

NOT RECOMMENDED FOR PUBLICATION

FILED

Nos. 98-6568/6569, 01-6504

JAN 18 2002

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEONARD GREEN, Clerk

ABU-ALI ABDUR'RAHMAN,

Petitioner-Appellant,

v.

RICKY BELL,

Respondent-Appellee.

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) ON APPEAL FROM THE UNITED
) STATES DISTRICT COURT FOR
) THE MIDDLE DISTRICT OF
) TENNESSEE
)
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Before: SILER, BATCHELDER and COLE, Circuit Judges.

SILER, Circuit Judge. This matter comes before the court on the application by Abdur' Rahman for a certificate of appealability, a request that his Fed.R.Civ.P. 60(b) appeal be heard initially en banc and a motion to consolidate his Rule 60(b) appeal with pending motions in Nos. 98-6568/6569 to withhold mandate, grant a rehearing en banc, and remand. For the reasons stated hereafter, insofar as we have the authority, the motions are denied.

His application for a certificate of appealability arises from the transfer by the district court of this matter after he had applied for relief from judgment under Fed.R.Civ.P. 60(b). Petitioner moved the district court for relief from judgment under Rule 60(b) based upon the fact that Tennessee Supreme Court Rule 39 was just adopted on June 28, 2001, in which it stated:

In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error.

Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tenn. Code. Ann. § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

The petitioner raised it in a Rule 60(b) motion because this case was appealed to the Tennessee Supreme Court after 1967 and the district court in this case found that certain claims were barred by the failure of the petitioner to seek discretionary review from the Tennessee Supreme Court. See *Abdur'Rahman v. Bell*, 999 F. Supp. 1073, 1080-82 (M.D. Tenn. 1988). The district court properly found that a Rule 60(b) motion is the equivalent of a successive habeas corpus petition, see *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996), so it transferred this case to our court for a determination of whether the Rule 60(b) motion satisfied the gateway criteria of 28 U.S.C. § 2244(b).

We consider that this is the equivalent of a successive habeas corpus petition, so it is necessary to determine whether the petition meets the criteria of 28 U.S.C. § 2244(b)(2). *Abdur'Rahman* has not been able to meet these criteria. First, he does not rely upon a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court. Second, there is no factual predicate for the claim which could not have been discovered previously through the exercise of due diligence. Finally, he does not show that the facts underlying the claim would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found him guilty of the offense charged. Instead, his argument rests upon a state procedural rule, adopted three years after the district court's judgment. The district

Nos. No. 01-6504
Rahman v. Bell

court properly found that the claims were then unexhausted for failure to present them before the Tennessee Supreme Court under the authority of *Silverburg v. Everts*, 993 F.2d 124, 126 (6th Cir. 1993). In addition, the decision of this court on appeal from the judgment of the district court did not rest upon any procedural default. *See Abdur'Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000).

Therefore, the application for a certificate of appealability is denied. The motions or requests that the Rule 60(b) appeal be heard initially en banc and to consolidate the Rule 60(b) appeal with pending motions in Nos. 98-6568/6569 are not matters which this panel can resolve, because they should be decided by the en banc court. Thus, all relief requested to this panel is denied.