UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

CHANTHA LEUTHAVONE, Petitioner,	)	
vs.	)	C.A. No. 97-996T
STATE OF RHODE ISLAND, et al., Respondents.	)	
CHANTHA LEUTHAVONE, Petitioner,	)	
vs.	)	C.A. No. 03-121S
A.T. WALL, Director of Corrections; and PATRICK C. LYNCH, R.I. Attorney General, Respondents.	)	

MEMORANDUM AND ORDER REGARDING MOTION TO CONSOLIDATE AND MOTION TO TREAT PETITIONER'S MOTION TO ENLARGE TIME AS PETITIONER'S MOTION TO RECONSIDER

The above-captioned actions are both applications for postconviction relief pursuant to 28 U.S.C § 2254 filed by Petitioner Chantha Leuthavone. Presently before the Court are two motions: (1) Petitioner's "Motion to Treat Petitioner's Motion to Enlarge Time [sic] as Petitioner's Motion to Reconsider the dismissal of Petitioner's § 2254 petition or in the alternative that this pleading be construed as a Motion to Reopen pursuant to U.S. District Court Rules of Criminal [sic] Procedure Rule 60(b)" (the "Motion to Reconsider and/or Reopen"); and (2) Petitioner's Motion to Consolidate the two above-captioned habeas proceedings.

A. Background and Travel

The background and travel of these two proceedings are relevant to both motions. In 1992 Petitioner was convicted in the Rhode Island Superior Court of first-degree murder, two counts of assault with a dangerous weapon and illegal possession of a firearm. That conviction was affirmed on direct appeal. See State v. Leuthavone, 640 A.2d 515 (R.I. 1994). Petitioner then filed an application for postconviction relief pursuant to 28 U.S.C. § 2254 in this Court, entitled Leuthavone v. Rhode Island, C.A. No. 97-556-T (the "1997 habeas proceeding"). The State objected to the petition, and the matter was referred to Magistrate Judge Jacob Hagopian.

On May 19, 1998 the Magistrate Judge filed a Report and Recommendation recommending that the Petitioner's application for writ of habeas corpus be denied on the basis that it was untimely. On June 1, 1998 Petitioner submitted a letter to this Court, contesting his waiver of Miranda rights following his arrest in light of his lack of understanding of English and proclaiming his innocence of the underlying offense. The letter did not mention or refer to the Report and Recommendation. Chief Judge Torres, to whom the case was assigned, treated the letter as an objection to the Report and Recommendation and on June 22, 1998, entered an order adopting the Report and Recommendation. See Order dated June 22, 1998. On July 13, 1998, Petitioner, apparently unaware of the

Court's action, filed a Motion for Enlargement of Time to "reply" to the Report and Recommendation. On July 30, 1998 the case was closed, without any action taken on Petitioner's motion.

From the record, it appears that at the time the 1997 habeas proceeding was filed, the Petitioner had an unresolved application for postconviction relief pending in the Rhode Island Supreme Court. Petitioner did not bring this proceeding to the Court's attention, and it was not noted in the Court's dismissal of the 1997 habeas proceeding.

In March 2003, Petitioner filed a second application for postconviction relief, entitled Leuthavone v. Wall, C.A. No. 03-121-S (the "2003 habeas proceeding"), together with a request for appointment of counsel. That case was assigned to the undersigned.[1] The request for counsel was referred to a Magistrate Judge who granted the request on May 19, 2003, noting "complicated issues" concerning whether the 1997 habeas proceeding was actually time-barred in light of the pending state court habeas application. On the same date this Court, construing the 2003 habeas proceeding as a "second or successive" application in light of the 1997 habeas proceeding, transferred the case to the U.S. Court of Appeals for the First Circuit, to permit consideration of whether such petition should be allowed to proceed. See 28 U.S.C. § 2244(b)(3)

[1] In order that these cases can be handled together, the 1997 habeas proceeding has subsequently been reassigned to the undersigned as well.

(outlining procedure for seeking circuit authorization for district court to consider a "second or successive" habeas application).[2]

Thereafter, Petitioner's counsel filed a motion with the First Circuit to hold the transferred 2003 habeas proceeding in abeyance, pending counsel's review of the proceedings at the district court level. On July 7, 2003, the Court of Appeals issued an Order granting the motion and directing counsel to file a status report within 60 days. See Leuthavone v. Wall, Dkt. No. 03-1732, Order of Court. In its Order, the Court of Appeals expressly noted that Petitioner's Motion for Enlargement of Time remained pending in the 1997 habeas proceeding and suggested that Petitioner's counsel might consider either pursuing that motion or otherwise moving to reopen that proceeding. Id. at 1. The Court further stated that, if and when the matter was ready to proceed in the Court of Appeals (depending on what transpired in this Court), it would permit briefing of the "second and successive" issue. Id. at 1-2.

In a subsequent status report, Petitioner's counsel indicated his intention to pursue the unresolved Motion for Enlargement of Time. Petitioner then filed in this Court (1) the instant Motion to Reconsider and/or Reopen, which requests this Court to

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[2] At the time it issued the transfer order, this Court was unaware that counsel had been appointed. This Court subsequently transmitted a Memorandum and Order to the First Circuit recommending that counsel be appointed to represent Petitioner in proceedings before that Court. See Memorandum and Order Recommending Granting of Petitioner's Motion for Appointment of Counsel, dated June 6, 2003.

reconsider the dismissal of Petitioner's § 2254 petition, or in the alternative, to construe Petitioner's Motion for Enlargement of Time as a motion to reopen the 1997 habeas proceeding, pursuant to Fed. R. Civ. P. 60(b);[3] and (2) a Motion to Consolidate the 1997 habeas proceeding with the 2003 habeas proceeding.

B. Motion to Reconsider and/or Reopen

The Motion to Reconsider and/or Reopen has a direct impact on the 1997 habeas proceeding. If the 1997 habeas proceeding is deemed properly and finally disposed of, then Petitioner's later-filed application may constitute a "second and successive" petition under 28 U.S.C. § 2244(b), authorization for which must be sought from the First Circuit. See 28 U.S.C. § 2244(b)(2). If the 1997 habeas proceeding is reopened, then this Court may proceed to address the issue of whether the 1997 habeas proceeding was improperly dismissed as untimely, in view of the pendency of Petitioner's state court application for postconviction relief, and whether the state court proceeding tolled the one-year limitations period for filing a § 2254 petition for habeas relief. See 28 U.S.C. § 2244(d)(2) ("The time during which a properly-filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this

[3] Although the Motion refers to the Federal Rules of Criminal Procedure, the Court construes the motion as requesting relief under Rule 60(b) of the Federal Rules of Civil Procedure.

subsection.”). Furthermore, if the 1997 habeas proceeding is determined to have been timely filed, the Court would then need to address whether Petitioner has exhausted his state remedies or whether exhaustion is necessary prior to filing for postconviction relief from this Court. Both the 1997 habeas proceeding and the 2003 habeas proceeding assert claims of “actual innocence” of the conviction.

In light of the foregoing circumstances, and because the State has indicated in its response to the Motion to Reconsider and/or Reopen that it does not oppose the reopening of the 1997 habeas proceeding, it makes sense to construe Petitioner’s Motion for Enlargement of Time, filed *pro se* on July 13, 1998, as a motion for relief from judgment under Fed. R. Civ. P. 60(b)(6), for the purpose of determining whether the 1997 habeas proceeding was improvidently dismissed on the basis of untimeliness. See Rodwell v. Pepe, 324 F.3d 66, 70 (1st Cir. 2003), cert. denied, 124 S. Ct. 224 (2003) (rule 60(b) motion which challenges the manner in which previous habeas judgment was obtained may be considered on merits). Alternatively, the Motion for Enlargement of Time may be construed as a motion to reopen the 1997 habeas proceeding.

Under either reading, the Motion to Reconsider and/or Reopen is GRANTED, and the Court hereby directs the parties to submit memoranda of law according to the schedule set forth below on the following issues:

(1) whether the one-year limitations period was tolled by Petitioner's pending state court application for postconviction relief, so as to render his 1997 habeas petition timely filed; and

(2) if so, whether Petitioner has exhausted his state court remedies.

As part of this briefing, the parties are directed to advise the Court as to: (a) the effect of Petitioner's failure to advise the Court of the pendency of his state court application for postconviction relief at the time his 1997 habeas proceeding was pending; and (b) the current status of Petitioner's state court application for postconviction relief.

C. Motion to Consolidate

Petitioner's Motion to Consolidate presents conflicting considerations. Both habeas proceedings are based on common facts and raise similar issues, and thus consolidation is appropriate. However, in view of the fact that the 2003 habeas proceeding has been transferred and is currently pending before the First Circuit, it is not clear whether this Court has the ability to consolidate that proceeding with the 1997 habeas proceeding at this juncture.

If, however, the 2003 habeas proceeding were remanded to this Court, for example, pursuant to a motion to remand filed with the Circuit by one or both parties, this Court could consider the consolidation of that matter with the 1997 habeas proceeding and would be inclined to grant it. Absent a remand, however, the Court is not able to grant such consolidation.

Therefore, the Motion to Consolidate is DENIED without prejudice to Petitioner's renewal of that motion if and when the 2003 habeas proceeding is remanded to this Court.[4]

D. Conclusion

Accordingly, in view of the foregoing considerations, the Court hereby ORDERS as follows:

1. Petitioner's Motion to Reconsider and/or Reopen is hereby GRANTED.

2. The parties shall submit memoranda on the issues described above according to the following schedule: (1) Petitioner's memorandum shall be due on or before March 19, 2004; (2) the State's memorandum shall be filed on or before April 2, 2004; and (3) Petitioner's reply memorandum shall be filed on or before April 12, 2004.

3. Petitioner's Motion to Consolidate is DENIED without prejudice.

IT IS SO ORDERED.

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William E. Smith
United States District Judge

Date:

[4] This Court is mindful of the directive in the Court of Appeals' July 7, 2003 Order, and intends to place matters in position to determine the propriety of the dismissal of the 1997 habeas proceeding, which may ultimately lead to the resolution of both proceedings.