UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

STEPHEN MICHAEL WEST,	)	
	)	
Petitioner	)	
	)	
v.	)	**No. 3:01-cv-91**
	)	Varlan/Shirley
RICKY BELL, **Warden**,	)	**DEATH PENALTY CASE**
	)	**EXECUTION SCHEDULED**
Respondent	)	**NOVEMBER 9, 2010**

REPLY TO RESPONSE TO PETITIONER'S
MOTION FOR RELIEF FROM JUDGMENT

Mr. West filed a Motion for Relief from Judgment Pursuant to FED. R. CIV. P. 60(b) and this Court's Article III inherent authority, alleging that the proceedings are defective because this Court erroneously failed to review and consider several allegations of ineffectiveness at sentencing, due to a misapprehension of the relationship between 28 U.S.C. § 2254 (d) and (e). R.212. Respondent filed a response contending the motion is an impermissive successor habeas application subject to 2244(b)'s gatekeeping requirements, R.214, p. 3 of 6, is filed untimely, p. 3-4 of 6, and is barred by the law of the case doctrine, p. 4-5 of 6. Respondent is in error on all counts.

Respondent erroneously contends "because West ... seeks to re-litigate an issue previously denied on the merits, it is the equivalent of a second or successive application ...." R.214, p. 1. Mr. West's Motion for Relief neither raises a new claim for relief nor does it argue the merits of an issue previously denied on the merits. Instead, Mr. West contends this Court failed to consider several allegations of ineffective

assistance of counsel, due to a misapprehension of the interplay between 2254(d) and (e)(2). R.212, p. 2-3 of 13.

When this case was initially before this Court, Respondent vigorously urged this 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 (Filed March 25, 2002); 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 (filed May 6, 2002). This court accepted Respondent's arguments and refused to review the following claims: whether trial counsel was ineffective for failing to present evidence about Mr. 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 Mr. 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

[1]Affidavit of Dr. Keith Caruso, dated February 23, 2001 (Exhibit 1 to Motion for Relief from Judgment); Medical Record from Community Hospital confirming West was born in a mental institute (Exhibit 2 to Motion for Relief from Judgment). *See* page 85, n. 23, of the Court's Memorandum Opinion, R.188.

[2]Affidavit of Debra West Harless, dated December 31, 1998 (Exhibit 3 to Motion for Relief from Judgment). *See* page 85, n. 23 of the Court's Memorandum Opinion, R.188.

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 Mr. West,[4] whether trial counsel was ineffective for failing to present testimony of Mr. West's manager at McDonald's that Ronnie Martin was hostile and aggressive while Mr. West was more passive,[5] and whether trial counsel was ineffective for failing to present proof that Mr. West suffered repeated childhood abuse which caused him to become very passive and submissive as an adult, suffering from post-traumatic stress disorder.[6]

Accordingly, Respondent's assertion that these claims have been reviewed on the merits is without basis. These claims have not, in fact, been reviewed on the merits. It is the erroneous denial of merits review that is the basis for Mr. West's Motion for Relief. Mr. West's Motion for Relief from Judgment cannot be barred as an impermissible successor petition.

The inclusion of the claim in the initial petition does not prohibit future

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[3]Affidavit of Karen West Bryant, dated December 18, 2001 (Exhibit 4 to Motion for Relief from Judgment). *See* page 85, n. 23 of the Court's Memorandum Opinion, R.188.

[4]Affidavit of Vestor West, dated December 31, 1998 (Exhibit 5 to Motion for Relief from Judgment). *See* page 85, n. 23 of the Court's Memorandum Opinion, R.188.

[5]Affidavit of Patty Rutherford, dated February 11, 2002 (Exhibit 6 to Motion for Relief from Judgment). *See* page 85, n. 23 of the Court's Memorandum Opinion, R.188.

[6]Report of Claudia R. Coleman, Ph.D., dated November 7, 2001(Exhibit 7 to Motion for Relief from Judgment); Report of Richard G. Dudley, Jr., M.D. dated February 22, 2002 (Exhibit 8 to Motion for Relief from Judgment). *See* page 85, n.23 of the Court's Memorandum Opinion, R.188. Affidavit of Pablo Stewart, M.D. dated December 13, 2002 (Exhibit 9 to Motion for Relief from Judgment), 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 this Court. *See* Motion to Expand, *supra*, and Order granting same, *supra*. His affidavit was not specifically discussed in this Court's Memorandum dismissing Mr. West's petition. Implicit in the Court's Memorandum Opinion is the holding that this evidence was likewise barred by 2254(e)(2). *See* R.188, p. 85-88.

consideration of whether earlier proceedings were defective for failure to review the claim. Review under RULE 60(b) is proper where the petitioner "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." *Gonzalez v. Crosby*, 545 U.S. 524, 532 n. 4.

Mr. West's Motion is similar to the one granted in *Balentine v. Thaler*, 609 F.3d 729 (6th Cir. 2010). 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 732. 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 State of Texas argued the motion was barred by AEDPA's requirements for successor petitions. *Id.* at 734. Relying on the language from *Gonzalez* concerning erroneous determination of exhaustion, the Fifth Circuit held the motion to reopen should be granted. *Id.* at 743. *See also Ruiz v. Quarterman*, 504 F.3d 523 (5th Cir. 2007) (same).

Respondent also contends that Mr. West's Motion for Relief from Judgment alleges a mistake of law and should be treated as a 60(b)(1) motion which should be filed within one year of this court's order dismissing the petition. R.214, p. 3 of 6. Respondent contends that it is the law of this circuit that a mistake of law is properly considered under 60(b)(1). Respondent is in error. Mr. West alleges that a fundamental misapprehension in the law may qualify as an extraordinary circumstance. *See* R.212 at 8-9 of 13 (citing *Overbee v. Van Waters & Rogers*, 765 F.2d 578, 580 (6th Cir. 1985) and *Thompson v. Bell*, 580 F.3d 423 (6th Cir. 2009). Under RULE 60(b)(6),

the question is whether West has diligently pursued this point of law. As explained in his motion, he has been diligent. R.212, p. 9-10 of 13.

Finally, Respondent contends the law of the case doctrine bars this Court from granting West's motion. R.214, p. 4 of 6. Again, this is incorrect. The Sixth Circuit has not ruled on the merits of Mr. West's motion to reopen under RULE 60(b)(6), which presents significantly different legal matters than were presented in Mr. West's appeal. Further, as Mr. West explained in his Motion, the Sixth Circuit has not ruled on the merits of the above-enumerated claims. R.212, p. 4 of 13. Further, if Respondent were correct, all 60(b) motions would be barred by the law of the case doctrine, a holding that is clearly contrary to *Gonzalez*.

In conclusion, Mr. West requests this Court grant him relief from judgment.

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2010, the foregoing Reply to Response to Petitioner's Motion for Relief From Judgment was filed electronically. Notice was electronically mailed by the Court's electronic filing system to all parties indicated on the electronic filing receipt. Notice was delivered by other means to all other parties via regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

s/Stephen Ferrell