

Nos. 02-6547/6548

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

MAR 05 2003

In re ABU-ALI ABDUR'RAHMAN,

Movant (02-6547).

ABU-ALI ABDUR'RAHMAN,

Petitioner - Appellant (02-6548),

v.

RICKY BELL, Warden,

Respondent - Appellee.

LEONARD GREEN, Clerk

ORDER

Before: SILER, BATCHELDER and COLE, Circuit Judges.

These two cases arise from the district court's order of December 17, 2002 which construed Petitioner's Motion for Relief from Judgment Exclusively Pursuant to Fed. R. Civ. P. 60(b) as a second or successive petition subject to 28 U.S.C. § 2244 and transferred it to the court of appeals. The district court also denied the motion for relief from the judgment of April 8, 1998 and dismissed it for lack of jurisdiction.

In case no. 02-6547, which was docketed as the § 2244 application, petitioner moves to transfer the case back to the district court. He also filed a substitute motion to transfer which conforms to the format requirements of Fed. R. App. P. 27. The warden opposes a transfer back to the district court on grounds that the transfer to this court was required by 28 U.S.C. § 1631, *In re Sims*, 111 F. 3d 45, 47 (6th Cir. 1997). Having carefully considered the arguments raised in the motion to transfer, the substituted motion to transfer and the warden's response, the motion to transfer the case back to district court is DENIED.

In case no. 02-6548, petitioner moves for a certificate of probable cause and/or a

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certificate of appealability on the issue whether the district court was correct in holding that it had no jurisdiction to grant relief under Fed. R. Civ. P. 60(b) from a judgment denying habeas corpus relief. The appellee warden objects on grounds that the district court's order was not an appealable, final order and, alternatively, that petitioner failed to meet the statutory requirements for a certificate of appealability. Having carefully considered the arguments raised in the motion for a certificate of probable cause and/or certificate of appealability and the warden's response, the motion is DENIED.

R. GUY COLE, JR., Circuit Judge, concurring in part, and dissenting in part. Because I would entertain petitioner Abu-Ali Abdur'Rahman's appeal of whether the district court correctly held that it had no jurisdiction to grant relief under Federal Rule of Civil Procedure 60(b) from a judgment denying habeas corpus relief, I respectfully dissent from the Court's denial of petitioner's request for a certificate of probable cause and/or a certificate of appealability on this issue.

In 1996, after Petitioner's conviction and sentence of death were affirmed by the Supreme Court of Tennessee and he failed to obtain post-conviction relief in the courts of Tennessee, Petitioner filed a petition for writ of habeas corpus in federal district court. Petitioner challenged the effectiveness of his trial counsel and alleged prosecutorial misconduct. On April 8, 1998, the district court granted relief on Petitioner's ineffective assistance of counsel claim, but concluded that his prosecutorial misconduct claim had not been exhausted in the state courts. In particular, Petitioner had not sought discretionary review of this claim by the Supreme Court of Tennessee, as the district court concluded was required. Respondent appealed the grant of the writ, but Petitioner did not cross appeal the ruling that the prosecutorial misconduct issue had been procedurally defaulted. This Court reversed the district court's grant of the writ, *Abdur'Rahman v. Bell*, 226 F.3d

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696 (6th Cir. 2000), and the Supreme Court denied certiorari, 534 U.S. 970 (2001).

Meanwhile, in response to the decision of the United States Supreme Court in *Sullivan v. Boerkel*, 526 U.S. 838 (1999), the Tennessee Supreme Court established a new rule, Rule 39, clarifying that it had not been necessary that Petitioner seek rehearing in, or apply for permission to appeal to, the Supreme Court of Tennessee in order to exhaust his available state remedies. Rule 39 made clear that Petitioner's prosecutorial misconduct claim had not been procedurally defaulted.

On November 2, 2001, Petitioner filed in the district court a motion pursuant to Federal Rule of Civil Procedure 60(b) requesting relief from that court's April 8, 1998 judgment. Relying on the Tennessee Supreme Court's Rule 39, Petitioner requested that the district court set aside its judgment that the prosecutorial misconduct claim was procedurally defaulted, and hear the merits of the claim. Petitioner did not raise any new claims, nor did he rely on newly discovered evidence.

Relying on the law of this Court, the district court construed Petitioner's Rule 60(b) motion as a second or successive application for writ of habeas corpus, concluded that it lacked jurisdiction to decide the motion, and transferred the case to this Court pursuant to 28 U.S.C. § 1631. Petitioner filed notices of appeal and requests for certificates of appealability in both this Court and the district court and sought to have the appeals consolidated. Thereafter, this Court denied all relief finding that Petitioner's Rule 60(b) motion was properly construed as a "second or successive" habeas petition, and that it did not meet the gatekeeping criteria for such a motion.

Subsequently, the Supreme Court granted certiorari to review our disposition of the Rule 60(b) motion. However, after hearing oral argument, the Supreme Court dismissed certiorari as improvidently granted. Justice Stevens dissented from the Supreme Court's dismissal of certiorari in this case, concluding that "[t]he Court of Appeals for the Sixth Circuit plainly erred when it

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characterized petitioner's Rule 60(b) motion as an application for second and successive petition and denied relief for that reason." *Abdur'Rahman v. Bell*, 537 U.S. ___, 123 S. Ct. 594, 599 (2002) (Stevens, J. dissenting).

On December 17, 2002, on remand, the district court entertained, essentially for the second time, Petitioner's Rule 60(b) motion. That court denied relief and dismissed the matter for lack of jurisdiction. It is this order denying relief that Petitioner now seeks to appeal.

Because I am convinced by Justice Stevens's dissent and believe that this Court's decision in *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996) is both wrongly decided and inapplicable in this case, I would allow Petitioner's certificate of appealability and vote to hear the Rule 60(b) issue en banc.

This Court held in *McQueen* that "a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition and therefore is subject to cause and prejudice analysis." 99 F.3d at 1335. As Justice Stevens suggested in his dissent in this case, this conclusion improperly conflates Rule 60(b) motions and "second or successive" habeas petitions. *See Abdur'Rahman v. Bell*, 123 S. Ct. at 597-98 (quoting *Mobley v. Head*, 306 F.3d 1096, 1100-1105 (11th Cir. 2002)). As other courts have concluded, these types of motions are distinct in both purpose and effect. *See, e.g., Rodriguez v. Mitchell*, 252 F.3d 191, 198-99 (2d Cir. 2001). A Rule 60(b) motion is brought to correct a mistake in a judgment resulting, for example, from a procedural error or substantive mistake of law committed by the court. FED. R. CIV. P. 60(b); *see United States v. Reyes*, 307 F.3d 451, 455 (6th Cir. 2002). The effect of a Rule 60(b) motion in the habeas corpus context is merely to re-open the habeas proceedings only perhaps paving the way for a later decision invalidating the petitioner's state court conviction. *See Rodriguez*, 252 at 198. In contrast, a "second or successive"

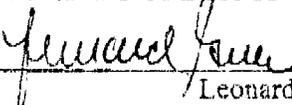
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habeas petition is intended, like a habeas petition in the first instance, to directly attack a state court judgment of conviction in order to remedy constitutional violations. See 28 U.S.C. §§ 2244, 2254. Thus, the better rule would be to treat Rule 60(b) motions made in the context of habeas corpus proceedings simply as Rule 60(b) motions and, concomitantly, distinct from "second or successive" habeas petitions.

Alternatively, I would find the rule of *McQueen* distinguishable in certain habeas cases, such as this one. Petitioner does not raise any new claims in his Rule 60(b) motion and, therefore, does not seek to invalidate his state court conviction through the Rule 60(b) motion. Instead, Petitioner merely seeks to re-open a federal habeas corpus proceeding based upon a clear error in the district court's interpretation of Tennessee's exhaustion requirements. I believe that Rule 60(b) provides the proper mechanism for such a request.

Ultimately, I would conclude that Petitioner has made a substantial showing of the denial of a constitutional right with respect to his Rule 60(b) motion. The evidence suggests that the prosecutor may have committed misconduct that impacted the jury's decision to award a sentence of death in this case. The district court's clearly erroneous procedural ruling should not be permitted to bar review of the merits of this serious constitutional claim. For the reasons stated above, as well as the reasons set forth in Justice Stevens's dissent from the dismissal of certiorari in this case, I would grant the certificate of appealability in this matter, and vote to hear Petitioner's appeal of the Rule 60(b) issue en banc.

ENTERED BY ORDER OF THE COURT


Leonard Green, Clerk