

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BRIAN E. MESERVE)
)
 Movant)
)
 v.) Civil No. 02-178-B-S
)
 UNITED STATES OF AMERICA) Criminal No. 99-19-B-S
)
 Respondent)

**RECOMMENDED DECISION ON RULE 60 MOTION CHALLENGING
RESOLUTION OF A 28 U.S.C. § 2255 MOTION**

Meserve has filed a motion pursuant to Federal Rule of Civil Procedure 60(b) seeking relief from the summary dismissal of his 28 U.S.C. § 2255 motion by this Court. (Docket No. 115.) The United States has filed a memorandum in opposition to the motion arguing that it is really a second § 2255 motion in disguise, that his claims are barred by the law of the case doctrine, and, in the alternative, that as a Rule 60(b) motion it is time-barred because it was filed over a year after the entry of the challenged judgment.¹ I now recommend that the Court **DENY** Meserve's Rule 60(b) motion for the reasons explained below.

Discussion

Federal Rule of Civil Procedure 60(b), as conceivably relevant, provides:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final

¹ The District Court judge's order affirming the recommended decision was docketed February 13, 2003; Meserve's Rule 60(b) motion was filed on September 30, 2004.

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, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

Fed. R. Civ. P. 60(b) (emphasis added).

There is an evolving body of law on the permissible parameters of Rule 60(b) challenges to judgments entered in 28 U.S.C. § 2254 and § 2255 proceedings. See, e.g., United States v. Vargas, ___ F.3d ___, 2004 WL 2937252 (D.C. Cir. Dec. 21, 2004); In re Abdur'Rahman, 392 F.3d 174, 182 (6th Cir. 2004) (collecting cases); but see, e.g., Mobley v. Head, 306 F.3d 1096, 1096 (11th Cir. 2002) ("[W]e believe that the district court fairly read Felker v. Turpin, 101 F.3d 657 (11th Cir.1996), to have established a bright-line rule that the restrictions in 28 U.S.C. § 2244(b) for 'second or successive' petitions apply to all Rule 60(b) motions filed by habeas corpus petitioners."). In Rodwell v. Pepe, the First Circuit explained that when "the motion challenges only the etiology of the habeas judgment itself. ... it makes sense to consider the motion as a Rule 60(b) motion simpliciter rather than as a second or successive habeas petition." 324 F.3d 66, 70 (1st Cir. 2003). It expressed a reluctance to "subscribe to a 'one size fits all' taxonomy for the handling of Rule 60(b) motions in the habeas context" and directed that

the "inquiry ... proceed case by case." Id.²

The case at hand

On May 24, 2000, I conducted an evidentiary hearing³ on Meserve's first motion for a new trial, filed prior to sentencing, in which Meserve presented evidence as to why he was entitled to a new trial. In his motion for a new trial Meserve asserted that since the trial ended, Wendy Rhodes, the sister of John Nicholas, a witness for the prosecution at the trial of this matter, obtained new evidence from her brother which impeached his trial testimony and strongly supported the argument that he had himself thrown away the gun used in the robbery. Meserve also alleged in his motion for a new trial that Justin Meserve (a/ka/ Justin Nicholas) would testify that in approximately mid-1997 he observed John Nicholas sawing off the shotgun used in the robbery. Brian Meserve also claimed that Justin Meserve would testify that he disposed of parts of the sawed off shotgun in a stream at the request of his uncle. Both Wendy Rhodes and Justin Meserve testified under oath at the 2000 hearing. Neither of the witnesses supported the allegations that Meserve put forth in his written materials in support of the new trial and the motion was denied. The primary evidence at trial had been the testimony of Holly Grant, Meserve's ex-girlfriend and the individual who provided the evidence that led to Meserve's conviction. Grant not only provided testimony that tied Meserve to the gun,

² Advancing a wolf-in-sheep's-clothing argument, the United States contends that this court lacks authority to consider the motion because it is really a second and successive 28 U.S.C. § 2255 motion. See 28 U.S.C. § 2255 ¶ 8. I do not read Rodwell as it does. If the United States' line of reasoning was accepted vis-à-vis complaints such as Meserve's, then any Rule 60 motion would be impermissible because, of course, the final objective is to get 28 U.S.C. § 2255 relief after the hoped-for reopening of the habeas proceedings. Rodwell expressly rejected the view of other Circuits that adopted such a rigid approach. I am confident that Meserve has presented a sufficient challenge to the etiology of my 28 U.S.C. § 2255 order to justify addressing that determination via a Rule 60(b) motion.

³ The trial judge in this case died between the trial and sentencing. The first Motion for New Trial was thus referred to me.

she advised the police of the location where he had disposed of the weapon and the police recovered the gun from that location.

Following the affirmance of his conviction in January 2002, Meserve filed a Rule 33 motion for a new trial on October 21, 2002. Then on November 15, 2002, Meserve filed a 28 U.S.C. § 2255. He was represented by counsel on both motions. On December 27, 2002, I entered an order addressing both motions. With respect to Meserve's ineffective assistance ground contained in the § 2255 motion I observed: "The seventh ground is cast as an ineffective assistance of counsel claim and alleges for supporting facts that '[d]efendant's counsel failed (sic) to challenge known false testimony regarding the location, possession and use of the firearm purported to be used in the crime represented ineffective assistance by defendant's counsel.'" (Recommend Dec. Mot. New Trial & Mot. Vacate at 2.) Vis-à-vis this ground I concluded:

With respect to Meserve's seventh ground, his proffer of "supporting facts" is nothing more than a conclusory assertion that his attorney failed to challenge known false testimony about the location, possession, and use of a firearm. The First Circuit has made it clear that it is permissible to summarily deny cognizable 28 U.S.C. § 2255 claims that merely state conclusions without specific and detailed supporting facts. United States v. Butt, 731 F.2d 75, 77 (1st Cir. 1984); see also Siciliano v. Vose, 834 F.2d 29, 31 (1st Cir. 1987) (affirming summary denial of conclusory ineffective assistance of counsel claim).

(Id. at 9-10.)

In this Rule 60(b) pleading Meserve details his relationship with counsel retained to assist Meserve with his Rule 33 and 28 U.S.C. § 2255 motions.⁴ Meserve explains that he contacted this attorney seeking his assistance and that the attorney agreed to help Meserve file the brief with the condition that he would limit his services to a review of

⁴ Meserve makes it clear that he is not bringing a claim of ineffective assistance of counsel apropos this representation and that he provides this history only as background information.

the accuracy of the format and the case law. Meserve and counsel decided that the Rule 33 motion would be filed first and counsel instructed Meserve to hold on to his § 2255 brief until it was time to file it.

With respect to discussions pertaining to the § 2255 motion, Meserve told his attorney that he needed to file it by November 12, 2002, due to the impending one-year limitation period, and indicated that his attorney should file a motion to stay the (yet to be filed) § 2255 proceeding⁵ to preserve Meserve's right to seek § 2255 review. Counsel indicated that he was pressed for time and told Meserve to sign the § 2255 form, which was missing the attachment listing grounds one through seven. Meserve's mother sent counsel a check for \$1500 with a "specifically worded receipt that clearly states that the payment was for 'legal services for Brian Meserve regarding his federal case: post conviction motion for stay.'" According to Meserve, this check was cashed on November 8, 2002.⁶ For reasons unknown to Meserve, counsel completed the attached list and filed the § 2255 motion itself with the Court on November 15, 2002, without Meserve having a chance to review the pleading actually filed.⁷ As a consequence, Meserve asserts, the ineffective assistance claims that were prepared by Meserve pro se explaining the supporting facts and evidence were not presented to the Court, resulting in summary dismissal of his skeletal claims. Because of a transfer of custody and problems with receiving mail, Meserve did not receive a copy of what was actually filed until it was, in

⁵ I do note, for Meserve's benefit, that this court cannot stay a proceeding that does not exist on its docket. Counsel would have run into difficulty if he followed Meserve's instructions to the letter.

⁶ Meserve considers this transaction as creating a contract for counsel to file a motion to stay and not an empty motion to vacate.

⁷ Meserve states that counsel informed him that the only form that he was allowed to file was the § 2255 form supplied by the court. He also indicates that counsel told him that he believed when he filed the form that he would have time to withdraw or amend the form and that his main concern was to preserve Meserve's § 2255 rights. Although the matter was pending from November 15, 2002, through February 2003, Meserve never filed a motion amend or to withdraw the § 2255 pleading.

his perception, too late to bring the mix-up and defects to the Court's attention.⁸

Meserve appealed this Court's determinations vis-à-vis his Rule 33 motion and his § 2255 motion. On May 18, 2004, the First Circuit Court of Appeals affirmed those rulings and Meserve responded with this Rule 60(b) motion on September 30, 2004.

Meserve argues further that at the time I conducted the evidentiary hearing on May 2000 I was on notice, via the letters written to the Court, that Meserve was complaining about his trial attorney's failure to introduce exculpatory evidence and counsel's tolerating the introduction of materially false testimony pertaining to his possession of the gun used in the robbery. Meserve identifies the testimony of John and Robert Nicholas who represented that between 1981 through 1994 Meserve was in Winslow Maine, used the gun, and was the last to possess the gun. Meserve contends that this testimony was provably false given the fact that Meserve was serving a sentence in Ohio at the time. Meserve contends that, by dint of the letters on file with the court, I was already on notice of the facts, evidence, and issues supporting his claims when I conducted the hearing. Accordingly, in his view, I should have realized that the information in these letters described the content of his § 2255 ineffective assistance claims and I should not have ignored this information on the grounds that it was not newly discovered evidence for purposes of the Rule 33 motion. Meserve points out that he made this argument in his objection to the recommended decision, asking the Court to look closer at the original issues that were in the original letters and that he explained the relevance of this information to the ineffective assistance claims. He faults the Court for

⁸ Meserve explains that he wanted the grounds pertaining to the Holly Grant perjury issues raised in the § 2255 under the ineffective assistance framework. He describes what transpired as an honest mix-up Meserve states that an attorney ought to realize that the only way to advance the Grant claim, as distinct from the Rule 33 claims and independently cognizable in a § 2255 proceeding, was to posture them as ineffective assistance claims.

a selective inquiry demonstrated by its inability to see how the complaints about counsel in Meserve's letters coalesced with his § 2255 ineffective assistance claims, instead recharacterizing them as brought under Rule 33. He further complains that this Court wrongly incorporated certain facts of the Rule 33 motion to divine the facts underlying the § 2255 ineffective assistance/perjury grounds, grounds that were, instead, predicated on other key prosecution witnesses.⁹

Meserve also faults the court for not having returned the § 2255 form to Meserve because it was too conclusory and for not recognizing that such a skeletal pleading "should not have a place in the one shot world of § 2255." (Reply Gov't Opp'n R. 60(b) Mot. at 4-5; see also id. at 10.)

The status of Meserve's claims under Rule 60(b)

First, Meserve makes it crystal clear that he is not bringing this motion under the second prong of Rule 60(b): newly discovered evidence. (See, e.g., Reply Gov't Opp'n R. 60(b) Mot. at 8.) Indeed, he stresses that the Court had the evidence in its files at the time the § 2255 motion was adjudicated. (Id.)

Meserve does argue that subsection (1) of Rule 60(b) is applicable in this case because the incomplete § 2255 motion was filed by "mistake." (Id. at 10.) It is clear that he cannot proceed under this subsection--or subsection (3) (Meserve does assert fraud)--as this Rule 60(b) motion was filed far outside of the one-year limitation period specified in the rule.

⁹ With respect to the perjury issue surrounding Holly Grant's testimony, it is Meserve's contention in his supplemental brief (Docket No. 116) that the standard for such a claim under Rule 33, i.e., requiring that the evidence be newly discovered, is stricter than one applied in a § 2255 review. Meserve seems to mistakenly believe that through a § 2255 lens the perjury issue would be addressed head-on, the court asking whether or not the false testimony was deliberately presented.

In responding to the United States' arguments in opposition to his motion, Meserve indicates that he sees his complaints, including this mistake, as supporting a disposition under subsection (6) of the rule, (id. at 11) which allows for relief, outside of a year, for "any other reason justifying relief from the operation of the judgment." See e.g., Vargas, ___ F.3d at ___, 2004 WL 2937252 at *1. In addition to his attorney's mistake in filing the defective § 2255 motion, Meserve points to the Court's failure to recognize the pointlessness of his defective § 2255 pleading; the Court's failure to recognize that the supporting facts and evidence for the ineffective assistance claims was in its own files at the time it ruled on the § 2255 motion; the Court's failure to fulfill its duty to provide the necessary process for adequate inquiry; the Court's failure to address the constitutional violations and to conduct a further evidentiary hearing; and the Court's treatment of Meserve's letters complaining of ineffective assistance of counsel when it concluded that they could not be considered in the context of the Rule 33 motion and then disregarded them in the § 2255 proceedings in which they could be considered. (Reply Gov't Opp'n R. 60(b) Mot. at 11-13.)

In In re Abdur'Rahman the Court noted that the movant had characterized his motion as one pursuant to Rule 60(b)(6). It opined:

This provision has been called a "reservoir of equitable power" to do justice in a particular case. Compton v. Alton S.S. Co., Inc., 608 F.2d 96, 106 (4th Cir.1979). For that reason, there is concern for abuse of a Rule 60(b)(6) motion in habeas proceedings--perhaps more concern than there is with other Rule 60(b) motions whose nature is more easily ascertained. But Rule 60(b)(6) has been narrowly interpreted and courts have stressed that such motions should only be raised in exceptional or "extraordinary circumstances." Liljeberg v. Health Svcs. Acquisition Corp., 486 U.S. 847, 863-64 (1988); Pierce v. United Mine Workers, 770 F.2d 449, 451 (6th Cir.1985). Furthermore, this provision and other provisions of Rule 60(b) are mutually exclusive--that is, if the reason offered for relief from judgment could be considered under one of the more specific clauses of

Rule 60(b)(1)-(5), then relief cannot be granted under Rule 60(b)(6).
Liljeberg 486 U.S. at 863 & n. 11.

392 F.3d at 183 (emphasis added).

Having full familiarity with the proceedings that have brought this matter to a head, including Meserve's insistence then and now that he could not have possessed the gun because he was not in Maine in the years prior to the robbery, during the time frame Nicolas testified he was, I am confident that Meserve is not entitled to Rule 60(b)(6) relief from the denial of his 28 U.S.C. § 2255 motion. Meserve's strongest argument is that pertaining to his attorney's mistake in filing a version of his § 2255 that was incomplete. Despite Meserve's protestations to the contrary, that claim surely could have been brought to the court's attention within the year allowed under Rule 60(b). In fact it could have been brought to this court's attention after the recommended decision issued and prior to the February 2003 judgment of this court. As for the other grounds identified by Meserve as justifying subsection (6) relief, I understand that Meserve is discontent with the process afforded by the Court but he was afforded ample opportunity to press his Rule 33 and § 2255 claims, a conclusion to which the docket and the full record bare witness. This case is simply not one that involves exceptional or extraordinary circumstances vis-à-vis the adjudication of Meserve's 28 U.S.C. § 2255 motion.

Conclusion

For these reasons I recommend that the Court **DENY** Meserve's Rule 60(b) motion.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

January 24, 2005.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

MESERVE v. USA

Assigned to: JUDGE GEORGE Z. SINGAL

Referred to: MAG. JUDGE MARGARET J.
KRAVCHUK

Demand: \$0

Cause: 28:2255 Motion to Vacate / Correct Illegal
Sentenc

Date Filed: 11/15/2002

Jury Demand: None

Nature of Suit: 510 Prisoner:

Vacate Sentence

Jurisdiction: U.S. Government
Defendant

Plaintiff

BRIAN EUGENE MESERVE

represented by **STEVEN J. LYMAN**
LAW OFFICE OF STEVEN J.
LYMAN
96 HARLOW STREET
BANGOR, ME 04401
947-9744
Email: lymanlaw@acadia.net
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

**UNITED STATES OF
AMERICA**