No. 06-6539

[DEATH PENALTY CASE]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDWARD JEROME HARBISON,
Petitioner-Appellant,

v.

RICKY BELL, Warden,
Respondent-Appellee.

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

Edward Jerome Harbison ("Harbison") has filed a motion requesting an order staying his February 22, 2007, execution "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." In addition, noting the pendency of *In re: Abu-Ali Abdur'Rahman* and *Abu-Ali Abdur'Rahman v. Ricky Bell, Warden* , Nos. 02-6547/6548, he requests the Court to "hold [his] appeal in abeyance until *Abdur 'Rahman* is decided." For the reasons that follow, the motion should be denied.

STATEMENT

Harbison was convicted in 1983 by a Hamilton County Criminal Court jury of first-degree murder, second-degree burglary, and grand larceny. The jury sentenced him to death for the murder, and the Tennessee Supreme Court affirmed the judgment. *State v. Harbison*, 704 S.W.2d 314 (Tenn.), *cert. denied*, 476 U.S. 1153 (1986).

Harbison filed a petition for state post-conviction relief in 1988, claiming, *inter alia*, ineffective assistance of appellate counsel. The post-conviction court denied relief, and the judgment was affirmed. *Harbison v. State*, No. 03C01-9204-CR-00125, 1996 WL 266114 (Tenn. Crim. App. May 20, 1996) (app. denied Nov. 12, 1996). In February 1997, Harbison filed a motion for appointment of counsel and for a stay of execution in the district court. The motions were granted. The appointed counsel then made a state public-records request for the Chattanooga Police Department's file relating to the murder. These documents were received by habeas counsel in October 1997.

Harbison filed a petition for a writ of habeas corpus in the district court on November 24, 1997. Among the twenty-six grounds for relief were a *Brady* claim, a claim of conflict of interest of appellate counsel (both of which were based on information from the police file), and the ineffective-assistance-of-counsel claim exhausted in the state courts. The district court denied relief and dismissed the petition on March 6, 2001. The court concluded that Harbison's *Brady* and conflict-of-interest claims were

barred by procedural default. The court rejected Harbison's ineffective-assistance-of-appellate-counsel claim, concluding that the state courts' determination was not an unreasonable application of clearly established federal law.

In June 2001, after the district court's judgment, Harbison filed in the state post-conviction court both a motion to reopen his 1988 petition for post-conviction relief and a petition for a writ of error coram nobis. In 2004, the state court dismissed the motion to reopen pursuant to *Harris v. State*, 102 S.W.3d 587 (Tenn. 2003) (holding that a petition for writ of error coram nobis, and not a motion to reopen, is the proper proceeding through which to seek review of newly discovered evidence) and dismissed the petition for a writ of error coram nobis as time-barred. The judgment was affirmed on appeal. *Harbison v. State*, No. E2004-00885-CCAR28PD, 2005 WL 1521910 (Tenn. Crim. App. June 27, 2005) (app. denied Dec. 19, 2005). In May 2004, on the appeal from the denial of federal habeas corpus relief, Harbison moved this Court to supplement the record with the new state-proceeding evidence and/or to hold the habeas corpus appeal in abeyance pending the resolution of the state-court appeal. The motion was denied. Order, No. 02-5392 (Aug. 6, 2004).

On April 29, 2005, this Court affirmed the district court's judgment in a 2 to 1 decision. The majority agreed that the *Brady* claim and the conflict-of-interest claim had been procedurally defaulted by Harbison's failure to raise the claims in state court. *Harbison v. Bell*, 408 F.3d 823, 830-36 (6th Cir. 2005). As to the ineffective-assistance-of-

appellate-counsel issue, the majority affirmed the district court's conclusion that the state courts' determination that Harbison had not established ineffective assistance of counsel was not an unreasonable application of clearly established federal law. *Id.* at 829-30. On September 23, 2005, Harbison's petition for rehearing en banc was denied. On April 24, 2006, the Supreme Court denied a petition for writ of certiorari. *Harbison v. Bell*, No. 05-9419, 2006 WL 481159.

On April 19, 2006, Harbison filed a second "petition for writ of habeas corpus" in the district court, alleging the unconstitutionality of his 1983 state-court convictions and death sentence. In the alternative, Harbison requested that the district court entertain the petition as a motion for relief from judgment under Fed.R.Civ.P. 60(b)(6). Treating the pleading as both a "second or successive habeas corpus application" under 28 U.S.C. § 2244 and a Rule 60(b)(6) motion for relief from judgment, on November 28, 2006, the district court denied the Rule 60(b)(6) motion and, in accordance with *In re: Sims v. Terbush*, 111 F.3d 45, 47 (6th Cir. 1997), transferred the successive application to this Court pursuant to 28 U.S.C. § 1631 for treatment as a motion for authorization to file a second or successive habeas corpus application.

Harbison filed a notice of appeal on December 8, 2006. The district court denied Harbison's motion to alter or amend on January 16, 2007. The respondent filed a motion to expedite this appeal on January 17, 2007.

ARGUMENT

I. HARBISON HAS NOT DEMONSTRATED ENTITLEMENT TO A STAY PENDING APPEAL FROM THE DENIAL OF HIS RULE 60(b) MOTION.

Harbison has not demonstrated his entitlement to a stay of execution pending review of the denial of his Rule 60(b) motion under the traditional four-factor test for preliminary injunctions, which focuses on: (1) the plaintiff's likelihood of success on the merits; (2) the possibility of irreparable harm to the plaintiff in the absence of an injunction; (3) public interest considerations; and (4) potential harm to third parties. *See Lexmark, Int'l, Inc. v. Static Control Components, Inc.,* 387 F.3d 522, 532 (6th Cir. 2004) (setting forth factors for granting of preliminary injunctions).

Harbison is concededly threatened with irreparable harm, but his interest must be weighed against the state's interest in carrying out punishment. The "State's interests in finality are compelling" and the "powerful and legitimate interest in punishing the guilty" attaches to both "the State and the victims of crime alike." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (citations and internal quotations omitted). Even considering the countervailing interests of Harbison and the state, the small likelihood of Harbison's success on the merits tips the balance in the state's favor.

In the first place, Harbison's purported Rule 60(b) motion is, in reality, a prohibited second or successive habeas corpus application under 28 U.S.C. § 2244(b)(1).

In seeking Rule 60(b) relief from the district court, Harbison contended that there were "defects" in the district court's first judgment-- "erroneous determinations that [his] *Brady* claim was 'never before raised and now barred in state courts by state law[']and that his conflict claim 'was not raised in state court [and] there is no state court decision on the claim,'" when, "[i]n reality, exhaustion proceedings were only recently completed." Pet. at 3 (footnote omitted). He contended that the district court's "misapprehension of the procedural posture" of the case qualifies as an extraordinary circumstance warranting the reopening of the first habeas proceeding. *Id.*

In *Gonzalez v. Crosby*, 125 S.Ct. 2641 (2005), the United States Supreme Court held that some Fed.R.Civ.P. 60(b) motions are properly construed as second or successive habeas applications subject to the restrictions set forth in 28 U.S.C. §2244(b). Purported Rule 60(b) motions, the Court held, that assert new claims for habeas relief "of course qualify" as successive habeas applications. 125 S.Ct. at 2648. In addition, motions that reassert claims for habeas relief that previously had been presented and denied on the merits likewise qualify as successive habeas applications. *Id.* "[A]lleging that the [district] court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is . . . entitled to habeas relief." *Id.*

On the other hand, the Court held that, "[w]hen no 'claim' is presented" by a Rule 60(b) motion, *i.e.*, when it alleges that the district court erred in denying habeas relief on a "nonmerits" basis, the motion does not qualify as a second or successive habeas corpus

application and properly may be ruled upon by the district court. 125 S.Ct. at 2649. A "nonmerits" ruling is one that "precluded a merits determination," such as a ruling based on a failure to exhaust, procedural default, or the statute of limitations. 125 S.Ct. at 2648 n.4.

Harbison's contentions relating to the *Brady* and conflict-of-interest claims belong in the first category because, contrary to Harbison's assertions, he received a merits review of these claims as part of the procedural-default ruling. To be sure, both the district court and this Court determined that both claims were procedurally defaulted. But in response to Harbison's contention that cause and prejudice excused the procedural defaults, both courts concluded that the petitioner could not demonstrate prejudice because the claims were without merit. R. 101 at 21-26, 39; *Harbison v. Bell*, 408 F.3d at 834-35, 836. Thus, a merits analysis was a part of the procedural-default analysis. This was particularly true with respect to the *Brady* claim, where, as this Court observed, "the cause and prejudice discussion parallels requirements for the *Brady* analysis." 408 F.3d at 834. It certainly cannot be said that the procedural-default rulings "precluded a merits determination."[1] Because Harbison now seeks to revisit those claims on the

[1]In some contexts, a procedural-default analysis *will* preclude a merits determination. For instance, where a court rests its cause-and-prejudice analysis on a determination of cause only or where the prejudice analysis does not entail a merits review, there has been a "nonmerits" ruling.

merits, his purported Rule 60(b) motion amounts to a "second or successive habeas corpus application" prohibited by §2244(b)(1).

But even if Harbison's motion is not a second or successive habeas corpus application and is treated as a true Rule 60(b) motion, the motion fails to present proper grounds for relief under Rule 60(b)(6). In *Gonzalez*, the Court was careful to point out that "several characteristics of a Rule 60(b) motion limit the friction between the Rule and the successive-petition prohibitions of AEDPA" and that these characteristics "ensur[e] that [the Court's] harmonization of the two will not expose federal courts to an avalanche of frivolous postjudgment motions." 125 S.Ct. at 2649. One of these characteristics of Rule 60(b), the Court observed, is the requirement that a movant seeking relief under Rule 60(b)(6) show "extraordinary circumstances" justifying the reopening of a final judgment, which the Court noted would "rarely occur" in the habeas context. *Id.* Indeed, in *Gonzalez* itself the Court affirmed the lower court judgment only after concluding that the habeas petitioner's reliance on an intervening legal development was insufficient to show the requisite "extraordinary circumstances." *Id.* at 2650-51.

Here, Harbison likewise relies on an intervening legal development — the litigation of a motion to reopen in state court — to support his motion. But this development fails to supply the "extraordinary circumstances" required for relief under Rule 60(b)(6). The fact that after the district court's judgment was entered Harbison presented the *Brady* and conflict-of-interest claims to the state courts does not show that at the time the district

court decided the case its determination was erroneous. Indeed, as this Court, fully cognizant of petitioner's subsequent state-court proceedings, concluded, Harbison's claims were deemed exhausted but procedurally defaulted. Harbison's subsequent actions cannot change the objective, historical fact of the procedural default.

Furthermore, the state-court legal development on which Harbison relies did not establish that the district court's procedural-default analysis was erroneous. To the contrary, the state court's adjudication demonstrated its correctness. The state court dismissed the motion to reopen, holding that a petition for writ of error coram nobis, and not a motion to reopen, was the proper proceeding through which to seek review of newly discovered evidence, and then it dismissed Harbison's petition for a writ of error coram nobis as time-barred. *Harbison v. State*, 2005 WL 1521910, at *5-6. Thus, although Harbison did finally present the claims to all state courts, the state-court adjudication merely confirmed that the claims were procedurally defaulted.

In *Gonzalez*, the Supreme Court's change in the interpretation of AEDPA's statute of limitations in *Artuz v. Bennett*, 531 U.S. 4 (2000), demonstrating that the court of appeals' decision holding Gonzalez' petition time-barred was erroneous, was not deemed an extraordinary circumstance justifying Rule 60(b)(6) relief. If such an intervening legal development, demonstrating clear error in the prior judgment, is insufficient, the development here, demonstrating the intrinsic correctness of the district court's prior

procedural-default determination, hardly qualifies. Harbison's Rule 60(b)(6) motion thus fails to set forth an "extraordinary circumstance" justifying relief.

In light of the foregoing, Harbison has shown no likelihood of success on the merits of his appeal from the denial of Rule 60(b)(6) relief.[2] When the factors determining the appropriateness of a stay are balanced, Harbison clearly fails to satisfy the test. The motion for a stay should be denied.

II. THE PENDENCY OF *ABDUR' RAHMAN* FURNISHES NO BASIS FOR A STAY OR FOR HOLDING THIS APPEAL IN ABEYANCE.

Harbison's reliance on the pendency of *Abdur'Rahman* as a reason for a stay or for holding this appeal in abeyance pending that decision is misplaced. The issue to be resolved in that case--whether Abdur'Rahman has demonstrated "extraordinary circumstances" justifying Rule 60(b) relief--has no bearing on whether Harbison has demonstrated "extraordinary circumstances" in this case. In fact, in *Abdur'Rahman*, the petitioner moved for Rule 60(b)(6) relief on the ground that the Tennessee Supreme

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[2]In a footnote in his motion, Harbison asserts that the pendency of his motion to re-transfer his second or successive habeas corpus application to the district court in *In re: Edward Jerome Harbison v. Ricky Bell, Warden*, Sixth Cir. No. 06-6474 (docketed Nov. 29, 2006), furnishes an additional reason for a stay. Mot. at 3 n.7. However, for the reasons stated in respondent's Response to the motion to re-transfer (filed Jan. 9, 2007) and respondent's "Motion to Deny Authorization to File a Second or Successive Habeas Corpus Application" (filed Jan. 16, 2007), Harbison cannot demonstrate a likelihood of success in that proceeding either.

Court's 2001 promulgation of Tenn.Sup.Ct.R. 39 (which purports to "clarify" existing law that intermediate-level exhaustion in the state appellate courts is sufficient) showed that the district court erred in dismissing his prosecutorial misconduct claims on non-exhaustion and procedural-default grounds. *See Abdur'Rahman*, *supra*, R. 286, App. A, p. 7. Harbison's case does not involve the application of Tenn.Sup.Ct.R. 39, and a decision in *Abdur'Rahman* as to whether Rule 39 constituted a change in existing law sufficient to establish "extraordinary circumstances" would be legally irrelevant in this case.

The Supreme Court has furnished guidance to the lower courts on what constitutes "extraordinary circumstances." *See Gonzales*, 125 S.Ct. at 2649-51; *Ackermann v. United States*, 340 U.S. 193, 202 (1950), *Klapprott v. United States*, 355 U.S. 601, 613 (1949). "Such circumstances will rarely occur in the habeas context." *Gonzales*, 125 S.Ct. at 2649. For the reasons stated in Part I, above, Harbison cannot demonstrate "extraordinary circumstances" for Rule 60(b)(6) relief.

CONCLUSION

The motion should be denied.

Respectfully submitted,

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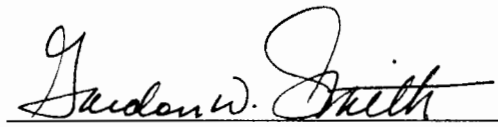

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been forwarded via First-Class U.S. mail, postage prepaid on this the 25th day of January, 2007 to:

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