petition survives under 5 V.I.C. § 1301.

Turning to Harris’ affidavit, the basis of Stevens’ petition, the Court notes that the affidavit describes a conversation Harris had with Ward at prison, where Ward purportedly admitted to Harris that he lied when he identified Petitioner as the person who shot him in his back. The Court finds that the affidavit consists entirely of hearsay.

Hearsay is defined as “a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.”²⁶ “Hearsay is inadmissible under [Federal Rule of Evidence] 802 unless one of the hearsay exceptions apply.”²⁷

Petitioner has not argued that Harris’ statements qualify under a hearsay exception. In the interest of justice, the Court will examine whether Harris’ statements qualify as hearsay exceptions under Federal Rule of Evidence 803.

Harris’ affidavit consists of two conversations he had with Ward. In the first conversation, Ward describes the origin of the gunshot wound in his back, and in the second, Ward purportedly admits that he “lied on [Petitioner]” to keep Petitioner away from one of Ward’s “girls.”

²⁵ *In re Clark*, 5 Cal. 4th 750, 766-767, 855 P.2d 729, 739 (Cal. 1993).

²⁶ Fed. R. Evid. 801(c).

²⁷ *People of the Virgin Islands v. Fenton*, 2013 V.I. LEXIS 71, *15-16, 59 V.I. 163, 173 (V.I. Super. Ct. 2013).

Ward's statements to Harris do not qualify as a "present sense impression" because they were not made "while or immediately after [Ward] perceived" the event or condition he was describing.²⁸ Instead, the statements were made at the Citrus County Detention Facility, several years after Ward was shot. Similarly, there is no indication in the affidavit that Ward stated he "lied on" Petitioner while or immediately after Petitioner yelled at Ward "through the glass window in a neighboring housing unit." Rather, Harris simply asked Ward "a few days later" why Ward was "always barking at him."

Ward's statements to Harris do not qualify as "an excited utterance" because they were not made while Ward was under the stress of being shot, and there is no indication that Ward's statement, that he "lied on" Petitioner, was a "statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused."²⁹ Instead, Harris avers that Ward "explained" that he lied on Petitioner, which does not suggest Ward was under stress of excitement when he made the statement.

Ward's statements to Harris do not qualify as a description of a "[t]hen-[e]xisting [m]ental, [e]motional, or [p]hysical [c]ondition," which is a "statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will."³⁰ While Ward's statements concerning his back wound pertain to a physical condition, the statements are "statements of memory or

²⁸ Federal Rule of Evidence 803(1).

²⁹ Federal Rule of Evidence 803(2).

³⁰ Federal Rule of Evidence 803(3).

belief” that are being presented “to prove the fact remembered or believed.” Ward’s other statements contained in Harris’ affidavit do not involve Ward’s motive, intent, or plan, mental feeling, pain, or bodily health.

Given that Harris and Ward were fellow prisoners at the time the statements were made, and that there is no indication that Harris was, or is, a healthcare professional, Ward’s statements concerning his back were not made “for [m]edical [d]iagnosis or [t]reatment.”³¹

In addition, considering that Ward’s statements to Harris were oral, the hearsay exceptions pertaining to records and documents do not apply.³² Moreover, Ward’s statements do not qualify under the reputation exceptions³³ or the judgment exceptions³⁴ of Rule 803.

Finally, Ward’s statements do not have “equivalent circumstantial guarantees of trustworthiness” and “admitting them would not best serve the purposes of these rules and the interests of justice.”³⁵

When reviewing a petition for writ of habeas corpus, the Court is “mindful that defendants often abuse new trial motions ‘as a method of delaying enforcement of just sentences,’ ”³⁶ and defendants similarly abuse the habeas corpus procedure to vacate just

³¹ Federal Rule of Evidence 803(4).

³² Federal Rule of Evidence 803(5) thru Rule 803(18).

³³ Federal Rule of Evidence 803(19) thru Rule 803(21). Ward’s statements do not relate to his reputation among his family or his associates “concerning [his] birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history,” to “boundaries of land,” “general historical events,” or to Ward’s character.

³⁴ Federal Rule of Evidence 803(22) thru Rule 803(23).

³⁵ Federal Rule of Evidence 807.

³⁶ *Herrera*, 506 U.S. at 417-418 (1993) (quoting *United States v. Johnson*, 327 U.S. 106, 112 (1946)).

sentences. A petition for writ of habeas corpus “based solely upon [an] affidavit [is] disfavored because the affiants’ statements are obtained without the benefit of cross-examination and an opportunity to make credibility determinations.”³⁷ Harris’ affidavit is “particularly suspect in this regard because ... [it] consist[s] of hearsay.”³⁸

In addition, “statements or conclusions that contradict prior deposition or other sworn testimony, without explaining the contradiction or attempting to resolve the disparity are not properly included in an affidavit.”³⁹

Harris’ affidavit contradicts Ward’s trial testimony and fails to explain the contradiction or resolve the disparity in statements. At trial, Ward testified a van pulled up close to him and Petitioner appeared holding a shot gun.⁴⁰ Ward stated he turned his back toward Petitioner, heard gunfire, and discovered he had been shot in his lower back.⁴¹ Ward turned around and saw Petitioner “putting back ... the gun” in the van and closing the van door.⁴² In Harris’ affidavit, Ward identifies a different individual, “Ariel,” as the shooter.

Harris’ affidavit also contradicts Ward’s January 19, 2011, affidavit submitted by Petitioner in support of his motion for a new trial. In the 2011 affidavit, Ward averred that the police “coerced” him to identify Petitioner as the shooter, and that he did not know who

³⁷ *Herrera v. Collins*, 506 U.S. 390, 417-418 (1993).

³⁸ *Id.*

³⁹ *Mitchel v. Buncich*, 2013 U.S. Dist. LEXIS 9404, *12-13, 2013 WL 275592 (N.D. Ind. Jan. 24, 2013) (citing *LaFary v. Rogers Grp., Inc.*, 591 F.3d 903, 908 (7th Cir. 2010)).

⁴⁰ Ward Trial Testimony, at ¶ 42.

⁴¹ *Id.*, at ¶¶ 43 and 44.

⁴² *Id.*, at ¶ 45.

shot him as his back was turned. In Harris' affidavit, Ward asserts that he "lied" and identified Petitioner as the shooter to keep Petitioner away from one of his "girls."⁴³

Moreover, the Harris affidavit suffers from reliability questions because it consists of conversations between fellow prisoners; the affidavit is undated; the affidavit fails to describe when Ward made the statements to Harris; and Harris did not swear to his statements under the penalty of perjury.⁴⁴ Even if the Court were to determine that the affidavit was executed in 2015,⁴⁵ "new statements from witnesses years after the crime are inherently suspect."⁴⁶

As a result, Harris' affidavit is inadmissible as substantive evidence. At most, Ward's statements in Harris' affidavit would be admissible only to impeach Ward's trial testimony and his statements in his 2011 affidavit.

However, California courts have determined that "newly discovered evidence is a basis for [habeas corpus] relief only if it undermines the prosecution's entire case. It is not sufficient that the evidence might have weakened the prosecution case or presented a more difficult question for the judge or jury."⁴⁷ "[E]vidence which is uncertain, questionable or directly in conflict with other testimony does not afford a ground for relief upon habeas

⁴³ The stark differences in the affidavits without explanation for the contradictions could suggest that Petitioner is abusing the habeas corpus process.

⁴⁴ See, e.g., *Purkhiser v. Wainwright*, 455 F.2d 506, 507 (5th Cir. 1972) ("[A]n unsigned, undated, and unnotarized affidavit by a fellow-prisoner stating that one of the Government witnesses lied at the trial" is insufficient to warrant habeas relief or an evidentiary hearing).

⁴⁵ The affidavit only indicates that it may have been signed and notarized in 2015, but the day and month were left blank.

⁴⁶ *Nixon v. McQuiggin*, 2012 U.S. Dist. LEXIS 161553, *25-28, 2012 WL 5471146 (E.D. Mich. Sept. 28, 2012) (citing *Schlup v. Delo*, 513 U.S. 298, 331 (1995) (reversed on other grounds)). See also *McCray v. Vasbinder*, 499 F.3d 568, 574 (6th Cir. 2007) (citing *United States v. Willis*, 257 F.3d 636, 645 (6th Cir. 2001)).

⁴⁷ *People v. Espinoza*, 95 Cal. App. 4th 1287, 1322, 116 Cal. Rptr. 2d 700, 726-727 (Cal. App. 6th Dist. 2002).

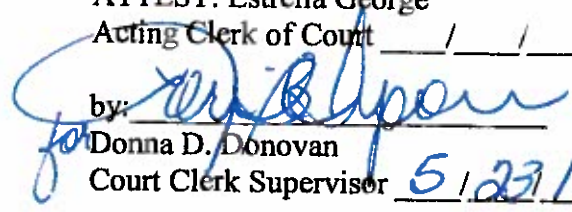
corpus.”⁴⁸ Puerto Rico courts, albeit in the context of a motion for a new trial, have similarly determined that newly discovered evidence cannot be “merely cumulative or impeaching.”⁴⁹

The Court finds that the Harris affidavit consists of inadmissible hearsay and does not constitute newly discovered evidence that is a basis for habeas corpus relief. As a result, Petitioner has failed to state a prima facie case for habeas corpus relief, and the Court will deny Stevens’ petition.

An Order consistent with this Opinion shall follow.

Dated: May 20, 2016

ATTEST: Estrella George
Acting Clerk of Court

by: 
Donna D. Donovan
Court Clerk Supervisor 5/23/16


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

A CERTIFIED TRUE COPY
DATE May 23, 2016
ESTRELLA H. GEORGE
ACTING CLERK OF THE COURT
BY 
COURT CLERK II

⁴⁸ *Id.*

⁴⁹ *El Pueblo de Puerto Rico, Recurrido vs. Jorge Marcano Parrilla, Peticionario*, 168 D.P.R. 721, 736, 2006 PR Sup. LEXIS 132, *19, 2006 TSPR 136 (P.R. 2006). California courts are in agreement. See *Lubeck v. Lopes*, 254 Cal. App. 2d 63, 68, 62 Cal. Rptr. 36, 39 (Cal. App. 1st Dist. 1967) (“newly discovered evidence to impeach or discredit a witness, even when discovered shortly after trial and made the basis of a motion for new trial, is not sufficient to require granting of a new trial”).