Nos. 96-6552/00-5367

FILED

JAN 30 2001

LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PHILIP R. WORKMAN,
Petitioner - Appellant,

v.

AMENDED
ORDER

RICKY BELL, Warden,
Respondent - Appellee

Before: MARTIN, Chief Judge; MERRITT, NELSON, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, Circuit Judges

...

This matter comes before the court upon the motion of the petitioner-appellant to recall the mandate and stay the execution scheduled for 1:00 A.M. on January 31, 2001, pending final disposition by the United States Supreme Court of a petition for a writ of certiorari and a petition for an original writ of habeas corpus now pending before it. The respondent has filed a response opposing the motion.

Upon consideration of the foregoing a majority of the judges of the court have voted to grant the motion. IT IS THEREFORE ORDERED that the motion be, and it hereby is, GRANTED; the stay of execution shall remain in place until the final disposition by the Supreme Court of the actions brought before it by the petitioner.

BOGGS, Circuit Judge, dissenting. In March 2000, a panel of this court refused to permit the filing of a second or successive habeas petition by Workman, pursuant to AEDPA. See *Workman v. Bell*, 227 F.3d 331, 336-39 (6th Cir. 2000) (en banc). Our court had previously held that a denial of such a motion was not subject to a petition for rehearing en banc. *In re King*, 180 F.3d 479 (6th Cir. 1999), *cert. denied*, 120 S. Ct. 1538 (2000). *See* 28 U.S.C. § 2244(b)(3)(E).

Workman then filed a document that the en banc court treated as a motion to recall the panel's mandate, and granted an en banc hearing on this document. See *Workman*, 227 F.3d at 333-34. After oral argument, our circuit denied the motion, albeit by an equally divided court, on September 5, 2000. *Id.* at 331. Workman did not seek a stay of our mandate and the mandate issued. When Tennessee set a new execution date, on October 5, 2000, Workman waited 74 more days, then filed a paper with this court labeled Motion to Recall Mandate. Our circuit has now granted that motion.

Because I believe we have acted in excess of our power and authority, as clearly set forth by the United States Supreme Court in *Calderon v. Harris*, 523 U.S. 553 (1998), I respectfully dissent.

The Supreme Court held in *Calderon* that an order recalling a mandate denying habeas corpus relief did not intrinsically contravene AEDPA. The court of appeals must exercise discretion, however, and must do so consistent with

AEDPA. Specifically, a court of appeals abuses its discretion in so doing "unless it acts to avoid a miscarriage of justice as defined by habeas corpus jurisprudence." *Id.* at 558.

I first note that we are acting even one step beyond the Ninth Circuit in *Calderon*. There, the court was at least acting with respect to a habeas petition that had been properly before the court, on appeal from a grant of habeas by a lower court. There was no question of the original jurisdiction of the en banc court to have considered the matter before it.

Here, Workman has already had the full process that the Ninth Circuit was considering. He filed a habeas that was denied and our court affirmed. We then held that the second habeas could not be filed in the district court – an act which the en banc court's authority to consider was at least controverted and, in my opinion, absent. Seven members of our court had read Workman's subsequent paper as a motion to recall the mandate, subject to the very narrow substantive grounds permitted in *Calderon*. *Workman*, 227 F.3d at 334, citing *Calderon*, 523 U.S. at 557. We then refused to recall that mandate, and dissolved the stay that we had granted to consider the issue. We issued a mandate memorializing our en banc action, in October 2000.

We are now asked to recall THAT mandate, and it would seem that our authority to do so can be no greater, and is perhaps less, than that of the Ninth

Circuit, which the Supreme Court found to be an abuse of discretion. Again, the Ninth Circuit at least had a colorable administrative reason for its action – confusion over an en banc vote. We have none. Whatever may be said on the underlying proceeding – and it was all said in the separate opinions on September 5, 2000 recorded at 227 F.3d 331 – there is no contention of any fraud or clerical error in our en banc court's action. Thus, for us to recall our October 2000 mandate refusing to recall our November 1998 mandate, only one basis appears – a naked determination to interfere with Tennessee's legal process, ostensibly in support of consideration of documents now before the Supreme Court. That Court is perfectly capable of issuing a stay in defense of its own jurisdiction. We have no proper jurisdiction and no claim, however faint, of any reason, to recall our own properly issued mandate.

In our case, the only claim asserted on which we should recall our mandate is exactly the same substantive one that Workman raised without success in all previous stages of this proceeding. I therefore respectfully dissent, and I trust that the Supreme Court will take action to rectify this abuse of power.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk