

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ABU-ALI ABDUR'RAHMAN)
)
v.) NO. 3:96-0380
) JUDGE CAMPBELL
RICKY BELL, Warden) CAPITAL HABEAS CORPUS

ORDER

Pending before the Court is Petitioner's Motion for Relief from Judgment Exclusively Pursuant to Fed. R. Civ. P. 60(b) (Docket No. 286). The Court held a hearing on the Motion on December 16, 2002. For the reasons described herein, the Court finds that the Motion is a second or successive petition subject to 28 U.S.C. § 2244 pursuant to McQueen v. Scroggy, 99 F.3d 1302, 1335 (6th Cir. 1996). Accordingly, the case is transferred to the Court of Appeals for the Sixth Circuit, pursuant to 28 U.S.C. § 1631, in accordance with In re Sims, 111 F.3d 45 (6th Cir. 1997). The Motion under Fed. R. Civ. P. 60(b) for relief from the judgment of April 8, 1998 is denied and dismissed for lack of jurisdiction. There being nothing further pending before the Court, this Order is a final Order in all respects.

A review of the Order (Docket No. 267) entered on November 27, 2001 is instructive for understanding the pending Motion. The prior Order states as follows:

Pending before the Court is Petitioner's Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b) (Docket No. 254). Because the Motion is a second or successive petition subject to 28 U.S.C. § 2244, this case is transferred to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631 and In re Sims, 111 F.3d 45 (6th Cir. 1997).

Petitioner, in this capital habeas corpus case, has moved pursuant to Fed. R. Civ. P. 60(b) for relief from this Court's Judgment of

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289

April 8, 1998 (Docket Nos. 205 and 206). Abdur'Rahman v. Bell, 999 F.Supp. 1073 (M.D. Tenn. 1998), aff'd. in part and rev'd. in part, 226 F.3d 696 (6th Cir. 2000), cert. denied, 122 S.Ct. 386 (2001), pet. for reh'g pending. The Rule 60(b) Motion is predicated upon a new Tennessee Supreme Court Rule, Rule 39 ("Rule 39"), adopted on June 28, 2001.¹

In the 1998 Judgment, this Court ruled that certain of Petitioner's claims had not been exhausted in state court and, therefore, were defaulted. Based on new Rule 39, Petitioner asserts that a petition for discretionary review by the Tennessee Supreme Court is not necessary for exhaustion purposes and, therefore, the claims in question were exhausted and the Court must now rule on the merits of those claims.

Respondent asserts that this Rule 60(b) Motion is actually a second or successive petition subject to 28 U.S.C. § 2244. The proper procedure, according to Respondent, is for this Court to transfer the matter to the Sixth Circuit for its determination of whether the Rule 60(b) Motion satisfies the gateway criteria of 28 U.S.C. § 2244(b). Respondent relies primarily on McQueen v. Scroggy, 99 F.3d 1302, 1335 (6th Cir. 1996). In McQueen, the Sixth Circuit held "[w]e agree with those circuits that have held that a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition..." Id. See, also, United States v. Rich, 141 F.3d 550, 551 (5th Cir. 1998); Thompson v. Calderon, 151 F.3d 918, 921 (9th Cir. 1998) (en banc); Felker v. Turpin, 101 F.3d 657, 660-61

¹ Tennessee Supreme Court Rule 39 reads as follows:

In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for a rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tennessee Code Annotated, § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

Tenn. S. Ct. R. 39.

(11th Cir. 1996); and United States v. Hernandez, 158 F.Supp.2d 388, 391 (D. Del. 2001).

Petitioner argues that this Rule 60(b) Motion is not a second or successive petition because it raises no new claims, no new facts, and does not rely on new law. Petitioner relies primarily on Rodriquez v. Mitchell, 252 F.3d 191, 198-200 (2nd Cir. 2001). In Rodriquez, the Second Circuit held “a Motion under Rule 60(b) to vacate a judgment denying habeas is not a second or successive habeas petition and should therefore be treated as any other motion under Rule 60(b).” Id. at 198.

In the Sixth Circuit, when a petitioner raises new matters in a Rule 60(b) Motion challenging the previous denial of a § 2254 habeas corpus petition, the Rule 60(b) Motion must be construed as an attempt by the petitioner to file a second or successive petition. McQueen v. Scroggy, 99 F.3d at 1334-35. 28 U.S.C. § 2244(b)(3)(A) provides: “Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.”

Because this Rule 60(b) Motion presents a new theory predicated on a new rule of law adopted by the Tennessee Supreme Court over three years after this Court’s Judgment, the Court finds that the Motion is a second or successive habeas petition subject to 28 U.S.C. § 2244. Accordingly, this Court is without jurisdiction to decide the Rule 60(b) Motion. The case is hereby transferred to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631 and In re Sims, 111 F.3d 45 (6th Cir. 1997).

The United States Supreme Court granted Abdur’Rahman’s petition for a writ of certiorari on April 23, 2002, to resolve, in part, the question of whether relief from judgment is available in a habeas corpus case under Fed. R. Civ. P. 60(b) or whether such relief is available only under the provisions of 28 U.S.C. § 2244(b). Abdur’Rahman v. Bell, 122 S.Ct. 1605 (2002) (mem.) (granting certiorari), 70 U.S.L.W. 3650 (U.S. April 23, 2002) (listing the questions on

which certiorari was granted). On December 10, 2002, the Supreme Court dismissed the writ of certiorari as improvidently granted.

In an opinion dissenting from that dismissal, Justice Stevens states that “[t]he Court’s decision to dismiss the writ of certiorari as improvidently granted presumably is motivated, at least in part, by the view that the jurisdictional issues presented by this case do not admit of an easy resolution.” Abdur’Rahman v. Bell, 537 U.S. ____, ____ (No. 01-9094 (Dec. 10, 2002)) (Stevens, J. dissenting) (Slip Op. at 1). Justice Stevens’ opinion cites an October 24, 2002, Order of the Supreme Court issued two weeks before oral argument, directing the parties to file supplemental briefs on the question of whether “the Sixth Circuit [had] jurisdiction to review the District Court’s order, dated November 27, 2001, transferring petitioner’s Rule 60(b) motion to the Sixth Circuit pursuant to 28 U.S.C. 1631.” *Id.* (Slip Op. at 1 n. 1). Petitioner contends that the jurisdictional issue arose because of the absence of an order by this Court stating explicitly that Abdur’Rahman’s motion for relief from judgment filed under Fed. R. Civ. P. 60(b) was “dismissed” for lack of jurisdiction. See Transcript of Oral Argument in Abdur’Rahman v. Bell (U.S. Nov. 6, 2002), at 2-6 (reporting questions by the Court indicating that the jurisdictional issue arose “when the district court transferred” the motion to the Court of Appeals without “enter[ing] a judgment against [Petitioner] under [Fed. R. Civ. P.] 60(b) to ... test whether this is a 60(b) case or a habeas case”).

Petitioner now again moves this Court under Fed. R. Civ. P. 60(b) for relief from this Court’s April 8, 1998 Order denying him relief from his capital sentence based on various claims of prosecutorial misconduct. The pending Motion relies on the same underlying grounds for relief from judgment that he presented to this Court in the prior Motion entitled “Petitioner’s

Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b),” dated November 2, 2001 (Docket No. 254).

The pending Motion states clearly that Petitioner has not sought and is not seeking to file a successive petition or otherwise seeking relief from this Court’s April 8, 1998 judgment under 28 U.S.C. § 2244, and that the exclusive basis for the relief he seeks is Fed. R. Civ. P. 60(b). As is stated in this Court’s November 27, 2001 Order, this Court has no jurisdiction to grant relief under Fed. R. Civ. P. 60(b) from a judgment denying habeas corpus relief, because 28 U.S.C. § 2244 provides the only avenue of relief from a habeas corpus judgment under the law of the Sixth Circuit as set forth in McQueen v. Scroggy, 99 F.3d at 1334-35.

The parties vigorously contest whether McQueen is correctly decided. Nevertheless, the Court is required to follow McQueen unless and until it is overruled by the Court of Appeals of the Sixth Circuit. This is especially so in this case since this Court’s application of McQueen in this case was previously affirmed by the Sixth Circuit. For this reason, the pending Motion under Fed. R. Civ. P. 60(b) for relief from this Court’s April 8, 1998 judgment must be and is hereby denied and dismissed for lack of jurisdiction.

In conclusion, for the reasons described above, this case is transferred to the Court of Appeals for the Sixth Circuit, pursuant to 28 U.S.C. § 1631, in accordance with In re Sims, 111 F.3d 45 (6th Cir. 1997). The Motion under Fed. R. Civ. P. 60(b) for relief from the judgment of

April 8, 1998 is denied and dismissed for lack of jurisdiction. There being nothing further pending before the Court, this Order is a final Order in all respects, including for purposes of appeal.

IT IS SO ORDERED.


TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE