

Appendix A

United States Court of Appeals
for the Fifth circuit decision

No. 19-20824

United States Court of Appeals
for the Fifth Circuit



No. 19-20824

A True Copy
Certified order issued Jun 24, 2021

Tyke W. Guyce
Clerk, U.S. Court of Appeals, Fifth Circuit

STEVEN WAYNE ISBEL,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF
CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:16-CV-2836

ORDER:

IT IS ORDERED that Appellant's motion for a certificate of appealability is DENIED.

/s/EDITH BROWN CLEMENT
EDITH BROWN CLEMENT
United States Circuit Judge

Appendix A

Appendix B

United States District Court
for the Southern Division of Texas
Houston Division Decision

Case No. 4:16-cv-02836

ENTERED

December 11, 2020
David J. Bradley, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

STEVEN WAYNE ISBEL,
(TDCJ-CID #01859521)

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vs

CIVIL ACTION NO. H-16-2836

BOBBY LUMPKIN,

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Respondent.

ORDER

The petitioner, Steven Wayne Isbel, sought habeas corpus relief under 28 U.S.C. § 2254, challenging a state-court conviction for fraudulent use or possession of identifying information. On September 20, 2018, this Court granted the respondent’s motion for summary judgment and dismissed Isbel’s petition on the merits. (Docket Entry No. 44). On June 12, 2019, the United States Court of Appeals for the Fifth Circuit denied Isbel’s motion for a certificate of appealability. (Docket Entry No. 53).

On October 29, 2019, Isbel moved for relief from the judgment under the “catchall provision” of Rule 60(b). (Docket Entry No. 55). In his federal petition, Isbel presented seventeen grounds for federal habeas relief. In ground fourteen, Isbel complained that he was deprived of a fair trial when the trial court failed to grant Isbel’s motion to dismiss his appointed counsel and when the trial court did not investigate the conflict of interest between counsel and client. (Docket

Entry No. 1, p. 17). Isbel further complained that he received ineffective assistance when defense counsel failed to advise the court of the conflict of interest between counsel and client. (*Id.*).

In its order entered on September 20, 2018, this Court found that if Isbel attempted to raise this claim in a second state application, the Court of Criminal Appeals would dismiss such an application as an abuse of the writ. As Isbel had not shown cause or prejudice for failing to present this claim in his initial state application, or that a fundamental miscarriage of justice would result if this Court did not consider the claim, this Court found that consideration of this claim was procedurally barred. (Docket Entry No. 44, pp. 76-77).

AEDPA limits the circumstances under which a state prisoner may file a second or successive application for habeas relief in federal court. In general, a later petition is successive when it raises a claim challenging the petitioner's conviction or sentence that was or could have been raised in an earlier petition or otherwise constitutes an abuse of the writ. *Leal Garcia v. Quarterman*, 573 F.3d 214, 222 (5th Cir. 2009); *Crone v. Cockrell*, 324 F.3d 833, 836-37 (5th Cir. 2003). To raise a new claim, the petitioner must show that the successive application is based on: (1) a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court; or (2) 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 fact finder would have found him guilty of the offense. 28 U.S.C. § 2244(b)(2). Before a petitioner may file his successive petition, however, a three-judge panel of the court of appeals must determine whether the application makes the requisite *prima facie* showing. *See* 28 U.S.C. § 2244(b)(3)(A)-(B). Section 2244(b)(3)(A) constitutes a bar to the district court's jurisdiction to consider a successive habeas petition unless the court of appeals has first granted the petitioner

permission to file such a petition. *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000) (*per curiam*) (section 2255 motion); *see also Crone v. Cockrell*, 324 at 836 (section 2254 habeas petition).

A Rule 60(b) motion constitutes a successive habeas petition when it attacks a judgment on the merits of a previously filed petition. *Will v. Lumpkin*, ___ F.3d ___, 2020 WL 6192980 (5th Cir. Oct. 22, 2020). “[W]hen a court order analyzes whether ‘there exist or do not exist grounds entitling a petitioner’ to habeas relief—in other words, makes a merits determination—a Rule 60(b) motion contesting this order (even on procedural grounds) necessarily presents a successive habeas claim.” *Id.* at *5 (citing *Gonzalez v. Crosby*, 545 U.S. 524, 531-32 n.4 (2005)). If a motion simply “attacks the federal court’s previous resolution of a claim on the merits,” it “is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief,” and should be considered a second or successive habeas application. *Gonzalez*, 545 U.S. at 532 (emphasis deleted). Here, the Court denied Isbel’s petition on the merits.

A Rule 60(b) motion that does not challenge “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” is not a successive habeas petition. *Gonzalez*, 545 U.S. at 532. A Rule 60(b) motion is proper if “neither the motion itself nor the federal judgment from which it seeks relief substantively addresses federal grounds for setting aside the movant’s state conviction.” *Id.* at 533. If the purported Rule 60(b) motion either 1) “attacks a defect in the integrity of the federal habeas proceeding” or 2) “attacks a procedural ruling that precluded a merits determination,” then the district court may properly consider it under Rule 60(b). *Gilkers v. Vannoy*, 904 F.3d 336, 344 (5th Cir. 2018) (internal quotations omitted).

Isbel challenged this Court's determination that his trial court error claim (Ground 14) was procedurally barred. Isbel's motion challenged a "defect in the integrity of the federal habeas proceedings," *Gonzalez*, 545 U.S. at 532. Because he did not attack the Court's ruling on the merits of his previous petition, his Rule 60(b) motion did not constitute a successive habeas petition.

In his motion for relief from judgment, Isbel stated that this claim was not procedurally barred because he actually presented this claim in a motion to supplement his state application, which was filed on January 19, 2016. Isbel states that, and state court records show that, the state court granted his motion to supplement on February 8, 2016. (Docket Entry No. 26-1, p. 55). The state habeas court found that, "44. The applicant fails to offer any proof, other than conclusory allegations in support of his claims presented in a supplemental application filed on January 19, 2016." (Docket Entry No. 26-2, p. 54). The state court rejected Isbel's trial court error claims. In denying Isbel's motion for relief from judgment, this Court found that Isbel failed to show that the state court's determination was contrary to, or involved an unreasonable application of, or was an unreasonable determination of the facts based on the evidence in the record. Isbel is not entitled to habeas relief on this claim.

This Court found that Isbel had shown no basis for this Court to reconsider his trial court error claim. Alternatively, this Court found that Isbel was not entitled to habeas relief on this claim. This Court denied the motion for relief from judgment, for the reasons previously set forth above and in the order entered on September 20, 2018. (Docket Entry No. 64).

Isbel sought a certificate of appealability to appeal this Court's denial of his Rule 60(b) motion for relief from the final judgment denying his 28 U.S.C. § 2254 petition. The Fifth Circuit stated:

The district court made no COA ruling with respect to the denial of Isbel's Rule 60(b) motion. Consequently, this court lacks jurisdiction to grant or deny a COA as to that ruling. *See Black v. Davis*, 902 F.3d 541, 545 (5th Cir. 2018). Accordingly, Isbel's motion is held in abeyance. The case is REMANDED for the limited purpose of allowing the district court to decide in the first instance whether to issue a COA in connection with its November 6, 2019 order denying Isbel's Rule 60(b) motion.

(Docket Entry No. 64).

Considering the record in this case and pursuant to Fed. R. App. P. 22(b), Rule 11(a) of the Rules Governing §§ 2254 and 2255 proceedings, and 28 U.S.C. § 2253(c), a certificate of appealability is DENIED. The Court finds that Isbel has failed to show (1) that reasonable jurists would find the Court's "assessment of the constitutional claims debatable or wrong," or (2) that reasonable jurists would find "it debatable whether the [Rule 60(b) motion] states a valid claim of the denial of a constitutional right" and "debatable whether [the Court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

SIGNED at Houston, Texas, on December 10, 2020.



VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

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