App. 1

No. 20-3422

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: HAROLD PERSAUD, Movant.	))))	ORDER (Filed Oct. 7, 2020)

Before: SUHRHEINRICH, GIBBONS, and KETHLEDGE, Circuit Judges.

Harold Persaud, a federal prisoner represented by counsel, moves the court for an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. *See* 28 U.S.C. §§ 2244(b), 2255(h). The government moves to strike Persaud's supplemental brief in support of his application.

In 2015, a federal jury convicted Persaud of healthcare fraud, multiple counts of making false statements relating to healthcare matters, and money laundering. The district court sentenced Persaud to a total term of twenty years of imprisonment, and we affirmed. *See United States v. Persaud*, 866 F.3d 371 (6th Cir. 2017).

In 2018, Persaud, though counsel, filed a § 2255 motion in the district court, raising two claims of ineffective assistance of trial and appellate counsel. First, Persaud claimed that his trial and appellate attorneys performed ineffectively by not contesting the

government's presentation of expert and lay witness opinion testimony. Second, Persaud claimed his trial and appellate attorneys performed ineffectively by not objecting to the loss amount on which the district court based his sentencing range under the Sentencing Guidelines. The district court denied Persaud's motion, and we denied Persaud a certificate of appealability. *See Persaud v. United States*, No. 19-3041 (6th Cir. Mar. 28, 2019) (order).

In February 2020, Persaud, now represented by new counsel, filed a motion to reopen his § 2255 motion under Federal Rule of Civil Procedure 60(b). Persaud claimed that there was a "defect" in his § 2255 proceedings because his original post-conviction counsel failed to raise a claim that his trial attorney was ineffective for failing to properly explain his sentencing exposure by going to trial versus accepting a plea offer from the government. Persaud claimed that had his trial attorney properly explained his sentencing risks, he would have pleaded guilty instead of going to trial. The district court construed Persaud's Rule 60 motion as a second or successive motion to vacate and transferred it to this court for permission to consider it. *See In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) (per curiam).

Persaud then filed a corrected application for authorization in this court, raising the same claim. Persaud argues, however, that the district court incorrectly construed his Rule 60 motion as a second or successive motion to vacate because the claimed ineffective assistance of his postconviction counsel raises a defect in his §2255 proceedings and not a new "claim" for relief,

as defined by *Gonzalez v. Crosby*, 545 U.S. 524 (2005). As he did below, Persaud relies on *Ramirez v. United States*, 799 F.3d 845 (7th Cir. 2015), to support his contention that he filed a "true" Rule 60 motion and not a successive § 2255 motion.

In *Gonzalez*, the Supreme Court clarified the difference between a "true" Rule 60 motion and a Rule 60 motion that sets forth a "claim" which is in actuality a second or successive habeas petition that requires preauthorization by a court of appeals to file. A Rule 60 motion, the Court said, "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." 545 U.S. at 532. The Court explained further that "an 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." *Id.* at 532 n.5.

On the other hand, a Rule 60 motion contains a "claim" if it: (1) "assert[s] that owing to 'excusable neglect,' Fed. Rule Civ. Proc. 60(b)(1), the movant's habeas petition had omitted a claim of constitutional error, and seek[s] leave to present that claim"; (2) "present[s] 'newly discovered evidence,' Fed. Rule Civ. Proc. 60(b)(2), in support of a claim previously denied"; (3) "contend[s] that a subsequent change in substantive law is a 'reason justifying relief,' Fed. Rule Civ. Proc. 60(b)(6), from the previous denial of a claim"; (4) "seeks to add a new ground for relief"; or (5) "attacks the

federal court's previous resolution of a claim on the merits." *Id.* at 530-32.

Under these standards, the district court correctly determined that Persaud's Rule 60 motion was really a second or successive motion to vacate. First, Persaud plainly raised an entirely new claim for relief from his sentence, i.e., his trial attorney's misadvice about his sentencing exposure caused him to go to trial instead of pleading guilty and receiving a lower sentence. That fact alone distinguishes this case from *Ramirez*. Second, Persaud asserted that his failure to raise this claim in his § 2255 motion was due to excusable neglect, i.e., the ineffective assistance of his post-conviction counsel. And third, his post-conviction counsel's omission of this claim from his § 2255 motion was not a defect in the proceedings for purposes of Rule 60. The district court's transfer order was therefore correct.

To receive permission to file a second or successive motion to vacate, Persaud must make a prima facie showing that his proposed claim is based on newly discovered evidence, *see* 28 U.S.C. § 2255(h)(1), or a new rule of constitutional law that was previously unavailable and that the Supreme Court has made retroactive to cases on collateral review, *see* 28 U.S.C. § 2255(h)(2); *In re Sargent*, 837 F.3d 675, 676 (6th Cir. 2016). Persaud concedes that his new claim does not satisfy either one of these criteria.

Accordingly, we **DENY** Persaud's motion for authorization and **DENY** as moot the government's motion to strike.

ENTERED BY ORDER OF
THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, -vs- HAROLD PERSAUD, Defendant.	Case No. 1:14-CR-276 JUDGE RONALD C. NUGENT MEMORANDUM OPINION AND ORDER (Filed Apr. 14, 2020)

This case is before the Court on Defendant, Harold Persaud's Motion Pursuant to Rule 60(b), Fed.R.Civ.P. to ReOpen 28 U.S.C. §2255 Proceeding. (ECF #237). The Government filed a Response in Opposition to Mr. Persaud's motion, and Mr. Persaud filed a Reply in Support of his Motion. (ECF #238, 239).

Following a nearly month long trial, Mr. Persaud was convicted of fifteen counts including healthcare fraud, false statements relating to health care matters, and money laundering. On December 18, 2015, he was sentenced to twenty years and ordered to pay $5,486,857.00 in restitution. A forfeiture order was also issued in the case. Mr. Persaud appealed and all convictions, sentences, and other orders were affirmed. (ECF #214). On June 18, 2018, the Defendant filed a motion to vacate under 28 U.S.C. §2255 asserting multiple claims of ineffective assistance of trial counsel. (ECF #217). He was represented by counsel. The motion was denied. (ECF #228). Mr. Persaud sought to

appeal the decision but was denied a certificate of appealability. His petition for rehearing was denied by the Sixth Circuit on June 6, 2019, and his petition for a writ of certiorari to the United States Supreme Court was denied on October 7, 2019. Following these denials, Mr. Persaud obtained new counsel who assisted him in the filing of the motion now before the Court.

The motion currently before the Court, although captioned as a motion under Fed. R.Civ.P. 60(b) is properly construed as a second or successive petition for relief under 28 U.S.C. §2255. It seeks to raise an entirely new substantive claim under 28 U.S.C. §2255, which exactly what happens in a second or successive claim. *See generally, Sims v. Terbush,* 111 F.3d 45, 47 (6th Cir. 1997). Re-labeling a new claim for relief as a request to "re-open" a prior claim is inaccurate and defies the purpose behind the certification requirements for second or successive petitions. As the Sixth Circuit has stated, because the new grounds for relief "concern the legitimacy of his trial and conviction, they should have been raised on direct appeal or in a §2255" motion. *Abdur-Rahim v. J.C. Holland,* No. 15-5297 (6th Cir. Jan. 12, 2016). Raising a new claim for relief after a prior §2255 has already been resolved, requires the permission of the Court of Appeals. 28 U.S.C. § 2255(h)

Even if Mr. Persaud's request to re-open could be viewed as an attack on the resolution of the prior motion, despite the fact that it seeks to raise entirely new grounds for relief, a Rule 60(b) motion that "attacks the federal court's previous resolution of a claim on the merits," should be considered a second or successive

petition for writ of habeus corpus. *Gonzalez v. Crosby,* 545 U.S. 524, 532 (2005).[1] Mr. Persaud's argument for bringing his request for relief under Fed.R.Civ.P. 60(b) relies entirely on a single Seventh Circuit opinion which has been otherwise rejected by the Sixth Circuit, at least in part, for misinterpreting prior Supreme Court cases. *See, Ramirez v. United States,* 799 F.3d 845 (7th Cir. 2015); *Kapanekas v. Snyder-Morris,* No. 16-6310, 2017 WL 3725355 (6th Cir. Apr. 10, 2017).

The Court, therefore, finds that Mr. Persaud's petition is properly viewed as a second or successive motion under §2255. Section 2255 provides that:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> > (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 the movant 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.

See 28 U.S.C. {S}2255(h).

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[1] Although *Gonzoles* was a 2254 case, the reasoning was made applicable to 2255 cases through *In re Nailor,* 487 F.3d 1018, 1023 (6th Cir. 2007).

Because Mr. Persaud has failed to receive authorization from the Sixth Circuit to file this second, or successive §2255 motion, the motion may not be reviewed by the Court at this juncture. Therefore, the Clerk of Court is directed to transfer Mr. Persaud's instant motion to the Sixth Circuit Court of Appeals pursuant to *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997).

IT IS SO ORDERED.

/s/ Donald C. Nugent
Donald C. Nugent
Senior United States
District Judge

Date: April 14, 2020

No. 20-3422

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: HAROLD PERSAUD, Movant.	))))	ORDER (Filed Nov. 24, 2020)

BEFORE: SUHRHEINRICH, GIBBONS, and KETHLEDGE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk