

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 an Application for a Certificate of Probable Cause to Appeal and/or for a Certificate of Appealability (Docket No. 291). For the reasons described herein, the Application is DENIED.

A brief history of this case is instructive in understanding the context of the pending Application. By Order (Docket No. 270) entered on December 4, 2001, the Court denied a similar Application as follows:

Pending before the Court is Petitioner's Application for Certificate of Appealability (Docket No. 269). For the reasons described herein, the Court is without jurisdiction to rule on the Application.

By Order (Docket No. 267) entered on November 27, 2001, the Court ruled that it was without jurisdiction to decide Petitioner's Rule 60(b) Motion because the Motion was a second or successive petition subject to 28 U.S.C. § 2244. The Court, accordingly, ordered the case transferred to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631 and In re Sims, 111 F.3d 45 (6<sup>th</sup> Cir. 1997).<sup>1</sup>

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<sup>1</sup> The Court also notes that this case was on appeal at the time the Rule 60(b) Motion was filed in this Court and that it remains on appeal at this time. Therefore, the Court generally lacks jurisdiction over the case due to the appeal. See First Nat'l Bank of Salem, Ohio v. Hirsch, 535 F.2d 343 (6<sup>th</sup> Cir. 1976) regarding the procedure for a District Court to act on a Rule 60(b) motion to vacate a judgment that is on appeal.

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(292)

Petitioner's Application for Certificate of Appealability asks the Court to grant a certificate of appealability. See 28 U.S.C. §§ 2253(c); Fed. R. App. P. 22(b); Slack v. McDaniel, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). According to Petitioner: Specifically, a COA should issue because reasonable jurists could disagree (and have disagreed) with this Court's conclusions that: (1) Every 60(b) motion in a habeas case is a second or successive petition; (2) Tennessee Supreme Court Rule 39 is a "new" rule of law; and (3) Abu-Ali Abdur'Rahman is not entitled to relief, despite egregious prosecutorial misconduct, including deliberate falsification of evidence pivotal to the death sentence.

Application, Docket No. 269, p. 1.

For the reasons stated in the prior Order (Docket No. 267), the Court finds that it does not have jurisdiction to rule on Petitioner's Application for Certificate of Appealability.

(Docket No. 270).

On December 10, 2002, Petitioner filed a Motion for Relief from Judgment Exclusively Pursuant to Fed. R. Civ. P. 60(b) (Docket No. 286). The Court ruled, in pertinent part, as follows:

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 (6<sup>th</sup> 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 (6<sup>th</sup> 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.

(Docket No. 289).

As with the Order (Docket No. 270) entered on December 4, 2001, this Court does not have jurisdiction to rule on the Application for a Certificate of Probable Cause to Appeal and/or for a Certificate of Appealability. The Court does not have jurisdiction because the Court did not

have jurisdiction over the underlying Motion for Relief from Judgment Exclusively Pursuant to Fed. R. Civ. P. 60(b) (Docket No. 286) since it is a second or successive petition, subject to 28 § U.S.C. § 2244, pursuant to McQueen v. Scroggy, 99 F.3d 1302, 1335 (6<sup>th</sup> Cir. 1996).

To the extent that the underlying Motion for Relief from Judgment Exclusively Pursuant to Fed. R. Civ. P. 60(b) (Docket No. 286) is construed to be a Rule 60(b) Motion, rather than a second or successive petition, no certificate of appealability or certificate of probable cause is necessary for Petitioner to appeal.

Accordingly, the Application is DENIED for lack of jurisdiction.<sup>2</sup> It is the intention of the Court that this is a final Order, there being nothing further pending before the Court.

The Clerk shall send a copy of this Order to the Clerk of the Sixth Circuit Court of Appeals.

IT IS SO ORDERED.

  
TODD J. CAMPBELL  
UNITED STATES DISTRICT JUDGE

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<sup>2</sup> In the event the Court of Appeals for the Sixth Circuit determines that this Court has jurisdiction over Petitioner's Motion for Relief from Judgment Exclusively Pursuant to Fed. R. Civ. P. 60(b), Petitioner's Application for a Certificate of Appealability is granted on the issue of whether 28 U.S.C. § 2244 bars review of the merits of Petitioner's purported Fed. R. Civ. P. 60(b) Motion (Docket No. 286) which this Court has held is a second or successive habeas petition, although Petitioner filed it as a Rule 60(b) motion.