IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DOLI SYARIEF PULUNGAN,

OPINION AND ORDER

Petitioner,

11-cv-470-bbc[1]

v.

UNITED STATES OF AMERICA,

Respondent.

- -

Federal law provides the possibility of damages for persons convicted unjustly in federal court. Under 28 U.S.C. § 2513, the acquitted person must obtain a "certificate of innocence" from the court that sentenced him before he can proceed to the United States Court of Federal Claims for a determination of his damages. Obtaining the certificate requires the petitioner to show not only that his conviction has been reversed (or that he has been found not guilty after a new trial), but that he did not commit the acts charged or his conduct did not constitute any crime under federal or state law and that he did not cause or bring about his own prosecution by misconduct or negligence. Id.

Petitioner Doli Syarief Pulungan has brought this petition for a certificate of

[1] This case has been transferred to me pursuant to Chief Judge William M. Conley's April 23, 2012 order in this case. Dkt. #12.

innocence, preparatory to seeking damages from the Court of Federal Claims. He was charged by the federal government with one count of conspiring to violate the Arms Control Export Act, 22 U.S.C. § 2278 and one count of making false statements in violation of 18 U.S.C. § 1001. On May 6, 2008, a jury found him guilty on the first count and not guilty on the second. His conviction on the first count was reversed by the Court of Appeals for the Seventh Circuit, which found that the evidence was insufficient to show beyond a reasonable doubt that petitioner had violated the statute "willfully." United States v. Pulungan, 569 F.3d 326 (7th Cir. 2009). By then, petitioner had served about 23 months in custody, before and after his trial.

I conclude that petitioner is entitled to a certificate. In its order reversing petitioner's conviction, the court of appeals made it clear that petitioner was not guilty of conspiring to violate the Arms Control Export Act because the government had not proved that he acted willfully. In essence, the court held that he did not commit the acts charged. He meets the requirement that he did not cause or bring about his own prosecution by negligence or misconduct, as this requirement has been interpreted by the court of appeals. Betts v. United States, 10 F.3d 1278 (7th Cir. 1993). Although petitioner's actions and statements were suspicious, he did not act in such a way as to mislead the authorities into thinking he had committed the offense charged against him.

Before turning to the merits of the petition, a few words are in order to explain why Chief Judge William Conley transferred this petition to this court on April 23, 2012, despite

the fact that petitioner had previously filed a civil complaint against me after his conviction had been reversed (case no. 10-cv-634). In that case, petitioner sought damages from me "to pay [his] claim of restitution and rehabilitation of [his] good name." That case was assigned to Judge Conley. When Judge Conley screened the complaint, he noted that petitioner's only allegations against me were that I had presided over his trial and signed the judgment of conviction and that judges have absolute immunity from suit for actions taken in their judicial capacity. Although Judge Conley dismissed the complaint without prejudice to allow petitioner to plead additional facts, he also stated that "[i]f all Pulungan can allege is that Judge Crabb acted in her judicial capacity by presiding over his criminal case, I will dismiss the case as frivolous with prejudice and costs." Pulungan v. Crabb, 2011 WL 97108, *1 (W.D. Wis. Jan. 12, 2011). Petitioner never filed an amended complaint in that case.

Petitioner's filing of this earlier suit raises the question whether I should recuse myself from hearing this case, either because of "personal bias or prejudice" under 28 U.S.C. § 144 or because my "impartiality might reasonably be questioned" under 18 U.S.C. § 455(a). The two phrases mirror each other, so they may be considered together. Brokaw v. Mercer County, 235 F.3d 1000, 1025 (7th Cir. 2000). Recusal is required when a "'reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits.'" Id. (quoting In re Mason, 916 F.2d 384, 385 (7th Cir. 1990).

No rule requires a judge to recuse herself from a case simply because she was or is involved in litigation with one of the parties. In re Taylor, 417 F.3d 649, 652 (7th Cir.

2005) (recusal "is not automatic because suits against public officials are common and a judge would likely not harbor bias against someone simply because the person named [her] in a meritless civil suit") (citing Lyons v. Sheetz, 834 F.2d 493, 495, n.1 (5th Cir. 1987); United States v. Balistrieri, 779 F.2d 1191, 1202 (7th Cir. 1985)). As Judge Conley noted, allegations that a judge presided over a criminal trial and signed the judgment of conviction are insufficient to state a claim against the judge. (I note that petitioner has filed another civil case, Pulungan v. In the United States District Court for the Western District of Wisconsin, 11-cv-575-wmc, in which he seeks "restitution" for his conviction. He does not name me as a defendant in that case, but even if he had, he does not include any allegations that I took any acts outside my judicial capacity while presiding over his criminal trial.)

Moreover, it is implicit in the very nature of certificate of innocence proceedings that the judge who presided over the criminal trial would rule on the certificate of innocence. Rigsbee v. United States, 204 F.2d 70, 73 n.3 (D.C. Cir. 1953) ("whether to issue a certificate of innocence is left to the discretion of the trial judge"); Benito Castro v. United States, 87 Fed. Cl. 182, 183 (2009) (petitioner "must provide [Court of Federal Claims] with a certificate of innocence from the trial judge who set aside his conviction"). That is why Judge Conley reassigned this action to me in the first place. Dkt. #12 ("This type of action is best heard by the judge who presided over the petitioner's criminal case."). Accordingly, I conclude that it is proper to proceed to examine the merits of petitioner's request for a certificate of innocence.

The following facts are taken from the record in petitioner's criminal case, no. 07-cr-144-bbc, and the court of appeals' opinion reversing petitioner's conviction.

BACKGROUND FACTS

Petitioner Doli Syarief Pulungan is a citizen of Indonesia who ran an import/export business in Jakarta, Indonesia. On October 11, 2007, a grand jury returned a two-count indictment against him, charging him in count one with conspiring with others to knowingly and willfully export 100 Leupold Mark 4 Close Quarter/Tactical riflescopes out of the United States, without having obtained the required license or other approval for such export, in violation of the Arms Control Export Act, 22 U.S.C. § 2778. In count two, the grand jury charged petitioner with making a materially false statement to an FBI agent about his travel history in connection with the arms export investigation, in violation of 18 U.S.C. § 1001, for falsely representing that his only travel out of Indonesia was to the United States.

Petitioner came to the United States to purchase 100 riflescopes to be used in Indonesia. He had no import license from Indonesia to import weapons and no export license of any kind, as he admitted to FBI Special Agent David Paul in a post-arrest interview. He had made two attempts to obtain the scopes; he tried to order them from a person named Louie Vulovic, for shipment to Vulovic's home in Cashton, Wisconsin, and later shipment to Singapore. Vulovic declined to have anything to do with the scopes. On a trip to the United States, petitioner asked a second individual, Steven Kaczik, to order 100

of the same riflescopes and ship them to Saudi Arabia, where petitioner would transport them to Indonesia. Petitioner first offered Kaczik $300 more than the price of the scope for each one that he would ship; later, he increased the offer to a total of $100,000. Petitioner told Kaczik that he could not purchase the riflescopes himself directly from Indonesia because of an embargo on some military sensitive items. Kaczik later contacted the FBI.

Petitioner was arrested by the FBI and agreed voluntarily to speak to Agent Paul and he consented to a search of his luggage. Initially, he lied about his reason for entering the country (saying that he was buying ground services equipment for aircraft) and when he was asked about the scopes he lied about the number he wanted to buy, the reasons he wanted to buy them and how he planned to get them back to Indonesia. Trial trans., dkt. #108, at 24-26. However, he changed his story about 30-40 minutes later and admitted that he wanted to buy 100 scopes. Id. at 28-29.

Petitioner showed Paul an Indonesian passport with a date of birth of May 7, 1953, which he confirmed was his birth date, but he did not tell Paul that he had a second passport with him. Paul asked petitioner what countries he had traveled to, and petitioner responded that he had traveled only to the United States from his home country of Indonesia. The passport he petitioner presented was consistent with that information. This answer was the basis for the false statement charge brought against petitioner.

During the search of petitioner's luggage, another FBI agent recovered a second passport that had expired in January of 2007. This passport showed petitioner's year of

birth as May 7, 1950. It also reflected an extensive travel history, including travel to at least ten countries between 2002 and 2004.

Petitioner's counsel argued to the jury that the question regarding past travel was ambiguous; it was unclear whether Paul asked where petitioner had traveled on his current trip or where he had *ever* traveled. Counsel also argued that petitioner may have misunderstood the question because of his limited English language skills.

Anthony Dearth of the United States Department of State Directorate of Defense Trade Controls testified at trial that, since 2003, the Leupold Mark 4 CQ/T Riflescope had been designated by the directorate as a "defense article" under category 1(f) of the United States Munitions List, because it is a riflescope manufactured to military specifications. Also, he testified that an arms embargo was in effect for Indonesia starting in late 1999, but rescinded or loosened in late 2005. Although the restriction had been lifted, Indonesians could not obtain an export license automatically by simply applying for one. Dearth explained that all requests for licenses were reviewed by the directorate on a case-by-case basis. He testified that petitioner had never applied to the directorate for an export license to export anything from the United States.

On May 6, 2008, the jury found petitioner not guilty of making false statements in violation of 18 U.S.C. § 1001, as charged in count 2 of the indictment, but found him guilty of violating the Arms Control Export Act. I sentenced petitioner to 48 months in federal prison.

The Court of Appeals for the Seventh Circuit reversed petitioner's conviction on June 15, 2009. The court focused on the "willfulness" aspect of the exporting charge, stating that the government had failed to prove that petitioner knew the Leupold riflescope was a "defense article" that required a license to export. Pulungan, 569 F.3d at 329. The court pointed out that the directorate's determination that the Leupold riflescope was a defense article was unknown to the public and the government had adduced no evidence suggesting that petitioner had learned the riflescope's status. Without proof that petitioner knew that he needed an export license to ship these particular scopes outside the country, petitioner could not be found to have acted willfully. Although it was clear that petitioner believed that what he was doing was illegal because he thought the items were subject to a now-rescinded embargo, the belief in a nonexistent rule could not suffice to prove the "willfulness" element of exporting the scopes without a license. Id. at 330. (The court also took issue with the Directorate's claim of authority to classify any item as a "defense article," saying that it would create serious constitutional problems if the government could do this without revealing the basis for its decision and without allowing any inquiry by the jury. Id. at 328.)

OPINION

A. Governing Statute

28 U.S.C. § 1495 waives the United States' sovereign immunity and allows suits for damages for wrongful imprisonment in the Court of Federal Claims, if the petitioner has met

the precondition to such a suit, which is obtaining a certificate of innocence. The burden of proving entitlement to a certificate is on the petitioner. 28 U.S.C. § 2513. This statute sets out the requirements for obtaining such a certificate. In relevant part, they read as follows:

> (a) Any person suing under section 1495 of this title must allege and prove that:
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> (1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction and
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> (2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.

These requirements "evince Congress' intent to compensate only those who are 'truly innocent,' both of the charges for which they were convicted and any other crime which their conduct would constitute." United States v. Graham, 608 F.3d 164, 178 (4th Cir. 2010) (Gregory, J., dissenting) (quoting Betts v. United States, 10 F.3d 1278, 1284 (7th Cir. 1990)). They have been read as requiring a person seeking a certificate to make three showings relevant to this case: (1) his conviction has been set aside (the other possibilities are irrelevant in this case); (2) he did not commit any of the acts charged *or* his acts in connection with the charge did not constitute any offense against the United States or any state; and (3) he did not bring about his own prosecution by negligence or misconduct.

B. First Requirement: Reversal of Conviction

The parties agree that petitioner's conviction was reversed on the ground that he was not guilty of the Arms Export Control Act charge, but they disagree about the effect of the reversal. The government argues that the narrowness of the court of appeals' decision, using an arguably heightened standard for willfulness, leaves open the question whether petitioner is actually innocent. Petitioner disagrees, pointing out that the government failed to prove that the riflescope petitioner wanted to export was manufactured to military specifications and failed to prove that he had acted willfully. Petitioner is correct. The court of appeals' holding was clear: the government did not prove that petitioner knew that the riflescopes he wanted to buy were defense articles that could not be purchased without a license. Without this proof, the government could not establish that petitioner had acted willfully. Pulungan, 569 F.3d at 329. Petitioner was not freed on a technicality or because of a procedural error; he was freed because the government failed to prove the essential elements of the crime charged against him.

It is unnecessary to discuss the jury's finding of not guilty on count two. Petitioner was not subject to any sentence on that count, so the issue is irrelevant to this proceeding. In any event, I agree with the jury's finding. It was not clear that petitioner made a knowing and willful false statement when he answered Agent Paul's questions about his passport.

C. Second Requirement: Petitioner Did Not Perform Any of the Charged Acts or the Acts

Committed Constitute No Crime against the United States or any State

Often, the requirement in subsection (1) of § 2513 that the petitioner show that his conviction was reversed will overlap the requirement in subsection (2) that the petitioner show that he did not commit any of the charged acts. They may be distinguished by considering that the first requirement goes to "legal innocence" and the second one goes to "actual innocence." A person may have his conviction reversed, and be "legally innocent," when the ground for the reversal "leaves room for the possibility that the petitioner in fact committed the offense with which he was charged," such as when "the conviction was set aside for lack of jurisdiction, expiration of the statute of limitations, use of inadmissible evidence, or failure of proof beyond a reasonable doubt." Betts, 10 F.3d at 1284. On the other hand, when as in this case, the reversal turns on a finding that the petitioner did not have the requisite state of mind to commit the charged offense, both requirements are satisfied. Cf. Rigsbee, 204 F.2d 70 (district judge disagreed with jury finding on remand that defendant's criminal acts were justified); United States v. Brunner, 200 F.2d 176, 280 (6th Cir. 1953) (defendant's conviction overturned because his wife was allowed to testify against him).

Subsection (2) actually includes three requirements, but the first two are phrased in the disjunctive: the petitioner must show that he did not commit any of the acts charged *or* that the acts in connection with the charge constitute no offense against the United States or any state. At least one court has held that they are to be construed in that manner. Osborn v. United States, 322 F.3d 835, 841 (5th Cir. 1963) ("Logically, it would not be

justifiable to require a claimant to prove both. If he did not commit the act charged, it would be immaterial whether the act was unlawful, and conversely, if the act was not criminal, it should make no difference whether he had done it.") In other words, if a petitioner can make the showing required under the first part of subsection (2), he is not required to prove that the acts charged against him do not constitute a crime.

The point is moot in this case. The record contains no evidence that petitioner's acts constituted an offense against the United States or any state.

D. Third Requirement: Petitioner Did Not Bring about His Own Prosecution

The one remaining requirement is that the petitioner did not bring about his own prosecution by misconduct or neglect. The Court of Appeals for the Seventh Circuit has described the language of the third clause of subsection (2) relating to misconduct or negligence prong as "'rather indefinite.'" Betts, 10 F.3d at 1284 (quoting Keegan v. United States, 71 F. Supp. 623, 638 (S.D.N.Y. 1947)). As the court noted, some courts have held that a person who engages in misconduct that turns out not to be illegal may be said to have brought about his own prosecution through misconduct or negligence. Id. (citing Weiss v. United States, 95 F. Supp. 176, 180 (S.D.N.Y. 1951) (petitioner not entitled to certificate despite having been found not guilty of conspiring to counsel draft evasion because testimony showed he counseled evasion and then destroyed evidence of his past activities); United States v. McMurry, 15 M.J. 1054, 1056 (N.M.C.M.R. 1983) (petitioner not entitled to certificate because he had heroin in his possession on a number of days, although not on

day for which he was charged); Forrest v. United States, 2 M.J. 870, 873 (A.C.M.R. 1976), aff'd, 3 M.J. 173 (C.M.A. 1977) (petitioner not entitled to certificate after being found not guilty of disobeying lawful order because he took it upon himself to determine that his superior's order was illegal, rather than seeking redress through proper channels)). The Seventh Circuit has rejected the idea that persons who engaged in wrongdoing later determined not to be criminal could be said to have brought about their own prosecution within the meaning of this clause. The court conceded in Betts, 10 F.3d at 1285, that "[i]n a moral sense, perhaps, a person who engages in conduct that a prosecutor or trial court mistakenly believes to constitute a criminal offense might be said to have 'brought about' his own prosecution, on the theory that he would not have been charged had he comported himself in a more upstanding fashion," but it added that "construing the statute in that way would require courts to assess the virtue of a petitioner's behavior even when it does not amount to a criminal offense. We decline to interpret section 2513(a)(2) in that fashion." Id. Instead, the court said, "the statute expressly requires a causal connection between the petitioner's conduct and his prosecution; it does not preclude relief simply because the petitioner engaged in misconduct or neglect, period." Id. A person might be said to have brought about "his prosecution if he acted or failed to act in such a way as to mislead the authorities into thinking he had committed an offense," such as by giving a false confession, intentionally withholding exculpatory evidence or attempting to flee or remove evidence.

Id.

The Court of Appeals for the Fourth Circuit disagreed with this view in a recent case, United States v. Graham, 608 F.3d 164 (4th Cir. 2010), but even if I were free to disregard the holding of the court of appeals for this circuit, I do not find the Fourth Circuit's holding persuasive. The court agreed with the district court, which had denied a certificate of innocence to the petitioner, that Graham had taken advantage of his position as executive direct of a nonprofit corporation to mislead his board of directors into approving increases in his salary and the conversion of sick leave into cash. Both the district and appellate courts had found him not guilty of embezzling from an employer receiving more than $10,000 annually in federal funds, but found that he had brought about his own prosecution by neglect or misconduct. The court of appeals found that its reading of the statute was congruent with Congress's decision to place the burden on the claimant to prove entitlement to the certificate, § 2513(a), and that it was appropriate to give the statute strict construction because it is a waiver of sovereign immunity. Id. at 171-72.

The conclusion in Graham is contrary to the Seventh Circuit's holding that construing the statute to cover conduct the prosecutor or trial court mistake for a criminal offense "would require courts to assess the virtue of a petitioner's behavior even when it did not amount to a criminal offense." Betts, 10 F.3d at 1285.

Following the court of appeals' lead, I conclude in this case that petitioner did not

bring about his own prosecution by the actions he took before his arrest. It is true that the acts looked suspicious, but, as the court of appeals explained, the acts did not add up to criminal behavior, because petitioner lacked the requisite knowledge. Pulungan, 569 F.3d at 329 (holding that "Pulungan cannot be convicted unless he *knew* that the [scope] is [a defense article], and that licenses are necessary to export them" and finding that government had failed to prove that he knew these things).

The acts that petitioner took after he was apprehended did not mislead "the authorities as to his culpability." Betts, 10 F.3d at 1285. Although he gave Agent Paul different versions of his attempted purchase and lied initially about the number of scopes he was trying to purchase and why, his statements could not be said to have led the authorities into thinking he had committed an offense because he had corrected them before the interview ended. The record contains no evidence that petitioner took any steps following his arrest to mislead the authorities into thinking he had committed an offense, attempted to flee, withheld exculpatory evidence, attempted to induce a witness or expert to give false testimony or made a false confession. Id. at 1285 (citing Keegan, 71 F. Supp. at 638). I conclude therefore that he is eligible for a certificate of innocence.

ORDER

IT IS ORDERED that petitioner Doli Syarief Pulungan's request for a certificate of

innocence, dkt. #1, is GRANTED. The certificate shall issue forthwith.

Entered this 9th day of May, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge