

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioner-Appellant,

HARRY K. RUSSELL, Warden,

Respondent-Appellee.

Jun 30, 2017

DEBORAH S. HUNT, Clerk

ORDER

In 1995, Farooq was convicted of two counts of aggravated murder and was sentenced to life in prison. The Ohio Court of Appeals affirmed Farooq's convictions, and the Ohio Supreme Court dismissed Farooq's appeal.

In his Rule 60(b)(4) motion, Farooq asserted that the district court's 1999 judgment was void because: (1) the court lacked subject matter jurisdiction due to its failure to "follow relevant law or procedure in securing a final, appealable order from the state court"; and (2) the district court "acted in a manner inconsistent with due process of the law by entering a judgment."

Farooq requested that the district court remand the action to the state court with directions to dismiss the indictment and expunge his criminal convictions.

A magistrate judge recommended denying the Rule 60(b)(4) motion, reasoning that the district court had subject matter jurisdiction over the 1997 habeas petition pursuant to 28 U.S.C. §§ 2241(a) and 2254(a). In his objections, Farooq again argued that the 1999 judgment was void because the district court had not secured a final judgment, in the form of a journal entry, from the state court. He further argued that the magistrate judge had failed to make a recommendation on the due process claim. Farooq simultaneously filed a motion to take judicial notice, again complaining about the lack of a final judgment and the magistrate judge's failure to consider the due process claim.

Upon de novo review, the district court referred to Farooq's objections and concluded that the state trial court's alleged failure to enter a final judgment did not deprive the district court of jurisdiction to entertain Farooq's habeas petition. The court observed that Farooq's motion to take judicial notice raised the same arguments as in his objections and likewise was without merit. The due process claim, which derived from the jurisdiction claim, was implicitly denied. *See A.O. Smith Corp. v. United States*, 774 F.3d 359, 371 (6th Cir. 2014). In a separate order, the district court declined to issue a COA.

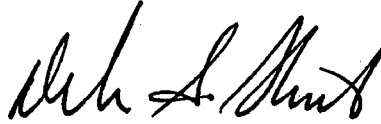
In his COA application, Farooq essentially reiterates the claims in his Rule 60(b)(4) motion and argues that the district court failed to review the report and recommendation de novo in light of his objections.

An individual seeking a COA is required to make a substantial showing of the denial of a federal constitutional right. *See* 28 U.S.C. § 2253(c)(2). A petitioner must "show[] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

Jurists of reason would agree that the district court had subject matter jurisdiction over the 1997 habeas corpus petition. Under 28 U.S.C. § 2254(a), a district court has jurisdiction to entertain and grant a writ of habeas corpus brought by a state prisoner "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Thus, the district court's jurisdiction was not dependent on whether the criminal judgment against Farooq was entered in accordance with state law. Because the jurisdiction claim does not deserve encouragement to proceed further, Farooq's related due process claim also does not deserve encouragement to proceed further. Finally, review of the district court's order denying Farooq's habeas petition reveals that it did, in fact, conduct a de novo review of the magistrate judge's report and recommendation.

Accordingly, the court **DENIES** Farooq's COA application. The IFP motion is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

ABDUSH-SHAHID FAROOQ,

Petitioner,

vs.

Civil Action 2:97-cv-838
Judge Marbley
Magistrate Judge King

HARRY RUSSELL,

Respondent.

ORDER

This action for a writ of habeas corpus under 28 U.S.C. § 2254 was originally filed in July 1997, and was dismissed on the merits on February 8, 1999. *Judgment* (ECF No. 12).¹ On August 26, 2016, this Court denied Petitioner's June 20, 2016 *Motion for Relief from Void Judgment pursuant to Federal Rules of Civil Procedure 60(b)(4)* (ECF No. 34). *Opinion and Order* (ECF No. 43). This matter is now before the Court on Petitioner's *Motion for Certificate of Appealability* (ECF No. 49).

¹ Petitioner has filed a number of challenges in this Court to his 1995 state court conviction on two counts of aggravated murder. Petitioner filed a second habeas corpus action under the name Timothy Grinnell, *Grinnell v. Warden, Ross Correctional Institution*, 2:13-cv-776. This Court transferred that action to the United States Court of Appeals for the Sixth Circuit. *Id.*, *Opinion and Order* (S.D. Ohio Sept. 18, 2013). The Court of Appeals denied permission to file a second or successive petition, *In re Timothy Grinnell*, Case No. 13-4092 (6th Cir. Feb. 26, 2014), and the United States Supreme Court denied the petition for a writ of habeas corpus filed by petitioner in that Court. *In re Timothy Grinnell*, 135 S.Ct. 219 (2014). Invoking the provisions of Rule 60(b)(4) of the Federal Rules of Civil Procedure, petitioner filed a third challenge to his 1995 state court murder conviction in this Court in March 2015. *Grinnell v. Warden, Chillicothe Correctional Institution*, 2:15-cv-973. This Court construed that action as a successive petition and transferred the matter to the United States Court of Appeals for the Sixth Circuit. *Id.*, *Order* (S.D. Ohio April 17, 2015). On May 5, 2015, the Court of Appeals granted petitioner's motion to voluntarily dismiss that petition. *In re: Timothy D. Grinnell*, Case No. 15-3421 (6th Cir. May 5, 2015).

“In contrast to an ordinary civil litigant, a state prisoner who seeks a writ of habeas corpus in federal court holds no automatic right to appeal from an adverse decision by a district court.” *Jordan v. Fisher*, — U.S.—, 135 S.Ct. 2647, 2650 (2015); 28 U.S.C. § 2253(c)(1)(requiring a habeas petitioner to obtain a certificate of appealability in order to appeal). When a claim has been denied on the merits, a certificate of appealability may issue only if the petitioner “has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To make a substantial showing of the denial of a constitutional right, a petitioner must show “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983)). When a claim has been denied on procedural grounds, a certificate of appealability may issue if the petitioner establishes 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*, 529 U.S. at 484.

Upon review of the record, this Court is not persuaded that reasonable jurists could debate whether Petitioner’s *Motion for Relief from Void Judgment pursuant to Federal Rules of Civil Procedure 60(b)(4)* (ECF No. 34) should have been resolved differently. Petitioner’s *Motion for Certificate of Appealability* (ECF No. 49) is therefore **DENIED**.

DATED: October 20, 2016

s/Algenon L. Marbley
Algenon L. Marbley
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

ABDUSH-SHAHID FAROOQ,

Petitioner,

vs.

Civil Action 2:97-cv-838
Judge Marbley
Magistrate Judge King

HARRY RUSSELL,

Respondent.

OPINION AND ORDER

This action for a writ of habeas corpus under 28 U.S.C. § 2254 was originally filed in July 1997, and was dismissed on the merits on February 8, 1999. *Judgment* (ECF No. 12).¹ On June 22, 2016, the United States Magistrate Judge recommended that Petitioner's June 20, 2016 *Motion for Relief from Void Judgment pursuant to Federal Rules of Civil Procedure 60(b)(4)* (ECF No. 34) ("*Motion for Relief from Void Judgment*") be denied. *Report and Recommendation* (ECF No. 35). This matter is now before the Court on Petitioner's objection to that recommendation, *Objection* (ECF No. 41), and on *Petitioner's Motion to Take Judicial Notice*

¹ Petitioner has filed a number of challenges in this Court to his 1995 state court conviction on two counts of aggravated murder. Petitioner filed a second habeas corpus action under the name Timothy Grinnell, *Grinnell v. Warden, Ross Correctional Institution*, 2:13-cv-776. This Court transferred that action to the United States Court of Appeals for the Sixth Circuit. *Id.*, *Opinion and Order* (S.D. Ohio Sept. 18, 2013). The Court of Appeals denied permission to file a second or successive petition, *In re Timothy Grinnell*, Case No. 13-4092 (6th Cir. Feb. 26, 2014), and the United States Supreme Court denied the petition for a writ of habeas corpus filed by petitioner in that Court. *In re Timothy Grinnell*, 135 S.Ct. 219 (2014). Invoking the provisions of Rule 60(b)(4) of the Federal Rules of Civil Procedure, petitioner filed a third challenge to his 1995 state court murder conviction in this Court in March 2015. *Grinnell v. Warden, Chillicothe Correctional Institution*, 2:15-cv-973. This Court construed that action as a successive petition and transferred the matter to the United States Court of Appeals for the Sixth Circuit. *Id.*, *Order* (S.D. Ohio April 17, 2015). On May 5, 2015, the Court of Appeals granted petitioner's motion to voluntarily dismiss that petition. *In re: Timothy D. Grinnell*, Case No. 15-3421 (6th Cir. May 5, 2015).

(ECF No. 42). The Court will consider the matter *de novo*. See 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b).

The *Motion for Relief from Void Judgment* asks that this Court vacate its February 1999 judgment and “remand this case back to the state court with direction to dismiss the indictment . . . , and expunge the underlying criminal charges from petitioner’s record.” *Motion for Relief from Void Judgment*, PAGEID 169-70. Petitioner specifically argues that this Court lacked subject matter jurisdiction when it entered final judgment in February 1999 because “this court did not follow relevant law or procedure in securing a final, appealable, order from the state court.” *Motion for Relief from Void Judgment*, PAGEID 166-67. The Magistrate Judge first considered whether the merits of the motion may properly be considered by this Court or, instead, whether the motion must be transferred to the United States Court of Appeals for the Sixth Circuit as a successive petition under 28 U.S.C. § 2244(b)(1)(A). *Report and Recommendation*, PAGEID 186.² The Magistrate Judge construed the *Motion for Relief from Void Judgment* as a true motion under Rule 60(b) of the Federal Rules of Civil Procedure because it does not purport to attack the substance of this Court’s 1999 judgment but, rather, alleges a defect in the integrity of the prior proceedings. *Id.*

The Magistrate Judge therefore went on to consider the merits of the *Motion for Relief from Void Judgment*, but concluded that the motion is without merit. *Report and Recommendation*, PAGEID 186. Specifically, the Magistrate Judge reasoned that the bases of

² A successive petition for a writ of habeas corpus must be transferred to the appropriate Court of Appeals for authorization. 28 U.S.C. § 2244(b)(2); *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997). However, a true motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure – *i.e.*, a motion that attacks some defect in the integrity of the federal habeas proceedings – is not a successive petition and may proceed in the District Court without prior authorization from the Court of Appeals. See *Gonzales v. Crosby*, 545 U.S. 524, 532 (2005).

Petitioner's challenge to the Court's jurisdiction, 28 U.S.C. § 158(a)(1),³ and 28 U.S.C. § 1447,⁴ were simply inapplicable. "This Court unquestionably had subject matter jurisdiction over petitioner's habeas corpus challenge to his 1995 state court conviction. *See* 28 U.S.C. §§ 2241, 2254(a)." *Report and Recommendation*, PAGEID 186.

In his *Objection*, Petitioner insists that "the fact still remain[s] that this court['s] judgment is void because this court did not secure a final judgment from the state court[,] rendering this court powerless to enter its February 8, 1999 judgment." *Id.* at PAGEID 198. In making this argument, Petitioner appears to misapprehend the nature of a habeas corpus action. True appeals ordinarily require a final, appealable judgment. *See, e.g.*, 28 U.S.C. § 1257(a) ("Final judgments or decrees rendered by the highest court of a State . . . may be reviewed by the Supreme Court by writ of certiorari"); 28 U.S.C. § 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts"). However, a habeas corpus action under 28 U.S.C. § 2254 is not an appeal from a state court conviction. Rather, federal courts are expressly granted the jurisdiction to grant a writ of habeas corpus to, *inter alios*, prisoners who are "in custody in violation of the Constitution or laws or treaties of the United States. . . ." 28 U.S.C. § 2241(c)(3). *See also* 28 U.S.C. § 2254(a) ("[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."). Even if, as Petitioner argues,⁵ the Franklin County Court of Common Pleas did not enter a final judgment that was valid under Ohio law, that fact would not divest this Court of jurisdiction to entertain Petitioner's original habeas corpus petition, which

³ Section 158(a)(1) governs appeals to District Courts from the judgments and orders of Bankruptcy Judges.

⁴ Section 1447 governs the procedures to be followed after the removal of a case from state court to a federal court.

⁵ In recognizing Petitioner's argument in this regard, the Court does not intend to adopt that argument.

was filed in 1997 and dismissed in 1999. The challenge to this Court's jurisdiction, made in *Motion for Relief from Void Judgment*, is therefore without merit.

In short, Petitioner's objection to the *Report and Recommendation* are without merit. *Petitioner's Motion to Take Judicial Notice* (ECF No. 42), which incorporates the same argument presented in the *Objection* (ECF No. 41), is likewise without merit.

The *Report and Recommendation* (ECF No. 35) is **ADOPTED AND AFFIRMED**. The *Motion for Relief from Void Judgment pursuant to Federal Rules of Civil Procedure 60(b)(4)* (ECF No. 34) and *Petitioner's Motion to Take Judicial Notice* (ECF No. 42) are **DENIED**.

s/Algenon L. Marbley

Algenon L. Marbley
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

ABDUSH-SHAHID FAROOQ,

Petitioner,

vs.

Civil Action 2:97-cv-838
Judge Marbley
Magistrate Judge King

HARRY RUSSELL,

Respondent.

REPORT AND RECOMMENDATION

Petitioner, a state prisoner, originally filed this action for a writ of habeas corpus under 28 U.S.C. § 2254 in July 1997, presenting eleven (11) substantive challenges to his 1995 conviction in the Franklin County Court of Common Pleas on two counts of aggravated murder. Final judgment dismissing those habeas claims on the merits was entered by this Court on February 8, 1999. *Judgment*, ECF No. 12. That judgment was affirmed by the United States Court of Appeals for the Sixth Circuit, *Farooq v. Russell*, Case No. 99-3242, 2000 WL 658963 (6th Cir. May 12, 2000), and the United States Supreme Court denied petitioner's petition for a writ of *certiorari*. *Farooq v. Russell*, 531 U.S. 898 (2000). On February 2, 2016, this Court construed petitioner's November 23, 2015 motion for relief from judgment, *see* Fed. R. Civ. P. 60(b)(4), as a successive habeas corpus petition within the meaning of 28 U.S.C. § 2244(b)(3)(A)

and transferred the matter to the United States Court of Appeals for the Sixth Circuit pursuant to *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997). *Opinion and Order*, ECF No. 31.¹

This matter is now before the Court on petitioner's *Motion for Relief from Void Judgment pursuant to Federal Rules of Civil Procedure 60(b)(4)*, ECF No. 34 ("*Motion for Relief from Void Judgment*"). In it, Petitioner asks that this Court vacate its February 1999 judgment and "remand this case back to the state court with direction to dismiss the indictment . . . , and expunge the underlying criminal charges from petitioner's record." *Motion for Relief from Void Judgment*, PAGEID169-70.

A successive petition for a writ of habeas corpus must be transferred to the Court of Appeals. 28 U.S.C. § 2244(h); 28 U.S.C. § 1631; see *In re Sims*, 111 F.3d at 47. However, a true motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure – i.e., a motion that attacks some defect in the integrity of the federal habeas proceedings – is not a successive petition and may proceed without prior authorization from the Court of Appeals. See *Gonzales v. Crosby*, 545 U.S. 524, 532 (2005).

Petitioner's current *Motion for Relief from Void Judgment* argues that this Court lacked subject matter jurisdiction when it entered final judgment in February 1999 because "this court did not follow relevant law or procedure in securing a final, appealable, order from the state

¹ Petitioner has filed quite a number of federal habeas corpus challenges to his 1995 state court conviction, proceeding under the names of Abdush-Shahid Farooq or Timothy Grinnell: Petitioner's second habeas corpus action was filed in this Court in 2013. *Grinnell v. Warden, Ross Correctional Institution*, 2:13-cv-776. This Court transferred that action to the United States Court of Appeals for the Sixth Circuit. *Id.*, *Opinion and Order* (S.D. Ohio Sept. 18, 2013). The Court of Appeals denied permission to file a second or successive petition, *In re Timothy Grinnell*, Case No. 13-4092 (6th Cir. Feb. 26, 2014), and the United States Supreme Court denied the petition for a writ of habeas corpus filed by petitioner in that Court. *In re Timothy Grinnell*, 135 S.Ct. 219 (2014). Invoking the provisions of Rule 60(b)(4) of the Federal Rules of Civil Procedure, petitioner filed a third challenge to his 1995 state court murder conviction in this Court in March 2015. *Grinnell v. Warden, Chillicothe Correctional Institution*, 2:15-cv-973. This Court construed that action as a successive petition and transferred the matter to the United States Court of Appeals for the Sixth Circuit. *Id.*, *Order* (S.D. Ohio April 17, 2015). On May 5, 2015, the Court of Appeals granted petitioner's motion to voluntarily dismiss that petition. *In re: Timothy D. Grinnell*, Case No. 15-3421 (6th Cir. May 5, 2015).

court.” *Motion for Relief from Void Judgment*, PAGEID 166-67. This Court concludes current *Motion for Relief from Void Judgment* is not a successive petition, and that the Court entertain the merits of the motion without prior authorization by the Court of Appeals. However, the Court also concludes that the current motion is without merit.

The *Motion for Relief from Void Judgment* invokes 28 U.S.C. § 158(a)(1) and argues that, because the state court’s judgment was not final or was otherwise invalid, this Court lacked jurisdiction to enter judgment in February 1999. However, § 158(a)(1), which governs appeals to district courts from judgments and orders of bankruptcy judges, is simply inapplicable to these habeas corpus proceedings. Section 1447 of Title 28 of the United States Code – which petitioner invokes in requesting the remand of the action to the state court – addresses cases that have been removed to a federal court from a state court and is likewise inapplicable to these habeas corpus proceedings. This Court unquestionably had subject matter jurisdiction over petitioner’s habeas corpus challenge to his 1995 state court conviction. *See* 28 U.S.C. §§ 2241(a), 2254(a).

It is therefore **RECOMMENDED** that petitioner’s *Motion for Relief from Void Judgment pursuant to Federal Rules of Civil Procedure 60(b)(4)*, ECF No. 34, be denied.

If any party seeks review by the District Judge of this *Report and Recommendation*, that party may, within fourteen (14) days, file and serve on all parties objections to the *Report and Recommendation*, specifically designating this *Report and Recommendation*, and the part thereof in question, as well as the basis for objection thereto. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Response to objections must be filed within fourteen (14) days after being served with a copy thereof. Fed. R. Civ. P. 72(b).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to *de novo* review by the District Judge and

of the right to appeal the decision of the District Court adopting the *Report and Recommendation*. See *Thomas v. Arn*, 474 U.S. 140 (1985); *Smith v. Detroit Fed'n of Teachers, Local 231 etc.*, 829 F.2d 1370 (6th Cir. 1987); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

s/Norah McCann King
Norah M^cCann King
United States Magistrate Judge

June 22, 2016

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