No. 01- 9094

IN THE
SUPREME COURT OF THE UNITED STATES

ABU-ALI ABDUR'RAHMAN,
Petitioner,

v.

RICKY BELL, Warden,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

I.

Whether a post-judgment motion filed in the district court under Fed. R. Civ. P. 60(b), which sought to reopen constitutional claims that had been dismissed as procedurally defaulted, was a second or successive habeas corpus petition.

II.

Whether the court of appeals abused its discretion by declining to rehear or remand petitioner's appeal of the denial of his habeas corpus petition when the claims petitioner sought to have reheard or reconsidered were not the subject of that appeal.

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On February 11, 2002, the United States Court of Appeals for the Sixth Circuit issued an order denying, *inter alia*, petitioner's application for leave to file a second habeas corpus petition; the court also denied petitioner's motion to withhold the mandate in, and to rehear or remand, his appeal of the denial of his original habeas corpus petition. This order (Pet. App. B1-B2) is unpublished.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. §§ 1254(1). As more particularly discussed below, respondent submits that the Court, by virtue of 28 U.S.C. § 2244(b)(3)(E), lacks jurisdiction to review the first issue presented by petitioner.

STATEMENT OF THE CASE

In 1987, petitioner, then known as James Lee Jones, was convicted of first degree murder, assault with intent to commit first degree murder with bodily injury, and armed robbery. After the sentencing phase of petitioner's trial, the jury sentenced petitioner to death, finding three aggravating circumstances: 1) the defendant was previously convicted of one or more felonies whose statutory elements involved the use of violence to the person; 2) the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind; and 3) the murder was committed while the defendant was

engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, theft, or kidnapping.[1] The Tennessee Supreme Court affirmed the judgment, *State v. Jones*, 789 S.W.2d 545 (Tenn. 1990), and this Court denied certiorari. *Jones v. Tennessee*, 498 U.S. 908 (1990).

In 1991, petitioner sought post-conviction relief in state court, which was denied by the trial court. That judgment was affirmed by the Tennessee Court of Criminal Appeals, *Jones v. State*, No. 01C01-9402-CR-00079, 1995 WL 75427 (Tenn. Crim. App. Feb. 23, 1995), and the Tennessee Supreme Court denied review, and this Court denied certiorari. *Jones v. Tennessee*, 516 U.S. 1122 (1996).

Petitioner filed a petition for federal habeas corpus review in 1996, challenging both his convictions and the sentences. The district court granted the writ and vacated petitioner's death sentence on petitioner's claim of ineffective assistance of counsel at the sentencing phase; the district court denied relief on all other claims. *Abdur'Rahman v. Bell*, 999 F. Supp. 1073 (M.D. Tenn. 1998). The court of appeals reversed the judgment vacating petitioner's death sentence but affirmed the judgment in all other respects. *Abdur'Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000).

On October 9, 2001, this Court denied certiorari review of the Sixth Circuit's

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[1] The trial court sentenced petitioner to two consecutive life terms for the two remaining convictions.

judgment. *Abdur'Rahman v. Bell*, 122 S.Ct. 386 (2001). On October 10, 2001, petitioner filed in the Sixth Circuit a Motion to Withhold the Mandate and Grant Rehearing *En Banc* or Remand for Further Proceedings. On November 2, 2001, petitioner filed in the district court a Fed. R. Civ. P. 60(b) motion for relief from the court's 1998 habeas corpus judgment. On November 5, 2001, petitioner filed in this Court a petition for a rehearing of the denial of certiorari.

On November 27, 2001, the district court, concluding that petitioner's Rule 60(b) motion constituted a second or successive petition subject to 28 U.S.C. § 2244(b), transferred the matter to the Sixth Circuit pursuant to 28 U.S.C. § 1631. The district court also denied a certificate of appealability. On November 30, 2001, petitioner filed a notice of appeal from the district court's action on the Rule 60(b) motion. On December 3, 2001, this Court denied the petition for rehearing. *Abdur'Rahman v. Bell*, 122 S.Ct. 661.

On December 6, 2001, petitioner filed in the Sixth Circuit a motion requesting 1) a certificate of appealability from the district court's action on his Rule 60(b) motion; 2) *en banc* consideration of his appeal therefrom; and 3) consolidation with the previously filed motion to withhold the mandate and to rehear or remand. In the meantime, on January 15, 2002, the Tennessee Supreme Court set a date of April 10, 2002, for execution of petitioner's sentence.

On January 18, 2002, a panel of the Sixth Circuit denied the application for a

certificate of appealability. In that order, the court construed petitioner's Rule 60(b) motion as a second habeas corpus petition, subject to 28 U.S.C. § 2244(b). On February 11, 2002, the court denied all of petitioner's pending motions, including his application for leave to file a second habeas corpus petition and his motion for rehearing or remand of his original appeal.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO REVIEW THE FIRST QUESTION PRESENTED BY PETITIONER.

Petitioner seeks this Court's review, as an exercise of its certiorari jurisdiction, of the Sixth Circuit's February 11, 2002, denial of petitioner's application for leave to file a second or successive habeas corpus petition. This denial, however, "shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E); *see Felker v. Turpin*, 518 U.S. 651, 661, 665 (1996)(certiorari petition to review denial of successive habeas application dismissed for want of jurisdiction); *see also Stewart v. Martinez-Villareal*, 523 U.S. 637, 641-2 (1998)("If the Court of Appeals in this case had granted respondent leave to file a second or successive application, then we would be without jurisdiction to consider petitioners' petition and would have to dismiss the writ"). Therefore, this Court is without jurisdiction to review the first question presented by the petition.

Nevertheless, petitioner suggests that this Court can review the Sixth Circuit's

"predicate determination, embodied in a final order in this case as set forth in the February 11, 2002 Order" that his Rule 60(b) motion is a second or successive application.[2] But adopting petitioner's distinction here would eviscerate the restrictions set forth in 28 U.S.C. § 2244(b). Under petitioner's theory, a habeas petitioner could always seek certiorari review by merely characterizing his successive habeas application as a Rule 60(b) motion. As petitioner himself points out, a court should not be bound by the captions a litigant uses to style his pleadings, but should look to the relief that the litigant seeks. *See United States v. Woods*, 169 F.3d 1077, 1079 (7th Cir. 1999)(captions do not matter; the court must determine the substance of the motion). The determination of whether a pleading in a given habeas case constitutes a second or successive application is an implicit and necessary component of any decision by a court of appeals to grant or deny such an application; when, as here, the court determines that the pleading is a successive application and applies the provisions of § 2244(b) to it, that decision may not be the subject of a petition for a writ of certiorari.

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[2] Petition for Writ of Certiorari ("Petition"), p. 1 n. 1. Respondent notes, however, that petitioner further states that it does not matter whether petitioner's pleading was a Rule 60(b) motion or an entirely separate habeas application, insisting that he was entitled to seek relief in either event "because [the claims raised therein] had been raised before but never decided on their merits." *Id.*, p. 23 n. 11. Clearly, then, petitioner seeks this Court's certiorari review of the Sixth Circuit's denial of his effort to reassert claims from his original petition — review that is prohibited by the statute.

II. NO COMPELLING REASONS EXIST TO WARRANT CERTIORARI REVIEW OF THE SIXTH CIRCUIT'S DECISION CONSTRUING PETITIONER'S POST-JUDGMENT MOTION AS A SUCCESSIVE HABEAS CORPUS PETITION.

A. *The Decision Below Does Not Create a Categorical Rule Establishing That Every Rule 60(b) Motion in a Habeas Case Constitutes a Second or Successive Habeas Application.*

Even assuming, for the purpose of argument, that this Court has jurisdiction to review the Sixth Circuit's determination that petitioner's Rule 60(b) motion constitutes a successive habeas application, such review is unwarranted. In his bid for this Court's review, petitioner contends that the Sixth Circuit applied a "categorical rule that every Rule 60(b) Motion (sic) filed by a habeas petitioner constitutes a 'second or successive' habeas application."[3] In the unpublished order in question,[4] however, the Sixth Circuit concluded only that "[w]e consider that this [petitioner's Rule 60(b)motion] is the equivalent of a successive habeas corpus petition."[5] The court relied on *McQueen v. Scroggy*, 99 F.3d 1302 (6th Cir. 1996), in which the court stated,

> We agree with those circuits that have held that a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition and therefore is subject to a cause and prejudice analysis.

Id. at 1335 (citing *Blair v. Armontrout*, 976 F.2d 1130, 1134 (8th Cir. 1992); *Lindsey v.*

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[3] Petition, p. 12.

[4] Only published panel decisions are binding on subsequent panels, 6 Cir.R. 206(c), and the citation of unpublished decisions is disfavored. 6 Cir. R. 28(g).

[5] January 18, 2002, order denying application for certificate of appealability. This order is referred to in the February 11, 2002, order, which is the subject of this petition.

Thigpen, 875 F.2d 1509, 1511-12, 1515 (11th Cir. 1989); *Landano v. Rafferty*, 897 F.2d 661, 668 (3rd Cir. 1990); *Jones v. Murray*, 976 F.2d 169, 172 (4th Cir. 1992); *Clark v. Lewis*, 1 F.3d 814, 825-26 (9th Cir. 1993); *Williams v. Whitley*, 994 F.2d 226, 230 n. 2 1993); *Bonin v. Vasquez*, 999 F.2d 425, 426 (9th Cir. 1993)).

Nowhere in *McQueen*, or in the Sixth Circuit's order in this case, does the court state that *every* Rule 60(b) motion constitutes a second or successive habeas corpus petition, as petitioner alleges. Indeed, while the above-quoted language in *McQueen* may be interpreted in the abstract as a statement of such a rule, this statement itself refers to, and expresses the court's agreement with, decisions from circuits in which petitioner himself asserts that the rule is non-categorical. Moreover, petitioner's characterization of the Sixth Circuit's rule regarding post-judgment motions in habeas corpus actions as "categorical" ignores the court's historical treatment of such motions.

In *Workman v. Bell*, 227 F.3d 331 (6th Cir. 2000), *cert. denied*, 531 U.S. 1193 (2001), the Sixth Circuit, sitting *en banc*, addressed a capital habeas petitioner's post-judgment motion to reopen his original habeas corpus petition. In support of that motion, which was filed in the Sixth Circuit, the petitioner alleged the perpetration of a fraud upon the court. While the *en banc* court split evenly on the merits of the motion, the full court unanimously agreed to consider the motion in spite of the restrictions against second or successive habeas corpus petitions. Citing this Court's decision in *Calderon v. Thompson*, 523 U.S. 538, 557 (1998), the full court observed that, precisely

because the post-judgment motion alleged a fraud upon the court, the restrictions imposed by 28 U.S.C. § 2244(b) did not preclude it from acting on the motion. *Workman v. Bell*, 227 F.3d at 335, 341. *See Workman v. Bell*, 245 F.3d 849, 851 (6th Cir. 2001)("[i]n our equally divided opinion denying further relief for the petitioner in *Workman*, 227 F.3d 331, all of the judges agreed that the court can reconsider the petition if there was a fraud upon the court"). *See also Lewis v. Alexander*, 987 F.2d 392, 395 (6th Cir. 1993)(Rule 60(b) motion granted to permit timely appeal where notice of appeal filed late). Clearly, the Sixth Circuit does not treat every post-judgment motion in a habeas corpus action as a second or successive habeas corpus petition.

B. ***The Decision of the Sixth Circuit Does Not Conflict With Decisions of This Court.***

The Sixth Circuit's decision in this case, then, stands for the unremarkable proposition that a post-judgment motion seeking to relitigate claims that were dismissed as procedurally defaulted, and thus barred from federal habeas corpus review, constitutes a successive habeas petition. Despite petitioner's contention that this holding is "totally irreconcilable" with *Calderon v. Thompson*, 523 U.S. 538 (1998), *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), and *Slack v. McDaniel*, 529 U.S. 473 (2000), no such conflict exists.

In *Thompson*, this Court observed that a prisoner's motion to recall the mandate on the basis of the merits of the underlying decision can be regarded as a successive application for purposes of § 2244(b). "Otherwise, petitioner could evade the bar

against relitigation of claims presented in a prior application." *Id.*, 523 U.S. at 553. *See id.*, 523 U.S. at 569 (Souter, J., dissenting)("All would agree . . . that the *sua sponte* recall of mandates could not be condoned as a mechanism to frustrate the limitations on second and successive habeas petitions"). While petitioner correctly points out that the Court further observed that the underlying basis of the court's action will determine whether such cases are subject to § 2244(b), petitioner misplaces emphasis on the question of whether that court considers "new claims or evidence." This Court's emphasis in *Thompson* was instead focused on whether the court's action was based on matters raised by the successive application, rather than being restricted to matters contained in the original petition. As the *Thompson* Court observed, "had the court [of appeals] considered claims or evidence presented in [the petitioner's] later filings, its action would have been based on a successive application." *Id.*, 523 U.S. at 554. Here, petitioner asked the Sixth Circuit to reconsider his procedurally defaulted claims on the basis of a new state procedural rule — a rule that was promulgated some three years after the district court adjudged the claims defaulted and, therefore, not mentioned in the original habeas petition. Under *Thompson*, any action on petitioner's claims based upon consideration of the new procedural rule would therefore be based on a successive petition, subject to § 2244(b).

Neither is the Sixth Circuit's decision in this case inconsistent with this Court's decisions in *Martinez-Villareal* and *Slack*. In both cases, this Court held that where claims

contained in a first habeas corpus petition are not adjudicated, either because they are not ripe for such adjudication, as in *Martinez-Villareal*, or have not yet been exhausted in state court, as in *Slack*, the reopening or reassertion of such claims at a later time does not constitute a successive habeas petition. Petitioner likens his case to these scenarios, pointing out that, in his case too, several of his claims were not exhausted in state court. But petitioner's case is significantly different. In *Slack*, quoting from its decision in *Martinez-Villareal*, this Court observed,

> [None] of our cases . . . have ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, *and who then did exhaust those remedies and returned to federal court*, was by such action filing a successive petition.

Slack, 529 U.S. at 487 (quoting *Martinez-Villareal*, 523 U.S. at 644)(emphasis added). The crucial difference for petitioner is that he filed a habeas corpus petition that included unexhausted claims *that he was no longer able to exhaust*. As a result, petitioner *did receive* an adjudication of these claims — an adjudication that they were procedurally defaulted. Thus, his post-judgment motion is barred from habeas corpus review under § 2244(b).

Petitioner insists that the reassertion of old claims can *never* be construed as a successive petition unless the habeas petitioner received an adjudication on the merits. In support of this argument, petitioner relies on the language in *Thompson* wherein this Court stated that "a prisoner's motion to recall the mandate *on the basis of the merits of the underlying decision* can be regarded as a second or successive application." *Thompson*, 523

U.S. at 553 (emphasis added). But that language cannot be read to imply a requirement that the underlying denial of a habeas claim must have been based on an assessment of the substantive merits of that claim. Simply put, "the merits of a decision" is a different concept than "a decision on the merits."

Furthermore, such a requirement would run afoul of the clear and unambiguous terms of the statute. Under 28 U.S.C. § 2244(b)(1), a claim presented in a second or successive habeas application "that was presented in a prior application" shall be dismissed. There is no requirement that such claims have been previously determined or even, for that matter, previously adjudicated. *See Martinez-Villareal*, 523 U.S. at 650, 646 (Scalia, J., dissenting; Thomas, J., dissenting). Indeed, to subject claims that are barred from a federal court's review due to a petitioner's procedural default, to future relitigation of the merits of that default judgment would frustrate the very purpose of the AEDPA's enactments. In addition, imposing a requirement that the original denial of habeas relief have been on the merits of a claim would ignore the practical reality that a great many claims presented in an original habeas petition are disposed of on the basis of procedural default. Finality interests likewise attach to these judgments, just as they do to those made on the merits. Instead, *Thompson*'s language is properly read to apply to a petitioner's effort to reassert claims that have been previously and finally decided by a federal court and to relitigate the merits of that decision.

C. *Despite Petitioner's Assertion of a Conflict Between the Sixth Circuit's Decision and a Decision of the Second Circuit, Certiorari Review of the Sixth Circuit's Decision Is Unwarranted.*

Seizing upon the 2001 decision of the Second Circuit Court of Appeals in *Rodriguez v. Mitchell*, 252 F.3d 191 (2nd Cir. 2001), petitioner seeks this Court's review of the Sixth Circuit's judgment on the basis of the conflict he asserts it creates. First, despite the language employed by the Second Circuit in *Rodriguez*, no true conflict exists between the actual holding in that case and the Sixth Circuit's decision in this case. To be sure, the Second Circuit in *Rodriguez* purported to "rule that a motion under Rule 60(b) to vacate a judgment denying habeas is not a second or successive habeas petition." *Id.*, 252 F.3d at 198. But this statement, and others like it in the court's decision, are dicta. The precise holding of the case is that a Rule 60(b) motion alleging that fraudulent misrepresentations and non-disclosures had been made to the district court during the pendency of the habeas proceedings will not be considered a successive habeas petition subject to § 2244(b). *Id.*, 252 F.3d at 196, 197, 199. As discussed above, such a holding is not at all inconsistent with the Sixth Circuit's treatment of such post-judgment motions; nor is it inconsistent with the Sixth Circuit's decision in this case.

Second, assuming that the dicta in *Rodriguez* epitomizes the stance of the Second Circuit regarding how it would treat all post-judgment motions in habeas cases, that circuit stands alone on this issue. Indeed, the Second Circuit itself recognized in

Rodriguez that it was deviating from "the majority of the circuit courts that have considered the issue," *id.*, 252 F.3d at 199-200; in fact, it appears that the Second Circuit has deviated from the position taken by *every* other circuit court in the land, save the only one that has not considered the question.[6] Furthermore, it is the Second Circuit's statement in *Rodriguez* — that a post-judgment motion under Rule 60(b) can never be construed as a successive habeas petition — and not the decision of the Sixth Circuit in this case, that conflicts with this Court's decision in *Thompson*. Respondent submits that, while any conflict between this statement of the Second Circuit and the rule in other circuits, including the Sixth Circuit, might warrant certiorari review of an appropriate Second Circuit decision in the future, it does not justify an exercise of this Court's discretionary review in this case.

The notion that constitutional claims that are procedurally defaulted and thus barred from federal review may one day become "un-barred" demonstrates the absurdity of the argument that petitioner ultimately seeks to advance — that a state can retroactively alter the historical *fact* that discretionary review by that state's highest court was available at the time of a petitioner's appeal.[7] Furthermore, while petitioner

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[6] In *McQueen*, 99 F.3d at 1335, the Sixth Circuit relies on like cases from the Third, Fourth, Fifth, Eighth, Ninth and Eleventh Circuits. *See also Burris v. Parke*, 130 F.3d 782, 783 (7th Cir. 1997); *Lopez v. Douglas*, 141 F.3d 974, 975 (10th Cir. 1998). Respondent has been unable to locate any decision of the First Circuit addressing this issue.

[7] *See* Respondent's Brief in Opposition to petitioner's Petition for An Original Writ of Habeas Corpus. *See also Wenger v. Frank*, 266 F.3d 218 (3rd Cir. 2001), *cert.*

contends that the constitutional claims that he seeks to reassert by way of his Rule 60(b) motion are "indisputably substantial,"[8] these are the same claims that petitioner failed to include in his application for discretionary review to the Tennessee Supreme Court during state court proceedings; they are also the same claims for which petitioner declined to seek an appeal of the district court's ruling that they were procedurally defaulted. But now that all other avenues of relief have been exhausted, and petitioner faces a date for execution of his sentence, he seeks to resurrect these claims and place new emphasis upon them. These cannot be the "compelling reasons" for which this Court reserves grants of certiorari review.[9] *See* U.S. Sup. Ct. R. 10.

III. THE SIXTH CIRCUIT DID NOT ABUSE ITS DISCRETION BY DECLINING TO REHEAR OR REMAND TO THE DISTRICT COURT.

Petitioner asks this Court to review the Sixth Circuit's decision to decline to remand his appeal of the denial of his original habeas application. He contends that the Sixth Circuit abused its discretion because it deprived him of the ability to assert his post-judgment challenge to the district court's ruling that his claims were procedurally defaulted. Petitioner's request for certiorari review of this decision is answered simply by the fact that the issue of petitioner's procedural default of these claims was never

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denied, No. 01-7852 (Mar. 25, 2002).

[8] Petition, p. 28.

[9] Petitioner's argument that the Sixth Circuit's decision "raises a grave question under the Constitution's Suspension Clause" is vitiated by petitioner's contemporaneous filing of a petition seeking an original writ of habeas corpus from this Court on the basis of these same claims. *See Felker v. Turpin*, 518 U.S. 651, 663-4 (1996).

before the Sixth Circuit because petitioner declined to appeal that ruling of the district court.[10] As the Sixth Circuit observed, "the decision of this court on appeal from the judgment of the district court did not rest upon any procedural default."[11] Respondent submits that it cannot have been an abuse of discretion for the Sixth Circuit to decline to remand for further consideration matters that were never placed before it in the first instance.

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[10] *See* petitioner's October 9, 2001, Motion to Withhold the Mandate and Grant Rehearing *En Banc* or Remand for Further Proceedings, p. 24.

[11] February 11, 2002, order denying application for leave to file successive habeas application and denying motion for rehearing.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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