IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDWARD JEROME HARBISON,	)	
	)	
Petitioner-Appellant	)	**No. 06-6539**
	)	
v.	)	**Death Penalty Case**
	)	**EXECUTION DATE:**
RICKY BELL, Warden	)	**February 22, 2007**
	)	
Respondent-Appellee	)	

MOTION FOR ORDER STAYING EXECUTION AND TO STAY APPEAL PENDING THE OUTCOME OF A SUBSTANTIALLY RELATED CASE

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Petitioner/Appellant, Edward Jerome Harbison, respectfully requests this Court to enter an order staying his execution scheduled for February 22, 2007, so that this Court may consider the substantial grounds to be raised on appeal from the district court's denial of his RULE 60(b) motion.

I. INTRODUCTION

The case before the Court involves federal review of a recent state court decision concerning a newly-completed exhaustion proceeding. The subject of the state court exhaustion proceeding was the State's withholding of exculpatory evidence for over fourteen years. The state trial court proceeding lasted three

years, from 2001-2004. The state case became final in December 2005.[1]

In April 2006, Mr. Harbison brought his case to the district court as soon as possible and well within the statute of limitations. On June 13, 2006, with full knowledge that Mr. Harbison's case was pending in the federal district court, the State called for his execution. In response, and aware of the pending federal litigation, the Tennessee Supreme Court scheduled Mr. Harbison's execution. In November 2006, the district court issued its decision and notice of appeal was timely made on December 8, 2006. Notice of appeal from the district court's decision on Mr. Harbison's motion to alter or amend the RULE 60(b) decision was timely made on January 17, 2007.[2]

The instant appeal has been fully pending before this Court for only 2 days.[3] Mr. Harbison has not yet had an opportunity to brief and argue the merits of this

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[1] *Harbison v. State*, 2005 WL 1521910 *6 (Tenn.Crim.App.), *perm. app. den.* (Tenn. Dec.19, 2005).

[2] The district court also denied Mr. Harbison's motion to expand his counsel's appointment to include representation in clemency proceedings (R.158, p.10-14). A notice of appeal from this final order was made on January 17, 2007, (R.160). The appeal is docketed as number 07-5059.

[3] Even before jurisdiction was fully vested in this Court, the state asked for the panel to expedite the appeal. *See* state's motion for expedited appeal filed 1/16/07.

appeal.[4] An order staying the execution should enter to prevent Mr. Harbison's appeal from becoming moot by his execution.[5]

Furthermore, the outcome of this appeal may turn on this Court's resolution of *Abdur'Rahman v. Bell*, nos. 02-6547/6548, which raises the issue of what constitutes "extraordinary circumstances" in the context of FED.R.CIV.P. RULE 60(b) motions. This same issue was addressed by the district court below and will be part of Mr. Harbison's appeal.[6] The panel should hold Mr. Harbison's appeal in abeyance until *Abdur'Rahman* is decided. Given these circumstances, the Court will be unable to resolve the merits of Mr. Harbison's appeal before the date of execution.[7] Thus, Mr. Harbison "is entitled to a stay of execution to permit due

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[4]*Barefoot v. Estelle*, 463 U.S. 880, 889 (1983).

[5]*Barefoot*, 463 U.S. at 893-94; *see also Lonchar v. Thomas*, 517 U.S. 314, 320 (1996)(district courts should enter stays of execution in order to address the merits and prevent cases from becoming moot).

[6]*Harbison v. Bell*, no. 1:97-cv-00052 R.151 p.11 (hereinafter "R.151") (Attachment A)

[7]Also before the Court is case number 06-6474 which was transferred from the district court. The issue is whether the district court properly characterized a portion of Mr. Harbison's pleading as a "second or successive" petition. Pending, is Mr. Harbison's motion to re-transfer or remand the case to the district court. Given the pendency of this additional case, which presents substantial grounds upon which relief might be granted, an order staying the execution should enter.

consideration of the merits" of his appeal.[8]

II. A Death Sentence Cannot Begin To Be Carried Out By The State While Substantial Legal Issues Remain Outstanding[9]

Courts should stay an execution to give "non-frivolous claims of constitutional error the careful attention that they deserve."[10] Mr. Harbison's RULE 60(b) motion and petition, (R.135), presented substantial legal issues to the district court. These issues were pending for two months when the State asked the Tennessee Supreme Court for Mr. Harbison's execution date. Mr. Harbison alerted the state court of his federal case. Without explanation, and despite the outstanding legal issues, the state court granted the State's motion.[11] Mr. Harbison's execution was scheduled for October 11, 2006, but was re-set for unrelated reasons to February 22, 2007.

The issues presented to the district court involved the integrity of the initial federal habeas proceeding.[12] The defects in the district court proceeding involved

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[8]*Barefoot*, 463 U.S. at 889.

[9]*Barefoot*, 463 U.S. at 888.

[10]*Id.*

[11]*State v. Harbison*, No. M1986-00093-SC-OT-DD (Tenn. July 17, 2006)(Attachment B).

[12](R.135, p.3-4)

the erroneous determination that Mr. Harbison's later-arising claims were procedurally barred. Unlike in *Gonzalez v. Crosby*,[13] a RULE 60(b) case where there was a *general* change in law unrelated to Gonzalez, the recent occurrences in this case not only provided Mr. Harbison a potential remedy for his later-arising claims, the law of *Mr. Harbison's* case changed with the new state court decision. In *Gonzalez*, the general change in law allegedly resulting in procedural irregularities did not amount to the "extraordinary circumstances" needed to reopen the case.

This Court holds relief under RULE 60(b)(6) is appropriate where "the principles of equity mandate relief." *Olle v. The Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990). In balancing the principles of equity here, the fact that the procedural irregularities in this case stem from the State's withholding for fourteen years information sought by Mr. Harbison which supports his *Brady* and conflict of interest claims, the fact that the State mischaracterized state law in 1998 and created the district court's misapprehension of state procedural law, the fact that state impediments to exhaustion of Mr. Harbison's later-arising claims were recently removed and the fact that the state court re-opened Mr. Harbison's state post-conviction proceeding to consider Mr. Harbison's later-arising claims, all

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[13] 545 U.S. 524 (2005)

amount to "extraordinary circumstances" justifying the re-opening of the federal habeas proceeding.

Failing to recognize that these important facts distinguish this case from the facts leading to an adverse outcome in *Gonzalez*, the State opposed Mr. Harbison's RULE 60(b) motion on the basis that "extraordinary circumstances" are not present to afford relief.[14]

On November 28, 2006, the district denied relief, (R.151, 152).[15] It found Mr. Harbison's RULE 60(b) motion "is properly characterized."[16] Addressing the merits of the RULE 60(b) motion, the district court found "the state court's *later* decision" verified its initial conclusion that a state procedural bar existed, "at least with respect to the *Brady* claim."[17] It determined that

> the testimony and evidence offered at the coram nobis hearing by Harbison's post-conviction attorney and now offered here involve factual matters which could have (and likely would have) led the Court to reach a different conclusion as to the existence of cause.[18]

However, the district court again found no "prejudice" relying upon the

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[14](State's response to petition for writ of habeas corpus, R.140 p.9-10)

[15](R.151)

[16](R.151 p.5)

[17](R.151 p.7)(emphasis supplied)

[18](R.151 p.9)

panel majority's ruling regarding "prejudice."[19] Importantly, the district court did not account for the fact that, when the panel majority engaged in its "prejudice" analysis, it did *not* consider the facts from the exhaustion hearing..[20]

There is a substantial likelihood that relief might be granted after the Court considers the instant appeal because (1) the district court *reversed* its prior "cause" determination after considering the recent state court exhaustion proceeding , (2) the panel majority *did not* consider the facts developed in the state court proceeding, (3) the dissenting member of the panel who *did* consider those facts would have granted relief, and (4) this case presents "extraordinary circumstances" and this Court is poised to decide, in another case, what may constitute

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[19] *Compare* (R.151, p.9) ("The Sixth Circuit agreed with the [no prejudice] finding[]"); *with Harbison v. Bell*, 408 F.3d 823, 834 (6th Cir. 2005) ("Harbison has not demonstrated such prejudice"). The majority's "no prejudice" finding was based on a reasonable doubt standard. *Id.* However, "a showing of materiality does not require demonstration by [even] a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). It was error to require Harbison to meet a near 99% burden when Harbison need not even show by 51% that the evidence puts the case in such a different light that it undermines confidence in the outcome.

[20] *See e.g. Harbison v. Bell*, 408 F.3d at 836-37 (finding it inappropriate to consider matters "outside the record").

"extraordinary circumstances" for RULE 60(b) purposes.[21]

The state should not have sought an execution date before the federal courts adjudicated his claims. Accordingly, an order staying Mr. Harbison's execution should enter because approving his execution "before his appeal is decided on the merits would clearly be improper."[22]

III. TRADITIONAL FACTORS WEIGH IN FAVOR OF AN ORDER STAYING THE EXECUTION

Other factors, including irreparable injury, prejudice to the opposing party, and whether the stay would serve the public interest, favor a stay of execution.[23] In cases where a prisoner is scheduled to be executed, irreparable harm is deemed "to be self-evident."[24]

Courts also conclude that a state suffers no substantial harm when an

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[21]Furthermore, 28 U.S.C. §2253(c)(1) does not impede success on the merits because Respondent concedes that appellate review of a RULE 60(b) decision may be had without issuance of a certificate of appealability. *Thompson v. Bell*, 06-5770, *State's Response to Protective Application for Certificate of Appealability,* p.3, filed October 5, 2006. Irrespective of Respondent's prior concession in a different case, Mr. Harbison will file a protective application for certificate of appealability as soon as possible.

[22]*Barefoot*, 463 U.S. at 889

[23]*In re: Holladay*, 331 F.3d 1169, 1176 (11th Cir. 2003)(granting stay of execution); *In re: Morris*, 328 F.3d 739, 741 (5th Cir. 2003)(same).

[24]*Holladay*, 331 F.3d at 1177.

execution is delayed in order to determine whether the execution would be unconstitutional.[25] Here, any notion of "delay" is spawned from the State's efforts to prematurely execute Mr. Harbison. Furthermore, the State of Tennessee withheld exculpatory evidence for over fourteen years. This evidence reasonably demonstrates that Mr. Harbison did not commit this crime and that his attorney's representation was deficient where he failed to present evidence of the other suspect because of a conflict of interest. The State also unnecessarily delayed, for almost two years, the state court exhaustion proceedings by repeatedly failing to meet court deadlines and submit required information to the state court.[26] In light

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[25] *Id.*; *Morris*, *supra*; *In re: Johnson*, 322 F.3d 881, 883 (5th Cir. 2003)(finding "nothing upon which we could determine that 'the granting of the stay would substantially harm other parties,' including the State of Texas.").

[26] The state trial court proceeding lasted almost three years. It was delayed for approximately twenty-four months due to the State's late filings. Mr. Harbison's state court action began on June 26, 2001. Three months later, the State responded. On October 29, 2001, the State court held oral argument on Mr. Harbison's motion. The State court entered a preliminary order re-opening the proceedings and providing thirty days for Mr. Harbison to file an amended petition. Because the State did not respond to the amended petition, the State court entered an order on January 25, 2002, requiring the state to file a response within thirty days. Three months later, the State's response was filed but it failed to address the specific issues as directed by the State court. On June 18, 2002, the State court again ordered the State to respond within twenty days and to address the court's concerns. Eight months later, the State responded. On February 21, 2003, the lower court ordered Mr. Harbison to file an amendment discussing the state's alleged time-bar and to file an affidavit supporting the *Brady* claim. This was filed on March 14th and 21st, respectively. On April 22, 2003, pursuant to new

of the State's fourteen year delay in disclosing material evidence and the State-created delay in the exhaustion proceeding, the State will suffer no substantial harm from a stay and cannot now be heard to complain of the minimal amount of time that is required for this Court to decide the important constitutional issues surrounding Mr. Harbison's execution.

Of course, the public interest is served *a fortiori* upon these circumstances.[27] Additionally, in considering the public interest, the fact cannot be ignored that one federal court jurist would have granted Mr. Harbison guilt-phase relief and one state court judge would have granted Mr. Harbison sentencing relief.[28] This underscores the importance of a careful, unhurried review of the case. For all these reasons, this Court should issue an order staying Mr. Harbison's execution.

IV. ADDITIONALLY, THE INSTANT APPEAL SHOULD BE STAYED PENDING THE DECISION IN *ABDUR'RAHMAN*.

There is no question that a stay of execution should enter, but also, that this

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State court case law, Mr. Harbison filed a supplemental request for relief. Sixth months later, the State responded. The State trial court held a hearing on October 13, 2003, and denied relief on April 2, 2004. On appeal to the Court of Criminal Appeals, the State requested two extensions of time to submit its brief.

[27] *In re: Holladay*, *supra*; *In re: Morris*, *supra*.

[28] *Harbison v. Bell*, 408 F.3d 823, 840 (6th Cir. 2005); *State v. Harbison*, 704 S.W.2d 314, 320 (Tenn. 1986).

case should be stayed. The resolution of the *Abdur'Rahman* case may impact the resolution of Mr. Harbison's appeal. "[C]ourts are justified in granting a 'stay pending the resolution of a related case in another court.'"[29] The Supreme Court itself has stayed cases until similar issues presented in other pending cases were resolved.[30] This Court has explicitly approved of stays pending the decision in *Abdur'Rahman*.[31] District courts have also stayed proceedings in anticipation of the *Abdur'Rahman* ruling.[32]

The availability of relief in Mr. Harbison's case rests, in part, on whether "extraordinary circumstances" are present. *Abdur'Rahman* will define the term "extraordinary circumstances." If the result in *Abdur'Rahman* supports a finding of "extraordinary circumstances" in Mr. Harbison's case then relief is available for

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[29] *Friends of the Everglades, Inc. v. South Florida Water Management Dist.*, 2003 U.S.Dist. LEXIS 13827 (S.D.Fla. 2003) *quoting Ortega Trujillo v. Conover & Co. Communications, Inc.*, 221 F.3d 1262, 1264 (11th Cir. 2000).

[30] *See e.g. Mikutaitis v. United States*, 478 U.S. 1306 (1986)(court imposed stay of the proceedings where issue is "sufficiently similar" to the question presented by another case); *California v. Hamilton*, 476 U.S. 1301 (1986)(same).

[31] *Johnson v. Bell*, No.05-6925 (6th Cir. 10/19/06); *Caruthers v. Bell*, No. 01-5914/5915 (6th Cir. 6/20/03); *Hutchison v. Bell*, No. 04-5066 (6th Cir. 4/1/04) (Attachment C, order); *Cooey v. Bradshaw*, 338 F.3d 615, 616 (6th Cir. 2003) *affirming* 216 F.R.D. 408, 414-415 (N.D.Ohio 2003)(district court deferred ruling on inmate's 60(b) motion and granted motion for stay of execution).

[32] *See e.g. Hutchison v. Bell*, no. 3:98-cv-664 (E.D.Tenn. 1/22/04) (Attachment D, order).

him. If the result in *Abdur'Rahman* does not support a finding of "extraordinary circumstances," then relief may not be available. Under either scenario, the relatively short stay in the proceedings would prevent irreparable harm, insure equal application of the law and further the interests of justice and judicial economy.

This Court is presented with the same circumstances as the courts in *Johnson, Caruthers, Hutchison* and *Cooey*. Therefore, Mr. Harbison respectfully requests this Court stay the appeal and defer ruling pending the Court's decision in *Abdur'Rahman*.

V. CONCLUSION

WHEREFORE Mr. Harbison prays that this Court enter a stay of execution (scheduled for February 22, 2007), to maintain its jurisdiction and prevent Mr. Harbison's appeal from becoming moot and stay the current appeal until *Abdur'Rahman* is resolved by the Court.

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CERTIFICATE OF SERVICE

I, Dana C. Hansen Chavis, hereby certify that a true and correct copy of the foregoing document was mailed to:

Gordon W. Smith, Esquire
Associate Solicitor General
Criminal Justice Division
P. O. Box 20207
Nashville, TN 37202

this the 19th day of January, 2007, by postage prepaid delivery.

Dana C. Hansen Chavis

Attachment
A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

EDWARD JEROME HARBISON,	)	
Petitioner,	)	
v.	)	NO. 1:97-CV-52
RICKY BELL, Warden,	)	*Chief Judge Curtis L. Collier*
Respondent.	)	

MEMORANDUM

Petitioner Edward Jerome Harbison ("Harbison"), a Tennessee inmate under sentence of death, has filed a fee-paid petition for a writ of habeas corpus, pursuant to 28 U.S.C.§ 2241, *et seq.*, or in the alternative, a motion for relief from judgment, under Fed. R. Civ. P. 60(b)(6) and *Gonzalez v. Crosby*, 545 U.S. 524, 125 S.Ct. 2641, 2648 and n.4 (2005) [Court File No. 135]; as well as a motion for a stay of his execution, now scheduled for February, 22, 2007 [Court File Nos. 146, 148]. Harbison, who is represented by counsel, has also filed an application to proceed *in forma pauperis* in connection with any additional fees or costs, which is supported by his financial affidavit and a copy of his inmate trust account statement [Court File Nos. 136, 137]. Based upon the financial data included in those documents, it appears Harbison lacks the wherewithal to pay any subsequent fees or costs of this litigation. Therefore, the application will be **GRANTED**.

I. PROCEDURAL BACKGROUND

In 1983, a jury in the Hamilton County, Tennessee Criminal Court convicted Harbison of second-degree burglary, grand larceny, and first degree murder and, upon a finding of one aggravating circumstance, sentenced him to death for the murder. After the Tennessee courts denied his appeal and several collateral attacks (including post-conviction, habeas corpus, and coram nobis petitions), Harbison brought a petition for a federal writ of habeas corpus, pursuant to 28 U.S.C.§ 2254. Subsequently, the Court dismissed it. *Harbison v. Bell*, Civil Action No. 1:97-cv-52 (E.D.Tenn. Mar. 6, 2001) (order denying petition). The decision was affirmed on appeal, and the petition for a writ of certiorari which followed was denied by the United States Supreme Court. *Harbison v. Bell*, 408 F.3d 823 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 1888 (2006). Following the entry of the Court's judgment denying his § 2254 application, he returned to the state courts to raise various claims, but did not receive relief. *See Harbison v. State*, No. E2004-00885-CCA-R28-PD, 2005 WL 1521910 (Tenn. Crim. App. June 27, 2005), *permission to app. denied* (Tenn. Dec. 19, 2005). Harbison now brings this instant pleading/Rule 60(b)motion, supported by various documents, including the record of those recent state court proceedings.[1]

II. DISCUSSION

Respondent Warden has filed a response [Ct. File No. 140], citing to 28 U.S.C.§ 2244(b) and arguing this instant filing amounts to a "second or successive" petition, which must be transferred to the Court of Appeals. The Respondent also argues that, even if treated as a Rule 60(b) motion, the motion states no grounds upon which to grant relief.

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[1] The Sixth Circuit denied Harbison leave to supplement the appeal record to provide the materials from the state court proceedings because this Court had not had those materials when it ruled on his petition. *Harbison*, 408 F.3d at 836-37.

Harbison has submitted a reply [Court File No. 143] and, not surprisingly, offers several counter-arguments. First, he denies that his petition qualifies as a second or successive petition, reasoning that the two issues raised in this instant petition originated in the state coram nobis proceeding and, therefore, could not have been raised in his initial § 2254 petition. He takes the position that this petition, though numerically his second, does not qualify as a second or successive petition under 28 U.S.C.§ 2244(b).

His next suggestion is that, if indeed his petition is a second or successive one, it was filed within one year of the state court decision which furnished the factual predicate for his claims. His third argument is constructed in the alternative and rests on the ruling in *Gonzalez*. Harbision maintains he is entitled to Rule 60(b) relief because, just as the petitioner in *Gonzalez*, he is not asserting errors in his state convictions but instead, is challenging this Court's finding of procedural default—a ruling which prevented a merits review of his claims. The procedural-default ruling, according to Harbision, amounts to a defect in the integrity of the initial federal habeas proceeding because it was constructed on this Court's "erroneous fact findings and erroneous conclusions regarding state law; errors recently confirmed by the state court."

Since the Clerk chose to file Harbison's first submission in his previous habeas corpus case, Civil Action No. 1:97-cv-52 , the Court turns first to the alternative Rule 60(b) aspect of that filing.

A. Motion for Relief from Judgment

1. Applicable law

Rule 60(b) of the Federal Rule of Civil Procedure permits a party to ask a Court to relieve him from a judgment and reopen a case for certain enumerated reasons, among them mistake, inadvertence, surprise, fraud, and newly discovered evidence. The sixth subsection of Rule 60(b) — the catchall provision under which Harbison brings his motion — allows relief to be granted for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6).

In *Gonzalez*, the case on which Harbison primarily relies,[2] the Supreme Court addressed the applicability of a Rule 60(b) motion to § 2254 habeas corpus proceedings, concluding that a Rule 60(b) motion was permitted in such a context and could be harmonized with AEDPA's restrictions on second and successive petitions. 125 S.Ct. at 2649-50. The Court explained that, if, after a denial of a habeas petition, a Rule 60 motion attempts to advance a substantive claim, then it is properly characterized as a second or successive petition. Presenting a claim not offered in the original petition because of mistake or excusable neglect; seeking to submit newly discovered evidence not contained in the original petition; and asking for relief predicated on an alleged modification of law since the petition was denied — all illustrate a second or successive petition packaged as a Rule 60(b) motion. By contrast, an authentic Rule 60(b) motion is one which assails "some defect in the integrity of the federal habeas proceedings" but does not challenge "the substance of the federal court's resolution of a claim on the merits." *Id.* at 2648. For example, an assertion of error with respect to a previous ruling, such as finding of procedural default, which precluded a merits determination, does not constitute an attack on the disposition of a claim on the merits and, therefore, is properly raised in a Rule 60(b) motion. *Id.* and n.4. Finally, success on a Rule 60(b) motion hinges on a showing of "extraordinary circumstances," though these circumstances rarely occur in the habeas context. *Id.* at 2649.

2. Characterizing the Instant Filing

In his motion, Harbison maintains the Court incorrectly ruled that certain claims raised in his original petition had never been presented to the state courts, could not then be presented, and, therefore, were

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[2] Harbison also cites to *Abdur'Rahman v. Bell*, 392 F.3d 174, 185-86 (6th Cir. 2004) as support for his position. However, the Supreme Court vacated and remanded that decision to the United States Court of Appeals for the Sixth Circuit (the "Sixth Circuit") for further consideration in light of *Gonzalez*. *See Bell v. Abdur'Rahman*, 125 S.Ct. 2991 (2005). A decision which has been vacated cannot bolster Harbison's argument.

procedurally barred. He asserts that, following the entry of the Court's judgment denying his § 2254 application, he returned to the state courts and exhausted the two claims now offered in his Rule 60(b) motion—one alleging the Chattanooga Police Department's records were not disclosed to the defense, in violation of the rule in *Brady v. Maryland*, and the other alleging the attorney who represented him in his motion for a new trial and on appeal had a conflict of interest in that counsel also represented a primary suspect in the murder before being appointed to represent Harbison. Harbison submits the state court decision shows the above rulings were defective and those defects undermine the integrity of the judgment.

Because "[a] motion that... challenges the District Court's failure to reach the merits does not warrant [] treatment [as a successive habeas petition]," *Gonzalez*, 125 S.Ct. at 2651, the part of the motion attacking the Court's prior procedural default determinations, which prevented the Court from reaching the merits of the claims, is properly characterized as a Rule 60(b) motion. Therefore, it "can be ruled upon by [this Court] without precertification by the Court of Appeals pursuant to § 2244(b)(3)." *Id.*

3. The Court's Previous Rulings

In the memorandum opinion which accompanied the order dismissing the petition [Court File No. 101] , the Court discussed the related doctrines of exhaustion and procedural default.

> A petitioner who has never presented a claim in the state courts and is now barred from returning to those courts to present his claim meets the technical requirements of exhaustion because there are no state remedies left to exhaust. Nevertheless, a petitioner in such a situation can obtain federal habeas review of the claim only if he can show cause to excuse his procedural default and actual prejudice as a result of the alleged constitutional violation. Likewise, where a petitioner presented a federal claim to the state courts but those courts declined to reach its merits because of his failure to comply with the requirements of a state procedural rule, he too must demonstrate cause and prejudice to secure federal review. Mem. Op., Mar. 6, 2001, at 12 (all citations omitted).

Thereafter, the Court found that "Petitioner's *Brady* claim, never before raised and now barred in state courts by state law, is deemed to be technically exhausted, but procedurally defaulted" [Mem. Op. at 19 (footnote omitted)]. The Court further found the claim of attorney conflict of interest had not been presented to the state courts either and, thus, it too had been procedurally defaulted[3] [Id. at 39].

4. The Coram Nobis Rulings

Three months after entry of the opinion, Harbison returned to state court, where he moved to reopen his post-conviction petition; filed an amended petition; and raised his *Brady* and attorney-conflict claims. Some two years later, upon Harbison's request, the motion to reopen was converted to a petition for a writ of error corum nobis. Following an evidentiary hearing, the trial court dismissed the petition as time-barred, and an appeal ensued.

In its subsequent opinion, the state appellate court pointed out that coram nobis was not the appropriate remedy for Harbison's claim that his attorney labored under a conflict of interest and, thus, it did not address the claim. As to the *Brady* claim, however, the state court explained Harbison would be entitled to coram nobis relief if: 1) there was newly-discovered evidence; 2) such evidence may have resulted in a different judgment had it been presented at trial; and 3) Harbison was faultless for failing to present the new evidence at the proper time. *Harbison*, 2005 WL 1521910, at *5. Though observing that the proper time for presenting such evidence is one-year after the final judgment, the state appellate court

[3] The Court also held, in the alternative, that "[w]hat Petitioner must do, but what he has failed to do, is to 'demonstrate that the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other. If he did not make such a choice, the conflict remained hypothetical'... and [w]here as here, the conflict is merely potential, it cannot furnish a basis for relief." Mem. Op. at 39 (citation omitted).

noted the one-year period is tolled where required by due process, pursuant to the rule established in *Burford v. State*, 845 S.W.2d 204 (Tenn. 1992). *Id.* at *4.

Next, the appeals court recounted that, according to the trial court's determinations, Harbison became aware of the alleged exculpatory evidence in October of 1997, but waited four years after receiving the police records to file his motion to reopen. *Id.* at *4. The state appellate court then determined Harbison had waited two years more before seeking to have the motion converted to a coram nobis action and that he had an "ample opportunity" to seek coram nobis relief but had "waited an unreasonable time to do so." *Id.* at *5. Finally, implicitly concluding that due process did not preclude application of the relevant one-year limitations statute, the Tennessee Court of Criminal Appeals affirmed the lower court's decision to dismiss the petition as time-barred. *Id.* at *5-6.

5. *The Alleged Defects*

a) The not-raised-before findings

Among the purported defects, as allegedly shown by the state court decision, were the Court's findings in its memorandum opinion that Harbison's *Brady* claim was "never before raised and now barred in state courts by state law"and his attorney-conflict-of-interest claim "was not raised in state court [and] there is no state court decision on the claim."

At the time the opinion was issued, the state courts had never been offered the opportunity to consider—nor had they considered—the *Brady* or attorney-conflict-of-interest claim. The Court was not in error in so finding and will not reopen the judgment on this basis. Moreover, the state court's *later* decision that Harbison's coram nobis petition was untimely, does not undermine, but instead verifies, this Court's conclusion of the existence of a state court procedural bar, at least with respect to the *Brady* claim.

b) Findings of no-cause-and-prejudice

Another defect, according to Harbison, is the Court's conclusion that there was an insufficient showing of cause and prejudice to overcome the procedural default. This conclusion too, he maintains, is belied by the state court decision addressing his coram nobis petition.

i) ***Evidence of Cause***

This Court found, based on the record then before it, that the police department files became available in January 1992; Harbison waited five years—until 1997—to request them; and he had not shown cause for failing to seek those files. While addressing Harbison's motion to alter or amend, the Court also noted "evidence purporting to show the existence of a conflict of interest became available to Petitioner during his post-conviction appeal . . . There is no reason why Petitioner's post-conviction attorneys could not have obtained those files" [Court File No. 118].

However, during the hearing on the coram nobis petition, Harbison's post-conviction attorney testified, without contradiction, that a subpoena directed to a homicide detective with the Chattanooga Police Department did not produce the police files at the evidentiary hearing on the post-conviction petition; nor did counsel's two additional requests—one directed to the police department and the other to the District Attorney's Office, both of which were made while the post-conviction case was on appeal [Court File No. 135, Attach. "C," T. of October 13, 2003 Coram Nobis Hrg. at 93-106]. Counsel also stated the police department did not respond to the later requests, but the D.A.'s office indicated that it had no materials or information in its files not already presented by Harbison at the post-conviction hearing [id.]. The state court record contains copies of those two letter requests, as well as of the subpoena duces tecum [id., Exhs. 16, 17; Attach. I].

As noted, the stated evidence was not presented in the initial habeas proceedings while the Court was making the cause-and-prejudice inquiry with respect to the *Brady* claim. Certainly, the testimony and evidence offered at the coram nobis hearing by Harbison's post-conviction attorney and now offered here involve factual matters which could have (and likely would have) led the Court to reach a different conclusion as to the existence of cause. However, even assuming this evidence demonstrates adequate cause for the procedural default, such a finding would not help Harbison. This is so because Harbison must also demonstrate prejudice and because there is no evidence to offset the Court's prior finding that he had not shown prejudice as a result of the withholding of the evidence.

ii) ***Evidence of Prejudice***

To be more specific, the Court found that the information contained in the police files did not constitute a *Brady* violation because, *inter alia*, it was not material. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999) (A petitioner alleging a *Brady* claim must show the evidence was favorable, suppressed by the state, willfully or inadvertently; and material because prejudice ensued.). The Court concluded the information was not material because there was no reasonable probability of a different result if the evidence had been disclosed to Harbison [Mem Op. at 22, 24-26]. The Sixth Circuit agreed with these findings, citing Harbison's confession as strong evidence of guilt, "which this new evidence was unlikely to overcome." *Harbison*, 408 F.3d. at 834. Nothing in the Rule 60(b) motion or the state court record of the coram nobis proceedings invalidates these conclusions or raises any genuine question regarding these findings.

With respect to the attorney-conflict-of-interest claim, while the Sixth Circuit found the Court's procedural default analysis relevant, it affirmed the Court's decision to deny the claim based on Harbison's failure to show any prejudice or impairment of his interests stemming from his attorney's alleged conflict of interest. *Id.* at 836. *See also Strickland v. Washington*, 466 U.S. 668, 687 (1984) (A petitioner claiming

ineffective assistance of counsel must show not only deficient performance but also resulting prejudice); *United States v. Mays*, 77 F.3d 906, 908 (6th Cir. 1996) (A Sixth Amendment violation is established by showing "the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other;" it is not enough to show a conflict which is merely hypothetical.).

Rule 60(b) relief is not warranted with respect to the alleged defective cause-and-prejudice findings. Though the state appellate court determined the conflict claim could not be raised in a coram nobis petition and, thus, did not rule on it, this Court held, on the allegations and evidence then before it, that Harbison could not be granted relief on the claim—not only because of the procedural default but also because he had failed to show his attorney had an actual conflict of interest, as opposed to a speculative conflict. The Sixth Circuit agreed with the latter finding. *Harbison*, 408 F.3d 823, 836 (finding that Harbison has not demonstrated prejudice resulting from counsel's alleged conflict). While his assertion of "no available state remedies for his attorney-conflict claim" may well have been confirmed by the state court opinion, it remains that Harbison has not submitted anything to undercut the integrity of the Court's finding that, at the very most, the asserted conflict was merely speculative and provided no basis for habeas relief.

c. <u>The Court's Alleged Misapprehension</u>

Harbison suggests the state court decision shows the Court misapprehended the procedural posture of his petition. The Court infers he is arguing that, contrary to the Court's finding, his claims were not procedurally-barred since he was permitted to seek relief in the state courts. If this is his intended suggestion, it is rejected. The state appellate court's opinion confirms the Court did not misapprehend the procedural posture of this case because, ultimately, the state court found the *Brady* claim had not been raised at the proper time and the attorney conflict-of-interest claim had not been raised in the proper manner.

6. Extraordinary Circumstance

A habeas petitioner seeking relief under Rule 60(b)(6) must "show 'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez*, 125 S.Ct. at 2649. According to Harbison, the Court's purported misapprehension as to the procedural posture of his claims constitutes an extraordinary circumstance and justifies the reopening of his original habeas case. Again, this Court found the claims to be procedurally barred and the state court's opinion supports the finding. At any rate, contrary to Harbison's allegations, the findings of the state courts do not amount to an extraordinary circumstance. *See Artuz v. Bennett*, 531 U.S. 4, (2000) (later interpretation of law which demonstrates incorrectness of dismissal of a § 2254 petition as untimely is not an extraordinary circumstance). Certainly, those state court rulings in no way nullify this Court's holdings.

B. Petition under 28 U.S.C. § 2241, et seq.

As an initial matter, Harbison did not designate 28 U.S.C. § 2254 as the statutory authority for his submission, but instead, invoked "28 U.S.C. § 2241, *et seq*."—the general habeas statute— as the statutory source. Perhaps the reason for the imprecise labeling is that, under 28 U.S.C. § 2244(3)(A), a prisoner must obtain authorization from a court of appeals before a second or successive petition may be filed in a district court. As noted earlier, Harbison's original § 2254 application was dismissed; the decision was affirmed on appeal; and the Supreme Court denied his request for certiorari review. Despite the vagueness in its labeling, this filing is governed by 28 U.S.C. § 2254 and all related statutory restrictions. *Byrd v. Bagley*, 37 Fed.App'x 94, at 95 (6th Cir. Feb. 20, 2002) ("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.") (unpublished disposition). *See also Rittenberry v. Morgan*, - - - F.3d - - -, 2006 WL 3230278 , *5 (6th Cir. Nov. 9, 2006) (holding "that section 2244(b) applies to any habeas corpus petition

seeking relief from custody pursuant to a state court judgment,"even where a petition is brought under § 2241).

1. Applicable law

A petition which is filed after a prior § 2254 petition has been dismissed on the basis of a procedural default stemming from a failure to exhaust state remedies, where the limitations statute has now run on those remedies, constitutes a dismissal on the merits. *See In re Cook*, 215 F.3d 606, 608 (6th Cir. 2000). Hence, any § 2254 petition filed thereafter is "second or successive" and must be authorized by the Sixth Circuit. *Id.*

2. Analysis

Both claims raised in this petition were also contained in the original petition filed in this Court and were dismissed on the basis of procedural default.[4] Harbison did not present those claims to the state courts "before the time for him to do so [] expired." *Id.* at 607. Indeed, the Tennessee Court of Criminal Appeals has issued an opinion confirming the *Brady* claim was not timely offered to the state court. Accordingly, this instant filing is a "second or successive" § 2254 petition, and, under 28 U.S.C. § 2244(b)(3), it must be and will be transferred to the Sixth Circuit for an order authorizing this Court to consider it.

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[4] This Court dismissed the attorney-conflict claim on the additional basis that Harbison had shown nothing more than a speculative conflict—not an actual conflict. On appeal, the Sixth Circuit observed that a conflict which was "merely hypothetical"could not establish a Sixth Amendment violation and went on to find no prejudice had resulted from the alleged conflict. *Harbison*, 408 F.3d at 836. Moreover, while the Sixth Circuit did "not directly reach the merits" of the *Brady* claim, it noted that since the "cause and prejudice discussion parallels requirements for the *Brady* analysis" and since Harbision had not demonstrated cause and prejudice, he had failed to establish a *Brady* violation in the first place. *Id.* at 834-36.

C. Motion for a Stay of Execution

Harbison moves to stay his execution to allow sufficient time to consider his petition on the merits. According to Harbison, the stay is justified for five reasons: 1) this petition is his first and only opportunity to have his *Brady* and attorney-conflict-of-interest claims reviewed on the merits; 2) his petition offers substantial issues upon which he is likely to prevail; 3) irreparable injury will occur absent a stay; 4) a stay will not prejudice the Respondent; and 5) the public interest will be served. He cites to several cases as support for his motion, even though those cases involve first petitions, whereas, this instant petition is his second. Harbison also proposes that, irrespective of whether this petition is his second-in-time, the Court should treat the petition as though it were his first.

The Respondent objects to the stay, correctly pointing out that *Gonzalez* rejects the idea that a Rule 60(b) motion is to be treated as a habeas corpus petition and arguing that 28 U.S.C. § 2251[5] does not apply to a Rule 60(b) motion. Harbison, however, has not based his motion for a stay on his Rule 60(b) motion, and, thus, has abandoned this issue. With respect to the habeas-corpus petition, the Respondent argues it is a second or successive habeas corpus application, which under § 2244(b), must be transferred to the Sixth Circuit.

1. Applicable law

The Supreme Court has held "[a] stay of execution pending disposition of a second or successive federal habeas petition should be granted only when there are 'substantial grounds upon which relief might be granted.' " *Bowersox v. Williams*, 517 U.S. 345, 346 (1996) (citing, *inter alia*, *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983)). It has also held "[e]ntry of a stay on a second . . . petition is a drastic measure, and . . . it is 'particularly egregious' to enter a stay absent substantial grounds for relief." *Id.* (citation omitted).

[5] This statute permits issuance of a stay where a habeas corpus application is pending.

2. Analysis

Having already found this to be a second or successive petition, this Court agrees with the Respondent's position on this issue. Absent authorization from a court of appeals, a district court lacks jurisdiction over a second or successive petition. 28 U.S.C. § 2244(b)(3)(A). The Sixth Circuit has not authorized the filing of this petition; thus, this Court lacks jurisdiction over the case. Since this Court has no jurisdiction over the petition, it likewise has no jurisdiction to stay Harbison's execution. *See Kutzner v. Cockrell*, 303 F.3d 333, 338 (5th Cir. 2002) ("[A] federal court is without jurisdiction to consider a request for stay of execution in connection with a successive habeas petition in the absence of express authorization by [a court of appeals] pursuant to 28 U.S.C. § 2244(b)(3)(A)."), *cert. denied*, 536 U.S. 978 (2002). Even if jurisdiction lies, the petition does not justify a stay since, as can be seen from the foregoing discussion, it contains no "substantial grounds on which relief might be granted." *Bowersox*, 517 U.S. at 346.

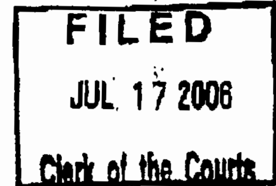
III. CONCLUSION

As set forth above, the "motion" facet of Harbision's submission, which attacks this Court's prior ruling of procedural default, warrants no Rule 60(b) relief and will be **DENIED**; the "habeas corpus petition pursuant to § 2241, *et seq.*" part of his filing is, in substance, a second or successive petition over which a district court has no jurisdiction absent precertification by the court of appeals and, in light of Harbison's approaching execution date, the "petition" part of the filing will be **TRANSFERRED** to the Sixth Circuit Court of Appeals for a determination as to whether, under 28 U.S.C. § 2244(b)(2), this successive habeas petition may be filed; and finally, his motion for a stay of execution will be **DENIED**.

A separate order shall enter.

/s/
CURTIS L. COLLIER
CHIEF UNITED STATES DISTRICT JUDGE

Attachment B



IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE V. EDWARD JEROME HARBISON

No. M1986-00093-SC-OT-DD - **Filed: July 17, 2006**

ORDER

On June 13, 2006, the State of Tennessee filed a Motion to Set Execution Date in the case of Edward Jerome Harbison. The State alleged that Harbison had completed the standard three-tier appeals process and that this Court should therefore set an execution date. See Tenn.S.Ct.Rule 12.4(A). On June 22, 2006, a Response to Motion to Set Execution Date was filed on behalf of Harbison. The Response contended that an execution date should not be set because Harbison's federal habeas corpus proceedings were not complete. The Response also requested that this Court exercise its authority under Tenn. Code Ann. § 40-27-106 to issue a certificate of commutation to the governor. In support of the request for a certificate of commutation, the Response alleged that police files contained exculpatory information indicating that someone else committed the murder for which Harbison had been convicted. In addition, it was contended that a certificate of commutation should issue because the jury did not hear evidence of Harbison's horrendous childhood and his psychological and mental impairments and because the murder was not sufficiently aggravated to warrant the sentence of death, which allegedly had resulted from a "series of unacceptable errors" by the police, counsel and the courts. The Response, which was filed by the Office of the Assistant Federal Community Defender in Knoxville, Tennessee, also asked that this Court appoint counsel to represent Harbison in this case.

Upon due consideration of the State's Motion to Set Execution Date and the Response to the Motion, the State's Motion is GRANTED. It is hereby ORDERED, ADJUDGED and DECREED by this Court that the Warden of the Riverbend Maximum Security Institution, or his designee, shall execute the sentence of death as provided by law on the eleventh day of October, 2006, unless otherwise ordered by this Court or other appropriate authority.

It is further ORDERED that the request for appointment of counsel to represent Edward Jerome Harbison is GRANTED. The Court hereby appoints the Office of the Post-Conviction Defender, 530 Church Street, Suite 600, Nashville, Tennessee 37243, to represent Harbison in the instant case No. M1986-00093-SC-OT-DD.

Counsel for Edward Jerome Harbison shall provide a copy of any order staying execution of this order to the Office of the Clerk of the Appellate Court in Nashville. The Clerk shall expeditiously furnish a copy of any order of stay to the Warden of the Riverbend Maximum Security Institution.

PER CURIAM

Attachment C

Case No. 04-5066

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

FILED
APR - 1 2004
LEONARD GREEN, Clerk

In re: OLEN E. HUTCHISON

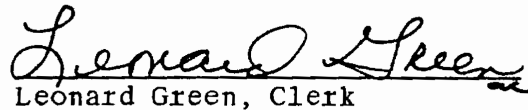
Movant

Upon consideration of movant's motion to hold proceedings in abeyance pending resolution of motion to re-transfer the case back to district court and issuance of a decision in 02-6547/6548, Abu-Ali Abdur'Rahman v Ricky Bell, Warden,

Further considering the response in opposition,

It is ORDERED that the motion be and it hereby is GRANTED.

ENTERED BY ORDER OF THE COURT



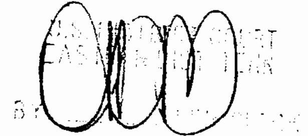
Leonard Green, Clerk

Attachment D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

FILED

2004 JAN 22 A 9:12



OLEN E. HUTCHISON,

Petitioner,

v. 3:98-cv-664

RICKY BELL, Warden,

Respondent.

MEMORANDUM AND ORDER

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

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

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> In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tennessee Code Annotated, § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

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

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

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

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

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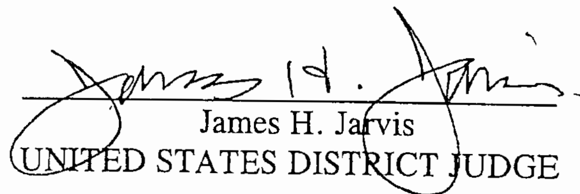

James H. Jarvis
UNITED STATES DISTRICT JUDGE