

No. _____

ORIGINAL

23-5008

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

JUN 24 2023

OFFICE OF THE CLERK

MICHAEL JOSEPH BIEN,
Petitioner

v.

STATE OF TEXAS,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES FIFTH CIRCUIT OF APPEALS

Michael J. Bien,
Petitioner pro se
TDCJ no. 01915041
Hughes Unit
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QUESTIONS PRESENTED

1. Whether a United States District Court's ruling to deny a §2254 Certificate of Appealability should be vacated by the Circuit Court when Rule 60(b) new evidence requires a hearing but no hearing was conducted by the District Court;

AND

2. Whether COVID-19 circumstances were extraordinary events which should be considered external barriers for federal Habeas Corpus applicants for tolling purposes.

PARTIES

All parties appear in the caption of the case on the cover page.

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Petitioner Michael J. Bien asks that this Court issue a writ of certiorari to review the judgment of the United States Fifth Circuit of Appeals.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is attached to this petition as Appendix A. Bien v. Lumpkin, No. 22-11032 (February 28, 2023). The opinion of the United States District Court for the Northern District of Texas, San Angelo Division is attached as Appendix B. Bien v. Director, TDCJ-CID, No. 6:21-cv-00020C (June 29, 2022).

The United States Court of Appeals for the Fifth Circuit's denial of petitioner's motion for rehearing is attached as Appendix C. Order Denying Petitioner's Motion for Rehearing.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment on February 28, 2023 and denied petitioner's Motion for Rehearing on March 29, 2023. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254, Bien having asserted below and in this petition the deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution which applies the Fifth Amendment to the States, providing in relevant part, "No State shall ... deprive any person of life, liberty, or property, without due process of law [.]" U.S.

Const.., Amend. XIV, Sec. 1 Bien is seeking his constitutional right to Habeas Corpus consideration in federal court.

STATEMENT OF THE CASE

Michael Bien is a Texas state prisoner convicted of solicitation of capital murder and serving a life sentence. He sought appeal and state Habeas Corpus relief. The state's highest court, the Texas Court of Criminal Appeals granted relief of a double jeopardy violation but denied all other relief. Bien is seeking federal Habeas Corpus relief but was denied consideration due to AEDPA deadlines - Bien's 28 U.S.C. §2254 application deemed to be submitted past the one year deadline. Bien sought equitable tolling be applied to the timeline but his request was denied by the federal district court. The Fifth Circuit upheld the district court's decision on appeal.

A. Underlying State Case

In the underlying state case, Bien was alleged to have sought the murder of his ex-brother-in-law. Bien v. State, 550 SW3d 180 (Court Crim. App. 2018) Relevant to Bien's Habeas Corpus applications, the state's investigation and evidence relied primarily on testimony of an informant who was provided (by the DA) with \$1,000 to loan to Bien so he could hire a hit-man. Id. at 182-184

Bien's trial attorney raised an ineffectual entrapment defense and Bien's Habeas Corpus allegations centered on the ineffective assistance by his attorney.

Bien's trial resulted in two convictions, attempted capital mur-

der and solicitation of capital murder. Ultimately the Court of Criminal Appeals vacated the less severe conviction for double jeopardy reasons. (The court allowed the prosecutor to decide which conviction to vacate.)

B. Federal Habeas Corpus

During the course of his state Habeas Corpus proceedings, Bien became indigent. Although his hired attorney agreed to make his federal 2254 application, Bien was abandoned for economic reasons. Moreover, Bien's attorney represented to Bien that a timely application could be made if he were paid \$1,000. Unbeknownst to Bien, his attorney had no intention of making the 2254 application and was simply seeking additional funds before abandoning Bien. Appendix B, Dist. Ct. Op. 06/29/22

During this time, late 2020, Bien was incarcerated in the Texas prison system which was under lock-down for COVID-19 quarantine. When Bien realized his attorney had defrauded him he sought assistance from a jail-house attorney who informed Bien his 2254 application was past due for AEDPA timeliness purposes. Bien submitted his 2254 application within 9 days with the jailhouse attorney's assistance.

The United States District Court for the Northern District of Texas denied Bien's 2254 application and denied him a Certificate of Appealability. Appendix B, Dist. Ct. Op. 06/29/22

Bien sought review by the Fifth Circuit and, contemporaneously, submitted a Rule 60(b) motion to the district court with new evidence he had obtained related to the attorney fraud and abandonment. The district court denied the Rule 60(b) motion and the Fifth Circuit denied Bien's request to grant a COA.

C. Decisions Below

As the appendix opinions indicate, the courts below determined Bien's application did not warrant equitable tolling - the circumstances amounted to attorney neglect or error.

Bien contends the courts below erred when they did not hold an evidentiary hearing when he presented the courts with the new evidence, the Rule 60(b) motion, showing the attorney fraud and abandonment. Furthermore, Bien contends it was an error for the courts to fail to consider the extraordinary circumstances of his COVID-19 lockdown quarantine.

REASONS FOR GRANTING THE WRIT

Question 1

Bien contends that the courts below erred when a Rule 60(b) motion called for further development of the record to determine if equitable tolling was appropriate due to a fraud on the court by the attorney representing Bien.

As Bien was pro se seeking review of his 2254 he was also seeking further evidence to support his stance that it was not mere garden variety attorney negligence or error but was fraud that caused him to miss his 2254 AEDPA deadline. In short, with COVID-19 concerns among his family causing his mother to reconnect with Bien, she provided him with the records of Bien's attorney fee payments. Those were of significance to the case because they would support Bien's contention of attorney fraud, rather than error or negligence.

Further militating for a hearing to be granted, Bien had made a motion for rehearing on several issues the district court had misapprehended. The 06/29/22 opinion of the district court, Appendix B, gave factually incorrect statements which were central to the timeline question. Notably, the court believed Bien had waited three months (following receipt of his attorney-client file) to make his 2254 application. That was incorrect. He had not received his attorney-client file for several months due to COVID-19 quarantine effects on the prison system mail delivery BUT he prepared his 2254 within just 9 days of discovering his attorney's fraud.

Here, the federal Circuits seem to be in conflict with regard to determining when to look at the underlying substance of a Rule 60(b). The Fifth Circuit has aligned with a more stringent view of Rule 60(b) motions when raised in habeas proceedings, even denoting them as subsequent petitions. see Mobley v Head, 306 F.3d 1096 (11th Cir. 2002); Lopez v Douglas, 141 F.3d 974, 975 (10th Cir. 1998)

The most rational approach, however, seems to be the recognition that "a Rule 60(b) motion to set aside a habeas denial is 'undoubtedly a step on the road to the ultimate objective of invalidating the judgment of conviction' but a Rule 60(b) motion itself does not seek habeas relief and should, therefore, be treated as any other motion under Rule 60(b) for AEDPA purposes." Rodriguez v Mitchell, 252 F.3d 191 (2nd Cir. 2001)(quoted by Harris v United States, 367 F.3d 74 (2nd Cir. 2004))

By granting the writ and taking review of this case, the Court can improve judicial economy by establishing a clear rule to follow as the courts use judicial discretion with Rule 60(b) motions.

Question 2

Bien also raised to the lower courts the issue of equitable tolling for extraordinary issues related to COVID-19 quarantines.

The lower courts failed to address his arguments. Bien's arguments were specific and related to two primary barriers he encountered due to Texas prison protocols. First, Bien was unable to access the prison law library. As a lay-person, had Bien been able to access the law library he could ask the inmate clerks for assistance in determining his AEDPA deadline. His Texas prison unit, Hughes Unit, was under a lock-down for the entirety of time to prepare a pro se petition.

Because Bien could not research the timeline, or other aspects of his 2254 application, due to the quarantine conditions, his access to the courts was impermissibly denied. Bounds v Smith, 430 U.S. 817, 821-22 (1977) This should have been considered by the district and circuit courts when Bien raised the COVID-19 barriers.

Additionally, Bien was unable to contact family except through mail correspondence due to the quarantine. Prisoners were confined to cells almost exclusively and phone use was curtailed. As earlier noted, Bien was reunited with his mother who had important new evidence of the attorney fraud. That new evidence could only be developed over the many weeks it took for correspondence to be delivered.

Lastly, this Court made special orders on March 19, 2020 and again on April 15, 2020 related to extending timelines for filing deadlines. The Court deemed the COVID-19 circumstances to be extraordinary. It should recognize that prisoners were even more effect-

ed by the pandemic as it relates to legal filings. Certainly a hearing to develop the record of Bien's circumstances was called for.

CONCLUSION

This Court should grant certiorari, appoint counsel to Bien, and schedule this case for briefing so that lower courts have clear guidance related to Rule 60(b) hearings, motions, and procedures in the context of Habeas Corpus petitions. Alternatively, this Court should summarily grant this petition and remand the case for hearings and appointment of counsel for Bien.

Respectfully submitted,



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