No. 10-6333

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re:

STEPHEN M. WEST,

Movant.

RESPONSE IN OPPOSITION TO
MOTION TO RE-TRANSFER CASE TO THE
UNITED STATES DISTRICT COURT

Petitioner, Stephen West, has filed a motion requesting that this Court re-transfer this case to the United States District Court for the Eastern District of Tennessee for consideration of his motion for relief from the district court's September 2004 judgment denying habeas corpus relief (R. 189).[1] Specifically, West seeks reconsideration of his claim that he received ineffective assistance of counsel at his capital sentencing proceeding "due to a misapprehension of the relationship between 28 U.S.C. § 2254(d) and (e)." However, both the district court and this Court rejected West's ineffective-assistance claim on the merits. Because

[1] The district court entered an amended judgment on July 8, 2005. (D.E. 201).

West's motion seeks to re-litigate an issue previously denied on the merits, it is the equivalent of a second or successive habeas application subject to 28 U.S.C. § 2244(b)'s gatekeeping requirements. Thus, under *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997), and 28 U.S.C. § 1631, the district court properly transferred the matter to this Court, and West's motion should be denied.

In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), the United States Supreme Court clarified that not all motions filed under Fed. R. Civ. P. 60(b) are properly construed as second or successive habeas applications subject to the restrictions set forth in 28 U.S.C. § 2244(b). Purported Rule 60(b) motions, the Court held, that assert new claims for habeas relief "of course qualify" as successive habeas applications. *See id*., at 532. In addition, motions that reassert claims for habeas relief that had been previously and denied on the merits likewise qualify as successive habeas applications. *Id.* "[A]lleging that the [district] court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is . . . entitled to habeas relief." *Id*. The Court further explained the meaning of a merits determination in this way:

> We refer here to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. § 2254(a) and (d). When a movant asserts one of those grounds (*or asserts that a previous ruling on one of those grounds was in error*) he is making a habeas claim. He is not doing so when he merely asserts that a previous ruling which precluded a merits determination was in error –

> for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar."

Id., at 532 n.4 (emphasis added).

In denying habeas relief, both the district court and this Court rejected on the merits West's contention that he received ineffective assistance of counsel at his capital sentencing proceeding. *See West v. Bell*, 550 F.3d 542 (6th Cir. 2008) (reh. denied May 20, 2009), *cert. denied*, 130 S.Ct. 1687 (2010) – "[W]e cannot grant habeas unless West is 'in custody of the Constitution or laws or treaties of the United States.' 28 U.S.C. § 2254(a). . . . A careful review of the record demonstrates that West's counsel was not so ineffective as to constitute a denial of his constitutional rights. For this reason, we must deny West's petition for a grant of habeas corpus relief even though the state court decision was an unreasonable application of clearly established federal law." *Id.*, 550 F.3d at 554. West cannot show that a procedural ruling precluded a merits determination of his ineffective assistance claim. Rather, he contends that the merits determination of his ineffective assistance claim was in error due to faulty legal analysis employed by the district court and this Court – "[A]ll evidence presented [in the district court] should have been reviewed by a habeas court conducting *de novo* review. . . . The failure to review this evidence on procedural grounds provides a proper basis for 60(b) review." West's assertion that the previous merits determination was in error due to the failure to consider all

relevant evidence is precisely the type of "habeas claim" that is categorically barred by AEDPA's prohibition on successive applications. 28 U.S.C. § 2244 (b)(1) ("A claim presented in a second or successive petition habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.").[2]

Although he now attempts to cast the excluded evidence as a separate habeas claim – "the district court erroneously failed to review and consider several allegations of ineffectiveness" related to the presentation of mitigating evidence at sentencing (Motion, p. 2) – he specifically avoided such a characterization in his original habeas proceeding. Rather, petitioner relied on the evidence in question to demonstrate the unreasonableness of the state courts' merits determination of the prejudice prong of his ineffective-assistance claim and asserted that the evidence "would not fundamentally alter the legal claim already considered by the state courts." *See West v. Bell*, No. 05-132/6219 (6th Cir., Reply Brief of Appellant, filed July 5, 2007, at p. 7). The district court's refusal to consider evidence outside the state-court record in connection with a reasonableness review of the state court's merits determination under § 2254(d) does not transform that "evidence" to a

[2] West misplaces his reliance on *Balentine v. Thaler*, 609 F.3d 729 (5th Cir. 2010). Unlike this case, the original federal habeas court in *Balentine* had rejected the petitioner's ineffective assistance claim as procedurally defaulted and had not reached the merits. The petitioner there obtained relief from the judgment only after a subsequent state court decision was deemed to be a merits determination that vitiated the district court's earlier exhaustion/default finding.

separate claim. *Miller-El v. Cockrell*, 537 U.S. 322, 348 (2003) (reasonableness of state court's factual finding assessed "in light of the record before the court"); *Bell v. Cone*, 535 U.S. 685, 697 n.4 (2002) (declining to consider evidence not presented to state court in determining whether its decision was contrary to federal law).

More importantly, following a *de novo* review of the evidence before the state courts, *this* Court concluded that West's allegations regarding trial counsel's performance at sentencing did not rise to the level of deficient performance in the case in any event. Thus, re-assessment of the district court's analysis of the prejudice prong is both unnecessary and beside the point.

The district court correctly ruled that West's Rule 60(b) motion was a successive § 2254 petition that may not be filed without authorization from this Court. Under *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997), "when a second or successive petition for writ of habeas corpus relief or § 2255 motion is filed in the district court without § 2244(b)(3) authorization from [the Sixth Circuit], the district court shall transfer the document to [the Sixth Circuit] pursuant to 28 U.S.C. § 1631." West has already had one fully-litigated petition for writ of habeas corpus challenging his Tennessee first-degree murder conviction and death sentence. He has neither sought nor received authorization from this Court to proceed on a successive application. *See Felker v. Turpin*, 518 U.S. 651, 662 (1996) (federal

habeas relief to state prisoners challenging the legality of their confinement pursuant to the judgment of a State court is necessarily limited by the requirements of AEDPA).

Because the district court properly transferred the matter to this Court under *Sims* and 28 U.S.C. § 1631, petitioner's motion to re-transfer should be denied.

Respectfully submitted,

ROBERT E. COOPER, JR.
Attorney General & Reporter

/s/ Jennifer L. Smith
JENNIFER L. SMITH
Associate Deputy Attorney General
Criminal Justice Division
P.O. Box 20207
Nashville, Tennessee 37202-0207
(615) 741-3487
B.P.R. No. 16514

CERTIFICATE OF SERVICE

I certify that the foregoing response was filed electronically on November 3, 2010. A copy of the document will be served via the Court's electronic filing process on: Roger W. Dickson, Miller & Martin LLP, 832 Georgia Ave., Suite 1000, Chattanooga, TN 37402; and Stephen Ferrell, Federal Defender Services of Eastern Tennessee, Inc., 800 S. Gay St., Suite 2400, Knoxville, TN 37929.

/s/ Jennifer L. Smith
JENNIFER L. SMITH
Associate Deputy Attorney General