IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-10121

United States Court of Appeals
Fifth Circuit
FILED
January 30, 2018
Lyle W. Cayce
Clerk

IN RE: WILLIAM EARL RAYFORD,

Movant

CONSOLIDATED WITH 18-70003

WILLIAM EARL RAYFORD,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 3:06-CV-978

Before HIGGINBOTHAM, ELROD, and GRAVES, Circuit Judges.

PER CURIAM:*

The defendant, William Rayford, is an inmate on death row currently scheduled for execution on January 30, 2018. Several days before his execution,

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

he filed a Rule 60(b) motion and requested a stay in federal district court. The district court determined that his motion constituted a successive habeas petition, and on January 29, 2018, it transferred both the motion and the request for a stay to us. In the alternative, the district court denied his Rule 60(b) motion. Because we conclude that Rayford is not entitled to Rule 60(b) relief, we AFFIRM the district court's denial of his Rule 60(b) motion. We also DENY leave to file a successive writ, DENY his request for a stay of execution, and DENY his request for a COA.

I.

The case history spans nearly two decades. The facts underlying the conviction, as set out by the Texas Court of Criminal Appeals, are as follows:

> Appellant was Carol Hall's former boyfriend and had lived with Hall and her children for about three years. A couple of months before the offense, Hall asked appellant to move out and ultimately removed him from her home with the help of her uncle. Hall's twelve-year-old son, Benjamin Thomas, testified that Hall was afraid of appellant. About 6:30 on the morning of the offense, appellant entered Hall's house with a key. Appellant and Hall began to argue about appellant having a key to the house. The argument escalated, and Hall began screaming for Thomas. When Thomas woke up and came out of his room, appellant stabbed him in the back with a knife. Hall fled the house and ran down the street toward her mother's house. Appellant ran after her and caught her before she reached the next house. Hall was wearing her night clothes and was barefooted.
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> Thomas, who ran from the house after them, saw appellant pick up Hall and throw her over his shoulder. Hall was screaming and beating on appellant as he carried her toward a creek behind the house. Thomas ran to a neighbor's house and called the police. Dwayne Johnson, a bus driver who was parked at the intersection by Hall's house, saw a woman and a man run from Hall's house. Johnson testified for the defense that when the man caught the woman he beat her severely in the head area to the point that she became "lifeless." The man then dragged her behind the house where Johnson could no longer see them.

Police arrived on the scene and began searching for Hall. About an hour later, appellant appeared in Hall's backyard. He was wet and shivering and complaining of an injury to his knee, and he appeared to have grass and blood on his clothes. Appellant was arrested and taken to a hospital for treatment of his injuries. He consented to a search of his person which included giving samples of blood, saliva, and trace evidence.

Hall's body was found shortly thereafter about 300 feet inside a culvert pipe. There was a large blood stain on the concrete wall of the pipe about 150 feet from the entrance. Water was running through the bottom of the pipe. The floor of the pipe, especially where the water was deepest, was covered with broken bottles, glass objects, metal, rocks, sticks, and other debris.

Dallas County Medical Examiner Jennie Duvall testified to Hall's injuries. There was evidence of both ligature and manual strangulation. There were blunt force injuries including blows to the face and scalp and injuries to the knees, upper chest, and shoulder. There were sharp force injuries inflicted by a sharp object such as a knife, including a stab wound on the inside of an elbow. There were also numerous superficial cuts and scrapes about the head and body. The injuries to the head were consistent with striking or slamming against concrete. There were no cuts or other injuries to Hall's feet, suggesting that she was carried through the culvert. Duvall testified that Hall was alive when strangled. The cause of death was determined to be strangulation, with blunt and sharp force injuries. Hall could have died from the strangulation alone, the blunt force injuries to her head alone, or the combination of these injuries. Duvall further testified that it was her opinion that Hall died in the culvert because the culvert was the most likely surface to have caused the head injuries and no blood was found until some 150 feet inside the culvert. She conceded on cross-examination, however, that Hall could have been strangled anywhere.

Swabs of trace blood taken from appellant's lip, head, and neck matched Hall's DNA. Blood on appellant's shirt matched Hall's DNA. The blood stain on the concrete in the culvert also matched Hall's DNA. The DNA expert testified that the probability of the DNA belonging to someone other than Hall was one in 116 billion.[1]

[1] *Rayford v. State*, 125 S.W.3d 521, 525–26 (Tex. Crim. App. 2003), *cert. denied*, 543 U.S. 823, 125 S. Ct. 39 (2004).

Rayford was convicted and sentenced to death in 2000, exhausting his direct appeal several years later.[2] His state habeas petition was denied, as was his initial habeas petition at the district court level.[3] Pending appeal of that denial, the Supreme Court issued *Martinez v. Ryan*[4] and *Trevino v. Thaler*,[5] which together establish that a showing that state habeas counsel provided ineffective assistance by failing to raise claims that the trial counsel rendered ineffective assistance lifts the procedural bar to pursuit in federal court the claim that trial counsel was ineffective.[6] Informed by these decisions, this Court vacated the district court's decision and remanded for renewed consideration.[7] In his amended petition before the district court, Rayford raised two grounds central to the relief he now seeks: trial counsel's failure to perform a reasonable investigation into mitigating evidence, and trial counsel's failure to counter the testimony of the state's medical examiner.[8] The district court once again denied relief and declined to issue a COA.[9] We also declined to issue a COA,[10] and the Supreme Court denied his request for certiorari.[11]

Rayford followed with a habeas petition in state court but it was rejected as successive.[12] He subsequently filed a habeas petition invoking the Supreme Court's original jurisdiction and a motion in the federal district court for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b) and a stay of execution. The district court determined that the Rule 60(b) motion represents

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[2] *Id.*; *Rayford v. Texas*, 543 U.S. 823 (2004).
[3] *See Rayford v. Stephens*, 2014 WL 4744632, at *1 (N.D. Tex. Sept. 22, 2014).
[4] 566 U.S. 1 (2012).
[5] 569 U.S. 413 (2013).
[6] *See id.* at 417, 429.
[7] *Rayford*, 2014 WL 4744632, at *2.
[8] *Id.* at *4.
[9] *Id.* at *14.
[10] *Rayford v. Stephens*, 622 F. App'x 315, 337 (5th Cir. 2015).
[11] *Rayford v. Stephens*, 136 S. Ct. 585 (2015).
[12] *Ex parte Rayford*, No. WR-63,201-02 (Tex. Crim. App. Jan. 26, 2018).

a successive habeas petition and therefore transferred it to us, denying a COA. In the alternative, if the motion represents a Rule 60(b) one, the district court denied relief.

II.

If the district court correctly held that Rayford's motion is a successive petition, Rayford has offered no explanation for how it can survive the statutory bar and indeed has specifically not sought to file a successive petition.[13] We therefore consider only the district court's determination that it cannot stand as a Rule 60(b) motion. We review a denial of a motion for relief pursuant to Rule 60(b) as well as a motion for a stay of execution for abuse of discretion.[14] To the point, "it is not enough that the granting of relief might have been permissible, or even warranted—denial must have been so unwarranted as to constitute an abuse of discretion."[15]

Rule 60(b) allows a defendant to seek relief under a limited set of circumstances, including mistake and fraud.[16] Rule 60(b)(6) is its catch-all provision; while its preceding subsections outline narrow circumstances appropriate for federal relief from a final judgment, Rule 60(b)(6) adds "any other reason that justifies relief."[17] Its language is facially open-ended, but in application a movant must present with "extraordinary circumstances" for Rule 60(b)(6) relief.[18] Relatedly, Rule 60(b)(6) offers no pass to the strictures imposed on successive petitions.[19] Instead, to be properly before a district

[13] *See, e.g.*, *In re Coleman*, 768 F.3d 367, 373 (5th Cir. 2014).
[14] *See, e.g.*, *Diaz v. Stephens*, 731 F.3d 370, 374 (5th Cir. 2013).
[15] *Id.* (internal alterations omitted).
[16] Fed. R. Civ. P. 60(b)(1)–(5).
[17] Fed. R. Civ. P. 60(b)(6).
[18] *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005).
[19] *Id.* at 532.

court, a Rule 60(b) motion must offer "some defect in the integrity of the federal habeas proceedings."[20]

Rayford argues that he was improperly denied funding pursuant to 18 U.S.C. § 3599(f), a denial that prevented his federal habeas counsel from adequately researching and developing claims of ineffective assistance of trial counsel. In particular, he urges that sufficient investigative funding would have allowed him to further develop the theories that his trial counsel was ineffective for failing to conduct a reasonable investigation into mitigating evidence and failing to counter the testimony of the state's medical examiner, Duvall, concerning where Hall was slain.

With funding obtained in the course of petitioning for clemency, Rayford uncovered the aforementioned two pieces of evidence he argues would have been available with earlier funding. First, he produced a toxicology report pointing to the possibility of Rayford's chronic lead exposure, and documenting physical symptoms consistent with that condition. Second, he produced a forensic pathologist report that avers that Duvall overemphasized evidence that Hall died inside the culvert pipe rather than outside it, which premise made the defendant eligible for capital murder by supporting a finding of kidnapping.

In arguing for Rule 60(b)(6) relief for want of funding, Rayford claims that this Court's standard for determining when funds are "reasonably necessary for the representation of the defendant" is more demanding than in other circuits. This, he says, is the source of the injustice and the asserted requirement that his case be reopened. He avers that the Supreme Court's

[20] *Id.*

recent decision to grant certiorari in *Ayestas v. Davis* signals evidence that our reading of 18 U.S.C. § 3599(f) is flawed.[21]

The district court's denial of funding in this case, however, does not amount to the kind of "extraordinary circumstance" that justifies the application of Rule 60(b)(6). While Rayford correctly notes that the Supreme Court may overturn this Court's reading of 18 U.S.C. § 3599's reasonable necessity requirement, such a potential change does not present the extraordinary circumstance required by Rule 60(b)(6).[22] This is so because the district court did not deny funding because it perceived a failure to satisfy the "substantial need" standard outlined in *Ayestas*.[23] It denied funding because it determined that new evidence developed under the request would likely not be admissible in federal court.

Indeed, the sole claim for which Rayford sought funding was his theory that trial counsel was ineffective for failing to perform a proper mitigation investigation. This claim had already been exhausted in state court, which means that the district court correctly concluded that the strictures of *Pinholster* would likely keep new evidence out.[24] Further, and as the district court properly noted, Rayford's requested funding amount stood at over ten

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[21] *Ayestas v. Davis*, 137 S. Ct. 1433 (2017).

[22] *Cf., e.g.*, *Hernandez v. Thaler*, 630 F.3d 420, 429 (5th Cir. 2011) (holding that the Supreme Court's announcement of a new rule for calculating limitations periods under 28 U.S.C. § 2244(d)(1)(A) is not an "extraordinary circumstance").

[23] *Ayestas v. Stephens*, 817 F.3d 888, 896 (5th Cir. 2016)*, cert. granted sub nom. Ayestas v. Davis*, 137 S. Ct. 1433 (2017).

[24] *See Cullen v. Pinholster*, 563 U.S. 170, 181–82 (2011) ("[T]he record under review is limited to the record in existence at that same time i.e., the record before the state court."); *Escamilla v. Stephens*, 749 F.3d 380, 395 (5th Cir. 2014) ("Here, [the defendant's] ineffective-assistance-of-trial-counsel claim based on his attorneys' failure to investigate and present mitigating evidence was considered and denied by the state habeas court. . . . *Pinholster* bars [him] from presenting new evidence to the federal habeas court with regard to this already-adjudicated claim.").

times the limit encoded in 18 U.S.C. § 3599(g)[25] with no accompanying explanation for why the higher figure was needed. As best we can discern, Rayford did not appeal this denial of his funding request, request a more reasonable amount, or provide more detail in light of the district court's concerns. Nor did Rayford request funding for unexhausted claims in light of our decision to remand to the district court for additional proceedings once *Martinez* and *Trevino* were decided—the district court repeatedly asked him to point to the existence of any such claims, but he failed to do so, producing instead only permutations of his exhausted claims.[26] In short, the issues at stake in *Ayestas* had no bearing on the district court's decision to deny funding in this case.[27]

This case therefore does not present the extraordinary circumstances necessary to justify reopening the case at this juncture. While we have not squarely held that the *Seven Elves*[28] factors applicable to claims arising out of

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[25] 18 U.S.C. § 3599(g)(2) ("Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under subsection (f) shall not exceed $7,500 in any case, unless payment in excess of that limit is certified by the court . . . as necessary to provide fair compensation for services of an unusual character or duration.").

[26] *See Dickens v. Ryan*, 740 F.3d 1302, 1328 (9th Cir. 2014) (en banc) (Callahan, J., concurring in part and dissenting in part) (noting that an approach similar to Rayford's "encourages state defendants to concoct 'new' IAC claims that are nothing more than fleshed-out versions of their old claims supplemented with 'new' evidence" and observing that "[t]his cannot have been the Supreme Court's intention, nor is it an unintended but inherent consequence of the Supreme Court's opinions in *Martinez* and *Pinholster*").

[27] *See Devoe v. Davis*, 2018 WL 341755, at *10 (5th Cir. Jan. 9, 2018).

[28] *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981) ("(1) That final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) whether if the judgment was a default or a dismissal in which there was no consideration of the merits the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant's claim or defense; (6) whether if the judgment was rendered after a trial on the merits the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack. These factors are to be considered in the light of the great desirability of preserving the principle of the finality of judgments.").

Rule 60(b)(1)–(5) similarly apply to claims arising out of Rule 60(b)(6),[29] they confirm the conclusion we have reached in this case, for all of the reasons the district court laid out below.

For instance, *Seven Elves* insists that final judgments not be "lightly disturbed." As Rayford notes, he has already made the arguments that his trial counsel was ineffective because of his failure to employ a mitigation specialist and failure to counter the testimony of Duvall in federal court, and he was denied on both counts.[30] The new evidence he seeks to present does not disturb these judgments. First, as we have held in the past, a mitigation specialist need not be employed in every case for the trial counsel to provide effective assistance.[31] In this case, the habeas court determined that the trial counsel conducted a thorough investigation, consulting members of Rayford's family and presenting expert testimony centered on "the long-term psychological, emotional, physical and cognitive effects of th[e defendant's] history of abuse and neglect."[32] The toxicology report that Rayford now claims a mitigation specialist would have produced is provisional; it does not arise out of any actual medical examination of him, and its conclusions note only that his condition is consistent with lead poisoning. Relatedly, Rayford's new forensic expert report has not "testified that the victim died before being dragged away to a culvert."[33] Instead, the new expert argues only that either death location was possible, and faults the state's expert for "overemphasiz[ing] the possibility that the victim died in the culvert, while minimizing the possibility that she died somewhere else." As Rayford's expert notes, the state also produced evidence—

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[29] *See, e.g.*, *Diaz*, 731 F.3d at 376 n.1.

[30] *Rayford*, 2014 WL 4744632, at *14.

[31] *See Runnels v. Davis*, 664 F. App'x 371, 376 (5th Cir. 2016) ("This Court has previously stated that defense counsel is not obligated to retain a mitigation expert.").

[32] *Rayford*, 2014 WL 4744632, at *12.

[33] *Rayford v. Thaler*, 2011 WL 7102282, at *15 (N.D. Tex. July 12, 2011).

including tested blood stains and eye witness testimony—that suggested Hall died in the culvert. While closer to the mark, the subsequent production of an expert who just qualifies the conclusions made by that of the state does not dramatically change the bite of the ineffective assistance of trial counsel claims that the district court already rejected. Indeed, the state's expert already conceded at trial—under the cross-examination of trial counsel—that Hall "could have been strangled anywhere."[34] The scope of the evidence produced by Rayford, in other words, does not justify overturning the existing final judgments determining that the trial counsel did not provide ineffective assistance.

For the same reasons, reopening Rayford's case is not necessary to serve "substantial justice." Rayford's arguments on this front are largely repetitive, pointing primarily to the same grounds he argues rendered the trial counsel's assistance ineffective in the first place. In short, according to Rayford's theory, denial of funding for a mitigation specialist frustrated his efforts to present the merits of his ineffective assistance of trial counsel claims, since the habeas court did not have the evidence now in his possession before it. But because we have concluded that the district court acted reasonably under our precedent concerning the requirements of 18 U.S.C. § 3599(f), accepting Rayford's argument would require reopening decisions to deny funding that we have deemed faithful applications of the statute. This is an implausible understanding of the principles involved in Rule 60(b).

Seven Elves also suggests that a Rule 60(b) motion should not be used as a substitute for an appeal. Yet as we have noted, Rayford never actually appealed the district court's denial of funding for a mitigation specialist, nor did he file a subsequent motion on remand or seek to correct the errors in his

[34] *Rayford*, 125 S.W.3d at 526.

initial request that the district court identified. The fact that his first challenge to the district court's decision comes in the form of a Rule 60(b)(6) motion to reopen the case cuts against him.

Even aside from the lack of extraordinary circumstances, Rayford's Rule 60(b) argument is simply untimely. This Court requires that a Rule 60(b)(6) motion be filed within a reasonable time, "unless good cause can be shown for the delay."[35] The district court denied Rayford's request for funding in 2009, and it went on to deny his habeas petition first in 2012 and once again, upon remand following *Martinez* and *Trevino*, in 2014. Rayford could have filed a Rule 60(b) motion challenging the denial of funding at either of these points, but he failed to do so. His justifications for the delay are unpersuasive.[36]

In addition to his appeal, Rayford moves for a stay of execution. Determining whether he is entitled to a stay requires asking:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) whether the public interest lies.[37]

In light of all the foregoing discussion, we conclude that Rayford is unlikely to succeed on the merits of his Rule 60(b)(6) motion and that he is therefore not entitled to a stay of execution.[38] Rayford now enjoys the benefit of experienced and creative counsel. But there are limits to the results achievable by the most

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[35] *Clark v. Davis*, 850 F.3d 770, 780 (5th Cir. 2017).

[36] He claims to have first needed to secure the funding elsewhere first. It is not clear why this is so; the district court's initial denial was based on the large amount requested and, again, the perception of exhaustion problems. *Cf. id.* at 782–83**.** He also claims that bringing a Rule 60(b) motion would risk prompting the Texas Court of Criminal Appeals to dismiss his successive petition. But the successive petition was only pending before the Texas Court of Criminal Appeals for around one week. The Rule 60(b) motion itself was only filed four days before the scheduled execution, and the appeal was filed today.

[37] *Diaz*, 731 F.3d at 379 (quoting *Green v. Thaler*, 699 F.3d 404, 411 (5th Cir. 2012)).

[38] *See In re Edwards*, 865 F.3d 197, 209–10 (5th Cir. 2017).

able counsel, footed in the facts and law they confront. For all of the above reasons, we AFFIRM the district court's denial of Rayford's Rule 60(b) motion and DENY leave to file a successive writ. We also DENY his request for a stay of execution, and DENY his request for a COA.