

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

FIL

2004 JAN 22



OLEN E. HUTCHISON,

Petitioner,

v.

3:98-cv-664

RICKY BELL, Warden,

Respondent.

MEMORANDUM AND ORDER

This is a petition for the writ of habeas corpus pursuant to 28 U.S.C. § 2254; the petitioner is presently incarcerated on death row. The court denied habeas corpus relief and the Sixth Circuit affirmed; the United States Supreme Court denied certiorari. *Hutchison v. Bell*, 303 F.3d 720 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 2608 (2003). The matter is now before the court on the petitioner's motion for relief from judgment and motion to stay proceedings and for a stay of execution.

In his motion for relief from judgment, petitioner relies, *inter alia*, on the recently promulgated Rule 39 of the Rules of the Tennessee Supreme Court, which provides as follows:

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 Tennessee Code Annotated, § 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.

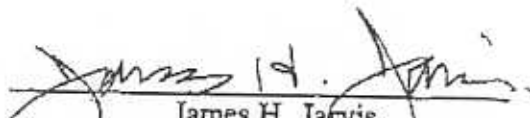
Several of petitioner's claims were dismissed as procedurally defaulted, for failure to present the claim to the Tennessee Supreme Court in an application for permission to appeal. Rule 39 took effect June 28, 2001, which was some nine months after the court's decision in this case. Petitioner alleges the rule should be applied retroactively and thus the court should reconsider two of those claims that were deemed defaulted. *See Adams v. Holland*, 330 F.3d 398 (6th Cir. 2003), *petition for en banc review denied*, No. 00-6575 (August 27, 2003), *petition for certiorari filed*, 72 USLW 3408, No. 03-821 (November 18, 2003).

The respondent alleges, *inter alia*, that the Rule 60(b) motion for relief from judgment constitutes a second or successive habeas corpus petition. The court agrees with respondent on this issue.

In accordance with the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a petitioner cannot file a second or successive § 2254 petition in the district court until he has moved in the United States Court of Appeals for the Sixth Circuit for an order authorizing the district court to consider the petition. 28 U.S.C. § 2244(b)(3). This court has not received an order from the Sixth Circuit authorizing the Court to consider the pending Rule 60(b) motion.

Accordingly, the Clerk is **DIRECTED** to transfer the Rule 60(b) motion [Court File No. 68] to the United States Court of Appeals for the Sixth Circuit, pursuant to 28 U.S.C. § 1631. See In re Sims, 111 F.3d 45 (6th Cir. 1997). Petitioner's motion to stay proceedings in this court is **GRANTED** pending a determination by the Sixth Circuit. See Abu-Ali Abdur'Rahman v. Ricky Bell, Nos. 02-6547/6548 (6th Cir.) (pending review *en banc*). Petitioner's execution is **STAYED** pending further order of this court

ENTER:


James H. Jarvis
UNITED STATES DISTRICT JUDGE