United States Court of Appeals for the Fifth Circuit

No. 21-20284

CLIFTON LEE TRIBBLE,

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. 4:18-CV-2021

ON MOTION FOR RECONSIDERATION
AND REHEARING EN BANC

Before JONES, DUNCAN, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:

The motion for reconsideration is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

Appendix "V"

United States Court of Appeals for the Fifth Circuit

A True Copy
Certified order issued Apr 08, 2022
Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

No. 21-20284

CLIFTON LEE TRIBBLE,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division,*

Respondent—Appellee.

Application for Certificate of Appealability from the
United States District Court for the Southern District of Texas
USDC No. 4:18-CV-2021

ORDER:

Clifton Lee Tribble, Texas prisoner # 2105477, seeks a certificate of appealability (COA) to appeal the district court's denial of his Federal Rule of Civil Procedure 60(b)(3) motion that sought to vacate the district court's judgment denying his 28 U.S.C. § 2254 application.

Except in limited circumstances not present here, a COA is required to appeal the denial of Rule 60(b) relief in a § 2254 proceeding. *See Ochoa Canales v. Quarterman*, 507 F.3d 884, 887-88 (5th Cir. 2007). A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Buck v. Davis*, 137 S. Ct. 759,

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773 (2017). When the district court's denial of federal habeas relief is based on procedural grounds, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Specifically, with respect to the denial of Rule 60(b) relief, the movant must show that "a jurist of reason could conclude that the district court's denial of [the Rule 60(b)] motion was an abuse of discretion." *Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011).

Tribble has not made the requisite showing. *See Slack*, 529 U.S. at 484; *Hernandez*, 630 F.3d at 428. Accordingly, it is ORDERED that his motion for a COA is denied. His motions for appointment of counsel, oral argument, and remand also are DENIED.

STUART KYLE DUNCAN
United States Circuit Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CLIFTON LEE TRIBBLE, TDCJ #2105477, Petitioner, vs. BOBBY LUMPKIN, Director, Texas Department of Criminal Justice - Correctional Institutions Division, Respondent.	§ § § § § § § § § § § § § §	CIVIL ACTION NO. H-18-2021

ORDER

On September 27, 2019, this Court granted the respondent's motion for summary judgment and dismissed the federal habeas corpus petition filed by state inmate Clifton Lee. Tribble after finding that he was not entitled to relief on any of his claims [Doc. # 36]. On November 12, 2020, the Fifth Circuit considered Tribble's claims and denied his request for a certificate of appealability. *See Tribble v. Lumpkin*, Appeal No. 19-20729 (5th Cir. Nov. 12, 2020) [Doc. # 44]. Tribble has filed a motion for relief from the final judgment under Rule 60(b)(3) of the Federal Rules of Civil Procedure, arguing further that the judgment should be set aside because his proceeding was tainted by "fraud on the court" [Doc. # 45]. Tribble has also filed a supplemental pleading in support of his motion for relief under Rule 60(b)(3) [Doc. # 46], a motion for leave to provide additional exhibits [Doc. # 47], and a motion for appointment of counsel [Doc. # 48]. Tribble's motions are addressed below.

Appendix 4

Rule 60(b)(3) affords relief from a judgment for a showing of "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." Fed. R. Civ. P. 60(b)(3). "A party making a Rule 60(b)(3) motion must establish: (1) that the adverse party engaged in fraud or other misconduct, and (2) that this misconduct prevented the moving party from fully and fairly presenting his case." *Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 641 (5th Cir. 2005) (citation omitted). The movant must show that the opposing party engaged in misconduct by clear and convincing evidence. *Id.* A Rule 60(b)(3) motion "is addressed to the sound discretion of the court," 11 Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure § 2860 (1973), and "will be denied if it is merely an attempt to relitigate the case or if the court otherwise concludes that fraud has not been established." *Id.*

The Court has considered Tribble's motion, the supplemental pleading, and all of the exhibits that Tribble presents and concludes that he has not established fraud on the part of the respondent or respondent's counsel of record during the proceedings in this case. Instead, he takes issue with "fraudulent" statements attributed to his defense counsel, "abuse of discretion" by the state trial court, and withholding of evidence by the prosecutor during his underlying criminal proceeding [Doc. # 45, at 4-11; Doc. # 46, at 7]. Although Tribble presents a litany of errors [Doc. # 45, at 20], he has not presented evidence of fraud or other misconduct attributable to the respondent as the opposing party and, therefore, he fails to show that he is entitled to relief under Rule 60(b)(3). To the extent that Tribble disagrees with this Court's rulings [Doc. # 45, at 12-20; Doc. # 46, at 1-13], he does not

demonstrate that he is entitled to relief under any other provision found in Rule 60(b), which may not be used to relitigate or rehash arguments presented previously. *See Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 269 (5th Cir. 2007) (noting that, as a general proposition, a Rule 60(b) motion is not a permissible method for a party to "relitigate its case"); *see also Segundo v. Davis*, 757 F. App'x 333, 336 (5th Cir. 2018) (per curiam) (holding that a Rule 60(b) motion was an unauthorized successive habeas petition where a claim of ineffective assistance of counsel "was the focus of the motion, and reopening the proceedings to relitigate it is the clear objective of the filing").

Accordingly, the Court **ORDERS** as follows:

1. The motion for relief from the final judgment under Rule 60(b)(3) filed by Clifton Lee Tribble [Doc. # 45] is **DENIED**.
2. Tribble's motion to supplement the record with additional exhibits [Doc. # 47] is **GRANTED**.
3. Tribble's motion for appointment of counsel [Doc. # 48] is **DENIED**.
4. No certificate of appealability will issue from this decision.

The Clerk shall provide a copy of this order to the parties.

SIGNED at Houston, Texas, on May 10, 2021.

ALFRED H. BENNETT
UNITED STATES DISTRICT JUDGE

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

CLIFTON LEE TRIBBLE, (TDCJ #2105477) Petitioner, v. LORIE DAVIS, Director, Texas Department of Criminal Justice - Correctional Institutions Division, Respondent.	§ § § § § § § § § § § §	CIVIL ACTION NO. 4:18-cv-2021

ORDER

Clifton Lee Tribble, a Texas state inmate, filed a petition under 28 U.S.C. § 2254, seeking a federal writ of habeas corpus to challenge a state-court conviction for driving while intoxicated. The respondent's answer is not yet due. Tribble now moves for leave to conduct discovery and inspection.

Under the federal rules, discovery takes place only after the opposing party has filed a response. Discovery is limited further in habeas corpus proceedings. The Supreme Court has clarified that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Likewise, "Rule 6 of the Rules Governing § 2254 cases permits discovery only if and only to the extent that the district court finds good cause." *Murphy v. Johnson*, 205 F.3d 809, 814 (5th Cir. 2000); *see also Hill v. Johnson*, 210 F.3d 481, 487 (5th Cir. 2000).

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Because the Court has not yet had an opportunity to review the respondent's answer or the pertinent state court records, Tribble's motion is premature. It is **ORDERED** that the motion for discovery and inspection, (Docket Entry No. 13), is **DENIED** at this time.

SIGNED at Houston, Texas, on AUG 21 2018.

ALFRED H. BENNETT
UNITED STATES DISTRICT JUDGE

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