U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

January 3, 2006

The Honorable Susan C. Bucklew
Chair, Advisory Committee
on the Criminal Rules
United States District Court
109 United States Courthouse
611 North Florida Avenue
Tampa, FL 33602

Dear Judge Bucklew:

The Department of Justice recommends that the Federal Rules of Criminal Procedure and the Rules Governing Section 2254 and Section 2255 Proceedings be amended to address collateral review practices that are inconsistent with the collateral review provisions of the Antiterrorism and Effective Death Penalty Act of 1996. We hope that the Advisory Committee will consider and vote on our proposal to address these inconsistencies at its next meeting in April 2006.

Our proposal would create a new rule in the Federal Rules of Criminal Procedure that clarifies that outdated procedures for obtaining relief from a judgment – *i.e. coram nobis*, *coram vobis*, *audita querela*, bills of review, and bills in the nature of review – have been abolished. In addition, we are seeking amendments to the Rules Governing Section 2254 and 2255 Proceedings to create an exclusive mechanism by which a litigant can seek reconsideration of a District Court's ruling on an application under sections 2254 and 2255. This would create a limited new avenue of litigation under section 2254 and 2255 but at the same time eliminate the procedure to which some litigants now resort of relying on Rule 60(b) of the Federal Rules of Civil Procedure to relitigate old collateral review claims and raise new ones.

We have attached proposed amendments along with proposed Committee Notes that more fully explain the basis for our proposal. We have also included a conforming amendment to Rule 4 of the Federal Rules of Appellate Procedure that would be appropriately considered by the Advisory Committee on the Appellate Rules should this Committee enact the Department's proposal.

We believe this proposal warrants timely and thorough consideration by the Advisory Committee. We appreciate your assistance with this proposal and look forward to continuing our work with you to improve the federal criminal justice system.

Sincerely,

Benton J. Campbell
Acting Counselor to the
Assistant Attorney General

cc: Professor Sara Sun Beale
Mr. John Rabiej

PROPOSED AMENDMENTS TO COLLATERAL RELIEF PROCEDURES

(1) A new Rule 37 of the Federal Rules of Criminal Procedure is added as follows:

Rule 37. Exclusive Remedy

Writs of coram nobis, coram vobis, audita querela, bills of review, and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment in a criminal case shall be by motion as prescribed in these rules, by motion as prescribed by 18 U.S.C. §§ 3582 or 3600 or 28 U.S.C. § 2255, or by appeal.

Advisory Committee Notes

The language in this new rule is essentially identical to that in Civil Rule 60(b), which was amended in 1946 to make clear that these "old forms of obtaining relief from a judgment, i.e., coram nobis, coram vobis, audita querela, bills of review, and bills in the nature of review, had been abolished," because the 1944 Civil Rules had provided specific remedies to civil parties. United States v. Beggerly, 524 U.S. 38, 45 (1998); Fed. R. Civ. P. 60(b) Advisory Committee Note (1946). The enactment of the Federal Rules of Criminal Procedure in 1944, and 28 U.S.C. § 2255 in 1948, similarly provided specific remedies for the criminal defendant. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 235 (1985); United States v. Hayman, 342 U.S. 205, 218 (1952). Although the Supreme Court initially held that the writ of coram nobis in criminal cases survived Civil Rule 60(b) and § 2255, United States v. Morgan, 346 U.S. 502, 505-12 (1954), the Court has since reiterated that "it is difficult to conceive of a situation in a federal criminal case today where [a writ of coram nobis] would be necessary or appropriate." Carlisle v. United States, 517 U.S. 416, 429 (1996), *quoting* United States v. Smith, 331 U.S. 469, 475 n.4 (1947). Indeed, the Supreme Court has found no such situation in the fifty years since Morgan, which itself has been cast into doubt, *see* Spencer v. Kemna, 523 U.S. 1, 7-16 (1998).

Nonetheless, criminal defendants have been creative in frequently seeking to resurrect these writs, often trying to use them to evade the requirements of the Criminal Rules and § 2255. Some courts, moreover, have entertained coram nobis petitions, under varying standards and bases. Similar circumstances led to the amendment of Civil Rule 60(b), which rejected such efforts because "the rules should be complete in this respect and define the practice with respect to any existing rights or remedies to obtain relief from final judgments." Fed. R. Crim. P. 60(b) Advisory Committee Notes (1946). This is equally true of the Criminal Rules and § 2255, which have been amended and improved over fifty years to provide remedies where appropriate from criminal judgments, and to protect the finality of such judgments where "relief" would be inappropriate. Under the current Criminal Rules, defendants can seek relief as provided in Rule 29 (Motion for a Judgment of Acquittal), Rule 33 (New Trial), Rule 34 (Arresting Judgment) and Rule 35(a) (Correcting Clear Error in the sentence). Defendants can also seek relief by motion as provided in 18 U.S.C. § 3582(c)(2) (Modification of an Imposed Term of Imprisonment based

on certain amendments to the Sentencing Guidelines), 18 U.S.C. § 3600(g) (motion for a new trial or resentencing after exculpatory DNA testing), and 28 U.S.C. § 2255 (Motion Attacking Sentence). Finally, defendants can seek relief by appeal where permitted under the Appellate Rules and by statute, *e.g.*, 18 U.S.C. § 3742(a), 28 U.S.C. § 1291, and 28 U.S.C. § 2253. It better serves justice, the courts and the litigants, especially *pro se* litigants, to spell out that relief can be obtained under these provisions, rather than continuing to allow their circumvention by invocation of writs which are "shrouded in ancient lore and mystery." Fed. R. Crim. P. 60(b) Advisory Committee Notes (1946).

Some defendants have been allowed to use coram nobis to challenge their convictions after they are no longer in custody, without having to meet the requirements of § 2255. It is poor policy, however, to allow defendants who are not in custody to escape the requirements that must be met by defendants who are still incarcerated. Abolishing coram nobis ensures that collateral challenges must be brought under the rules and statutes above in a timely manner, when the records, judge, witnesses and prosecutor are more likely to be available to resolve the claims more accurately and to participate in any resulting proceedings.

(2) Rule 11 of the Rules Governing Section 2255 Proceedings shall be amended to read as follows:

Rule 11. Reconsideration; Appeal

(a) Reconsideration. A motion for reconsideration of a final order entered under these rules shall be filed no later than thirty days after the entry of the order. Such a motion may not raise new claims of error in the movant's conviction or sentence, or attack the federal court's previous resolution of such a claim on the merits, but may only may raise a defect in the integrity of the § 2255 proceedings. Such a motion shall be the sole procedure for obtaining relief in the district court from such an order, notwithstanding any other provisions of law.

(b) Time for Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. These rules do not extend the time to appeal the original judgment of conviction.

Advisory Committee Notes

These Rules have not previously provided a mechanism by which a litigant can seek reconsideration of the District Court's ruling on a motion under 28 U.S.C. § 2255. Because no procedure was specifically provided by these Rules, some litigants have resorted to Civil Rule 60(b) to provide such relief. *See* Rule 12 of the § 2255 Rules. Invocation of that civil rule, however, has "has generated confusion among the federal courts." Abdur'Rahman v. Bell, 537 U.S. 88, 89 (2002) (Stevens, J., dissenting from the dismissal of certiorari as improvidently granted); In re Abdur'Rahman, 392 F.3d 174 (6th Cir. 2004), *vacated*, 125 S. Ct. 2991 (2005); Pridgen v. Shannon, 380 F.3d 721, 727 (3d Cir. 2004); *see also* Pitchess v. Davis, 421 U.S. 482, 490 (1975). This confusion has arisen, in part, from the fact that Civil Rule 60(b) is not designed for use in post-conviction proceedings, and is not an appropriate method of relief because of its wide-ranging and inapposite nature. *See* Fed. R. Civ. P. 60(b) (allowing, *e.g.*, motions where "the judgment has been satisfied, released, or discharged"). Furthermore, the indeterminate and lengthy time periods for filing a motion under Civil Rule 60(b) are inconsistent with the set time period for filing a § 2255 motion, as added to § 2255 in 1996; indeed, if Rule 60(b) is applied, defendants would have the same or more time to file a motion for reconsideration than they have to file the § 2255 motion itself. *Compare* 28 U.S.C. § 2255 (requiring § 2255 motions to be filed within one year after the date on which the judgment of conviction becomes final, or on which certain specified events occur) *with* Fed. R. Civ. P. 60(b) (requiring a Rule 60(b) motion to made "within a reasonable time," and for certain grounds "not more than one year"). Moreover, the wide-ranging nature and indeterminate and lengthy time periods of Civil Rule 60(b) have led convicted defendants to invoke it abusively to evade the requirements of § 2255, especially by raising new claims to evade the one-year time period, the certificates of appealability requirement, and the limitations on second and successive § 2255 motions also added to § 2255 in 1996. *See* Gonzalez v. Crosby, 125 S. Ct. 2641, 2646-48 (2005) ("Using Rule 60(b) to present new claims for relief," to present "new evidence in support of a claim already litigated," or to raise "a purported change in the substantive law," "circumvents AEDPA's requirement"); *e.g.*,

United States v. Vargas, 393 F.3d 172, 174 (D.C. Cir. 2004) (requiring certificate of appealability in appeal from denial of Rule 60(b) motion); Munoz v. United States, 331 F.3d 151, 152-53 (1st Cir. 2003) (treating Rule 60(b) motion as second or successive § 2255 motion); Dunlap v. Litscher, 301 F.3d 873, 875 (7th Cir. 2001) ("Prisoners are not allowed to avoid the restrictions that Congress has placed on collateral attacks on their convictions or other custody-creating or -enhancing punishments by styling their collateral attacks as motions for reconsideration under Rule 60(b)."). Such improper Rule 60(b) motions, even if treated as second or successive § 2255 motions, initiate successive litigation in the wrong way in the wrong court. *See* 28 U.S.C. §§ 2244(b), 2255 (requiring second or successive motions to be filed in the Court of Appeals pursuant to specified procedures); Gonzalez, 125 S. Ct. at 2648.

The Supreme Court in Gonzalez attempted a "harmonization" of Rule 60(b) and the AEDPA requirements for state prisoners by holding that Rule 60(b) motions can be treated as a successive habeas petition if they "assert, or reassert, claims of error in the movant's state conviction," but can proceed if they attack "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." 125 S. Ct. at 2648, 2651. The Court, however, in attempting to "limit the friction between the Rule and the successive-petition prohibitions of AEDPA," did not alter the lengthy and uncertain time period for filing a Rule 60(b) motion, and divided over Rule 60(b)(6)'s vague requirements. Id. at 2650-51 *and* 2652-55 (Stevens, J., dissenting).

Rule 11 is amended to end this confusion and abuse by replacing the application of Civil Rule 60(b) in collateral review proceedings with a procedure tailored for such proceedings. Under the amendment, the sole method of seeking reconsideration by the district court of a § 2255 order is the procedure provided by Rule 11 of the Rules Governing § 2255 Proceedings, and not any other provision of law, including Rule 60(b). The amended Rule 11 provides disappointed § 2255 litigants with an appropriate opportunity to seek reconsideration in the district court based on a "defect in the integrity of the federal habeas proceeding," Gonzalez, 125 S. Ct. at 2648-49 & n.5, but within an appropriate and definitive time period, and with an express prohibition on raising new claims that "assert, or reassert, claims of error in the movant's" conviction or sentence, or "attack[] the federal court's previous resolution of a claim *on the merits*," id. at 2648 & nn.4-5, 2651 (emphasis by Court). Rule 11 will thus provide clear and quick relief in the district court, while safeguarding the requirements of § 2255 and the finality of criminal judgments.

Rule 4 of the Federal Rules of Appellate Procedure is being amended to ensure that timely filing of such a motion (within thirty days of the entry of the order) should be treated as postponing the running of the time to file a notice of appeal. *See* Fed. R. App. P. 4(a)(4) (treating the timely filing of specified motions as postponing the running of the time to file a notice of appeal), 4(b)(3) (similar); Browder v. Director, Dept. of Corrections of Illinois, 434 U.S. 257, 262-73 (1978).

(3) Rule 11 of the Rules Governing Section 2254 Proceedings shall be renumbered Rule 12, and a new Rule 11 shall be enacted to read as follows:

Rule 11. Reconsideration

A motion for reconsideration of a final order entered under these rules shall be filed no later than thirty days after the entry of the order. Such a motion may not raise new claims of error in the movant's conviction or sentence, or attack the federal court's previous resolution of such a claim on the merits, but may only may raise a defect in the integrity of the § 2254 proceedings. Such a motion shall be the sole procedure for obtaining relief in the district court from such an order, notwithstanding any other provisions of law.

Advisory Committee Notes

These Rules have not previously provided a mechanism by which a litigant can seek reconsideration of the District Court's ruling on an application under 28 U.S.C. § 2254. Because no procedure was specifically provided by these Rules, some litigants have resorted to Civil Rule 60(b) to provide such relief. *See* Rule 11 (now 12) of the § 2254 Rules. Invocation of that civil rule, however, has "has generated confusion among the federal courts." Abdur'Rahman v. Bell, 537 U.S. 88, 89 (2002) (Stevens, J., dissenting from the dismissal of certiorari as improvidently granted); In re Abdur'Rahman, 392 F.3d 174 (6th Cir. 2004), *vacated*, 125 S. Ct. 2991 (2005); Pridgen v. Shannon, 380 F.3d 721, 727 (3d Cir. 2004); *see also* Pitchess v. Davis, 421 U.S. 482, 490 (1975). This confusion has arisen, in part, from the fact that Civil Rule 60(b) is not designed for use in post-conviction proceedings, and is not an appropriate method of relief because of its wide-ranging and inapposite nature. *See* Fed. R. Civ. P. 60(b) (allowing, *e.g.*, motions where "the judgment has been satisfied, released, or discharged"). Furthermore, the indeterminate and lengthy time periods for filing a motion under Civil Rule 60(b) are inconsistent with the set time period for filing an application under § 2254, as added to 28 U.S.C. § 2244 in 1996; indeed, if Rule 60(b) is applied, defendants would have the same or more time to file a motion for reconsideration than they have to file the § 2254 application itself. *Compare* 28 U.S.C. § 2244(d) (requiring § 2254 applications to be filed within one year after the date on which the judgment of conviction becomes final, or on which certain specified events occur) *with* Fed. R. Civ. P. 60(b) (requiring a Rule 60(b) motion to made "within a reasonable time," and for certain grounds "not more than one year"). Moreover, the wide-ranging nature and indeterminate and lengthy time periods of Civil Rule 60(b) have led convicted defendants to invoke it abusively to evade the requirements of §§ 2244 and 2254, especially by raising new claims to evade the one-year time period, the certificates of appealability requirement, and the limitations on second and successive § 2254 applications, also added to § 2254 in 1996. *See*, Gonzalez v. Crosby, 125 S. Ct. 2641, 2646-48 (2005) ("Using Rule 60(b) to present new claims for relief," to present "new evidence in support of a claim already litigated," or to raise "a purported change in the substantive law," "circumvents AEDPA's requirement"); *e.g.*, United States v. Vargas, 393 F.3d 172, 174 (D.C. Cir. 2004) (requiring certificate of appealability in appeal from denial of Rule 60(b) motion); Munoz v. United States, 331 F.3d 151, 152-53 (1st Cir. 2003) (treating Rule 60(b) motion as

second or successive § 2255 motion); Dunlap v. Litscher, 301 F.3d 873, 875 (7th Cir. 2001) ("Prisoners are not allowed to avoid the restrictions that Congress has placed on collateral attacks on their convictions or other custody-creating or -enhancing punishments by styling their collateral attacks as motions for reconsideration under Rule 60(b)."). Such improper Rule 60(b) motions, even if treated as second or successive § 2254 applications, initiate successive litigation in the wrong way in the wrong court. *See* 28 U.S.C. §§ 2244(b)(requiring second or successive applications to be filed in the Court of Appeals pursuant to specified procedures); Gonzalez, 125 S. Ct. at 2648.

The Supreme Court in Gonzalez attempted a "harmonization" of Rule 60(b) and the AEDPA requirements for state prisoners by holding that Rule 60(b) motions can be treated as a successive habeas petition if they "assert, or reassert, claims of error in the movant's state conviction," but can proceed if they attack "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." 125 S. Ct. at 2648, 2651. The Court, however, in attempting to "limit the friction between the Rule and the successive-petition prohibitions of AEDPA," did not alter the lengthy and uncertain time period for filing a Rule 60(b) motion, and divided over Rule 60(b)(6)'s vague requirements. Id. at 2650-51 *and* 2652-55 (Stevens, J., dissenting).

This new Rule 11 is added to end this confusion and abuse by replacing the application of Civil Rule 60(b) in collateral review proceedings with a procedure tailored for such proceedings. Under the amendment, the sole method of seeking reconsideration by the district court of a § 2254 order is the procedure provided by Rule 11 of the Rules Governing § 2254 Proceedings, and not any other provision of law, including Rule 60(b). The new Rule 11 provides disappointed § 2254 litigants with an appropriate opportunity to seek reconsideration in the district court based on a "defect in the integrity of the federal habeas proceeding," Gonzalez, 125 S. Ct. at 2648-49 & n.5, but within an appropriate and definitive time period, and with an express prohibition on raising new claims that "assert, or reassert, claims of error in the movant's" conviction or sentence, or "attack[] the federal court's previous resolution of a claim *on the merits*," id. at 2648 & nn.4-5, 2651 (emphasis by Court). Rule 11 will thus provide clear and quick relief in the district court, while safeguarding the requirements of §§ 2244 and 2254 and the finality of criminal judgments.

Rule 4 of the Federal Rules of Appellate Procedure is being amended to ensure that timely filing of such a motion (within thirty days of the entry of the order) is treated as postponing the running of the time to file a notice of appeal. *See* Fed. R. App. P. 4(a)(4) (treating the timely filing of specified motions as postponing the running of the time to file a notice of appeal), 4(b)(3) (similar); Browder v. Director, Dept. of Corrections of Illinois, 434 U.S. 257, 262-73 (1978).

(4) Federal Rule of Appellate Procedure 4(a)(4)(A) is amended as follows:

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure or the Rules Governing 2254 and 2255 Proceedings, the time to file an appeal runs for all parties from the entry of the order disposing of the last remaining motion:

...

(v) for a new trial under Rule 59; [or]

(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered[.]; or

(viii) for reconsideration under Rule 11(a) of the Rules Governing Section 2254 or 2255 Proceedings.

Advisory Committee Notes

Rule 11 of the Rules Governing Section 2255 Proceedings is being amended, and a new Rule 11 of the Rules Governing Section 2254 Proceedings is being added, to provide a procedure for motions for reconsideration in such proceedings. Resolution of such motions may obviate the need to appeal, or clarify the ruling of the court. Accordingly, subsection (viii) is added to delay the running of the time for appeal until entry of the order ruling on a motion for reconsideration under Rule 11.