

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

ROGER DEAN GILLISPIE,

Petitioner,

:

Case No. 3:09-cv-471

:

-vs-

Magistrate Judge Michael R. Merz

DEB TIMMERMAN-COOPER, Warden,

:

Respondent.

ORDER FOR ADDITIONAL BRIEFING

This habeas corpus case is before the Court on Respondent’s “Response to Court’s Order to Show Cause” (Doc. No. 92). In it, the State takes the position that, because the judgment on which Gillispie sued in this Court is no longer valid, having been vacated on other grounds by the Second District Court of Appeals, there is no longer a live case or controversy between the parties and this Court’s conditional writ “may no longer be enforced and should be vacated.” *Id.* at PageID 4650. The Respondent’s Motion does not suggest any authority for this Court to vacate its Decision and Order, but merely argues it cannot be enforced.

Gillispie responds that this Court should not vacate its prior Decision and Order because, Gillispie says, it lacks jurisdiction to do so (Gillispie’s Response, Doc. No. 95, PageID 4661).

The parties have not discussed the possible impact on their respective positions of Fed. R. Civ. P. 60(b). The text of that Rule reads:

On motion and upon such terms as are just, the court may relieve a party or a party’s representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which

by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills or review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Without question, the Decision and Order Granting Conditional Writ of Habeas Corpus (Doc. No. 63) is a final order of this Court; the fact that the writ granted was conditional did not prevent the order from being final and therefore appealable.

To be sure, the Court did lack jurisdiction to grant a motion under Fed. R. Civ. P. 60(b) while the appeal was pending. *Marrese v. American Academy of Osteopathic Surgeons*, 470 U.S. 373 (1985); *Pickens v. Howes*, 549 F.3d 377, 381 (6th Cir. 2008); *Pittock v. Otis Elevator Co.*, 8 F.3d 325, 327 (6th Cir. 1993); *Lewis v. Alexander*, 987 F.2d 392, 394 (6th Cir. 1993); *Cochran v. Birkel*, 651 F.2d 1219, 1221 (6th Cir. 1981). However, the appeal has now been dismissed and it is the understanding of this Court that the dismissal divests the Sixth Circuit of jurisdiction.

Because Rule 60(b) appears prima facie to be applicable to the current posture of the case, the parties are ORDERED to file memoranda addressing the applicability of Rule 60 not later than

December 15, 2012. Specifically, the Court requests the views of the parties on the following questions: Does consideration of the provisions of Rule 60(b) change Petitioner's position on whether this Court has jurisdiction to vacate or amend its final order? If not, why not? Assuming the Court does have authority under 60(b), what considerations should inform its use of that authority?

December 1, 2012.

s/ *Michael R. Merz*
United States Magistrate Judge

