APPENDIX

APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit

April 5, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JASON BROOKS,

Petitioner - Appellant,

v.

LOU ARCHULETA, Warden; CYNTHIA COFFMAN, The Attorney General of the State of Colorado,

Respondents - Appellees.

No. 17-1460
(D.C. No. 1:16-CV-00895-LTB)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY

Before **BACHARACH**, **MURPHY**, and **MORITZ**, Circuit Judges.

Proceeding *pro se*, Jason Brooks seeks a certificate of appealability ("COA") from this court so he can appeal the district court's denial of the motion he filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. *See Spitznas v. Boone*, 464 F.3d 1213, 1218 (10th Cir. 2006) (holding a petitioner must obtain a COA before he can appeal from the denial of a "true" Rule 60(b) motion). Brooks also seeks authorization to proceed *in forma pauperis* on appeal.

The matter currently before this court began on April 20, 2016, when Brooks filed an application for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in federal district court. The district court dismissed the habeas petition

on July 26, 2016, concluding the claim raised by Brooks was unexhausted and procedurally barred.[1] In March 2017, Brooks's request for a COA was denied by

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[1]Specifically, Brooks filed a Colorado Rule 35(c) post-conviction motion on August 10, 2015, raising the issue he raised in this federal habeas petition. The Colorado trial court denied the Rule 35(c) motion, concluding it was untimely and the claim was procedurally barred. Brooks did not appeal the denial of the motion. The federal district court concluded Brooks's failure to appeal resulted in his failure to exhaust an available state remedy. The district court found exhaustion is futile because the time to file an appeal has expired.

Brooks's repeated attempts to obtain relief pursuant to Rule 60(b)(6) appear to be based on his misreading—whether willful or otherwise—of the holding in *Anderson v. Sirmons*, 476 F.3d 1131 (10th Cir. 2007). In that matter, exhaustion of a federal habeas petitioner's ineffective assistance claim was futile because he was procedurally barred from bringing it in Oklahoma state court. *Id.* at 1136-37. The federal district court went on to analyze whether the unexhausted claim was procedurally barred in federal court. *Id.* at 1137 (citing *James v. Gibson*, 211 F.3d 543, 550 (10th Cir. 2000) for the proposition that "[e]ven if a failure to exhaust is excused, . . . claims may otherwise be procedurally barred"). After determining the state of Oklahoma had not shown the state procedural bar was evenhandedly applied, the federal district court ruled the claim was not procedurally barred and addressed it on the merits. *Id.* at 1137. *Anderson* most certainly does *not* stand for the proposition espoused by Brooks—i.e., that the federal courts must consider the merits of an unexhausted claim if exhaustion is futile because of a state procedural bar. Such a claim is procedurally barred in federal court unless the state procedural bar is not adequate and independent. *Coleman v. Thompson*, 501 U.S. 722, 731-32, 750 (1991). If the state procedural bar is determined to be adequate and independent, "federal habeas review of the claims is barred unless the [petitioner] can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Id.* at 750. In its order dismissing Brooks's § 2254 petition, the district court fully examined all of these issues before concluding Brooks's claim is procedurally barred. Although the reasoning behind the district court's dismissal of Brooks's § 2254 habeas petition has been clearly explained to him multiple times, both by the district court and this court, he continues to seek relief pursuant to Rule 60(b)(6). The district court may, in its discretion, consider the propriety of imposing filing restrictions on Brooks.

this court and his appeal was dismissed. *Brooks v. Archuleta*, 681 F. App'x 705, 707 (10th Cir. 2017). Brooks returned to district court and filed a motion seeking relief from that court's July 2016 judgment pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. The motion was denied by the district court and this court denied Brooks's request for a COA. *Brooks v. Archuleta*, 702 F. App'x 790, 793 (10th Cir. 2017).

Brooks filed a second Rule 60(b)(6) motion in district court on December 11, 2017. In this motion, he argued the federal claim raised in his § 2254 petition is exhausted because the substance of the claim was presented to the Colorado Court of Appeals in state post-conviction proceedings he initiated on March 7, 2016.[2] The district court disagreed, concluding the state post-conviction proceedings referenced by Brooks were not completed until nearly a year after Brooks's § 2254 petition was dismissed. Further, the court noted, Brooks previously asserted in this matter that the state post-conviction proceeding involved only state law issues that "will never have anything to do with" the claims raised in his § 2254 petition. *See Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) (per curiam) (holding a claim raised in a state-court proceeding must be presented to that court as a federal constitutional claim or it is not exhausted for

[2]On March 7, 2016, Brooks filed a state post-conviction motion which was denied by the state trial court on April 4, 2016. At the time Brooks filed his § 2254 petition on April 20, 2016, his appeal to the Colorado Court of Appeals from the state trial court ruling was still pending. The Colorado Court of Appeals denied relief in June 2017.

federal habeas corpus purposes). Accordingly, the district court denied Brooks's Rule 60(b)(6) motion.

This court cannot grant Brooks a COA unless he can "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (quotation omitted). Brooks is not required to demonstrate that his appeal will succeed to be entitled to a COA. He must, however, "prove something more than the absence of frivolity or the existence of mere good faith." *Id.* (quotations omitted). A movant seeking relief under Rule 60(b)(6) must "show extraordinary circumstances justifying the reopening of a final judgment." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (quotation omitted). "Such circumstances will rarely occur in the habeas context." *Id.*

This court has reviewed Brooks's application for a COA and appellate brief, the district court's order, and the entire record on appeal pursuant to the framework set out by the Supreme Court and concludes Brooks is not entitled to a COA. Reasonable jurists could not debate the district court's conclusion that Brooks has failed to establish the existence of extraordinary circumstances justifying Rule 60(b)(6) relief from the July 2016 ruling that the claim raised in his § 2254 petition is procedurally barred. Because Brooks has not "made a substantial showing of the denial of a constitutional right," he is not entitled to a COA. 28 U.S.C. § 2253(c)(2).

This court **denies** Brooks's request for a COA and **dismisses** this appeal. Brooks's request to proceed in forma pauperis in this matter is **denied** and we remind him of his responsibility to immediately pay the unpaid balance of the appellate filing fee.

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-00895-LTB

JASON BROOKS,

Applicant,

v.

LOU ARCHULETA, Warden, and
CYNTHIA COFFMAN, Attorney General of the State of Colorado,

Respondents.

ORDER DENYING MOTION FOR RELIEF FROM FINAL JUDGMENT

This matter is before the Court on "Plaintiff's Second Request for Relief From Judgment Pursuant to Fed. R. Civ. P. 60(b)(6)" (ECF No. 35) filed *pro se* by Applicant, Jason Brooks. Mr. Brooks seeks relief from the Order of Dismissal (ECF No. 15) and the Judgment (ECF No. 16) entered in this action on July 26, 2016.

Mr. Brooks is a prisoner in the custody of the Colorado Department of Corrections. He initiated this action by filing an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging the validity of his conviction in Weld County District Court case number 09CR959. The Court determined that Mr. Brooks' claim in the application is unexhausted and procedurally barred because he failed to appeal to the Colorado Court of Appeals from the trial court's January 2016 order denying his postconviction Rule 35(c) motion. The Court also determined that Mr. Brooks failed to demonstrate cause and prejudice for his procedural default or that a failure to consider his claim will result in a fundamental miscarriage of justice. The United States Court of Appeals for the Tenth

Circuit subsequently denied Mr. Brooks' request for a certificate of appealability and dismissed his appeal from the Court's order dismissing this action. *See Brooks v. Archuleta*, 681 F. App'x 705 (10th Cir. 2017).

In April 2017 Mr. Brooks filed his first motion seeking relief pursuant to Rule 60(b)(6). (*See* ECF No. 25.) He argued that the Court erred in concluding his claim is procedurally barred based on a single sentence in the Court's dismissal order that he misquoted and mischaracterized. He also argued that the Tenth Circuit erroneously denied his application for a certificate of appealability based on the merits of the wrong case. On April 25, 2017, the Court denied the motion. (*See* ECF No. 26.) The Tenth Circuit subsequently denied Mr. Brooks' request for a certificate of appealability and dismissed his appeal from the Court's order denying the motion. *See Brooks v. Archuleta*, No. 17-1177, 2017 WL 3575224 (10th Cir. Aug. 18, 2017).

Mr. Brooks concedes in the instant motion that he did not immediately appeal from the trial court's January 2016 order denying his postconviction Rule 35(c) motion. However, he also contends that his failure to appeal does not matter, and that his claim in this action now is exhausted, because the substance of the claim he raised in the Rule 35(c) motion subsequently was presented to the Colorado Court of Appeals on appeal from the denial of a postconviction Rule 35(a) motion and the Colorado Court of Appeals denied relief in June 2017

The Court must construe the instant motion for relief from judgment liberally because Mr. Brooks is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). For the

reasons discussed below, the motion will be denied.

The Court first must determine whether the motion is a second or successive habeas corpus application or a true Rule 60(b) motion. *See Spitznas v. Boone*, 464 F.3d 1213, 1215 (10th Cir. 2006). Distinguishing between a true Rule 60(b) motion and a second or successive habeas application turns on the "relief sought, not [the] pleading's title." *United States v. Nelson*, 465 F.3d 1145, 1149 (10th Cir. 2006). A Rule 60(b) motion "is a second or successive petition if it in substance or effect asserts or reasserts a federal basis for relief from the petitioner's underlying conviction." *Spitznas*, 464 F.3d at 1215. A Rule 60(b) motion is a true 60(b) motion if it either "challenges only a procedural ruling of the habeas court which precluded a merits determination of the habeas application" or "challenges a defect in the integrity of the federal habeas proceeding, provided that such a challenge does not itself lead inextricably to a merits-based attack on the disposition of a prior habeas petition." *Id.* at 1215-16.

The instant motion for relief from judgment is a true Rule 60(b) motion because Mr. Brooks is challenging a procedural ruling that precluded a merits determination. Therefore, the Court has jurisdiction to consider the argument he raises in the motion. However, relief under Rule 60(b) is appropriate only in extraordinary circumstances. *See Massengale v. Oklahoma Bd. of Examiners in Optometry*, 30 F.3d 1325, 1330 (10th Cir. 1994). Furthermore, the sort of extraordinary circumstances sufficient to justify relief under Rule 60(b) "will rarely occur in the habeas context." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005).

Upon consideration of the instant motion for relief from judgment and the entire file,

the Court finds that Mr. Brooks fails to demonstrate any extraordinary circumstances that justify relief in this action. As noted above, the Court dismissed this action because Mr. Brooks failed to appeal from the trial court's January 2016 order denying his postconviction Rule 35(c) motion and he also failed to demonstrate cause and prejudice or a fundamental miscarriage of justice to overcome that procedural default. Mr. Brooks' new argument that he exhausted state remedies nearly a year later in proceedings relevant to a separate postconviction Rule 35(a) motion does not alter the Court's conclusion. This is particularly true given that Mr. Brooks previously asserted in this action that the Rule 35(a) motion raised a state law issue that "will never have anything to do with" his federal claim in this action. (ECF No. 14 at 5.) Therefore, the motion for relief from judgment will be denied. Accordingly, it is

ORDERED that "Plaintiff's Second Request for Relief From Judgment Pursuant to Fed. R. Civ. P. 60(b)(6)" (ECF No. 35) is DENIED.

DATED at Denver, Colorado, this 14th day of December, 2017.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court

APPENDIX E

FILED
United States Court of Appeals
Tenth Circuit

May 1, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JASON BROOKS,

Petitioner - Appellant,

v.

LOU ARCHULETA, Warden, et al.,

Respondents - Appellees.

No. 17-1460

ORDER

Before **BACHARACH**, **MURPHY**, and **MORITZ**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

Additional material from this filing is available in the Clerk's Office.