Exhibit A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED
January 5, 2022

Lyle W. Cayce
Clerk

No. 21-70001

ROBERT ALAN FRATTA,

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. 4:13-cv-3438

Before OWEN, *Chief Judge*, and SMITH and COSTA, *Circuit Judges*.

PER CURIAM:*

A Texas jury convicted of Robert Fratta of murder and sentenced him to death. Last year, Fratta filed a Rule 60(b) motion seeking to reopen his federal habeas case. The district court dismissed Fratta's motion as a disguised, successive habeas petition and refused to certify an appeal from its

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

decision. Fratta then requested a certificate of appealability from this court, though in the motion he argues he is entitled to an appeal as of right. Under our precedent, however, Fratta needs permission to appeal from a district court ruling treating a Rule 60(b) motion as a successive petition. We decline to grant Fratta that permission because the district court's conclusion is not subject to reasonable dispute.

I.

Fratta was first convicted in 1997 of hiring someone to murder his wife. Due to a Confrontation Clause violation, the conviction was vacated on federal habeas. *Fratta v. Quarterman*, 536 F.3d 485, 507 (5th Cir. 2008).

The second jury also convicted Fratta and sentenced him to death. The Texas Court of Criminal Appeals affirmed on direct appeal and denied his state habeas petition. Fratta then filed another habeas petition in federal court, asserting various procedural and evidentiary deficiencies in his second trial. Among his claims, Fratta argued that (1) there was insufficient evidence to support a capital conviction and (2) the jury instructions used to convict Fratta strayed from his grand jury indictment by allowing his conviction if he was a party to the murder rather than the person who pulled the trigger.

This time, the district court denied the habeas petition. The court held that most of the claims were procedurally barred and, regardless, all of them failed on the merits. Relevant here, the court found that the state court had refused to consider the sufficiency and jury-charge claims on procedural grounds as Fratta had raised them in *pro se* filings despite being represented by counsel. We declined to authorize Fratta's appeal from that decision.

In October 2020, Fratta filed a Rule 60(b) motion for relief from the district court's dismissal of his federal habeas petition. Fratta argued that recent Supreme Court precedent undermined the rule against hybrid representation that the state court relied on in dismissing his *pro se* claims, so

extraordinary circumstances warranted reconsideration of his habeas petition. The lower court denied Fratta's motion, finding it to be an improperly filed, successive petition. The court ruled in the alternative that Rule 60(b) relief was not warranted as Fratta had failed to identify any extraordinary circumstances justifying postjudgment relief. The court also declined to grant Fratta a certificate of appealability (COA) from its decision.

II.

We first address the threshold question of whether Fratta is required to obtain permission before appealing the district court's ruling that the ostensible Rule 60(b) is actually a successive habeas petition.

The Antiterrorism and Effective Death Penalty Act of 1996 provides that an "appeal may not be taken" from "the final order in a habeas proceeding" without a COA. 28 U.S.C. § 2253(c). Because the denial of a Rule 60(b) motion is a final order, we have consistently held that it is subject to this requirement. *See Storey v. Lumpkin*, 8 F.4th 382, 386 (5th Cir. 2021); *United States v. Vialva*, 904 F.3d 356, 359 (5th Cir. 2018); *see also Ochoa Canales v. Quarterman*, 507 F.3d 884, 888 (5th Cir. 2007) (requiring a COA, except when the sole purpose of the Rule 60(b) motion "is to reinstate appellate jurisdiction over the original denial of habeas relief").

Nevertheless, Fratta asks this court to reconsider its COA requirement for Rule 60(b) appeals in light of *Harbison v. Bell*, 556 U.S. 180 (2009). In *Harbison*, the Supreme Court explained that Section 2253(c) only applies to final orders that "dispose of the merits" of a habeas challenge. *See id.* at 183. Fratta urges us to follow the Fourth Circuit, which has applied *Harbison* to hold that an appeal of a Rule 60(b) order is "so far removed from the merits of the underlying habeas petition" that it does not require a COA. *See United States v. McRae*, 793 F.3d 392, 400 (4th Cir. 2015). But we have already held that *Harbison* "does not amount to the clear directive from the

Supreme Court that is required for us to set aside our established precedent." *See Storey*, 8 F.4th at 388. In this jurisdiction, Fratta is still "required to obtain a COA to appeal the district court's dismissal of his Rule 60(b) motion as a 'second or successive' habeas petition filed without authorization." *Id.*

III.

The question before us, then, is whether we should authorize a full appeal from the district court's ruling. When a petitioner seeks to challenge a procedural ruling, a COA may only issue if "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). In death penalty cases, "doubts as to whether a COA should issue must be resolved in favor of the petitioner." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000).

What is the difference between a proper Rule 60(b) motion and one that is a disguised successive motion for habeas relief? The Supreme Court has "distinguished between a subsequent habeas petition and a Rule 60(b) motion along the lines of substance and procedure." *See In re Coleman*, 768 F.3d 367, 371 (5th Cir. 2014) (discussing *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005)). If the motion "seeks to add a new ground for relief" or "attacks the federal court's previous resolution of a claim *on the merits*," then the challenge is substantive and an improper, successive habeas petition. *Id.* If, however, the motion challenges "some defect in the integrity of the federal habeas proceedings" and not the substance of the judgment, it is a proper Rule 60(b) motion. *Id.* We have identified "two circumstances in which a district court may properly consider a Rule 60(b) motion in a [habeas] proceeding: (1) the motion attacks a 'defect in the integrity of the federal habeas proceeding,' or (2) the motion attacks a procedural ruling which

precluded a merits determination." *Gilkers v. Vannoy*, 904 F.3d 336, 344 (5th Cir. 2018).

Fratta's motion does not present either of these circumstances that characterize a legitimate Rule 60(b) motion to reopen a habeas case. First, the district court's procedural ruling in denying the habeas petition did not "preclude[] a merits determination." *See id.* Although the court found that the Texas rule against hybrid representation presented independent and adequate state procedural grounds to bar federal review of Fratta's claims, it still reviewed and rejected both claims on the merits. *Fratta v. Davis*, 2017 WL 4169235, *31–37 (S.D. Tex. Sept. 18, 2017). This type of "full merits analysis in the alternative is a merits determination" for habeas purposes. *Will v. Lumpkin*, 978 F.3d 933, 939 (5th Cir. 2020). On this basis, we recently held that a Rule 60(b) motion which seeks to reopen a procedural ruling that was paired with an alternative merits determination "inherently presents a successive habeas petition." *Id.* *Will* thus forecloses Fratta's attempt to characterize his Rule 60(b) motion as a challenge to a procedural ruling that precluded merits review of his claims.

That brings us to the second way a Rule 60(b) motion can avoid the bar on successive habeas motions. Fratta argues he properly labelled his filing a Rule 60(b) motion because it identifies "defect[s] in the integrity of the federal habeas proceeding." *See Gilkers*, 904 F.3d at 344. The Supreme Court has not clearly defined what qualifies as a "defect in the integrity of the federal habeas proceeding." *See Gonzalez*, 545 U.S. at 532. But it has pointed to "[f]raud on the federal habeas court" as one example. *Id.* at 532 n.5. We have found qualifying defects when an underlying feature of the habeas proceeding prevented the petitioner from presenting his claims. *See Crutsinger v. Davis*, 929 F.3d 259, 265–66 (5th Cir. 2019) (denial of funding to access investigative services); *United States v. McDaniels*, 907 F.3d 366, 370 (5th Cir. 2018) (refusal of a request for an evidentiary hearing); *Clark v.*

Davis, 850 F.3d 770, 779–80 (5th Cir. 2017) (material conflict of interest between habeas petitioner and his counsel).

Neither of the issues raised in Fratta's Rule 60(b) motion arguably amounts to a defect in the integrity of the federal proceeding. Fratta contends that two recent Supreme Court decisions cast doubt on the legitimacy of the Texas hybrid-representation rule[1] that procedurally barred his sufficiency and jury-instruction claims at the federal habeas stage. *See Garza v. Idaho*, 139 S. Ct. 738 (2019); *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). At the outset, we note that *McCoy* and *Garza* do not address the hybrid representation rule.[2] What is more, it is doubtful those decisions apply retroactively to cases on collateral review. *See Christian v. Thomas*, 982 F.3d 1215, 1224–25 (9th Cir. 2020) (holding *McCoy* does not apply retroactively); *Smith v. Stein*, 982 F.3d 229, 234 (4th Cir. 2020) (same). But more fundamentally, a court's failure to anticipate a change in decisional law from the Supreme Court is not in the same class of defects as a fraud on the court or a conflict of interest.[3] *See Vialva*, 904 F.3d at 360; *In re Coleman*, 768

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[1] *See Landers v. State*, 550 S.W.2d 272, 280 (Tex. Crim. App. 1977) (establishing the Texas bar on hybrid representation); *see also Myers v. Johnson*, 76 F.3d 1330, 1335 (5th Cir. 1996) (applying the same rule as matter of federal practice).

[2] These decisions bolstered the criminal defendant's right "to make [] fundamental choices about his own defense." *See McCoy*, 138 S. Ct. at 1511. Although the Court held that defense counsel must obey the defendant's decision to assert innocence at trial (*McCoy*) and to file an appeal (*Garza*), in both cases the Court clarified that these rights do "not displace counsel's, or the court's, respective trial management roles" and reiterated that many strategic decisions do not require the defendant's consent. *See id.* at 1509; *Garza*, 139 S. Ct. at 746.

[3] Arguments about changes in decisional law are properly raised in habeas cases under Rule 60(b) when they attack "a procedural ruling which precluded a merits determination." *Gilkers*, 904 F.3d at 344; *see Raby v. Davis*, 907 F.3d 880, 883 & n.3 (5th Cir. 2018); *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012). As we have discussed, however, Fratta cannot avail himself of that Rule 60(b) avenue because the district court

F.3d at 371 (both finding that the exception for defects in integrity must be "narrowly construed").

Fratta's second alleged defect is no more plausible. Fratta maintains that his claims merit further consideration because, when he first sought reconsideration of the habeas ruling in a *pro se* motion for relief, our precedent required the dismissal of Rule 59(e) motions for reconsideration as successive attacks on the merits of the habeas judgment. Since then, the Supreme Court has held that Rule 59(e) motions, unlike Rule 60(b) motions, do not act as successive habeas petitions. *Banister v. Davis*, 140 S. Ct. 1698, 1708 (2020). Fratta thus argues that a judicial defect—the now-defunct circuit rule—deprived him of the opportunity to seek reconsideration of the denial of his habeas petition.

But this argument ignores that the district court dismissed the Rule 59 motion as an improper, hybrid filing—not because of this circuit's pre-*Banister* rule regarding Rule 59(e) claims. To the extent Fratta argues his counsel would have pursued a similar Rule 59(e) motion were it not for the circuit rule, nothing in the record suggests this was the case. Moreover, Rule 59(e) is "backward-looking"; it gives habeas courts the chance to perfect "just-issued decisions" before a possible appeal. *Id.* Fratta does not cite any caselaw indicating that a court's refusal to alter a judgement after it has issued equates to a defect in the proceeding itself.

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alternatively denied these claims on the merits after finding them to be procedurally barred. *See Will*, 978 F.3d at 939.

In any event, *Raby* and *Adams* explain why changes in decisional law will rarely qualify as extraordinary circumstances justifying Rule 60(b) relief. *See Raby*, 907 F.3d at 884; *Adams*, 679 F.3d at 320–21. That general principle—combined with the problems with Fratta's reliance on *Garza* and *McCoy* noted above—would lead us to conclude that Rule 60(b) relief is not warranted here even if Fratta's filing were a proper Rule 60(b) motion.

In sum, Fratta has not shown that reasonable jurists could debate the propriety of the district court's ruling that Fratta's Rule 60(b) motion is a successive habeas petition. And he has not sought permission from our court to file a successive petition. *See* 28 U.S.C. § 2244(b)(3).

Fratta's request for a COA suffers from another flaw: he fails to state "a valid claim of the denial of a constitutional right." *Slack*, 529 U.S. at 484. Fratta's underlying constitutional claim alleges a fatal variance between his grand-jury indictment, which treated him as the person who shot his wife, and the jury instruction, which allowed the jury to convict him as a "party" to her murder even if someone else pulled the trigger. But, as the district court explained over four years ago, that jury instruction was authorized by state law and consistent with Fratta's constitutional rights. *Fratta*, 2017 WL 4169235 at *36–37. Indeed, we see no meaningful distinction between the Texas rule Fratta challenges and the longstanding rule in federal criminal law that the jury may be instructed on an aiding-and-abetting theory of liability even when the indictment charges the defendant only as a principal. *See generally United States v. Walker*, 621 F.2d 163, 166 (5th Cir. 1980) (rejecting challenge to jury instruction because it "is well-established, both in this circuit and others, that one who has been indicted as a principal may be convicted on evidence showing that he merely aided and abetted the commission of the offense" (quoting *United States v. Bullock*, 451 F.2d 884, 888 (5th Cir. 1971))). And Fratta's sufficiency claim is essentially derivative of his claim that he could only be convicted based on the "shooter" theory alleged in the indictment.

We thus conclude that Fratta has not presented colorable constitutional claims. That is another reason why he is not entitled to a full appeal from the district court's ruling.

* * *

The motion for a certificate of appealability is DENIED.

Exhibit B

United States Court of Appeals for the Fifth Circuit

No. 21-70001

ROBERT ALAN FRATTA,

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. 4:13-CV-3438

ON PETITION FOR REHEARING EN BANC

Before OWEN, *Chief Judge,* and SMITH and COSTA, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing 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.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

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February 28, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 21-70001 Fratta v. Lumpkin
USDC No. 4:13-CV-3438

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Monica R. Washington, Deputy Clerk
504-310-7705

Mr. Joshua Aaron Freiman
Mr. James Gregory Rytting
Ms. Ellen Stewart-Klein