

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PASCHALL L. SANDERS III,

Petitioner,

MEMORANDUM
AND ORDER

v.

99-C-421-C

BYRAN BARTOW, Director, Wisconsin
Resource Center,

Respondent.

MEMORANDUM

Paschall L. Sanders, III, who is presently detained at the Wisconsin Resource Center, has filed a motion to “reopen/review denial” of a previous habeas corpus petition. Sanders, who has filed numerous civil lawsuits and habeas petitions in this court in the past, has not identified the petition to which the instant motion relates except to say that it involved a challenge to his “parole revocation-forfeiture.” I infer that petitioner is referring to Case No. 99-C-421-C, which was a petition filed by Sanders under 28 U.S.C. § 2254 to challenge the 1993 revocation of his state parole. In an order entered October 19, 1999, this court adopted the magistrate judge’s report and recommendation that the petition be dismissed with prejudice on grounds of procedural default and untimeliness.

Petitioner contends that he is entitled to a new parole revocation hearing on the basis of the United States Supreme Court’s recent decision in Crawford v. Washington, 124 S.

Ct. 1354 (2004), which held that testimonial out-of-court statements by witnesses are barred under the confrontation clause unless the witnesses are unavailable and the defendant had a prior opportunity to cross-examine the witness. Petitioner asserts that this rule was violated in the revocation proceedings against him.

A motion to reconsider may be brought pursuant to Fed. R. Civ. P. 59(e) or 60(b). A motion filed within 10 days of the entry of judgment is considered under Rule 59 and one filed after such time is considered under Rule 60. Petitioner's motion was filed several years after the entry of judgment. Accordingly, I consider it under Rule 60(b).

A court addressing a Rule 60(b) motion seeking reconsideration of the dismissal of a habeas petition must first determine whether it has jurisdiction to entertain the motion. Under certain circumstances, a Rule 60(b) motion must be treated as a second or successive habeas petition pursuant to 28 U.S.C. § 2244(b); otherwise, the limitations established by the Antiterrorism and Effective Death Penalty Act (AEDPA) on collateral attacks would be rendered naught. Dunlap v. Litscher, 301 F.3d 873, 875 (7th Cir. 2002) (collecting cases); Harris v. Cotton, 296 F.3d 578, 579-80 (7th Cir. 2002) ("Prisoners are not allowed to avoid the restrictions that Congress has placed on collateral attacks on their convictions . . . by styling their collateral attacks as motions for reconsideration under Rule 60(b).") (citations omitted). If a Rule 60(b) motion is in effect a second or successive petition, a district court lacks jurisdiction to consider it unless the court of appeals has granted the petitioner permission to file such a petition. See 28 U.S.C. § 2244(b)(3); Nunez v. United States, 96

F.3d 990, 991 (7th Cir. 1996). A Rule 60(b) motion must be treated as a second or successive petition only when it conflicts with the AEDPA. Dunlap, 301 F.3d at 875.

The Seventh Circuit has indicated that a Rule 60(b) motion does not conflict with the AEDPA if it contains allegations that implicate “the integrity of the court’s habeas proceeding” as opposed to those that implicate the validity of the conviction. See Dunlap, 301 F.3d at 875-876 (Rule 60(b) could be used if petitioner alleged that court’s dismissal of first habeas proceeding was based upon state’s fraudulent representations); Banks v. United States, 167 F.3d 1082, 1083-84 (7th Cir. 1999) (alleged failure of petitioner’s counsel to consult with petitioner before filing § 2255 petition undermined legitimacy of federal habeas proceeding and could be raised under Rule 60(b)). Accord Abdur’Rahman v. Bell, 537 U.S. 88, 94-95, (2002) (Stevens, J., dissenting from dismissal of certiorari) (Rule 60(b) motion should be treated as second or successive petition only when it challenges constitutionality of state court criminal conviction and not when it focuses on integrity of proceeding in district court). In this case, petitioner contends that this court should take another look at his habeas petition because the Supreme Court recently announced a new constitutional rule in Crawford that petitioner contends is favorable to him. This claim goes directly to the constitutionality of his custody and not to any procedural irregularity that occurred in this court during the pendency of his 1999 federal habeas petition. Accordingly, petitioner’s claim cannot be considered in the context of a motion under Rule 60(b); rather, he must present it in a successive habeas petition. Dunlap, 301 F.3d at 876 (Rule 60(b)

cannot be used to seek relief on basis that movant's conviction was based on mistake of law). In order to file such a petition, petitioner must first obtain permission from the court of appeals as provided by 28 U.S.C. § 2244(b)(3)(A).

ORDER

IT IS ORDERED that the motion of petitioner Paschall Sanders III to reopen/review the denial of his habeas petition is DENIED as improperly filed under Fed. R. Civ. P. 60.

Dated this 27th day of September, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge