

**Kissner v. Macauley**

United States Court of Appeals for the Sixth Circuit

April 4, 2023, Filed

No. 22-1987

**Reporter**

2023 U.S. App. LEXIS 8001 \*

DONALD LEE KISSNER, Petitioner-Appellant, v. MATT  
MACAULEY, WARDEN, Respondent-Appellee.

**Core Terms**

en banc, petition for rehearing

**Counsel:** [\*1] DONALD LEE KISSNER, Petitioner -  
Appellant, Pro se Ionia, MI.

For MATT MACAULEY, Warden, Respondent -  
Appellee: Bruce H. Edwards, Office of the Attorney  
General, Lansing, MI.

**Judges:** Before: GUY, MOORE, and KETHLEDGE,  
Circuit Judges.

**Opinion**

**ORDER**

Donald Lee Kissner petitions for rehearing en banc of this court's order entered on February 14, 2023, denying his motion for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original motion was properly denied. The petition was then circulated to all active members of the court,\* none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

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\* Judge Davis recused herself from participation in this ruling.

## Kissner v. Macauley

United States Court of Appeals for the Sixth Circuit

February 14, 2023, Filed

No. 22-1987

### Reporter

2023 U.S. App. LEXIS 3526 \*

DONALD LEE KISSNER, Petitioner-Appellant, v. MATT MACAULEY, Warden, Respondent-Appellee.

**Prior History:** Kissner v. Berghuis, 2013 U.S. Dist. LEXIS 91688, 2013 WL 12417859 (E.D. Mich., July 1, 2013)

### Core Terms

district court, habeas petition, evidentiary hearing, motion for relief, state court, untimely, motions, jurist, limitations period, per curiam, abused, independent action, final judgment, construe, one-year, sentence, Appeals, default, reasons, argues, reopen, moves

**Counsel:** [\*1] For DONALD LEE KISSNER, Prisoner Number: State Prisoner: #383562, Petitioner - Appellant: Donald Lee Kissner, Bellamy Creek Correctional Facility, Ionia, MI.

For MATT MACAULEY, Warden, Respondent - Appellee: Bruce H. Edwards, Office of the Attorney General, Lansing, MI.

**Judges:** Before: MURPHY, Circuit Judge.

### Opinion

#### ORDER

Donald Lee Kissner, a Michigan prisoner proceeding pro se, appeals the district court's order denying his motion for relief from judgment under Federal Rule of Civil Procedure 60(b). Kissner sought relief from the district court's 2016 judgment denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Kissner moves this court for a certificate of appealability (COA). Kissner also moves this court for leave to proceed in forma pauperis, appointment of counsel, and an evidentiary

hearing.

In 2004, a jury in the Shiawassee County Circuit Court convicted Kissner of burning real property. Following a remand for resentencing, see People v. Kissner, No. 258333, 2005 Mich. App. LEXIS 3209, 2005 WL 3481374 (Mich. Ct. App. Dec. 20, 2005) (per curiam), the trial court sentenced Kissner as a third habitual offender to 11 to 20 years of imprisonment. The Michigan Court of Appeals affirmed Kissner's sentence. People v. Kissner, No. 271977, 2007 Mich. App. LEXIS 2165, 2007 WL 2713414 (Mich. Ct. App. Sept. 18, 2007) (per curiam), perm. app. denied, 480 Mich. 1011, 743 N.W.2d 32 (2008). Kissner then sought post-conviction relief in the state courts, filing two unsuccessful motions [\*2] for relief from judgment.

Kissner filed a § 2254 habeas petition in 2010. The district court held Kissner's habeas petition in abeyance to allow him to exhaust his claims in the state courts. After the state courts rejected Kissner's third motion for relief from judgment, the district court reopened the case and granted his motion to amend his habeas petition. The district court then denied Kissner's habeas petition, as amended, concluding that his claims failed on the merits or were procedurally defaulted, and declined to issue a COA. Kissner appealed, and we denied him a COA. Kissner v. Palmer, 826 F.3d 898 (6th Cir. 2016) (order).

Kissner has since filed multiple motions for relief from the district court's judgment under Rule 60(b). The district court has denied Kissner's motions or transferred them to this court as second or successive habeas petitions. See 28 U.S.C. § 1631; In re Sims, 111 F.3d 45, 47 (6th Cir. 1997) (per curiam).

In 2022, Kissner filed another Rule 60(b) motion for relief from judgment, which he later amended. Kissner asserted that the district court made various errors in considering his habeas petition, such as failing to consider whether his actual-innocence claim excused

his procedural default, addressing certain issues omitted from his amended habeas petition, failing to "relate back" [\*3] certain issues to his original habeas petition, relying on the record from an uncounseled evidentiary hearing in state court, and misconstruing his claim about trial counsel's ineffectiveness in failing to investigate and present an insanity defense. Kissner also filed a motion for an evidentiary hearing. The district court denied Kissner's Rule 60(b) motion and his related motion for an evidentiary hearing as untimely, concluding that his claims fell within Rule 60(b)(1) and that his Rule 60(b) motion was therefore subject to the one-year limitations period under Rule 60(c)(1). The district court declined to issue a COA. This timely appeal followed.

In the absence of a COA, Kissner's notice of appeal is construed as a request for a COA. See *Fed. R. App. P. 22(b)(2)*. In the context of a Rule 60(b) motion, "the COA question is . . . whether a reasonable jurist could conclude that the District Court abused its discretion in declining to reopen the judgment." *Buck v. Davis*, 580 U.S. 100, 123, 137 S. Ct. 759, 197 L. Ed. 2d 1 (2017).

In his COA motion, Kissner argues that the district court abused its discretion in construing his motion as brought under Rule 60(b)(1) when his motion cited Rule 60(b)(6) and Rule 60(d)(1). Rule 60(b)(1) provides that a district court may grant relief from a final judgment, order, or proceeding for "mistake, inadvertence, surprise, or excusable neglect," while [\*4] Rule 60(b)(6) permits a district court to grant a motion for "any other reason that justifies relief." Rule 60(d)(1) allows the district court to "entertain an independent action to relieve a party from a judgment, order, or proceeding." However, such an independent action may still be treated as a Rule 60(b) motion. See *Mitchell v. Rees*, 651 F.3d 593, 595 (6th Cir. 2011).

"We have held that 'a Rule 60(b)(1) motion is intended to provide relief . . . when the judge has made a substantive mistake of law or fact in the final judgment or order.'" *Penney v. United States*, 870 F.3d 459, 461 (6th Cir. 2017) (quoting *United States v. Reyes*, 307 F.3d 451, 455 (6th Cir. 2002)). By contrast, "[r]elief pursuant to Rule 60(b)(6) is available 'only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule' and 'only as a means to achieve substantial justice.'" *Tanner v. Yukins*, 776 F.3d 434, 443 (6th Cir. 2015) (quoting *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990)). Because Kissner's motion asserted various errors in the district court's disposition of his habeas petition, no reasonable jurist could debate

the district court's decision to construe his motion as brought under Rule 60(b)(1) rather than Rule 60(b)(6).

"A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of proceeding." *Fed. R. Civ. P. 60(c)(1)*. And "parties cannot disguise Rule 60(b)(1)-(3) motions as" Rule 60(b)(6) motions "to gain the benefits of a more generous [\*5] limitations period." *Kalamazoo River Study Grp. v. Rockwell Int'l Corp.*, 355 F.3d 574, 588 (6th Cir. 2004). Kissner filed his Rule 60(b) motion more than six years after the district court's judgment denying his habeas petition. Even if Kissner's motion were not subject to the one-year limitations period, he failed to articulate a reasonable basis for his delay. See *Tyler v. Anderson*, 749 F.3d 499, 510 (6th Cir. 2014). No reasonable jurist could disagree with the district court's determination that Kissner's Rule 60(b) motion was untimely.

Kissner also argues in his COA motion that the district court abused its discretion in failing to conduct an evidentiary hearing. Because Kissner's Rule 60(b) motion was untimely, the district court concluded, his related motion for an evidentiary hearing was also untimely. Reasonable jurists could not debate that conclusion.

For these reasons, we **DENY** Kissner's motion for a COA and **DENY** as moot his other pending motions.

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## **Kissner v. Palmer**

United States District Court for the Eastern District of Michigan, Southern Division

October 13, 2022, Decided; October 13, 2022, Filed

Case No. 10-cv-14759

### **Reporter**

2022 U.S. Dist. LEXIS 187421 \*; 2022 WL 7454832

DONALD KISSNER, Petitioner, v. CARMEN PALMER, Respondent.

**Prior History:** Kissner v. Berghuis, 2013 U.S. Dist. LEXIS 91688, 2013 WL 12417859 (E.D. Mich., July 1, 2013)

### **Core Terms**

motion for relief, evidentiary hearing, habeas petition, certificate, court erred, merits, denies, default

**Counsel:** [\*1] Donald Kissner, Petitioner, Pro se, IONIA, MI.

For Carmen Palmer, Respondent: Bruce H. Edwards, Michigan Attorney General's Office, Lansing, MI.

**Judges:** HON. MARK A. GOLDSMITH, United States District Judge.

**Opinion by:** MARK A. GOLDSMITH

### **Opinion**

#### **OPINION & ORDER**

**(1) DENYING THE MOTION FOR RELIEF FROM JUDGMENT (Dkt. 60), (2) DENYING THE AMENDED MOTION FOR RELIEF FROM JUDGMENT (Dkt. 61), (3) DENYING THE MOTION FOR AN EVIDENTIARY HEARING (Dkt. 63), (4) DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY, AND (5) DENYING PETITIONER LEAVE TO APPEAL IN FORMA PAUPERIS**

Before the Court is Petitioner Donald Kissner's Rule 60(b) motion for relief from judgment (Dkt. 60), his

amended motion for relief from judgment (Dkt. 61), and his motion for an evidentiary hearing (Dkt. 63). For the reasons that follow, the Court denies the motion.

### **I. BACKGROUND**

Over six years ago, the Court denied Petitioner a writ of habeas corpus, declined to issue a certificate of appealability, and granted him leave to appeal in forma pauperis. Kissner v. Palmer, No. 10-cv-14759, 2016 U.S. Dist. LEXIS 22775, 2016 WL 739989 (E.D. Mich. Feb. 25, 2016). The United States Court of Appeals for the Sixth Circuit subsequently denied Petitioner a certificate of appealability and dismissed the appeal. Kissner v. Palmer, 826 F. 3d 898 (6th Cir. 2016); reh. den. No. 16-1320 (6th Cir. Sep. 13, 2016); cert. den. sub nom. Kissner v. Harry, 580 U.S. 1125, 137 S. Ct. 1081, 197 L. Ed. 2d 195 (2017); reh'g denied [\*2], 581 U.S. 967, 137 S. Ct. 2112, 197 L. Ed. 2d 909 (2017).

Petitioner then filed a Rule 60(b) motion for relief from judgment. The Court denied in part the motion and transferred it to the Sixth Circuit pursuant to 28 U.S.C. § 2244(b)(3)(A) for authorization to file a second or successive habeas petition. Kissner v. Palmer, No. 10-cv-14759, 2017 U.S. Dist. LEXIS 127501, 2017 WL 3446598 (E.D. Mich. Aug. 11, 2017). The Sixth Circuit denied Petitioner a certificate of appealability regarding the denial of his Rule 60(b) motion. Kissner v. Haas, No. 17-2015, 2018 U.S. App. LEXIS 35728, 2018 WL 797450 (6th Cir. Feb. 8, 2018). It also denied Petitioner permission to file a second habeas petition. In Re Kissner, No. 17-1936, 2018 U.S. App. LEXIS 574 (6th Cir. Jan. 9, 2018).

Petitioner filed a second Rule 60(b) motion for relief from judgment. The Court again denied in part the 60(b) motion for relief from judgment and transferred the motion to the Sixth Circuit pursuant to 28 U.S.C. § 2244(b)(3)(A) for authorization to file a second or successive habeas petition. Kissner v. Palmer, No. 10-

CV-14759, 2018 U.S. Dist. LEXIS 183064, 2018 WL 5292024 (E.D. Mich. Oct. 25, 2018). The Sixth Circuit denied Petitioner a certificate of appealability regarding the denial of his Rule 60(b) motion. Kissner v. Palmer, No. 18-2356, 2019 U.S. App. LEXIS 39987, 2019 WL 2298964 (6th Cir. Apr. 4, 2019). It also denied Petitioner permission to file a second habeas petition. In re Kissner, No. 18-2242, 2019 U.S. App. LEXIS 5446 (6th Cir. Feb. 22, 2019).

Petitioner filed a third Rule 60(b) motion for relief from judgment, which the Court once again transferred to the Sixth Circuit pursuant to 28 U.S.C. § 2244(b)(3)(A) for authorization to file a second or successive habeas petition. Kissner v. Palmer, No. 10-cv-14759, 2021 U.S. Dist. LEXIS 45701, 2021 WL 926277 (E.D. Mich. Mar. 11, 2021). The Sixth Circuit denied Petitioner permission to file a successive petition. [\*3] In re Kissner, No. 21-1251, 2021 U.S. App. LEXIS 26076 (6th Cir. Aug. 27, 2021).

Petitioner has now filed another Rule 60(b) motion for relief from judgment and an amended motion for relief from judgment. Petitioner also filed a motion for an evidentiary hearing.

## II. DISCUSSION

A Rule 60(b) motion for relief from judgment that attempts to advance one or more substantive claims after the denial of a habeas petition, such as a motion seeking leave to present a claim that was omitted from the habeas petition due to mistake or excusable neglect, or seeking to present newly discovered evidence not presented in the petition, or seeking relief from judgment due to an alleged change in the substantive law since the prior habeas petition was denied, should be classified as a "second or successive habeas petition," which, pursuant to § 2244(b), requires authorization from the Court of Appeals before filing. See Gonzalez v. Crosby, 545 U.S. 524, 531, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005). A Rule 60(b) motion can be considered as raising "a 'claim' if it attacks the federal court's previous resolution of a claim on the merits, since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief." [\*4] Id. at 532. A habeas court's determination on the merits refers "to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)." Id. at 532 n.4.

On the other hand, when a habeas petitioner's Rule 60(b) motion alleges a "defect in the integrity of the federal habeas proceedings," the motion should not be transferred to the circuit court for consideration as a second or successive habeas petition. Id. at 532. A Rule 60(b) motion is not considered to be raising a claim on the merits when the motion "merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." Id. at 532 n.4.

In his current motion for relief from judgment, Petitioner argues that he is not seeking to raise a new substantive claim for relief or to relitigate the merits of his old claims. Instead, he argues that the Court erred in failing to grant his motion to delete certain claims from his petition. Petitioner also states that the Court erred in refusing to appoint counsel for him or to order an evidentiary hearing on his claims. In addition, Petitioner states that the Court erred in procedurally [\*5] defaulting several of his claims and in failing to use his claim of actual innocence to excuse the default. Finally, in his amended motion, Petitioner contends that the Court failed to review some of the records pertaining to his ineffective assistance of counsel claim.

To the extent that Petitioner claims that the Court erred in finding certain claims to be procedurally defaulted, this claim does not amount to a successive challenge to his conviction because it is an attack on the defect in the habeas proceedings. See e.g., Franklin v. Jenkins, 839 F.3d 465, 474 (6th Cir. 2016). Petitioner's allegation that the Court erred in failing to conduct an evidentiary hearing likewise is not a second or successive petition because it does not seek to advance a substantive claim. See Mitchell v. Rees, 261 F. App'x 825, 829 (6th Cir. 2008). The same analysis applies to Petitioner's claim that the Court erred in refusing to appoint counsel or failed to delete certain claims from his petition. Finally, Petitioner's claim that the Court failed to review some of the records before adjudicating his ineffective assistance of counsel claim is also not a successive petition. A Rule 60(b) motion alleging that a district court failed to adjudicate a petitioner's claim, or failed to properly adjudicate the claim, does not [\*6] constitute a second or successive petition because it too merely challenges a defect in the proceedings. See Tyler v. Anderson, 749 F.3d 499, 508 (6th Cir. 2014).

The Court nonetheless rejects the 60(b) motion and the amended motion because they are untimely. Under Federal Rule of Civil Procedure 60(b), a motion for relief

from judgment can be granted for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or,
- (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b).

Petitioner's claims fall within subsection (1) of Rule 60(b), based on the Court committing a mistake in procedurally defaulting his claims, failing to appoint counsel or conduct an evidentiary hearing, failing to permit Petitioner to delete some of his claims, or failing to review some of the records [\*7] prior to rendering a decision. Subsections (2) through (5) do not apply.

"Regardless of circumstances, no court can consider a motion brought under Rule 60(b)(1), (2), or (3) a year after judgment." In re G.A.D., Inc., 340 F. 3d 331, 334 (6th Cir. 2003). The Court denied the petition for writ of habeas corpus on February 25, 2016. Petitioner's motion for relief from judgment was signed and dated May 27, 2022 and filed with the Court on June 22, 2022. The amended motion was signed and dated August 9, 2022 and filed with the Court on August 16, 2022. Because Petitioner's Rule 60(b) motion for relief from judgment and the amended motion were filed more than one year after the Court denied the petition for writ of habeas corpus, Petitioner is not entitled to relief from judgment.

The Court recognizes that Petitioner attempts to avail himself of the catch-all provision of subsection (6) of Rule 60(b), but he is unable to obtain relief under this subsection. A litigant who seeks relief under Rule 60(b)(6) must show "extraordinary circumstances" that justify the reopening of a final judgment, "and such circumstances rarely occur in habeas cases." Landrum v. Anderson, 813 F.3d 330, 335 (6th Cir. 2016). More importantly, a motion for relief from judgment may not

be brought under Rule 60(b)(6) "if it is premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5)." Mitchell, 261 F. App'x. at 830. Motions for relief from judgment that are [\*8] subject to the one-year limitations period may not be disguised as motions with a more generous limitations period. See Kalamazoo River Study Grp. v. Rockwell Int'l Corp., 355 F. 3d 574, 588 (6th Cir. 2004). Petitioner's Rule 60(b) motion and the amended motion are based on one of the first three subsections of Rule 60(b), and, therefore, it would be error for the Court to grant Petitioner relief based on 60(b)(6). Mitchell, 261 F. App'x. at 830. The Court denies Petitioner's Rule 60(b) motion and amended motion.

Petitioner also filed a motion for an evidentiary hearing. The Court denies the motion because it is related to Petitioner's argument in his Rule 60(b) motion that the Court erred in failing to conduct an evidentiary hearing his ineffective assistance of counsel claim. Because the 60(b) motion is untimely, the related motion for an evidentiary hearing is untimely as well.

The Court also denies Petitioner a certificate of appealability on the Rule 60(b) motion and the amended motion. In habeas cases involving a district court's denial of a 60(b) motion for relief from judgment on procedural grounds without reaching the merits of any constitutional claims, a petitioner should be granted a certificate of appealability only if he or she makes both a substantial showing that he or she had a valid claim of the denial of a constitutional right and a substantial [\*9] showing that the district court's procedural ruling is wrong. See United States v. Hardin, 481 F. 3d 924, 926 n.1 (6th Cir. 2007). The Court denies Petitioner a certificate of appealability because jurists of reason would not find the Court's denial of the Rule 60(b) motion, the amended Rule 60(b) motion, or the motion for an evidentiary hearing to be debatable. The Court further concludes that Petitioner should not be granted leave to proceed in forma pauperis on appeal, as any appeal would be frivolous. See Fed. R. App. P. 24(a).

### III. CONCLUSION

For the reasons stated above, the Court denies Petitioner's motion for relief from judgment (Dkt. 60), amended motion for relief from judgment (Dkt. 61), and motion for an evidentiary hearing (Dkt. 63). The Court denies Petitioner a certificate of appealability and denies Petitioner leave to appeal in forma pauperis.

SO ORDERED.

Dated: October 13, 2022

Detroit, Michigan

/s/ Mark A. Goldsmith

MARK A. GOLDSMITH

United States District Judge

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