

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT ACORD,

Petitioner,

v.

WARDEN, ROSS CORRECTIONAL
INSTITUTION,

Respondent.

CASE NO. 2:12-CV-355

JUDGE JAMES L. GRAHAM

Magistrate Judge Elizabeth A. Preston Deavers

OPINION AND ORDER

On March 28, 2013, the Court entered final judgment dismissing the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the Court for consideration of Petitioner's *Motion for Relief from Judgment* pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. For the reasons that follow, Petitioner's *Motion for Relief from Judgment*, Doc. No. 21, is **DENIED**.

Petitioner asks the Court to reconsider its final judgment of dismissal of this action. He asserts that he was denied fundamental rights, due process, access to the courts, and that he is a victim of retaliation and prejudicial treatment. Petitioner again argues regarding the merits of his claims. He also appears to argue that his claims were improperly dismissed as procedurally defaulted.

Petitioner has raised no grounds justifying relief. The Supreme Court in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), held that, where a habeas petitioner seeks to re-argue or assert claims through a Rule 60(b) motion, the motion constitutes a successive petition that must be transferred to the United States Court of Appeals for authorization for filing. *Id.* at 530-32.

Using Rule 60(b) to present new claims for relief from a state court's judgment of conviction—even claims couched in the language of a true Rule 60(b) motion—circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts. § 2244(b)(2)... [A] Rule 60(b) motion based on a purported change in the substantive law governing the claim could be used to circumvent § 2244(b)(2)(A)'s dictate that the only new law on which a successive petition may rely is “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” In addition to the substantive conflict with AEDPA standards ... use of Rule 60(b) would impermissibly circumvent the requirement that a successive habeas petition be precertified by the court of appeals as falling within an exception to the successive-petition bar. § 2244(b)(3).

A Rule 60(b) motion is considered to bring motion can also be said to bring a “claim” if it attacks the federal court's previous resolution of a claim on the merits, . . . since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief. That is not the case, however, 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.

Gonzalez v. Crosby, 545 U.S. at 530–32 (footnote omitted). Thus, to the extent Petitioner again argues regarding the merits of his claims, or attempts to bring new claims for relief, his Rule 60(b) motion is properly construed as a successive petition.

28 U.S.C. § 2244(b)(3)(A) provides that before a second or successive petition for a writ of habeas corpus can be filed in the district court, the applicant shall move in the appropriate circuit court of appeals for an order authorizing the district court to consider the application.

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a district court does not have jurisdiction to entertain a successive post-conviction motion or petition for writ of habeas corpus in the absence of an order from the court of appeals authorizing the filing of such successive motion or petition. *Nelson v. United States*, 115 F.3d 136 (2d Cir. 1997); *Hill v.*

Hopper, 112 F.3d 1088 (11th Cir. 1997). Unless the court of appeals has given approval for the filing of a second or successive petition, a district court in the Sixth Circuit must transfer the petition to the United States Court of Appeals for the Sixth Circuit. *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) (*per curia*). Under § 2244(b)(3)(A), only a circuit court of appeals has the power to authorize the filing of a successive petition for writ of habeas corpus. *Nunez v. United States*, 96 F.3d 990 (7th Cir. 1996).

That being the case, this Court is without jurisdiction to entertain a second or successive § 2254 petition unless authorized by the Court of Appeals for the Sixth Circuit. The Sixth Circuit, in turn, will issue this certification only if Petitioner succeeds in making a *prima facie* showing either that the claim sought to be asserted relies on a new rule of constitutional law made retroactive by the United States Supreme Court to cases on collateral review; or that the factual predicate for the claim could not have been discovered previously through the exercise of diligence, and these facts, if proven, would establish by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the applicant guilty. 28 U.S.C. § 2244(b)(2).

The Sixth Circuit described the proper procedure for addressing a second or successive petition filed in the district court without § 2244(b)(3)(A) authorization in *In re Sims*.

[W]hen a prisoner has sought § 2244(b)(3)(A) permission from the district court, or when a second or successive petition for habeas corpus relief or § 2255 motion is filed in the district court without § 2244(b)(3) authorization from this court, the district court shall transfer the document to this court pursuant to 28 U.S.C. § 1631.

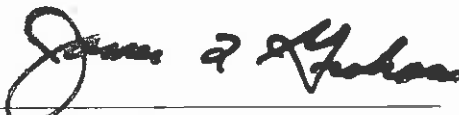
Id. at 47; *see also Liriano v. United States*, 95 F.3d 119, 123 (2d Cir.1996) (*per curiam*). Consequently, Petitioner's motion will be transferred to the United States Court of Appeals for the Sixth Circuit as a successive petition.

To the extent Petitioner argues that the District Court improperly dismissed his claims as procedurally defaulted, Petitioner fails to raise any argument warranting relief.

Therefore, it is **ORDERED** that Petitioner's Rule 60(b) motion be **TRANSFERRED** to the United States Court of Appeals for the Sixth Circuit as a successive petition.

IT IS SO ORDERED.

Date: October 7, 2013



JAMES L. GRAHAM
United States District Judge