No. _____

In the Supreme Court of the United States

STEPHEN MICHAEL WEST,
Petitioner,

v.

RICKY BELL,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Stephen A. Ferrell
Federal Defender Services
of Eastern Tennessee, Inc.
800 South Gay Street, Suite 2400
Knoxville, TN 37929-9714
(865) 637-7979

Counsel of record for Petitioner

Comes the Petitioner, Stephen Michael West, and asks leave to file the attached petition for writ of certiorari without prepaying of costs and to proceed *in forma pauperis.*

Petitioner has previously been granted leave under 28 U.S.C. §1915 to proceed *in forma pauperis* in the following courts:

(1) The United States Supreme Court;

(2) The United States Court of Appeals for the Sixth Circuit, and

(3) The United States District Court for the Eastern District of Tennessee.

Petitioner's trust account statement in support of this motion is attached hereto.

Stephen A. Ferrell
Federal Defender Services
of Eastern Tennessee, Inc.
800 South Gay Street, Suite 2400
Knoxville, TN 37929-9714
(865) 637-7979

Counsel of record for Petitioner

CERTIFICATE

TO BE COMPLETED BY AN AUTHORIZED CUSTODIAN OF INMATE ACCOUNTS

I certify that the applicant herein has the sum of $ 68.03 on account to his/her credit at the Riverbend Max Security (institution where the applicant is currently incarcerated). I further certify that the average balance in the applicant's trust fund account during the last six months was $ 115.41. A copy of the applicant's trust fund account (or an institutional equivalent) for the last six months is attached hereto.

Linda Pollock 10-15-10
Signature of Authorized Officer

Sworn to and subscribed before me this 15th day of October, 2010.

Carolyn Thompson
Notary Public

My commission expires Nov. 7, 2011

STATE OF TENNESSEE NOTARY PUBLIC DAVIDSON COUNTY

My Commission Expires Nov. 7, 2011

No. _____

In the Supreme Court of the United States
October Term, 2010

STEPHEN MICHAEL WEST,
Petitioner,

v.

RICKY BELL,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Stephen A. Ferrell*
Assistant Federal Community Defender
Federal Defender Services
of Eastern Tennessee, Inc.
800 South Gay Street, Suite 2400
Knoxville, TN 37929
(865) 637-7979
Stephen_Ferrell@fd.org

**Counsel of record for Petitioner*

CAPITAL CASE

Execution Scheduled for November 30, 2010 at 10:00 p.m. Central Standard Time

QUESTIONS PRESENTED

Whether the gate-keeping mechanism of 28 U.S.C. § 2244(b), which codifies the "abuse of the writ doctrine," bars Mr. West's FED. R. CIV. P. 60(b)(6) motion, where his motion alleged extraordinary circumstances that demonstrate the district court previously erred in its exhaustion determination.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SUPREME COURT CASES:

CIRCUIT COURT CASES:

STATE CASES:

FEDERAL STATUTES:

OPINIONS BELOW

The Sixth Circuit Court of Appeals opinion, in *West v. Bell*, No. 10-6333 and 10-6338, is unreported and is Appendix A to the petition. The unpublished order of the United States District Court for the Eastern District of Tennessee can be found at 2010 U.S. Dist. LEXIS 114523 (E.D.Tenn. Oct. 27, 2010) and is Appendix B to the petition.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 2010 (App.A). No further rehearing was sought.

The District Court had jurisdiction over the underlying federal habeas corpus petition pursuant to 28 U.S.C. §2254 and pursuant to FED.R.CIV.P. 60(b). The court of appeals had jurisdiction pursuant to 28 U.S.C. §1291 and/or §2253. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., art. I sec. 9 (Suspension Clause). The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of rebellion or Invasion the public Safety may require it.

U.S. Const., amend. V (Due Process Clause). No person shall ... be deprived of life, liberty or property, without due process of law ... .

FED.R.CIV.P. 60(b). Attached as Appendix C, App-013.

28 U.S.C. §2253 Attached as Appendix D, App-015.

STATEMENT OF THE CASE

Introduction

The district court defaulted compelling mitigating evidence offered in support of Stephen West's petition for habeas corpus relief. Later developments in the case and changes in habeas law have shown that the district court's procedural ruling was in error. Because the district court's error affected the integrity of the federal process, West filed a Motion for Relief from Judgment under FED. R. CIV. P. 60(b). The lower courts' decision to classify that motion as a successor habeas petition rather than a properly filed 60(b) motion now demands a grant of *certiorari* from this Court.

The sentencing jury in this capital case never heard substantial evidence that Stephen West, born inside a mental hospital, suffered from serious mental health problems that affected him at the time of the crime in this case. His genetic predisposition to mental illness was aggravated by horrific child abuse that he suffered from the time he was a baby. Despite West's diligent efforts, no court has yet reviewed his claims of ineffective assistance of counsel at sentencing under the proper constitutional and statutory standards. The district court's misapprehension of the interplay between sections 2254(d) and (e) of AEDPA caused it to fail to consider:

- whether trial counsel was ineffective for failing to present evidence about West being born in a mental hospital and how this strongly suggests a genetic tendency to succumb to significant mental illness, a high likelihood of

emotional deprivation in the critical bonding phase of his life,[1]

- whether trial counsel was ineffective for failing to present the testimony of West's sister, Debra West Harless, that West was physically abused as a child,[2]

- whether trial counsel was ineffective for failing to present the testimony of West's former wife, Karen West Bryant, about West describing to her the abuse he suffered,[3]

- whether trial counsel was ineffective for failing to present the testimony of his father, Vestor West, admitting that he severely abused West,[4]

- whether trial counsel was ineffective for failing to present testimony of West's manager at McDonald's that Ronnie Martin (his co-defendant) was hostile and aggressive while West was more passive,[5] and

- whether trial counsel was ineffective for failing to present proof that West suffered repeated childhood abuse which caused him to become very passive and submissive as an adult, suffering from post-traumatic stress disorder.[6]

---

[1]Affidavit of Dr. Keith Caruso, dated February 23, 2001 (R. 212-1); Medical Record from Community Hospital confirming West was born in a mental institute (R. 212-2). *See* page 85, n. 23, of the district court's Memorandum Opinion, R. 188.

[2]Affidavit of Debra West Harless, dated December 31, 1998 (R. 212-3). *See* page 85, n. 23 of the district court's Memorandum Opinion, R. 188.

[3]Affidavit of Karen West Bryant, dated December 18, 2001 (R. 212-4). *See* page 85, n. 23 of the district court's Memorandum Opinion, R. 188.

[4]Affidavit of Vestor West, dated December 31, 1998 (R. 212-5). *See* page 85, n. 23 of the district court's Memorandum Opinion, R. 188.

[5]Affidavit of Patty Rutherford, dated February 11, 2002 (R. 212-6). *See* page 85, n. 23 of the district court's Memorandum Opinion, R. 188.

[6]Report of Claudia R. Coleman, Ph.D., dated November 7, 2001(R. 212-7); Report of Richard G. Dudley, Jr., M.D. dated February 22, 2002 (R. 212-8). *See* page 85, n.23 of the district court's Memorandum Opinion, R. 188. Affidavit of Pablo Stewart, M.D. dated December 13, 2002 (R.212-9), which was attached to Petitioner's Fourth Motion to Expand the Record filed December 19, 2002 (R. 166), granted August 21, 2003 (R. 181). Dr. Stewart's affidavit was presented to the

The district court found 28 U.S.C. § 2254(e)(2) barred consideration of these claims, *see* R. 188, p. 85, n. 23, and ultimately denied West's habeas petition. (R. 188).

On appeal, the Sixth Circuit considered whether the evidence in question "fundamentally altered the legal claim already considered by the state courts ..." and, like the district court, declined to consider it. *West v. Bell*, 550 F.3d 542, 551 (6th Cir. 2008) (quoting *Vasquez v. Hillery*, 474 U.S. 254 (1986)). The Sixth Circuit found the state court unreasonably applied federal law by applying an unconstitutionally high burden of proof to West's *Strickland* claim. *West*, 550 F.3d at 552. That majority of the panel nonetheless denied relief, voting 2-1 that he had not established prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). This Court denied *certiorari*. *West v. Bell*, 2010 U.S. LEXIS 2142 (U.S., Mar. 1, 2010).

After the court of appeals rendered its decision, recent circuit case law has demonstrated that the district court erred in its determination that the lack of exhaustion barred the federal courts from considering West's claims. This Court's grant of *certiorari* in *Cullen v. Pinholster*, No. 09-1088, 130 S.Ct. 3410 (Mem.)(2010), further called the district court's ruling into question.

Based on these new developments in the law, West filed a Motion for Relief

---

district court. *See* Motion to Expand, *supra*, and Order granting same, *supra*. His affidavit was not specifically discussed in the district court's Memorandum dismissing West's petition. Implicit in that Opinion is the holding that this evidence was likewise barred by 2254(e)(2). *See* R. 188, p. 85-88.

from Judgment pursuant to FED. R. CIV. P. 60(b)(6). (R. 212). The district court dismissed this motion as an unauthorized successor petition, R. 216, p. 5 of 13, and transferred it to the appeals court. The appeals court affirmed the district court's determination that the motion was properly classified as a successor petition. (R. 222).

Despite West's diligent efforts, no court has reviewed the relevant mitigating evidence to determine whether the death sentence is appropriate. The erroneous failure to consider this claim affected the integrity of the federal process. The Sixth Circuit's application of Section 2244 to his motion conflicts with rulings from at least one other circuit as well as this Court's holding in *Gonzalez v. Crosby*, 545 U.S. 524 (2005). Its holding is also a gross misapplication of the abuse of the writ doctrine. *Slack v. McDaniel*, 529 U.S. 473 (2000) (holding section 2244 of the AEDPA codifies the abuse of the writ doctrine).

This Court should grant *certiorari* to resolve the interpretive difficulties apparent in *Gonzalez*. Furthermore, since this Court has accepted *certiorari* in *Pinholster*, a case presenting an identical issue to the one forming the basis of West's 60(b) motion, this Court should stay resolution of this case until that case has been resolved. Finally, this Court should grant *certiorari* to ensure that Stephen West is not put to death in violation of the constitution.

Factual and Procedural Background

Shortly before his birth, Stephen West's mother, who had a history of mental illness including auditory hallucinations and delusions, tried to kill herself by gas

inhalation. (R. 212-7, p. 5 of 10). Consequently, Stephen was born in a psychiatric hospital. (R. 212-1, p. 9 of 12). Beyond doubt, Stephen came into this world with a genetic predisposition to mental illness. In addition, because his mother was severely mentally ill, she lacked the capacity to care for him. As an infant, Stephen suffered from emotional deprivation and was deprived of the opportunity for maternal bonding. Stephen's parents relentlessly abused him. As a very young child, Stephen was often confined to his room, hiding on a urine-soaked mattress. (R. 212-7, p. 4 of 10). He was subjected to constant beatings so that his older sisters recall that Stephen was so scared of his mother that he would flinch and start crying if his mother raised her arm toward him in any manner. (R. 212-7, p. 4 of 10). Stephen's aunt recalls his parents beat, kicked, and punched him. (R. 212-9, p. 7 of 17). Stephen's alcoholic father hit him with a belt, an electric cord, sticks, and a broom handle. (R. 212-9, p . 8 of 17). With no parental support or encouragement, Stephen dropped out of school when he was a junior in high school. (R. 212-8, p. 5 of 15). He began consuming alcohol and marijuana as a way to self-medicate for significant depression. (*Id*). The abuse West suffered as a child caused him to become very passive and submissive as an adult, suffering from post-traumatic stress disorder. (R. 212-7, p. 9 of 10; R. 212-8, p. 14 of 15). Despite suffering innumerable acts of cruelty as a child, Stephen West reached adulthood, served three years in the Army, received an honorable discharge, fell in love, became married, and fathered a child. (R. 212-8, p. 6 of 15).

In 1986, West and his co-defendant, Ronnie Martin, were charged with the

murders of Sheila and Wanda Romines. *State v. West*, 767 S.W.2d 387 (Tenn. 1989). West was convicted of both murders. (*Id*). His sentencing phase testimony was brief and consisted of character evidence offered by friends and family. West's mother, who had hired defense counsel, did not want defense counsel to offer proof of the abuse she inflicted on West; so he did not. (R. 212-5, ¶ 5).[7] The jury imposed the death penalty. West's conviction and sentence were affirmed on direct appeal. *West, supra.*

In 1990, West filed a petition for post-conviction relief in state court, arguing his trial attorneys were ineffective for failing to investigate and present evidence of the tragic circumstances of his childhood. However, the proof was limited because the trial court only authorized $1200 to pay for expert psychological services.

The state trial court denied relief, finding he had not established by a preponderance of the evidence that his trial would have been different if the jury had heard the mitigating evidence. The preponderance of the evidence standard is exactly the same standard this Court condemned in *Williams (Terry) v. Taylor*, 529 U.S. 362, 405-06 (2000) for being "contrary to" *Strickland.* The Tennessee Court of Criminal Appeals affirmed, relying upon *Lockhart v. Fretwell*, 506 U.S. 364 (1993) instead of *Strickland. West v. State*, 1998 WL 309090, at * 8-9 (Tenn. Crim. App. 1998), *perm. app. granted on unrelated issue*, 19 S.W.3d 753 (Tenn. 2000).

---

[7]This evidence was corroborated by one of West's trial attorneys, Thomas McAlexander, whose affidavit the district court also refused to consider in habeas even though it was made a part of the record. (R. 129, Attachment A, Affidavit of Thomas McAlexander).

West next filed a timely habeas petition. (R.111). He alleged:

> The state court denied Mr. West relief with respect to his ineffective assistance of counsel claim and, citing *Lockhart v. Fretwell*, 506 U.S. 364 (1993), concluded that Mr. West had not demonstrated how he was prejudiced by counsel's deficient performance. ... The [state] court's citation and application of the erroneous prejudice standard of *Lockhart v. Fretwell*, 506 U.S. 364 (1993) mandates relief because this was contrary to or an unreasonable application of *Strickland*.

(R. 111, Amended Petition, p. 55). He also alleged, "[t]rial counsel failed to conduct a reasonable investigation of West's social history and failed to present mitigating evidence, through expert and lay witness testimony and records, at the trial." (*Id.* p.42).

In support of his petition, West filed several motions to expand the record with evidence that had never been presented to the state courts. (R.115, 129, 166). The district court granted all of the motions to expand. (R.145, 181). West then argued the evidence presented in post-conviction as well as the several affidavits detailed above in footnotes 1-7, *infra*, which were admitted into the record pursuant to Habeas RULE 7, demonstrated he was prejudiced by counsel's deficient performance at sentencing. (R.144, p. 54-70).

Respondent filed multiple pleadings urging the district court not to consider the affidavits because they had not been presented to the state court. *See, e.g.*, Response to Petitioner's Motion to Expand the Record, R. 119, p. 6-7; Motion for Summary Judgment, R. 125, p.162. Respondent objected to consideration of this evidence because it made his case "significantly stronger." (R.125, Memo. of Law in Supp. of Resp. Motion to Dismiss Am. Pet., p.162).

The district court addressed West's ineffective assistance of counsel at sentencing claim using a two-step analysis. It first considered whether the previously mentioned evidence could be considered pursuant to 28 U.S.C. § 2254(e)(2)(*See*, p. 83-88 of the district court's Memorandum Opinion, R. 188). Accepting Respondent's argument, the district court ruled it would not consider the additional evidence. (*Id.*, p. 88). The court reasoned that considering this evidence "would skew the determination to be made under AEDPA's standard of review because, logically, the state court could not have applied the law to facts that were not before it." (*Id.*) Thus, the district court amputated a significant portion of the proof offered in support of West's claims of ineffective assistance of counsel before proceeding to the merits of West's claims.

After excluding consideration of this evidence, the district court went on to review the reasonableness of the state court opinion under 28 U.S.C. § 2254(d)(1):

> The state post-conviction court and the appellate court decision that counsel was not ineffective for failing to investigate and present mitigating evidence during the sentencing hearing was based on a reasonable determination of the facts in light of the evidence presented in the state court proceeding, and that the decision was not contrary to *Strickland*. The decision reached by those courts does not reflect an unreasonable determination of the facts in light of the evidence presented in those state court proceedings nor is the decision contrary to *Strickland*.

(R. 188, District Court's Memorandum Opinion, p. 93). The district court dismissed West's habeas petition.

West appealed to the Sixth Circuit. The appeals court refused to consider the affidavits at issue, finding it could not consider this aspect of ineffectiveness because

it "fundamentally altered the legal claim already considered by the state courts." *West,* 550 F.3d at 551 (quoting *Vasquez v. Hillery*, 474 U.S. 254 (1986). The appeals court nonetheless held that the state court rulings were an unreasonable application of federal law: "Clearly, the Criminal Court for Union County stated the wrong standard for proving prejudice in a claim of ineffective assistance ... West is correct that his situation satisfies requirements of 28 U.S.C. §§ 2254[d] ... [W]e must deny West's petition for a grant of habeas corpus even though the state court decision was an unreasonable application of clearly established federal law." *West v. Bell*, 550 F.3d at 553-54. Even though it found that the state court decisions were unreasonable and thus not deserving of deference, the court refused to consider any evidence that had not been presented to the state courts.

The decision not to consider this evidence was significant because the court was deeply divided over whether West had established prejudice. Two judges found he had not established prejudice and voted to deny relief. (*Id.* at 550). The dissenting judge found West established he was prejudiced, as contemplated in *Strickland v. Washington*, 466 U.S. 668 (1984), and would have ordered a new sentencing hearing. *West*, 550 F.3d at 568. That judge considered and weighed the defaulted evidence. (*Id.*)

West timely sought a writ of *certiorari* from this Court, which was denied on March 1, 2010. *West v. Bell*, 2010 U.S. LEXIS 2142 (U.S., Mar. 1, 2010).

On June 14, 2010, this Court granted *certiorari* to address whether "Resolution of the 2254(d)(1) 'reasonableness' question should precede any

presentation of evidence in federal court.'" *Cullen v. Pinholster*, No. 09-1088, 130 S.Ct. 3410; *see Petitioner's Brief, 2010 WL 3183845 p. 21-42 (U.S. Aug. 9, 2010).* The answer to this question would directly affect the validity of the legal reasoning applied in West's case by the courts below.

On August 20, 2010, the Ninth Circuit Court of Appeals held that "when a state court adjudication is based on an antecedent unreasonable determination of fact, the requirement set forth in 2254(d) is satisfied and we may proceed to consider the petitioner's claim *de novo*." *Detrick v. Ryan*, 2010 WL 3274500 *18 (9th Cir. Aug. 20, 2010). In West's case, this reasoning would have compelled the Sixth Circuit to consider all of the evidence offered in support of West's claims of ineffective assistance of counsel.

After the grant of *certiorari* in *Pinholster,* and noticing the trend on this issue among the circuits, West filed a Motion for Relief from Judgment pursuant to FED. R. CIV.P. 60(b)(6), (R. 212), alleging that the clarification of the interaction between 28 U.S.C. §§ 2254 (d) and (e)(2) qualified as an extraordinary circumstance warranting reopening of his habeas case. (R. 212).

On October 27, 2010, the district court entered an order denying the 60(b) motion and also transferring the case to the court of appeals for authorization to file a successor petition. (R. 216, 217). On October 29, 2010, the district court denied West's certificate of appealability. (R. 221).

On November 4, 2010, the Sixth Circuit entered an order dismissing West's case, concluding it was a second or successive habeas petition.

REASONS FOR GRANTING THE WRIT

I. Where a habeas petitioner's motion under FED. R. CIV. P. 60(b)(6) demonstrates that the district court erred in its procedural default analysis, refusing to consider important mitigating evidence, the petitioner has properly invoked the rule for relief from judgment.

The appeals court erred by classifying West's 60(b)(6) motion as an impermissible successor petition for the simple reason that West has not abused the writ process. Despite his best efforts, no court has ever reviewed the full merits of this penalty phase ineffectiveness claims. West's 60(b) motion seeks to have compelling defaulted evidence reviewed and considered. No court has ever reviewed whether counsel was ineffective for failing to present the above-mentioned evidence and whether there is a reasonable probability that the consideration of this evidence could have caused at least one juror to return a verdict of less than death.

West's 60(b) motion is not a successor petition because it attacks the process the lower courts employed to exclude much of the evidence offered in habeas to support his claims of ineffectiveness. A proper 60(b) motion attacks, not the substance of a federal court's resolution of a claim on the merits, but rather, some defect in the integrity of the process. *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). In his motion, West is not attacking the merits of the earlier rulings, but rather, the decision to exclude essential evidence when deciding the merits of the claim. This is entirely consistent with *Gonzalez*. It is a proper 60(b) motion because it raises procedural error in the previous federal court process.

West's motion is similar to the one granted in *Ruiz v. Quarterman*, 504 F.3d

523 (5th Cir. 2007). In that case, the petitioner included an ineffective assistance at sentencing claim. The district court dismissed the petition, finding the sentencing claim unexhausted. (*Id.* at 525). The petitioner later returned to state court and exhausted his claim. Thereafter, he returned to federal court and filed a Motion to Reopen his initial habeas petition. The court first addressed whether the motion was barred by AEDPA's requirements for successor petitions. (*Id.* at 526). Relying on the language from *Gonzalez* concerning erroneous determination of exhaustion, the Fifth Circuit held the motion to reopen was not an improper successor habeas petition. (*Id.*) *See also Balentine v. Thaler*, __ F.3d __, 2010 WL 4630826 (5th Cir., Nov. 17, 2010) (same holding on characterization of 60(b) motion, but ultimately denying relief because state court decision constituted an adequate and independent ground for procedural default). West's case is on all fours with *Ruiz* and *Balentine*. If his motion had been filed in the Fifth Circuit, it would have been properly considered as a 60(b) motion. This situation presents an intolerable inconsistency.

In *Gonzalez*, this Court stated the determination of whether a 60(b) motion is a successor will often be simple. *Gonzalez*, 545 U.S. at 532. However, as one circuit judge has noted:

> In a narrow class of cases, however, the question of how to characterize the Rule 60(b) motion will not be "relatively simple." *Gonzalez*, 545 U.S. at 532. Such cases, like the present case, will involve requests for relief from judgments that have already addressed the merits of the underlying habeas petitions, but the requests for relief will be based upon something other than the substance of the merits ruling.

Ward v. Norris, 577 F.3d 925, 939 (8th Cir. 2009) (Melloy, J., concurring in part, and

dissenting in part).

Judge Melloy's comments in *Ward* accurately describe the situation in the present case. While some aspects of West's ineffective assistance of counsel claim have been reviewed, many important and compelling aspects have not. This case illustrates that ineffective assistance of counsel claims may be complex and multi-faceted. Such claims need to be reviewed with consideration of all of the evidence that the jury could have considered. *Porter v. McCollum,* 130 S.Ct. 447, 453 (2009). Plenary review has never been done in this case due to a defect in the federal proceedings. West's current 60(b) motion that focuses on that defect should be fully considered.

The Sixth Circuit's reading of *Gonzalez* speaks of default as if it only applies to the default of an entire claim. However, this Court's opinion in *Gonzalez* shows that its logic applies to all erroneous findings of procedural default that preclude plenary merits review. This Court specified that a proper RULE 60(b) motion may "assert[] 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." *Gonzalez,* 545 U.S. at 532, n. 4. West's Rule 60(b) motion is entirely consistent with this since it deals with the district court's erroneous decision to apply a default to much of West's evidence.

Thus, the logic *of Gonzalez* and the logic of justice and fair play require that its application be extended to cases, like West's, where some parts of the claim have been previously reviewed on the merits, but significant parts were erroneously

procedurally defaulted. This is crucial to cases where a fair assessment of prejudice can only be achieved by considering all of the evidence. *Williams (Terry) v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Porter v. McCollum*, 130 S.Ct. 447 (2009). In particular, West's case is deserving of re-opening where he presented all of this evidence to the district court during the original habeas proceedings. He is not trying to add new evidence after the fact.

It has been several years since this Court issued its opinion in *Gonzalez* and new cases have shown that some aspects of its application are not simple. The appeals courts and litigants would both benefit from guidance from this Court.

A proper RULE 60(b) motion attacks the integrity of the decision making in the federal habeas proceedings. "When a prisoner has shown reasonable diligence in seeking relief based on a change in procedural law, and when that prisoner can show that there is probable merit to his underlying claims, it would be well in keeping with a district court's discretion under RULE 60(b)(6) for that court to reopen the habeas judgment and give the prisoner the one fair shot at habeas review that Congress intended that he have." *Gonzalez,* 545 U.S. at 542. When there is an important mistake in the decision-making process, "Rule 60(b) has an unquestionably valid role to play in habeas cases." (*Id.* at 534). That role is essential in the present case where state court review was unquestionably unreasonable and an erroneous application of the law in the federal habeas courts prevented plenary review of an important constitutional claim.

This logical reading of *Gonzalez* would allow West's case to benefit from the

review this Court will be giving to another habeas litigant this term. This Court is already poised to give guidance on the important question at the heart of West's 60(b) motion. In *Cullen v. Pinholster*, No. 09-1088, this Court granted *certiorari* to address whether "Resolution of the § 2254(d)(1) 'reasonableness' question should precede any presentation of evidence in federal court." *See* order granting cert. on June 14, 2010, 130 S.Ct. 3410. *See* Petitioner's Brief, 2010 WL 3183845, p. 21-42 (U.S. Aug. 9, 2010). This Court's answer to that question would determine whether the district court and the court of appeals were both correct in concluding that they would not review evidence that was unexhausted before deciding whether the state court's resolution of the merits of the claims represented an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d)(1). This Court's resolution of *Pinholster* will show that once the circuit had determined that the state court decision met the requirements of section 2254(d)(1), there was no reason for it to not include all of the evidence in its *Strickland* analysis.

As outlined in the previous section, the federal habeas courts recognized that the state courts' resolution of West's claims of ineffectiveness was an unreasonable application of federal law. Once that conclusion was reached, there was no longer any reason to give deference to the state court resolution of his ineffectiveness claims. Therefore, in considering the merits of the claims, the federal courts should have considered all of the evidence presented in West's original habeas petition, not just that which had been presented in state post-conviction. Because law establishing this logical legal conclusion was not in effect at the time the habeas

courts rendered their decision, RULE 60(b)(6) provided the appropriate vehicle to bring it before the courts for their consideration.

The district court transferred West's 60(b) motion to the circuit court which dismissed it as a successive petition pursuant to 28 U.S.C. § 2244(b)(1). Section 2244(b) is a codification of the abuse of the writ doctrine. *Slack v. McDaniel*, 529 U.S. 473, 486-87 (2000); *see also Felker v. Turpin*, 518 U.S. 651, 664 (1996) (Section 2244's restrictions are "well within the compass" of the evolution of the abuse of the writ doctrine). *McKleskey v. Zant*, 499 U.S. 467 (1991), is this Court's lead case on the subject of "abuse of the writ." (*Id. at 477*). In that case, this Court noted the abuse of the writ "refers to a complex and evolving body of equitable principles ...." (*Id.* at 489). This Court further held "equity recognizes that 'a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.'" (*Id. at* 490) (internal citations omitted). The Petitioner "must conduct a reasonably diligent investigation aimed at including all relevant claims and grounds for relief." *Cress v. Palmer*, 484 F.3d 844, 852 (6th Cir. 2007). Under *McKleskey*, therefore, any analysis of whether section 2244 applies must necessarily look at the equity of its application.

Beyond doubt, West has diligently sought review of these claims and has not abused the writ. He presented all of his evidence in support of these claims in his initial petition. (R.40, p. 19-28 of 49, R. 111, p. 39-66). He appealed the denial of review of these claims and this evidence. Proof Brief of Appellant, Sixth Circuit Court of Appeals, Jan. 17, 2007, p. 15-50. Once the law demonstrating his entitlement to review of these claims emerged, he promptly filed a Motion for Relief

from Judgment. (R. 212). His diligence must inform this Court's analysis of the equities involved in any claim of abuse of the writ. Here, those equities demonstrate that West has in no way abused the process. Because of that, Section 2244(b) cannot bar his motion.

When this case was initially before the district court, Respondent vigorously urged that court to not review the merits of the sentencing claim. *See e.g.,* Response to Petitioner's Motion to Expand Record ("the merits of his ineffective assistance of counsel claim, of which a substantial portion is procedurally defaulted for purposes of federal habeas review") R.119, p. 6-7; Motion for summary judgment (urging denial of relief on basis of ineffective assistance as sentencing because "he has not exhausted his state remedies") R.125, p. 162. The district court accepted Respondent's arguments and refused to review the claims.

West originally urged the district court to consider this evidence, asserting it did not alter the claim presented in state court and was therefore reviewable under the purview of *Vasquez.* (*See* Petitioner's Response to Respondent's Motion to Dismiss or for Summary Judgment, R. 144, p. 11). The district court, however, held this evidence altered the claim and declined to review it. (*See* the district court's memorandum at p. 84 of 226, R. 188). Accordingly, this evidence, which was presented with West's initial petition, has never been reviewed. *Cf., Gonzalez,* 545 U.S. at 531, (a motion "seeking to present newly discovered evidence ... 'in support of a claim previously denied'" is not a true 60(b) motion.) The evidence is not newly discovered, nor is it offered in support of a new claim. It was part of West's initial

habeas action. The district court erroneously barred consideration of it, finding it was unexhausted. *Gonzalez* specifically held that an erroneous exhaustion finding will support a 60(b) motion. *Gonzalez*, 550 U.S. at 532, n. 4. West's motion is not a successor.

The Sixth Circuit's analysis of West's penalty phase ineffectiveness claim amply illustrates the "Catch-22" West has found himself in. That court excluded the evidence in question because it may have "fundamentally altered" the state court claim. *West v. Bell*, 550 F.3d 542 at 551, *quoting Vasquez v. Hillery*, 474 U.S. 254 (1986). The court categorically refused to consider this evidence: "We will consider only the evidence presented before the state court during the post-conviction proceedings." (*Id.)* Thus, there can be no denying that the court refused to consider a significant portion of the evidence that supported West's arguments that his trial counsel was ineffective.

Yet, when it came to consideration of West's 60(b) motion, the same court dismissed, concluding that West was abusing the writ. The court now held that West's 60(b) presented "the very same claim that we previously considered." (R. 222, p. 4 of 7). This is an inherent contradiction. None of the aspects of the claim and none of the evidence advanced in the 60(b) had ever been considered by any reviewing court. And, this failure to review also occurred in the circuit court that declared West's state post-conviction review unreasonable. Accordingly, the appeals court's conclusion that these claims could not be reviewed because they altered the claim, and cannot be reviewed now because they have already been reviewed on the

merits, is simply illogical.

These claims have not, in fact, been reviewed on the merits. It is the erroneous denial of merits review that is the basis for West's Motion for Relief. The equities in this case demonstrate that West's Motion for Relief from Judgment cannot be recharacterized as an impermissible successor petition.

II. West has established extraordinary circumstances warranting the reopening of his habeas case.

RULE 60(b)(6) provides that the "court may relieve a party ... from a final judgment, order, or proceeding for ... any other reason justifying relief from the operation of the judgment." This Court has noted that a motion for relief based upon subpart (6) should demonstrate "extraordinary circumstances." *Gonzalez*, 545 U.S. at 535. (quoting *Ackermann v. United States*, 340 U.S. 193, 200-01 (1950) (comparing petitioner's deliberate choice not to pursue his adjudicated claims to avoid the cost of sacrificing his home with extraordinary circumstances in *Klapprott v. United States*, 335 U.S. 601 (1949), where outside forces caused petitioner's claims to be defaulted)). Petitioner West meets this high standard.

If the RULE 60(b) motion is not granted, Stephen West stands to lose his life without a full merits review of whether death is the appropriate punishment and without the "fair shot" this Court found so important in *Gonzalez*. Indeed, the courts have recognized in capital habeas cases that the petitioner's right to life carries substantial – if not controlling – weight when a court exercises its equitable powers. *See e.g., Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir. 2001)(using equitable powers to

allow consideration of petition because "[i]n a capital case such as this, the consequences of error are terminal. ... We will therefore exercise leniency under the facts of this capital case."); *Calderon v. United States District Court*, 128 F.3d 1283, 1288 n. 4 (9th Cir. 1997)("'[O]ccasional' injustices . . . are decidedly not an acceptable cost of doing business in death penalty cases.").

The Sixth Circuit recently affirmed this principle in *Thompson v. Bell*, 580 F.3d 423 (6th Cir. 2009)(*cert. denied*, Oct. 4, 2010). Thompson filed a RULE 60 Motion for Relief alleging Tennessee clarified its law concerning exhaustion and that the district court erred in failing to consider certain allegations of ineffective assistance of counsel at sentencing. The Sixth Circuit held Thompson was entitled to relief, even though his Motion was filed years after the clarification in law. *Thompson*, 580 F.3d at 444, reasoning that the "irreversible finality of [an inmate's] execution, as well as serious concerns about ineffective assistance" are entitled to controlling weight. (*Id.*)

It is now apparent that the district court misapprehended the interplay between 28 U.S.C. §§ 2254(d) and (e)(2) and erroneously refused to consider several claims of ineffective assistance of counsel, finding them unexhausted. The error undermining the integrity of the district court's judgment is that it did not first determine the reasonableness of the state court decision under 28 U.S.C. § 2254(d). The fact that this was not the first step of the court's analysis precluded proper review on the merits of the prejudice component of the *Strickland* claim. This is the type of extraordinary error that supports a RULE 60(b) motion. The state court's

decision in this case was an unreasonable application of federal law because it applied an incorrect standard. *West v. Bell*, 550 F.3d at 553-54. Thus, having met 2254(d), the merits – including all evidence presented to the district court– should have been reviewed and considered. Such a review should have been conducted *de novo* precisely because 2254(d) was met.

The federal courts' failure to respect the proper order of review qualifies as a defect in the proceedings since it erroneously barred the courts from considering persuasive evidence in support of West's compelling ineffective assistance at sentencing claim. The legally unjustified failure to address the merits of West's claim strikes at the heart of the habeas proceedings. Due process lies in "the right to notice and an opportunity to be heard [which] must be granted at a meaningful time and in a meaningful manner." *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (internal quotation marks omitted) *citing Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). The erroneous "cutting-off" of this crucial review qualifies as an extraordinary circumstance.

Because RULE 60(b) is quintessentially a vehicle for the exercise of equity, this Court must properly consider the equities involved when assessing a motion for relief from judgment. Because West stands to lose his life absent remedy from this Court, and given the intervening events described in this motion, his case is one of the rare cases which "cries out for the exercise of that 'equitable power to do justice." *National Credit Union Administration Board v. Gray*, 1 F.3d 262, 266 (4th Cir. 1993) (granting relief from judgment). Rule 60(b) "constitutes a grand reservoir of

equitable power to do justice in a particular case. *Matarese v. LeFevre*, 801 F.2d 98, 106 (2nd Cir. 1986). That case is present here.

CONCLUSION

For the reasons set forth above, Stephen West prays the Court grant *certiorari* review, or alternatively, grant a stay of execution pending this Court's decision on the instant petition for *certiorari* review.

Respectfully submitted,

Stephen Alan Ferrell*
Assistant Federal Community Defender
Federal Defender Services
of Eastern Tennessee, Inc.
800 South Gay Street, Suite 2400
Knoxville, TN 37929
(865) 637-7979

Roger W. Dickson by S.A.F.
Roger W. Dickson, BPR#1933
MILLER & MARTIN, LLP
832 Georgia Avenue, Suite 1000
Chattanooga, TN 37402
(423) 756-6600

**Counsel of record for Petitioner*

LIST OF APPENDICES

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 10a0689n.06

Nos. 10-6333, 10-6338

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 04, 2010
LEONARD GREEN, Clerk

In re: STEPHEN MICHAEL WEST,	(10-6333)	)	
		)	
Movant,		)	
		)	On Transfer and Appeal from the
		)	United States District Court for the
STEPHEN MICHAEL WEST,	(10-6338)	)	Eastern District of Tennessee
		)	
Petitioner-Appellant,		)	
		)	
v.		)	
		)	
RICKY BELL, Warden,		)	
		)	
Respondent-Appellee.		)	

Before: BOGGS, NORRIS, and MOORE, Circuit Judges.

BOGGS, Circuit Judge. Stephen Michael West, who is scheduled to be executed on November 9, 2010, filed a motion for relief from judgment in district court. The district court considered the motion to be a second or successive petition for a writ of habeas corpus and transferred it to this court. We dismiss the petition pursuant to 28 U.S.C. § 2244(b)(1).

In 1987, Stephen Michael West was convicted by a Tennessee jury of two counts of first-degree murder, two counts of aggravated kidnapping, once count of aggravated rape, and one count of larceny. *West v. Bell*, 550 F.3d 542, 546 (6th Cir. 2008), *cert. denied*, 130 S. Ct. 1687 (2010). The first victim, a 15-year-old girl, was raped and tortured before being stabbed to death. *Ibid.* The

second victim, the girl's mother, was tortured and then stabbed to death. *Ibid.* West was sentenced to death. *Id.* at 547.

On February 20, 2001, West filed a petition for a writ of habeas corpus in district court. *Id.* at 549-50. West asserted 22 separate grounds for relief, including an ineffective assistance of counsel claim. *Id.* at 550. The district court dismissed the petition on September 30, 2004. *Ibid.*

On December 18, 2008, this court affirmed the district court's dismissal of West's habeas petition. *Id.* at 546. In considering West's ineffective assistance claim, we held that the state court used the wrong standard for determining prejudice under *Strickland*. *Id.* at 553. Accordingly, we conducted a de novo review of the claim, but nonetheless concluded that West's representation was constitutionally sufficient, and in the alternative, that West suffered no prejudice. *Id.* at 554-56.

On October 15, 2010, West filed what he described as a Rule 60(b) motion for relief from judgment in district court. In his motion, West alleged that the district court–and this court–"misapprehen[ded] the interplay between sections 2254(d) and 2254(e) of AEDPA" and therefore failed to consider an ineffective assistance of counsel claim premised upon a failure to present specific pieces of evidence. Specifically, West argues that, when this court conducted a de novo review of his ineffective assistance claim, it should have considered all available evidence–including evidence not presented to the state court–and that intervening case law indicates that this court should have considered such evidence.

The district court concluded that West's Rule 60(b) motion was actually, in substance, a successive habeas petition. Accordingly, the district court issued an order on October 27, 2010, in which it transferred the petition to this court in light of AEDPA's requirements for second or

successive habeas petitions. 28 U.S.C. § 2244(b)(3); 28 U.S.C. § 1631. Upon entry of the transfer order, the case was docketed in this court as docket number 10-6333.

That same day, West filed a motion for a certificate of appealability in district court, as well as a notice of appeal of the district court's transfer order. That appeal–also of the district court's decision to treat West's 60(b) motion as a second or successive petition and transfer it to this court–was docketed separately as docket number 10-6338.

We agree that West's Rule 60(b) motion should be treated as a second or successive habeas petition and conclude that, because the petition presents a claim that was already presented in West's initial habeas petition, the petition must be dismissed. *Id.* at § 2244(b)(1) ("A claim presented in a second or successive habeas application under section 2254 that was presented in a prior application shall be dismissed.").

West argues otherwise. He asserts in effect that, although we previously held that his counsel was not ineffective for failing to present pieces of evidence A through F, we did not consider for the same proposition whether his counsel was ineffective for failing to present pieces of evidence G through Z. West contends that this constitutes a separate claim that we never reached because we misunderstood AEDPA, and that this mistake of law qualifies as an "extraordinary circumstance" for purposes of Rule 60(b)(6). However, in our previous habeas decision, we held that the district court did not abuse its discretion by refusing to expand the record to consider the additional evidence, and we further held that even had West's attorneys discovered the evidence of past abuse, there is not "'a reasonable probability' that the proceeding would have been different." *West*, 550 F.3d at 550-51, 556. Notwithstanding West's artful framing of his argument, he simply argues that

these holdings were incorrect and therefore presents "a rule 60(b) motion that seeks to revisit the federal court's denial on the merits of a claim for relief [that] should [therefore] be treated as a successive habeas petition." *Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005).

We need not consider West's arguments regarding intervening case law or whether we erred in applying AEDPA, as whether or not we committed a legal error in reviewing West's first petition, AEDPA mandates the dismissal of this petition because it presents the very same claim that we previously considered. In West's habeas appeal, we considered whether West's counsel was ineffective for failing to present certain pieces of evidence that painted West as a troubled individual who was a "product of an unstable and abusive home." *West*, 550 F.3d at 556. West's counsel instead presented evidence that painted West as "a good and decent citizen." *Ibid.* West's "new" claim is that his counsel was ineffective for failing to present *additional* pieces of evidence that–like the evidence we already considered–painted West as a troubled individual. More evidence to support the same argument is not a new "asserted federal basis for relief from a state court's judgment of conviction." *Gonzalez*, 545 U.S. at 530; *In re Bowling*, 422 F.3d 434, 439-40 (6th Cir. 2005) (holding that new evidence to establish ineffective assistance of counsel does not constitute a new claim for purposes of §2244(b)(1)). Such a narrow definition of "claim" would eviscerate § 2244(b)(1) and therefore can not be a proper construction of the term.

We therefore DISMISS West's second or successive petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2244(b)(1).

We also DISMISS West's appeal of the district court's transfer order. Transfer orders of second or successive habeas petitions are not appealable. *Howard v. United States*, 533 F.3d 472, 474 (6th Cir. 2008).

KAREN NELSON MOORE, Circuit Judge, concurring. Although I must agree with the majority that West's efforts constitute a second or successive habeas application subject to 28 U.S.C. § 2244(b)'s gatekeeping requirements under *Gonzalez v. Crosby*, 545 U.S. 524 (2005), I continue to adhere to my conclusion that West received ineffective assistance of counsel at the penalty phase. *West v. Bell*, 550 F.3d 542, 567-70 (6th Cir. 2008) (Moore, J., dissenting in part).

LEXSEE 2010 US DIST LEXIS 114523

STEPHEN MICHAEL WEST, Petitioner, v. RICKY BELL, WARDEN, Riverbend Maximum Security Institution, Respondent.

No.: 3:01-cv-91

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

2010 U.S. Dist. LEXIS 114523

October 27, 2010, Filed

SUBSEQUENT HISTORY: Appeal dismissed by, Writ of habeas corpus dismissed *West v. Bell (In re West), 2010 U.S. App. LEXIS 23358 (6th Cir.) (6th Cir. Tenn., 2010)*

PRIOR HISTORY: *West v. Bell, 550 F.3d 542, 2008 U.S. App. LEXIS 25811 (6th Cir.) (6th Cir. Tenn., 2008)*

COUNSEL: **[*1]** For Stephen M West, Petitioner: Dana C Hansen Chavis, Stephen A Ferrell, LEAD ATTORNEYS, Federal Defender Services of Eastern Tennessee, Inc. (Knox), Knoxville, TN; Roger W Dickson, William A Harris, III, LEAD ATTORNEYS, Miller & Martin, PLLC (Chattanooga), Chattanooga, TN.

For Ricky J Bell, Respondent: Alice B Lustre, LEAD ATTORNEY, State of Tennessee - Office of the Attorney General, Civil Litigation and State Services Division, Nashville, TN; Jennifer L Smith, LEAD ATTORNEY, Office of the Attorney General (Nashville), Nashville, TN; Leonard Green, LEAD ATTORNEY, United States Court of Appeals for the Sixth Circuit, Cincinatti, OH.

JUDGES: Thomas A. Varlan, UNITED STATES DISTRICT JUDGE.

OPINION BY: Thomas A. Varlan

OPINION

DEATH PENALTY EXECUTION SCHEDULED NOVEMBER 9, 2010

MEMORANDUM

Stephen Michael West ("Petitioner") is awaiting his November 9, 2010 execution by the State of Tennessee following his 1987 convictions for killing a fifteen-year-old girl and her mother. He has exhausted his appeals in the Tennessee state courts and his federal habeas corpus petition was denied.

The matter now is before the Court on Petitioner's *Rule 60(b)* motion requesting relief from judgment [Doc. 212]. The motion rests on what Petitioner **[*2]** characterizes as this Court's "misapprehension" of the relationship between *28 U.S.C. § 2254(d)* and *(e)*.

After reviewing the pleadings and briefs filed by both parties, the record of Petitioner's underlying conviction, and the habeas record in this case, the Court finds Petitioner's *Rule 60(b)* motion, in substance, is a second or successive habeas petition and therefore will **IMMEDIATELY TRANSFER** this action to the United States Court of Appeals for the Sixth Circuit [Doc. 212].

I. Procedural Background

Petitioner was convicted in the Criminal Court of Union County, Tennessee of first degree premeditated murder, aggravated rape, and aggravated kidnaping of a

fifteen-year-old girl; the first-degree murder and aggravated kidnaping of her mother; and larceny. The jury sentenced Petitioner to death for each first-degree murder conviction after finding that three aggravating factors were present: the murders were (1) especially heinous, atrocious, or cruel, (2) committed while Petitioner was engaged in the commission of first degree murder, rape, or kidnaping, and (3) committed to avoid arrest or prosecution. The trial court imposed a sentence of forty years for each of the other convictions.

Petitioner's **[*3]** convictions and sentences were affirmed on direct appeal, *State v. West, 767 S.W.2d 387 (Tenn. 1989), cert. denied, 497 U.S. 1010, 110 S. Ct. 3254, 111 L. Ed. 2d 764 (1990)*, and he subsequently was denied state post-conviction relief, *West v. State, 1998 Tenn. Crim. App. LEXIS 636, 1998 WL 309090 (Tenn. Crim. App. June 12, 1998), affirmed, 19 S.W.3d 753 (Tenn. 2000)*. Petitioner then filed a federal habeas corpus petition, which this Court denied. The Sixth Circuit affirmed. *West v. Bell, 550 F.3d 542 (6th Cir. 2008), cert. denied, 130 S. Ct. 1687, 176 L. Ed. 2d 180 (2010), rehearing. denied, 130 S. Ct. 2142, 176 L. Ed. 2d 759 (2010)*.

Petitioner now brings the instant motion, citing *Gonzalez v. Crosby, 545 U.S. 524, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005)*, and claiming, *inter alia*, that based on new intervening law, the Court misapprehended the interplay between *sections 2254(d)* and *(e)* of the Anti-Terrorism and Effective Death Penalty Act (the "AEDPA"). According to Petitioner, this misapprehension caused the Court to decline to consider whether trial counsel was ineffective for failing to present mitigating evidence which was not first presented in state court.

II. Discussion

Petitioner's so-called *Rule 60(b)* motion asks for relief from this Court's September 2004 judgment denying his habeas corpus petition [Doc. 212]. Petitioner, **[*4]** more specifically, seeks to reopen proceedings on his claim that he received ineffective assistance of counsel at his capital sentencing proceedings because trial counsel failed to present evidence that Petitioner was born inside a mental hospital and subject to horrific child abuse [Doc. 212]. He argues these particular allegations present a challenge to the integrity of the proceedings on his *§ 2254* petition, not to this Court's disposition of the claim on the merits. Petitioner also maintains that intervening case law now demonstrates that, when a federal court engages in *de novo* review after a petitioner establishes an unreasonable application of the federal law by the state court, the federal court may consider the new evidence offered in the case that was not presented in state court.[1] Petitioner cites *Thompson v. Bell, 580 F.3d 423 (6th Cir. 2009), cert. denied*, Oct. 4, 2010, and *Pinholster v. Ayers, 590 F.3d 651 (9th Cir. 2009), cert. granted*, sub nom, *Cullen v. Pinholster, 130 S. Ct. 3410, 177 L. Ed. 2d 323, 78 USLW 3728 (U.S. Jun 14, 2010)* (No. 09-1088), as support for this proposition and argues that this new intervening law suffices as an extraordinary circumstance warranting *Rule 60(b)* relief **[*5]** [Doc. 212].

> 1 The Court observes that although the Sixth Circuit conducted a *de novo* review of Petitioner's ineffective-assistance-of-counsel-at-sen tencing claim, it concluded the state court's decision rejecting that claim was correct. *West v. Bell, 550 F.3d at 556*. Because the Sixth Circuit found that the state court's decision was correct under *de novo* review, Supreme Court precedent establishes it was "necessarily reasonable under the more deferential AEDPA standard of review, *28 U.S.C. § 2254(d)*." *Berghuis v. Thompkins, 130 S.Ct. 2250, 2264, 176 L. Ed. 2d 1098 (2010)* ("The state court's decision rejecting Thompkins's Miranda claim was thus correct under *de novo* review and therefore necessarily reasonable under the more deferential AEDPA standard of review, *28 U.S.C. § 2254(d)*."). Further, while the record from the Sixth Circuit is not currently before the Court, this argument could have and should have been raised in Petitioner's appeal to the Sixth Circuit, his motion for rehearing, and his subsequent petition for writ of certiorari and motion for rehearing, all of which were considered and denied.

Respondent opposes Petitioner's motion, arguing that both this Court and the Sixth Circuit Court of Appeals **[*6]** rejected Petitioner's ineffective-assistance-of-counsel-at-sen tencing claim. Therefore, argues Respondent, Petitioner's motion seeking to re-litigate this issue is the equivalent to a second or successive habeas application subject to *28 U.S.C. § 2244(b)*'s gatekeeping requirements and should be transferred to the United States Court of Appeals for the Sixth Circuit under *In re Sims, 111 F.3d 45, 47 (6th Cir. 1997)* and *28 U.S.C. § 1631* [Doc. 214].

In his reply, Petitioner argues, *inter alia*, that his motion neither raises a claim for relief nor argues the merits of an issue previously denied on the merits. According to Petitioner, his claim is that the Court failed to consider several allegations of ineffective assistance of counsel, due to a misapprehension of the interplay between *2254 (d)* and *(e)(2)*. Petitioner contends his motion is similar to the one granted in *Balentine v. Thaler, 609 F.3d 729 (5th Cir. 2010)* and *Ruiz v. Quarterman, 504 F.3d 523 (5th Cir. 2007)*.[2]

> 2 Unlike Petitioner's case, the issue in each of these Fifth Circuit cases was determined to be unexhausted and procedurally barred during federal habeas proceedings. In these cases, both petitioners returned to state court **[*7]** and were denied relief. Because the state court orders were not clearly based on adequate state grounds independent of the merits, the Fifth Circuit construed the state court orders as merits-based, and determined the state court rulings undermined the previous ruling during federal habeas proceedings that the claim was procedurally barred from review. Although these cases raised different issues, in both cases, the Fifth Circuit reversed and remanded the *Rule 60(b)* motions for consideration of the ineffective assistance of counsel claims.

A. Second or Successive Habeas Petition Analysis

Petitioner's claim is governed by *28 U.S.C. § 2254* and all related statutory restrictions because he bases his claim on new intervening law. *Byrd v. Bagley, 37 Fed. Appx. 94, 95 (6th Cir. Feb. 20, 2002), available at* 2002 WL 243400 ("We agree with those circuits that have held that regardless of the label on the statutory underpinning for the petition, habeas petitions of state prisoners are governed by *28 U.S.C. § 2254*."). Given the nature of the claims that the motion advances, the Court finds that Petitioner's motion is a second or successive *§ 2254* petition as it leads inextricably to a merits-based **[*8]** attack on the Court's prior dismissal of the *§ 2254* petition.

In *Gonzales*, the Supreme Court noted that, although, the "AEDPA did not expressly circumscribe the operation of *Rule 60(b)*," a *Rule 60(b)* motion is viable "only 'to the extent that [it is] not inconsistent with' applicable federal statutory provisions and rules." *Gonzalez, 545 U.S. at 529*. It went on to provide that the AEDPA-amended habeas statutes impose three requirements on second or successive habeas petitions: (1) "any claim that has already been adjudicated in a previous petition must be dismissed;" (2) "any claim that has not already been adjudicated must be dismissed unless it relies on either a new and retro-active rule of constitutional law or new facts showing a high probability of actual innocence;" and (3) "before the district court may accept a successive petition for filing, the court of appeals must determine that it presents a claim not previously raised that is sufficient to meet *§ 2244(b)(2)*'s new-rule or actual innocence provisions." *Id.*

In determining whether a *Rule 60(b)* motion filed by a habeas petitioner is a "habeas corpus application," the Supreme Court instructed that the first step is to determine **[*9]** whether a claim presented also was "presented in a prior application." *Id. at 530*. If so, the claim must be dismissed.[3] *Id.* If not, then the analysis turns to "whether the claim satisfies one of [the] two narrow exceptions." *Id.*

> 3 During the state post-conviction proceedings, there was testimony that Petitioner was born in a mental institution and suffered abuse at the hands of his parents [Doc. 188, at 25]. The Court considered this evidence, as well as all other evidence presented during the state court trial and post-conviction proceedings when assessing whether Petitioner demonstrated prejudice under the *Strickland* standard as a result of trial counsel's alleged short-comings. Even so, the Court will treat the current claims as though they were not presented in a prior application.

A "claim," according to the Supreme Court, is "an asserted federal basis for relief from a state court's judgment of conviction." *Id.* A motion seeking to add a new ground for relief "will of course qualify" as will an attack on the "federal court's previous resolution of a claim on the merits." *Id. at 532*. "[A]lleging that the court erred in denying habeas relief on the merits is effectively indistinguishable **[*10]** from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief." *Id.* When a *Rule 60(b)* motion attacks "not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings," however, then such is not the case and the motion may be a proper *Rule 60(b)* motion. *Id.*

The Supreme Court identified three types of claims that might be raised in a *Rule 60(b)* motion: excusable neglect or mistake, newly discovered evidence, or a subsequent change in substantive law. *Id. at 530-31.* It held that a "habeas petitioner's filing that seeks vindication of such claims is, if not in substance a 'habeas corpus application,' at least similar enough that failing to subject it to the same requirements would be 'inconsistent with' the statute." *Id. at 531.* Using *Rule 60(b)* to assert these types of claims, the Supreme Court stated, may circumvent AEDPA's requirement that a new claim must be dismissed unless it relies on either a new and retro-active rule of constitutional law or new facts showing a high probability of actual innocence, as well as the requirement that a successive habeas petition **[*11]** must be precertified by the court of appeals. *Id.*

Applying *Gonzalez's* edict that "a *rule 60(b)* motion that seeks to revisit the federal court's denial on the merits of a claim for relief should be treated as a successive habeas petition[,]" *id. at 534*, it is apparent that Petitioner's *Rule 60(b)* motion is, in substance, a successive habeas petition. In particular, Petitioner's argument that the Court incorrectly applied the AEDPA in denying his ineffective assistance of counsel claim amounts to an argument that the Court's analysis was incorrect and, as a result, reviewing Petitioner's argument would inextricably lead to a re-examination of the merits of petitioner's prior claim in his habeas petition. Similarly, Petitioner's contention that, based on new intervening law, this review is necessary also amounts to a request for another merits determination of this claim. Accordingly, Petitioner's challenge constitutes a second or successive habeas application.

As indicated above, the AEDPA requires a petitioner to obtain permission in the United States Court of Appeals for the Sixth Circuit for an order authorizing this Court to consider the petition. *28 U.S.C. § 2244(b)(3); also see Lyons v. Ohio Adult Parole Auth., 105 F.3d 1063, 1066 (6th Cir.),* **[*12]** *cert. denied, 520 U.S. 1224, 117 S. Ct. 1724, 137 L. Ed. 2d 845 (1997).* When a petitioner files a second or successive petition for habeas corpus relief in the district court without *§ 2244(b)(3)* authorization from the Sixth Circuit Court of Appeals, this Court must transfer the document(s) pursuant to *28 U.S.C. § 1631. See In re Sims, 111 F.3d 45, 47 (6th Cir. 1997).* This Court has not received an order from the Sixth Circuit authorizing the Court to consider the pending petition. Accordingly, the Clerk will be **DIRECTED** to **IMMEDIATELY TRANSFER** this action to the United States Court of Appeals for the Sixth Circuit, pursuant to *28 U.S.C. § 1631. In re Sims, 111 F.3d at 47.*

B. *Rule 60(b)* Motion for Relief from Judgment Analysis

Even if Petitioner has filed a proper motion under *Rule 60(b)*, he is not entitled to relief. *Rule 60(b) of the Federal Rules of Civil Procedure* permits a party to request relief from a judgment and reopen a case for certain enumerated reasons, among them mistake, inadvertence, surprise, fraud, newly discovered evidence, and "any other reason justifying relief from the operation of the judgment." *Fed. R. Civ. P. 60(b)(6).* Petitioner has not specified under which of the six enumerated subsections of **[*13]** *Rule 60(b)* he is proceeding; he argues, however, that the Court made a mistake and that his claims present an extraordinary circumstance.

1. *Rule 60(b)(1)*

Petitioner claims that the Court made a mistake when rendering its decision on the merits of his ineffective-assistance-of-counsel-at-sen tencing claim. The fundamental basis of Petitioner's claim of mistake is a claim of legal error, *i.e.*, application of incorrect legal standard. Petitioner argues his ineffective-assistance-of-counsel-at-sen tencing claim has not been reviewed under the proper constitutional and statutory standards because this Court misapprehended the interplay between *sections 2254(d)* and *(e)* of the AEDPA.

The Sixth Circuit "has recognized a claim of legal error as subsumed in the category of mistake under *Rule 60(b)(1)." Pierce v. United Mine Workers of Am. Welfare and Retirement Fund for 1950 and 1974, 770 F.2d 449, 451 (6th Cir. 1985), cert. denied, 474 U.S. 1104, 106 S. Ct. 890, 88 L. Ed. 2d 925 (1986).* Motions filed pursuant to *Rule 60(b)(1)* may not be filed more than one year after the judgment, order, or proceeding at issue was "entered or taken." *Fed. R. Civ. P. 60(b).*

Here, Petitioner seeks relief more than six years after the date of the challenged **[*14]** 2004 Memorandum and Order and Judgement and almost six years from the 2004 Supplement to the Memorandum and Order and Judgment [Docs. 188, 189, & 197]. Accordingly, if the Court construed this as a proper motion seeking relief

under *Rule 60(b)(1)*, the motion would be denied as untimely.

B. *Rule 60(b)(6)*

Petitioner has not alleged facts that would implicate the remaining subsections under *Rule 60(b)*. Nevertheless, his assertion of an extraordinary circumstance requires the Court to infer that he is proceeding under *Rule 60(b)(6)*, the catch-all provision with a more forgiving timeliness requirement.

A motion brought under the catch-all provision of *Rule 60(b)(6)* must be filed within a "reasonable time," *Fed. R. Civ. P. 60(b)(6)*, and requires a showing of "extraordinary circumstances." *Gonzalez, 545 U.S. at 535*. In addition, the Sixth Circuit has instructed that "[b]ecause of the residual nature of *Rule 60(b)(6)*, a claim of simple legal error, unaccompanied by extraordinary and exceptional circumstances, is not cognizable under *Rule 60(b)(6)*." *Id.* "These provisions are mutually exclusive, and thus a party who failed to take timely action due to 'excusable neglect' may not seek relief more **[*15]** than a year after the judgment by resorting to *subsection (6)*. . . . To justify relief under *subsection (6)*, a party must show 'extraordinary circumstances' suggesting that the party is faultless in the delay." *Pioneer Inv. Servs .Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 393, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)* (internal citations omitted).

As an initial matter and as noted above, Petitioner has allowed approximately six years to pass from the date of this Court's judgment before filing the instant motion seeking relief from that judgment. Petitioner offers no justification for why the intervening six years constitute a reasonable time within which to bring this motion and the Court finds it does not constitute a reasonable time.[4]

> 4 The instant motion was filed on October 15, 2010. The Court dismissed Petitioner's habeas petition on September 30, 2004, and disposed of his motion to alter or amend judgment on December 10, 2004. Petitioner filed a notice of appeal on January 7, 2005 [Doc. 199]. The Court of Appeals for the Sixth Circuit affirmed the district court on December 18, 2008 [Doc. 204]. The United States Supreme Court subsequently denied certiorari on March 1, 2010 [Doc. 209]. Petitioner filed the **[*16]** instant motion seven months and eleven days later, on October 15, 2010, after his November 9, 2010, execution date was set and less than four weeks prior to that date [Doc. 212]. Consequently, even considering the date on which the Supreme Court denied certiorari when determining the timeliness of this motion, it appears the motion was not filed within a reasonable time. The Court does observe, however, that the motion was filed within a reasonable time from the date on which *certiorari* was denied in *Thompson v. Bell, i.e.*, October 4, 2010, a case upon which Petitioner relies but which does not appear to address Petitioner's argument.

With respect to extraordinary circumstances, Petitioner contends that the Court's failure to review and consider new mitigating evidence--evidence which he failed to present in state court--due to a misapprehension of the relationship between *28 U.S.C. § 2254 (d)* and *(e)* qualifies as an extraordinary circumstance. The United States Supreme Court has noted that "[extraordinary] circumstances will rarely occur in the habeas context." *Gonzalez, 545 U.S. at 535*. Absent clear Supreme Court precedent, the Court does not conclude it misapprehended the relationship **[*17]** between *28 U.S.C. § 2254(d)* and *(e)*, and, even if it did, any alleged error was cured by the Sixth Circuit Court of Appeals' *de novo* review of Petitioner's ineffective-assistance-of-counsel-at-sen tencing claim. Thus, this alleged error does not qualify as an extraordinary circumstance.

Petitioner also claims an intervening change in the law qualifies as a new extraordinary circumstance. According to Petitioner, *Pinholster v. Ayers* and *Thompson v. Bell* change the law and permit a federal court to reject a state court's adjudication of a petitioner's claim as unreasonable under *28 U.S.C. § 2254* and grant habeas corpus relief based on facts that were never presented in state court. Thus, claims Petitioner, the Court erred when it refused to consider the affidavits and psychological reports and evaluations he submitted here, but not in state court.

These two cases do not persuade the Court it misapprehended the relationship between the two provisions of the statute. *Pinholster v. Ayers* is a Ninth Circuit case presently pending in the United States Supreme Court. The Ninth Circuit considered factual evidence not presented in state court but which could have been presented in state court, **[*18]** to reject the

state court's adjudication of a petitioner's claim as unreasonable under *28 U.S.C. § 2254. Pinholster, 590 F.3d at 667-68.* The Court declines to follow the decision as it does not appear to be followed by other circuits; indeed, eighteen Attorney Generals have submitted Amici Curiae briefs in support of the warden in that case. *Thompson v. Bell* is a Sixth Circuit case where the appellate court concluded the state court unreasonably applied federal law to a competency-to-be-executed claim and remanded the case back to the district court for a competency hearing. *Id. at 437-437.* The case does not appear to address Petitioner's argument.

Nevertheless, as just stated, any alleged error by this Court was cured by the Sixth Circuit's *de novo* review of this claim. Even if it was not, Petitioner's relief lies in the Sixth Circuit. This Court is bound by the Sixth Circuit's resolution of this claim as it is the law of the case. "Under the doctrine of law of the case, findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation." *United States v. Moored, 38 F.3d 1419, 1421 (6th Cir. 1994).* Subject to limited exceptions, which **[*19]** are not applicable here,[5] "[t]he law of the case doctrine . . . generally preclude[s] a lower court from reconsidering an issue expressly or impliedly decided by a superior court." *Id.*

> 5 Examples of limited circumstances when a case could be reopened is "where there is substantially different evidence raised on subsequent trial; a subsequent contrary view of the law by the controlling authority; or a clearly erroneous decision which would work a manifest injustice." *Moored, 38 F.3d at 1421* (internal quotation marks and citations omitted). The Court is not persuaded that either case cited as new intervening law amounts to "a subsequent contrary view of the law by the controlling authority," thus, the law of the case doctrine precludes this Court from reconsidering the issues expressly or impliedly decided by the Sixth Circuit.

Petitioner's alleged intervening change in circuit case law fails to qualify as an extraordinary circumstance.[6] *See Gonzalez, 545 U.S. at 536* (remarking that no extraordinary circumstance was presented by the ruling in *Artuz v. Bennett, 531 U.S. 4, 121 S. Ct. 361, 148 L. Ed. 2d 213 (2000)*, though it changed the interpretation of the AEDPA statute of limitations). Accordingly, not only would the Court **[*20]** find that Petitioner's *Rule 60(b)* motion is untimely, but also that it does not allege any exceptional or extraordinary circumstances placing his claim within the reach of *Rule 60(b)(6).*

> 6 Even if a change in law constitutes grounds for relief, Petitioner cannot make that showing as he has not demonstrated a change in Sixth Circuit or Supreme Court law that clearly undermines the validity of this Court's previous judgment.

III. Conclusion

For the reasons set forth above, Petitioner's *Rule 60(b)* motion is a second or successive habeas petition brought pursuant to *§ 2254* over which this Court has no jurisdiction absent precertification by the court of appeals. Therefore, in light of Petitioner's approaching execution date, the petition will be **TRANSFERRED IMMEDIATELY** to the United States Court of Appeals for the Sixth Circuit for a determination as to whether, under *28 U.S.C. § 2244(b)(2)*, this successive habeas petition may be filed [Doc. 212].

The Clerk **SHALL** notify the Sixth Circuit of the transfer and approaching execution date.

An appropriate order will enter.

/s/ Thomas A. Varlan

UNITED STATES DISTRICT JUDGE

C
United States Code Annotated Currentness
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title VII. Judgment
➡ **Rule 60. Relief from a Judgment or Order**

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) ***Timing.*** A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) ***Effect on Finality.*** The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; December 29, 1948, effective October 20, 1949; March 2, 1987, effective August 1, 1987; April 30, 2007, effective December 1, 2007.)

Amendments received to 05-01-10

END OF DOCUMENT

C

Effective: April 24, 1996

United States Code Annotated Currentness
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 153. Habeas Corpus (Refs & Annos)
➡ **§ 2253. Appeal**

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 113, 63 Stat. 105; Oct. 31, 1951, c. 655, § 52, 65 Stat. 727; Apr. 24, 1996, Pub.L. 104-132, Title I, § 102, 110 Stat. 1217.)

Current through P.L. 111-264 (excluding P.L. 111-203, 111-257, and 111-259) approved 10-8-10

END OF DOCUMENT