

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RONALD JOHNSON	:	
Petitioner	:	
v.	:	
	:	
JOSEPH LEHMAN, THE ATTORNEY	:	Civil Action No. 94-7583
GENERAL OF THE STATE OF	:	
PENNSYLVANIA, THE DISTRICT ATTORNEY:	:	
OF PHILADELPHIA COUNTY	:	
Respondents	:	

Norma L. Shapiro, S.J.

June 15, 2004

MEMORANDUM AND ORDER

Petitioner, Ronald Johnson ("Petitioner"), filing a Motion for Relief under Fed. R. Civ. P. 60(b), seeks modification of this court's judgment dismissing his Petition for Writ of Habeas Corpus. Respondents, Joseph Lehman, the Attorney General of the State of Pennsylvania, and the District Attorney of Philadelphia County ("Respondents"), assert that a Fed. R. Civ. P. 60(b) motion is unavailable to vacate a final judgment in an action pursuant to 28 U.S.C. §2254.

Background

On December 19, 1994, Petitioner filed a petition for Writ of Habeas Corpus with this court. On December 15, 1999, this court granted respondents' motion to dismiss, without prejudice, as Petitioner had not exhausted his state court remedies on all claims. Johnson v. Lehman, et al., No. 94-7583 (E.D. Pa. Dec. 15, 1999).

Petitioner filed a Pennsylvania Post-Conviction Relief Act ("PCRA") petition for relief from his conviction on August 27, 1999. The Pennsylvania Supreme Court having denied Petitioner's Petition for Allowance of Appeal, his state court remedies were exhausted on June 24, 2003. Eighty-one days later, on September 12, 2003, Petitioner filed a Motion to Reinstate Petition for a Writ of Habeas Corpus. By order of March 18, 2004, denying the motion, this court instructed Petitioner to file a motion pursuant to Fed. R. Civ. P. 60(b) or to file a new petition for habeas corpus. On April 21, 2004, Petitioner filed the instant Fed. R. Civ. P. 60(b) motion.

### **Discussion**

Before addressing the merits of Petitioner's Rule 60(b) motion, the court must determine whether that motion is, in essence, a second or successive §2254 habeas motion. The Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, Pub. L. No. 104-132, 110 Stat. 1214, limits a petitioner's ability to bring a second or successive habeas petition. 28 U.S.C. §2244(b).<sup>1</sup> A state prisoner seeking to file a second or

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<sup>1</sup>28 U.S.C. 2244(b) provides:

(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless -

successive §2254 habeas petition must, first, move in the court of appeals for an order authorizing the district court to consider such a motion. 28 U.S.C. §2244(b)(3)(A).

Fed. R. Civ. P. 60(b) provides that "the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding" for a number of reasons, including excusable neglect, newly discovered evidence, or any other reason justifying relief from the operation of judgment. The motion must be made within a reasonable time, not more than a year for

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(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3) (A) Before a second or successive application permitted by this section is filed in district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

reasons such as excusable neglect and newly discovered evidence, but with no absolute limit for other reasons justifying relief. Fed. R. Civ. P. 60(b).

The Third Circuit has not directly addressed whether a Rule 60(b) motion to vacate a judgment denying habeas relief is considered a second or successive habeas petition. Some courts in this and other circuits view a Rule 60(b) motion as the functional equivalent of a successive petition that cannot be considered by a district court without prior authorization from a court of appeals. See e.g., United States v. Rich, 141 F.3d 550 (5th Cir. 1998), cert. denied 526 U.S. 1011 (1999); United States v. Bovie, 2001 U.S. App. LEXIS 17107 (10th Cir. 2001); Felker v. Turpin, 101 F.3d 657, 661 (11th Cir. 1996) (per curiam); Prigden v. Shannon, Civ. A. No. 00-4561, 2002 U.S. Dist. LEXIS 18589, 2002 WL 31122131, at \*3 (E.D. Pa. Sept. 26, 2002).

The Second Circuit initially ruled that a Rule 60(b) motion to vacate a judgment denying habeas relief should never be construed as a successive habeas petition, and "the fact that the court to which the motion is addressed might conceivably go farther and grant the habeas in response to the [Rule 60(b)] motion does not ...make such a motion a second habeas petition." Rodriguez v. Mitchell, 252, F. 3d 191, 199 (2d Cir. 2001). However, in Gitten v. United States, 311 F.3d 529, 532 (2d Cir. 2002), it held that a Rule 60(b) motion with a substantive attack on a state court judgment should be transferred to the appellate

court; "suggesting that Rodriguez 'settled' the issue by ruling that a 60(b) motion should never be treated as a second or successive motion . . . somewhat overstated the matter.

Rodriguez concerned a 60(b) motion with grounds that 'related to the integrity of the federal habeas proceeding, not to the integrity of the [underlying conviction].'" 311 F.3d at 532 n.4.

The First and Seventh Circuits have held that a district court should treat a Rule 60(b) motion as a successive habeas petition requiring prior court of appeals authorization only if it challenges the underlying conviction. If the Rule 60(b) motion only challenges the integrity of the federal habeas proceedings, it is allowed to proceed without prior court of appeals authorization. Rodwell v. Pepe, 325 F. 3d 66, 71 (1<sup>st</sup> Cir. 2003); Banks v. United States, 167 F. 3d 1082 (7<sup>th</sup> Cir. 1999); Dunlap v. Litscher, 301 F. 3d 873 (7<sup>th</sup> Cir. 2002).

District courts in the Third Circuit, noting the absence of guidelines from the Court of Appeals or the United States Supreme Court, have opted to follow the First and Seventh Circuit by rejecting the restrictive view that a Rule 60(b) motion to vacate a judgment denying habeas relief should always be treated as a second or successive habeas petition, and adopting the procedural/substantive distinction. See, e.g., Telesford v. United States, Civ. A. No. 97-210, 2004 U.S. Dist. LEXIS 5872, 2004 WL 724959 (D. Del. Mar. 31, 2004); United States v. Cabiness, 278 F. Supp. 2d 478 (E.D. Pa. 2003); Harper v. Vaughn,

272 F. Supp. 2d 527, 532 (E.D. Pa. 2003); United States v. Harris, 268 F. Supp. 2d 500, 502-04 (E.D. Pa. 2003); Pridgen v. Shannon, 2002 U.S. Dist. LEXIS 18589, 2002 WL 31122131, at \*3 (E.D. Pa. Sept. 26, 2002). Usually in this district, if the motion challenges the federal habeas proceeding itself, rather than the underlying conviction, it can proceed as a motion under Rule 60(b) and not as a successive habeas petition. Harper, 272 F. Supp. at 532.

Petitioner's original habeas petition was dismissed for failure to exhaust state remedies. The dismissal was explicitly premised on the concession by the Commonwealth that after exhausting state remedies, Petitioner could re-file the habeas petition, and it would not be treated as a successive petition under AEDPA. Johnson v. Lehman, No. 94-7583 (E.D. Pa. Nov. 9, 1999) (order denying motion to amend petition). Petitioner has exhausted his state remedies and, in his Rule 60(b) motion, argues that the court should now address the merits of his claim. Petitioner's Rule 60(b) motion focuses on the circumstances surrounding the filing and disposition of his 1994 habeas petition. It does not raise arguments concerning the constitutionality of his conviction or otherwise seek to avoid AEDPA barriers to a successive habeas petition. Therefore, authorization from the Court of Appeals is not required and the court will address the issue raised in the Rule 60(b) motion.

The decision to grant or deny relief under Fed. R. Civ. P.

60(b) lies in the 'sound discretion of the trial court guided by accepted legal principles applied in light of all the relevant circumstances. Ross v. Meagan, 638 F. 2d 646, 648 (3d Cir. 1981).

Because of the one year limitations period for the first three grounds available under Fed. R. Civ. P. 60(b), the only arguable ground for the relief sought by Petitioner is the catchall provision of Fed. R. Civ. P. 60(b)(6). Fed. R. Civ. P. 60(b)(6) provides that the court may act to relieve a party from a final judgment for "any other reason justifying relief from the operation of the judgment." Relief under Fed. R. Civ. P. 60(b)(6) is available only in cases evidencing extraordinary circumstances. Morris v. Horn, 187 F. 3d 333, 341 (3d Cir. 1999). Although some courts have recognized that, under Fed. R. Civ. P. 60(b)(6), "in the exceptional case...an action may be reinstated on account of an intervening change in the law, [but] intervening developments in the law themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)." Harper, 272 F. Supp. 2d at 532.

Petitioner argues that the court erred in dismissing, rather than staying his federal habeas petition so that he could return to state court to assert his claim of newly discovered evidence. At the court's urging, Petitioner consented to the dismissal of his claims without prejudice, in order to exhaust his state remedies, with the explicit understanding that his claims could

be renewed after they were exhausted in the state courts.

Johnson v. Lehman, Civ. A. No. 94-7583 (E.D. Pa. Nov. 9, 1999) (order denying motion to amend). This court refused to stay the petition, because "it is impermissible to grant a stay while petitioner pursues his unexhausted claims in state court. See Lambert v. Blackwell, 134 F. 3d 506, 509 (3d Cir. 1998)." This court further ordered:

defendant's concession that petitioner may proceed in state court to present his new evidence precludes a later assertion that the federal statute of limitations was not tolled during petitioner's state court proceedings.

Id., at 1.

Recently, in Crews v. Horn, 360 F. 3d 146 (3d Cir. Mar. 4, 2004), the Court of Appeals changed the procedure in this Circuit. Considering a timely federal habeas petition containing both exhausted and unexhausted claims dismissed by the district court had dismissed, and finding there was a substantial danger Crews would be time-barred from returning to federal court (because his petition would be filed after the expiration of the limitations period and it was unclear whether tolling would apply), the court held:

district courts have the discretion to stay mixed habeas corpus petitions but that, as in this case, when an outright dismissal could jeopardize the timeliness of collateral attack, a stay is the only appropriate course of action.

Id., at 154.

In light of Crews, and Petitioner's reliance on the express

instructions of the court, Petitioner is entitled to relief from the final judgment.

**Conclusion**

For the foregoing reasons, Petitioner's Motion for Relief under Fed. R. Civ. P. 60(b) is granted. As this action was previously reviewed by Magistrate Judge Angell, the case will be referred to her for consideration of the merits of Petitioner's claims.

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Order

**AND NOW**, this 15<sup>th</sup> day of June, 2004, upon consideration of Petitioner's Motion for Relief under Fed. R. Civ. P. 60(b) and response thereto, it is hereby **ORDERED** that:

1. Petitioner's Motion for Relief under Fed. R. Civ. P. 60(b) (Paper #65) is **GRANTED**;

2. This action is referred to Magistrate Judge M. Faith Angell for a Report and Recommendation.

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Norma L. Shapiro, S.J.