INDEX OF APPENDICES

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50388

OSCAR L. SHAW,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION; FRED FIGUEROA, Warden,

Respondents-Appellees

Appeal from the United States District Court
for the Western District of Texas

O R D E R:

Oscar L. Shaw, Texas prisoner # 646048, seeks a certificate of appealability (COA) to appeal the denial of his Federal Rule of Civil Procedure 60(b) motion, which challenged the dismissal of his 1997 federal habeas application. He argues that his motion was properly brought under Rule 60(b)(4) to challenge a void judgment and under Rule 60(b)(6) because he has shown extraordinary circumstances in his criminal case.

To obtain a COA, a applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's

Appendix-A

resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El,* 537 U.S. at 327. Because he seeks a COA to appeal the denial of his Rule 60 motion, Shaw must show that reasonable jurists could conclude that the district court's denial of the Rule 60 motion was an abuse of discretion. *See Hernandez v. Thaler,* 630 F.3d 420, 428 (5th Cir. 2011).

Shaw has not met this standard. Accordingly, his motion for a COA is DENIED.

ANDREW S. OLDHAM
UNITED STATES CIRCUIT JUDGE

A True Copy
Certified order issued Jan 04, 2019

Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

OSCAR L. SHAW	§	
	§	
vs.	§	NO: MO:97-CV-00176-DC
	§	
LORIE DAVIS	§	

ORDER DENYING RULE 60(b) MOTION AND DENYING A CERTIFICATE OF APPEALABILITY

Before the Court is Petitioner Oscar L. Shaw's ("Petitioner") "Motion with Brief in Support thereof pursuant to Rule 60(b)(1)(2)(3)(4) and (6), of the Fed. R. Civ. Proc., requesting to reopen said cause due to 'fraud' and 'misrepresentation' due to misconduct by prosecutor's [sic], Judge, and attorney which has caused the Judgment to be void due to trial court lack of jurisdiction," ("Rule 60(b) Motion"), filed on March 28, 2018. [docket number 28].

I. Background and procedural history

On December 2, 1997, Petitioner submitted his initial application for writ of habeas corpus pursuant to 28 U.S.C. §2254 ("§2254"), from his 1993 conviction for Aggravated Robbery by a Habitual Offender, for which he received a ninety-nine year sentence. [docket numbers 8 & 28 at 24]. On May 26, 1998, this Court dismissed his §2254 for failure to exhaust state court remedies. [docket number 21]. Petitioner filed a Notice of Appeal on June 25, 1998. [docket number 23]. On October 30, 1998, the Fifth Circuit Court of Appeals dismissed his appeal. [docket number 27]. Petitioner did not file another thing in this Court until he filed his Rule 60(b) Motion on March 28, 2018. [docket number 28].

II. Petitioner's Rule 60(b) Motion is untimely

Rule 60(b) of the Federal Rules of Civil Procedure provides that upon motion, a court may relieve a party from a final judgment or order for the following reasons: (1) mistake,

Appendix-B

inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered earlier; (3) fraud, misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or it is based on an earlier judgment that has been reversed or vacated, or that applying the judgment prospectively is no longer equitable; or (6) any other reason that justifies relief. Fed. R. Civ. Proc. 60(b)(1)–(6).

A Rule 60(b) motion must be made within a reasonable time, and no longer than one year after judgment was entered under subsections (1), (2), and (3). *See* Fed. R. Civ. P. 60(c)(1). As Petitioner's Rule 60(b) Motion was filed almost twenty years after Judgment was entered, it is not timely and his Motion under Rule 60(b)(1), (2), and (3) is denied.

Rule 60(c)(1) also requires that any motion brought under Rule 60(b) "be made within a reasonable time...." *See Tamayo v. Stephens*, 740 F.3d 986, 991 (5th Cir. 2014) (holding that waiting eight months after relevant change in law to bring a 60(b) motion was not within a reasonable time). The present motion was filed almost twenty years after this Court denied the Petitioner's §2254 and, by his own Exhibit 2, at least sixteen months after he discovered the evidence in question concerning the two indictments. [docket number 28 at 32].

To the extent that the Petitioner is relying on his Exhibits as a vehicle for obtaining relief, he waited more than sixteen months after discovery of the original indictment issue in this case before filing the present motion. He has not brought his motion "within a reasonable time," and has not shown good cause for the delay. *See, e.g., In re Osborne*, 379 F.3d 277, 283 (5th Cir. 2004) ("Motions under Rule 60(b) must be made 'within a reasonable time,' unless good cause can be shown for the delay."). Therefore, the Petitioner's Rule 60(b) Motion is wholly untimely and is denied.

a. Rule 60(b)(4)

Petitioner also relies on Rule 60(b)(4), contending that the Court's judgment dismissing his habeas petition was void based on the idea that he was indicted twice (but convicted only once) and was unaware of the first indictment. [*See generally*, docket number 28]. Under Rule 60(b)(4), "[a] judgment is not void merely because it's erroneous." *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 143 (5th Cir. 1996).

The Fifth Circuit has held that a court may "consider the sufficiency of the indictment as a basis for habeas relief if the mistake in the indictment is so fatally defective that it deprives the convicting court of jurisdiction." *Riley v. Cockrell*, 339 F.3d 308, 313–14 (5th Cir. 2003) (citation omitted). However, a district court is "required to accord due deference to the state courts' interpretations of its own law that a defect of substance in an indictment does not deprive a state trial court of jurisdiction." *McKay v. Collins*, 12 F.3d 66, 69 (5th Cir. 1994) (citation omitted). The state court's implicit finding that the indictment was "not fundamentally defective should end the inquiry." *Id.* at 70.

Petitioner has filed three state writs of habeas corpus challenging what he believes to be a problem with the indictments in his case. "'By refusing to grant [Petitioner] relief, ... the Texas Court of Criminal Appeals has necessarily, though not expressly, held that the Texas courts have jurisdiction and that the indictment is sufficient for that purpose.'" *Nelson v. Scott*, 66 F.3d 323, 1995 WL 534996, at *2 (5th Cir. Aug. 17, 1995) (unpublished) (quoting *Alexander v. McCotter*, 775 F.2d 595, 598 (5th Cir. 1985)). This Court must defer to the Texas Court of Criminal Appeals' findings in this matter.

Additionally, "to the extent that [Petitioner] 'is challenging his criminal judgment of conviction,'" Rule 60(b)(4) "'is inapplicable and cannot provide him any relief on the claims he

alleges.'" *United States v. Garcia*, No. 3:95-cr-264-M (01), 2017 WL 876334, at *1 (N.D. Tex. Feb. 6, 2017) (quoting *Mayes v. Quaterman*, Civ. A. No. H-06-2680, 2007 WL 1465994, at *1 n.1 (S.D. Tex. May 16, 2007)), *rec. accepted*, 2017 WL 880869 (N.D. Tex. Mar. 3, 2017); *see United States v. Beaird*, Crim. No. H-02-633-01, 2007 WL 708576, at *1 (S.D. Tex. Mar. 5, 2007) ("Beaird cannot show that he is entitled to relief from his criminal judgment under any portion of Rule 60(b) because his motion concerns a criminal judgment. The Federal Rules of Civil Procedure govern the procedure in the United States district courts in suits of a civil nature. *See* Fed. R. Civ. P. 1, 81; *United States v. O'Keefe*, 169 F.3d 281, 289 (5th Cir. 1999). 'Federal Rule of Civil Procedure 60(b), therefore, simply does not provide for relief from a judgment in a criminal case.' *O'Keefe*, 169 F.3d at 289.").[1] Therefore, Petitioner's Rule 60(b)(4) Motion is denied.

b. Rule 60(b)(6)

Relief under Rule 60(b)(6)'s "catchall" provision is available "only if extraordinary circumstances are present." *Hess v. Cockrell*, 281 F.3d 212, 216 (5th Cir. 2002). The movant bears the burden of establishing at least one of Rule 60(b)'s bases for relief, and a determination of whether that burden has been met rests within the discretion of the Court. *See Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 173 (5th Cir. 1990) (*abrogated on other grounds by Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 n. 14 (5th Cir. 1994)). This clause is "'a residual clause used to cover unforeseen contingencies; that is, it is a means for accomplishing justice in exceptional circumstances.'" *Steverson v. Global SantaFe Corp.*, 508

[1] *See also United States v. Masserano*, Crim. A. No. H-92-0225 & Civ. A. No. H-06-2980, 2007 WL 470649, at *3 (S.D. Tex. Feb. 12, 2007) ("[B]ecause Masserano is challenging his criminal judgment of conviction, not his prior §2255 proceeding, Rule 60(b)(4) is inapplicable and cannot provide him any relief on the claims he alleges herein."); *United States v. Aird*, Crim. No. 98-0057-WS, 2008 WL 2157146, at *2 (S.D. Ala. May 14, 2008) ("With respect to Aird's motion seeking vacatur of the judgment under Rule 60(b)(4) of the Federal Rules of Civil Procedure, a wall of precedent unequivocally forbids him from utilizing Rule 60(b) in this manner." (collecting cases, including *United States v. Fair*, 326 F.3d 1317, 1318 (11th Cir. 2003) ("Rule 60(b)(4) is a civil motion that is not available to an individual challenging his sentence" in criminal proceedings.))).

F.3d 300, 303 (5th Cir. 2007) (quoting *Stipelcovich v. Sand Dollar Marine, Inc.*, 805 F.2d 599, 604–05 (5th Cir. 1986)). Motions under this clause "will be granted only if extraordinary circumstances are present." *Hess*, 281 F.3d at 216.

In *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396 (5th Cir. 1981), the Fifth Circuit set forth the following factors to consider when evaluating such a motion: (1) that final judgments should not lightly be disturbed; (2) that a Rule 60(b) motion should not be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether, if the case was not decided on its merits due to a default or dismissal, the interest in deciding the case on its merits outweighs the interest in the finality of the judgment and there is merit in the claim or defense; (5) whether, if the judgment was rendered on the merits, the movant had a fair opportunity to present his claims; (6) whether there are intervening equities that would make it inequitable to grant relief; and (7) any other factors relevant to the justice of the judgment under attack. *Id.* at 402.

Rule 60(b)(6) provides for relief from a judgment for "any ... reason that justifies relief." This Court can consider the motion if it "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). A "movant seeking relief under Rule 60(b)(6) [must] show 'extraordinary circumstances' justifying the reopening of a final judgment." *Id.* at 535 (citations omitted). "Such circumstances will rarely occur in the habeas context." *Id.*, *see also Trottie v. Stephens*, 581 F. App'x 436, 438 (5th Cir. 2014) (per curiam) (same).

Petitioner had a fair opportunity to present all of his claims challenging his conviction, including the new challenges he now raises, in his three subsequent 11.07 state court habeas

cases. [*See* docket number 28 at 11–12; WR-18,042-06; WR-18,042-07; and WR-18,042-08]. He has shown no extraordinary circumstances that demonstrate a reason to disturb the final judgment in his federal habeas case. Therefore, his Motion under Rule 60(b)(6) is also denied.

III. In the alternative, Petitioner's Rule 60(b) Motion is really a successive §2254 petition

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). They "must presume that a suit lies outside this limited jurisdiction, and the burden of establishing federal jurisdiction rests on the party seeking the federal forum." *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001). They have "a continuing obligation to examine the basis for jurisdiction." *See MCG, Inc. v. Great W. Energy Corp.*, 896 F.2d 170, 173 (5th Cir. 1990).

In *Gonzalez v. Crosby*, 545 U.S. 524, 530–33 (2005), the Supreme Court held that a motion for relief from judgment that seeks to advance one or more substantive claims, or attacks a federal court's previous resolution of a claim on its merits, qualifies as a second or successive habeas petition. *See also Ruiz v. Quarterman*, 504 F.3d 523, 526 (5th Cir. 2007); *see also Chase v. Epps*, 74 F. App'x 339, 345 (5th Cir. 2003) (per curiam) ("A Rule 60(b) motion that purports to challenge the denial of a 28 U.S.C. §2254 petition but actually attacks the underlying criminal conviction may be construed as a successive ... application") (citations omitted).

Because Petitioner's Motion does not challenge the failure to reach the merits of his original habeas petition, and asserts new grounds for relief from the underlying state court conviction he originally challenged in this case, it is properly construed as a successive petition for relief under 28 U.S.C. §2254.

A district court cannot exercise jurisdiction over a second or successive §2254 petition without authorization from the court of appeals. *See* 28 U.S.C. §2244(b); *Crone v. Cockrell*, 324 F.3d 833, 836 (5th Cir. 2003). A petition is successive if it raises a claim that was or could have been raised in an earlier petition or otherwise constitutes an abuse of the writ. *Hardemon v. Quarterman*, 516 F.3d 272, 275 (5th Cir. 2008); *Crone*, 324 F.3d at 836–37. If it essentially represents a second attack on the same conviction raised in the earlier petition, a petition is successive. *Hardemon*, 516 F.3d at 275–76 (distinguishing *Crone* because "*Crone* involved multiple §2254 petitions attacking a single judgment").

Under *Hardemon* and *Crone*, Petitioner was required to present all available claims in his original petition. A claim is available when it "could have been raised had the petitioner exercised due diligence." *Leonard v. Dretke*, No. 3:02–CV–0578–H, 2004 WL 741286, at *3 (N.D.Tex. Apr. 5, 2004) (recommendation of Mag. J.), *adopted by* 2004 WL 884578 (N.D.Tex. Apr. 20, 2004). The crucial question in determining availability is whether Petitioner knew or should have known through the exercise of due diligence the facts necessary to his current claims when he filed his prior federal petition challenging his conviction. *See also Gonzalez*, 545 U.S. at 532 n.5 ("[A]n attack based on the movant's own conduct, or his habeas counsel's omissions, ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably." (citation omitted)).

Petitioner's motion is a successive petition within the meaning of 28 U.S.C. §2244(b) because it raises claims that could have been raised in his initial federal petition. When a petition is second or successive, the petitioner must seek an order from the Fifth Circuit Court of Appeals that authorizes this Court to consider the petition. *See* 28 U.S.C. §2244(b)(3)(A). The Fifth Circuit "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 [§2244(b)]." *Id.* §2244(b)(3)(C). To present a claim in a second or successive application that was not presented in a prior application, the application must show that it is based on: (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found him guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. *Id.* §2244(b)(2). Before Petitioner files his application in this Court, a three-judge panel of the Fifth Circuit Court of Appeals must determine whether the application makes the requisite *prima facie* showing. *See id.* §2244(b)(3)(A) and (B).

Because this Court cannot decide Petitioner's habeas case on its merits, he is not entitled to relief from judgment pursuant to Rule 60(b)(6). Nor does Petitioner's attempt to re-characterize his federal habeas petition as a Rule 60(b) motion attacking a void state enhancement afford him relief. The Supreme Court has held that a Rule 60(b) motion that seeks to present a new claim that was not presented in an earlier habeas petition, or that seeks to present "newly discovered evidence" in support of a previous claim, or that argues that a subsequent change in law is a reason to grant relief is, in substance, a successive habeas petition and should be treated accordingly. *Gonzalez v. Crosby*, 545 U.S. 524, 530–32 (2005).

Petitioner's Rule 60(b) Motion is attempting to raise new claims challenging his state conviction that were not raised in his earlier federal habeas petition. Accordingly, Petitioner's Rule 60(b) Motion, whether labeled a §2254 petition or a Rule 60(b) motion, would be properly construed as a successive §2254 habeas petition that requires pre-certification by the Fifth Circuit. *Id.* at 531–32. And because the Fifth Circuit has not issued an order authorizing the

district court to consider a successive petition for habeas relief, this Court lacks jurisdiction and his Rule 60(b) Motion is denied without prejudice.

IV. Certificate of Appealability

Under the AEDPA, before Petitioner may appeal the denial of a habeas corpus petition filed under §2254, Petitioner must obtain a certificate of appealability ("COA"). *Miller–El v. Cockrell*, 537 U.S. 322, 335–36 (2003); 28 U.S.C. §2253(c)(2). Likewise, under the AEDPA, appellate review of a habeas petition is limited to the issues on which a COA is granted. *See Crutcher v. Cockrell*, 301 F.3d 656, 658 n.10 (5th Cir. 2002) (holding a COA is granted on an issue-by-issue basis, thereby limiting appellate review to those issues); *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997) (holding the scope of appellate review of denial of a habeas petition limited to the issues on which COA has been granted). In other words, a COA is granted or denied on an issue-by-issue basis, thereby limiting appellate review to those issues on which COA is granted alone. *Crutcher v. Cockrell*, 301 F.3d at 658 n.10; *Lackey v. Johnson*, 116 F.3d at 151; 28 U.S.C. §2253(c)(3).

A COA will not be granted unless the petitioner makes a substantial showing of the denial of a constitutional right. *Tennard v. Dretke*, 542 U.S. 274, 282 (2004); *Miller–El v. Cockrell*, 537 U.S. at 336; *Slack v. McDaniel*, 529 U.S. 473, 483 (2000); *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

To make such a showing, the petitioner need not show he will prevail on the merits but, rather, must demonstrate that reasonable jurists could debate whether (or, for that matter, agree) the petition should have been resolved in a different manner or that the issues presented are adequate to deserve encouragement to proceed further. *Tennard v. Dretke*, 542 U.S. at 282;

Miller–El v. Cockrell, 537 U.S. at 336; *Slack v. McDaniel*, 529 U.S. at 484; *Barefoot v. Estelle*, 463 U.S. at 893 n.4.

This Court is required to issue or deny a COA when it enters a final Order such as this one adverse to a federal habeas petitioner. Rule 11(a), Rules Governing §2254 Cases in the United States District Courts. This Court denied Petitioner a COA the first time Petitioner presented this Court with his claims concerning his 1993 trial. The Fifth Circuit likewise found Petitioner was not entitled to a COA.

Reasonable minds could not disagree with this Court's conclusion Petitioner's twenty year old Rule 60(b) motion is untimely, or in the alternative, a successive §2254. Reasonable minds could not disagree that this Motion fails to demonstrate "exceptional circumstances" exist which warrant relief from the Judgment in this cause under Rule 60(b)(6). Petitioner is not entitled to a COA from this Court's denial of Petitioner's Rule 60(b) Motion, and therefore, none will issue from this Court. Petitioner is advised, however, that he may request the issuance of a certificate of appealability from a federal circuit court of appeals judge. *See* Fed. R. App. P. 22(b).

V. Conclusion

Petitioner's rule 60(b) Motion is untimely, not permissibly used to collaterally attack a state court criminal conviction, as well as successive.

Pursuant to Rule 60(c), Petitioner's motion must have been filed within a "reasonable time." Fed. R. Civ. Proc. 60(c)(1). "'There is no hard and fast rule as to how much time is reasonable for filing of a Rule 60(b) motion.'" *Kagan v. Caterpillar Tractor Co.*, 795 F.2d 601, 610 (7th Cir. 1986) (quoting *Sudeikis v. Chicago Transit Auth.*, 774 F.2d 766, 769 (7th Cir. 1985)). Rather, "'what constitutes "reasonable time" depends upon the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to

learn earlier of the grounds relied upon, and [the consideration of] prejudice [if any] to other parties.'" *Id.* (quoting *Ashford v. Steuart*, 657 F.2d 1053, 1055 (9th Cir. 1981)); *see also First RepublicBank Fort Worth v. Norglass, Inc.*, 958 F.2d 117, 119 (5th Cir. 1992) (noting that what constitutes a "reasonable time" depends on the particular facts of the case); *see also McCorvey v. Hill*, 385 F.3d 846, 849 n.4 (5th Cir. 2004) (same). This Court could find no instance where twenty years was considered a reasonable amount of time to wait to pursue relief under Rule 60(b). This Court could not even find where sixteen months (the time from when Petitioner claimed he actually discovered the indictment discrepancy) was considered a reasonable amount of time. In light of his delay, Petitioner's Rule 60(b) Motion is denied as untimely.

Alternatively, Petitioner seeks relief from his 1993 state conviction under Fed. R. Civ. P. 60(b). However, Rule 60(b) does not permit a collateral attack on a final state court criminal conviction. *See Holleman v. Quarterman*, No. 3:07–CV–1825–P, 2007 WL 4468651 *2 (N.D.Tex. Dec. 19, 2007) (dismissing request for Rule 60(b) relief for want of jurisdiction as an attempt to bypass the *Rooker–Feldman* doctrine); *see also United States v. Flores*, 380 F. App'x 371, 372 (5th Cir. 2010) (unpublished per curiam) (Rule 60(b) applies only to civil cases and "simply does not provide relief from a judgment in a criminal case.").

Lastly, to the extent that Petitioner seeks to assert a new claim based on his original indictment, the assertion of a new claim in a Rule 60(b) Motion is a successive §2254 motion in disguise. And Petitioner's failure to obtain authorization from the Fifth Circuit under §2244(b)(3) before filing such a motion "acts as a jurisdictional bar to [this] district court's asserting jurisdiction over [it] until [the Fifth Circuit grants Petitioner] permission to file [it]." *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000) (citations omitted); accord *Crone v.*

Cockrell, 324 F.3d 833, 836 (5th Cir. 2003); *Williams v. Thaler*, 602 F.3d 291, 301 (5th Cir. 2010).

Therefore, Petitioner's Rule 60(b) Motion is denied and a certificate of appealability will not issue in this case. [docket number 28].

It is so **ORDERED.**

SIGNED this 5th day of April, 2018.

DAVID COUNTS
UNITED STATES DISTRICT JUDGE