

**DEATH PENALTY CASE,
EXECUTION SCHEDULED FOR
MARCH 11, 2004 at 1:00 a.m.
STAYED**

Nos. 04-5066 and 04-5081

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

OLEN E. HUTCHISON,

Movant/Appellant,

v.

RICKY BELL, Warden,

Respondent/Appellee.

**MOTION TO VACATE ORDER OF DISTRICT COURT
STAYING EXECUTION**

Warden Ricky Bell respectfully moves this Court pursuant to F.R.A.P. 8(a) to vacate the January 24, 2004, order of the Honorable James H. Jarvis, District Judge of the United States District Court for the Eastern District of Tennessee, staying the March 11, 2004, execution of Olen E. Hutchison's death sentence. Following petitioner's filing of a motion under Rule 60(b), Fed.R.Civ.P., Judge Jarvis transferred the matter to this Court as a second or successive habeas application pursuant to 28 U.S.C. § 2244(b)(3), ordered that Hutchison's execution be stayed and that further proceedings in the district court be stayed pending this Court's determination of whether to authorize further proceedings. For the

reasons that follow, the district court's order should be vacated immediately.

Olen E. Hutchison was convicted in the Criminal Court of Campbell County, Tennessee, of the first degree murder of Hugh Huddleston. Following a sentencing hearing, the jury sentenced Hutchison to death. The Tennessee Supreme Court affirmed his convictions and sentences on June 6, 1994. *State v. Hutchison*, 898 S.W.2d 161 (1994), *cert. denied*, 516 U.S. 846 (1995).

On May 4, 1995, Hutchison filed a petition for post-conviction relief. Following an evidentiary hearing, the trial court denied relief. This decision was affirmed by the Tennessee Court of Criminal Appeals. *Olen Eddie Hutchison v. State*, No. 03C01-9601-CC-00033, 1997 WL 607502, (Tenn. Crim. App. Oct. 3, 1997), *cert. denied*, 525 U.S. 904 (1998). While that matter was pending, Hutchison filed a second petition for post-conviction relief on August 1, 1996. The trial court again denied relief and that decision was affirmed on appeal. *Olen Edward Hutchison v. State*, No. 03C01-9702-CR-00065, 1997 WL 776342 (Tenn. Crim. App. Dec. 18, 1997) *permission to appeal denied*, Jan. 4, 1999.

Hutchison subsequently sought a petition for writ of habeas corpus in the United States District Court for the Eastern District of Tennessee. On September 15, 2000, that the district court entered an order granting respondent's motion for summary judgment and dismissing the petition. That decision was affirmed by this Court. *Hutchison v. Bell*, 303 F.3d 720 (6th Cir. 2002), *cert. denied*, 123 S.Ct. 2608 (2003).

On August 19, 2003, Hutchison filed a motion in the district court under Rule 60(b), Fed.R.Civ.P. On September 30, 2003, the Tennessee Supreme Court entered an order setting Hutchison's execution for March 11, 2004. On October 23, 2003, Hutchison filed a motion to stay execution and to stay proceedings in the district court. On January 22,

2004, the district court transferred the matter to this Court as a second or successive application for habeas relief and stayed the execution and any further proceedings. [Exh. 1] Respondent sought reconsideration of the stay, but that request was denied on February 5, 2004. [Exh. 2]

ARGUMENT

I. THE ORDER STAYING THE EXECUTION SHOULD BE VACATED AS THE DISTRICT COURT WAS WITHOUT JURISDICTION TO ENTER SUCH AN ORDER.

The authority to stay state court proceedings is governed by 28 U.S.C. § 2251. That provision states that “[a] justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding.” In this case, the habeas petition was denied by the district court in 2000, and the appeal from that decision was completed on August 25, 2003, when the United States Supreme Court denied Hutchison’s petition for rehearing of the denial of his petition for a writ of certiorari. [Exh. 3]. Therefore, at the time the stay was issued, there was no habeas petition pending before the district court, nor was the prior petition still on appeal. The district court correctly recognized that it lacked jurisdiction to rule on Hutchison’s Rule 60(b) motion, as it constituted a request to file a second or successive habeas petition and therefore required permission of this Court. Because the district court had no case pending before it, it was without authority to issue the stay of execution.¹ The order granting the stay should be vacated.

II. EVEN ASSUMING THAT THE DISTRICT COURT HAD JURISDICTION, THE STAY SHOULD BE VACATED, AS HUTCHISON CANNOT SATISFY THE STRINGENT

¹The order also purported to stay proceedings in that court, although there are presently no proceedings to be affected by such an order.

REQUIREMENTS FOR ISSUING A STAY.

Hutchison's claims are presently before this Court for evaluation under the gatekeeping provisions of 28 U.S.C. § 2244. As the United States Supreme Court has stated, "[e]ntry of a stay on a second or third habeas petition is a drastic measure, and we have held that it is 'particularly egregious' to enter a stay absent substantial grounds for relief." *Bowersox v. Williams*, 517 U.S. 345, 346 (1996) (quoting *Delo v. Blair*, 509 U.S. 823 (1993)). Hutchison seeks relief on three claims, but, as shown below, he cannot establish "substantial grounds for relief" on any of the three.²

A. Claim relating to Tennessee's waiver and limitations provisions.

Hutchison first reasserts his claim that Tennessee's post-conviction provisions related to waiver and the one-year limitations period do not constitute an adequate and independent state law ground barring federal review. This claim was fully litigated and decided adversely to Hutchison by the district court and on appeal to this Court. *Hutchison v. Bell*, 303 F.3d at 735-41. In an effort to relitigate this claim, Hutchison now asserts that respondent committed a fraud upon the district court. His assertion is based upon the response filed by Warden Bell to the petition for writ of certiorari taken from this Court's ruling.

While it is true that this Court has held that a fraud upon the court may constitute grounds for review under Rule 60(b) in a habeas case, Hutchison has failed to establish a

²Even if it were to be determined that Hutchison should be allowed to seek relief pursuant to Rule 60(b), the stay must still be vacated as he cannot show the requisite likelihood of success for the reasons discussed *infra*.

basis for a finding of fraud. See *Workman v. Bell*, 245 F.3d 849, 852 (6th Cir. 2001); *Demjanjuk v. Perovsky*, 10 F.3d 338, 348 (6th Cir. 1994). As an appendix to his petition for writ of certiorari, Hutchison attached a list of 296 cases which he claimed demonstrated that the limitations period was not regularly enforced as required to qualify as an adequate and independent state law ground. In response, respondent pointed out that, even utilizing Hutchison's statistics, the number of cases cited supported the holding that the rule was regularly applied. Further, respondent noted that a review of the listed cases revealed that a significant number of the cases cited did not, in fact, stand for the proposition asserted in Hutchison's petition. Hutchison now claims that the respondent has "conceded" the availability of relief under *Burford v. State*, 845 S.W.2d 204 (Tenn. 1992), and that, had this "concession" been made in the district court, the outcome would have been different. These facts simply cannot support a finding of fraud. Respondent has never asserted that *Burford* has not been utilized to grant relief in *some* cases, only that it was not done so frequently as to defeat the "firmly established and regularly applied" test for a state procedural bar. This Court's opinion itself recognized that *Burford* has sometimes been applied to grant relief but correctly noted that these instances were insufficient in number to avoid the procedural bar. *Hutchison*, 303 F.3d at 737-39. In the absence of any factual allegations which would support a claim of fraud, Hutchison has failed to demonstrate the existence of "substantial grounds upon which relief might be granted."

B. The constitutionality of the aggravating circumstance.

Hutchison next asserts that the district court's holding regarding his challenge to the constitutionality of the "murder for remuneration" aggravating circumstance, Tenn. Code

Ann. § 39-2-203(i)(4), has been undermined by this Court's recent holding in *Adams v. Holland*, 324 F.3d 838 (6th Cir. 2003), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Nov. 18, 2003) (No. 03-821). The *Adams* decision was based on an interpretation of a Tennessee Supreme Court rule which relates to the necessity to seek discretionary review in that court in order to satisfy the federal exhaustion requirement. Although *Adams* did hold that the rule was retroactive, it does not affect Hutchison's case, as the claim at issue was never raised by petitioner in *any* state appellate court. A challenge to the constitutionality of an aggravating circumstance would properly have been asserted on direct appeal. At the time of Hutchison's appeal, capital cases were sent directly to the state supreme court for direct review. Hutchison, as the district court noted, did not assert a challenge to the constitutionality of the aggravating circumstance, nor did the majority opinion of the state supreme court address the claim. In a dissent, then-Chief Justice Reid discussed the issue opining that the aggravating circumstance failed to narrow the class of death-eligible defendants. *Hutchison*, 898 S.W.2d at 175. Despite the filing of two post-conviction petitions, Hutchison made no effort to pursue this claim in the state courts, choosing to wait until he sought habeas relief before bringing this challenge. This case is wholly unlike the situation in *Adams*, where the claim at issue was presented to the Tennessee Court of Criminal Appeals but abandoned when the petitioner sought discretionary review pursuant to Rule 11.

Because the claim for relief was never presented to *any* appellate court, Rule 39, Rules of the Supreme Court of Tennessee, is inapplicable. Therefore, this Court's holding in *Adams* would have no effect on the district court's decision, and Hutchison cannot establish the existence of "substantial grounds upon which relief might be granted."

C. Rule 60(b) cannot support a claim of relief based upon the unanimity instruction in this case.

Hutchison also asserts that this Court's holding in *Davis v. Mitchell*, 318 F.3d 682 (6th Cir. 2003), supports the grant of relief pursuant to Rule 60(b), Fed.R.App.P. In his habeas petition, Hutchison asserted that the unanimity instruction given in his trial violated the holdings of the Supreme Court in *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433 (1990). The district court correctly found that the decision of the state supreme court was neither contrary to nor an unreasonable application of clearly established federal law as determined by the Supreme Court. Hutchison did not appeal from that portion of the district court's decision. It is well settled that a Rule 60(b) motion is not a substitute for an appeal. See, e.g., *Ackermann v. United States*, 340 U.S. 193, 197 (1950); *Jinks v. Alliedsignal, Inc.*, 250 F.3d 381, 385-87 (6th Cir. 2001); *Bell v. Eastman Kodak Co.*, 214 F.3d 798, 801 (7th Cir. 2000); *Greenwood Explorations, Ltd. v. Merit Gas & Oil Corp., Inc.*, 837 F.2d 423, 427 (10th Cir. 1988). Where Hutchison sought and was granted review on several issues but chose to forgo even a request to appeal his *Mills* claim, he cannot now be heard to complain that the district court's decision was in error.

Further, the district court's review of Hutchison's case was governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under the AEDPA, the district court was required to determine whether the decision of the state courts denying relief was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1) (emphasis added). For purposes of this review, the district court is required to look to the holdings of the Supreme Court in existence at the time the conviction

became final. *Williams v. Taylor*, 529 U.S. 362, 390, 412 (2000); *Williams v. Coyle*, 260 F.3d 684, 698-99 (6th Cir. 2001). Because the decision relied upon by Hutchison is neither a decision of the United States Supreme Court, nor a holding that was in effect at the time his conviction became final, Hutchison cannot establish the existence of “substantial grounds upon which relief might be granted.”

D. Comparative proportionality is not a cognizable basis for habeas relief.

As a fourth ground for relief, Hutchison relies upon the different sentences received by others involved in the conspiracy. Comparative proportionality among co-defendants is not constitutionally required and therefore cannot serve as a basis for habeas relief. *Pulley v. Harris*, 465 U.S. 37, 44 (1984); *Bowling v. Parker*, 344 F.3d 487, 521 (6th Cir. 2003); *Buell v. Mitchell*, 274 F.3d 337, 368 (2001). Because this claim cannot serve as a basis for relief, Hutchison cannot establish the existence of “substantial grounds upon which relief might be granted.”

CONCLUSION

For the foregoing reasons, the District Court's order staying the execution should be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document filing has been forwarded by facsimile transmission and first class mail, postage prepaid to: Dana C. Hansen Chavis, Federal Defender Services, 530 S. Gay Street, Suite 900, Knoxville, Tennessee 37902, (865) 637-7999, on this the ____ day of February, 2004.

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