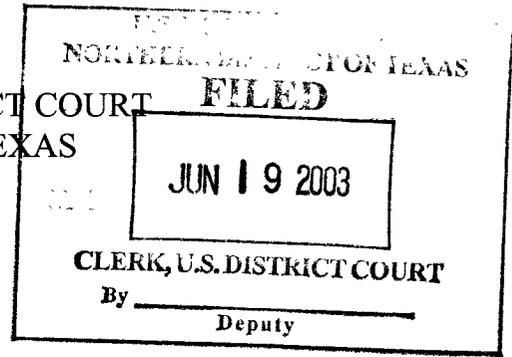


ORIGINAL

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION



NORMA McCORVEY,

Plaintiff,

v.

BILL HILL, DALLAS COUNTY  
DISTRICT ATTORNEY,

Defendant.

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Civil Action No. 3:03-CV-1340-N  
(formerly 3-3690-B and 3-3691-C)

**ORDER DENYING RULE 60(B) MOTION**

Before the Court is Plaintiff Norma McCorvey's Rule 60(b) Motion for Relief from Judgment. The Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), ended this case over thirty years ago. McCorvey wants to reopen that judgment for this Court to conduct a wide-ranging inquiry into whether *Roe* is still good law in view of more recent Supreme Court decisions and the current state of scientific knowledge. The first order of business, however, is to decide whether Federal Rule of Civil Procedure 60(b) permits reopening that thirty year old judgment.

Rule 60(b) provides only an extraordinary, limited exception to the finality of judgments, and a motion under Rule 60(b) must therefore be brought within a "reasonable time" after the judgment. Court opinions measure a "reasonable time" under Rule 60(b) in weeks or months, not in decades. Thirty years is manifestly not a reasonable time. The Court therefore denies McCorvey's motion for relief from judgment without considering the

substance of her criticisms of *Roe*; that must wait for a different party before another court in a proper case.

### **I. THE RULE 60(B) MOTION DOES NOT REQUIRE A THREE-JUDGE COURT**

McCorvey asks this Court to reconvene a three-judge court to consider her Rule 60(b) motion. Because the Court finds that a single judge can entertain a post-judgment motion such as this, the Court declines to request the Chief Judge of the Fifth Circuit to reconstitute the three-judge court.

A three-judge court originally heard this case, pursuant to 28 U.S.C. § 2281 (1970). *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970) (Goldberg, Hughes & Taylor, JJ.). The Act of August 12, 1976 repealed section 2281. Pub. L. No. 94-381, 90 Stat. 1119. That Act provides: “This Act shall not apply to any action commenced on or before the date of enactment.” *Id.* § 7. Because McCorvey originally filed this case before August 12, 1976, it remains subject to the otherwise-repealed section 2281.<sup>1</sup>

The simple proposition that this case is subject to section 2281 does not answer the question of whether a single judge can resolve the post-judgment Rule 60(b) motion. Section 2281 invokes the procedure of section 2284. Section 2284 was likewise amended by the Act

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<sup>1</sup>That section provides: “An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.” 28 U.S.C. § 2281 (1970).

of August 12, 1976, and the amendments to section 2284 likewise do not apply to this case.

The pre-amendment version of section 2284 provides in part:

Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before the final hearing.

28 U.S.C. § 2284(5) (1970).<sup>2</sup> Because the disposition of a Rule 60(b) motion constitutes an “order[] required or permitted by the rules of civil procedure” and is not excluded by the second sentence of section 2284,<sup>3</sup> a single judge may decide a Rule 60(b) motion.

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<sup>2</sup>That language was substantially carried forward by the Act of August 12, 1976 into the current version of section 2284: “A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.” 28 U.S.C. § 2284(b)(3) (2001).

<sup>3</sup>The issue in McCorvey’s Rule 60(b) motion presently before the Court is simply whether the prior judgment should be reopened. It does not address final relief on the merits and is not a “motion to . . . enter a . . . final judgment” prohibited to a single judge under former section 2284(5). It merely determines whether the extant judgment should be reopened. If the judgment in this case were reopened, the ensuing question of what relief should be granted on the merits might belong before a three-judge court. But the preliminary question of whether to reopen the judgment is not within the bar of the second sentence of former section 2284(5).

This result flowing from the text of the statute finds support in both case law and Congressional policy. Case law under section 2284 permits a single judge to handle not only preliminary, threshold matters,<sup>4</sup> but also post-judgment matters<sup>5</sup> in three-judge court cases. In a certain sense, a Rule 60(b) motion fits both categories, because while it is post-judgment, it is also a threshold question of whether there should be any further proceedings on the merits. This result is also consistent with the Congressional policy “to allocate as many functions as possible to a single district judge, consistent with the statutory purpose.” S. REP. NO. 94-204, at 13 (1975), *reprinted in* 1976 U.S.C.C.A.N. 1988, 2001 (quoting Note, *The Three-Judge District Court: Scope and Procedure Under Section 2281*, 77 HARV. L. REV. 299, 306 (1963)).<sup>6</sup> *See also* *Bailey v. Patterson*, 369 U.S. 31, 33 (1962) (“three-judge requirement is a technical one to be narrowly construed”). Accordingly, the Court declines

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<sup>4</sup>*See* 17 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4235, at 614-16 & nn.41, 43 (2d ed. 1988) (citing cases where single judge dismissed matters for: insubstantial constitutional question, lack of standing, lack of subject matter jurisdiction, lack of amount in controversy, failure to join indispensable parties, failure to state a claim, and inappropriateness of equitable relief) [hereinafter WRIGHT & MILLER].

<sup>5</sup>*Id.* § 4235, at 624 n.69 (citing cases where single judge acted post-judgment to: assess damages, rule on writ of assistance in aid of judgment, establish time limit for compliance, hear civil contempt proceedings, tax costs, and award attorneys’ fees).

<sup>6</sup>This citation is to the legislative history of the Act of August 12, 1976. Because that Act substantially brought forward the language of section 2284(5), the expression of Congressional intent would appear to be applicable to the predecessor statute as well.

to request the Chief Judge of the Fifth Circuit to reconvene the three-judge court to consider McCorvey's Rule 60(b) motion.<sup>7</sup>

## II. MCCORVEY DID NOT BRING HER MOTION WITHIN A REASONABLE TIME

McCorvey moves the Court for relief from judgment under Rule 60(b)(5) & (6). Rule 60(b) provides, in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (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.

FED. R. CIV. P. 60(b) (emphasis added). Because the Court finds the lapse of thirty years to exceed a reasonable time, the Court denies McCorvey's motion.

“As a general rule, the desirability of orderliness and predictability in the judicial process speaks for caution in the reopening of judgments.” *Allen v. Jacobson*, 82 F.R.D. 355, 358 (N.D. Tex. 1979) (citing *Fackelman v. Bell*, 564 F.2d 734, 735 (5th Cir. 1977)). Courts “have administered Rule 60(b) with a scrupulous regard for the aims of finality” and impose

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<sup>7</sup>McCorvey is not entitled to review of this Order by a three-judge court either. The last sentence of pre-amendment section 2284(5) permits review of a single judge's decisions by the full three-judge court “at any time *before* the final hearing.” 28 U.S.C. § 2284(5) (1970) (emphasis added). It is now 33 years after the final hearing by the three-judge court, so the statute does not permit review by a three-judge court; any review lies with the Court of Appeals. *Accord Hamilton v. Nakai*, 453 F.2d 152 (9th Cir. 1971), *cert. denied*, 406 U.S. 945 (1972) (single judge could consider post-judgment application for writ of assistance, and denial of that relief falls within appellate jurisdiction of court of appeals).

“a requirement of exceptional or extraordinary circumstances [in] motions under Rule 60(b)(6).” 11 WRIGHT & MILLER § 2857, at 259, 260. With that general view of Rule 60(b) in mind, the Court will address whether McCorvey’s motion was filed within a reasonable time.

In *Travelers Ins. Co. v. Liljeberg Enterprises, Inc.*, 38 F.3d 1404, 1410 (5th Cir. 1994), the Court observed:

[A] 60(b)(6) motion is not subject to the one year limitation imposed upon subparts (1) through (3). Instead, a party seeking 60(b)(6) relief must file the motion within a “reasonable time,” [*Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 (1988)], which depends upon the particular facts and circumstances of the case. *First RepublicBank Fort Worth v. Norglass, Inc.*, 958 F.2d 117, 119 (5th Cir. 1992); *Ashford v. Stewart*, 657 F.2d 1053, 1055 (9th Cir. 1981) (“What constitutes ‘reasonable time’ depends on the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties.”).

In considering those principles,<sup>8</sup> courts have found time ranges of weeks to months to even a few years to be within a reasonable time, *see* WRIGHT & MILLER § 2866, at 385 n.8 (collecting cases); courts have also found those same time ranges *not* to be within a reasonable time. *See id.* § 2866, at 386 n.9 (collecting cases). This Court has not found *any* case in which a period *remotely* close to thirty years was considered a “reasonable time” under Rule 60(b). Accordingly, the Court finds that McCorvey’s thirty year delay is of such great magnitude that her motion was not made within a reasonable time due to the length of time alone.

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<sup>8</sup>Those principles apply with equal force to timeliness under Rule 60(b)(5).

Alternatively, and additionally, the Court will consider whether thirty years constitutes a reasonable time in view of “the particular facts and circumstances of the case.” That examination is made more difficult because McCorvey does not discuss timeliness anywhere in her twenty-two page motion or its fifty-five page supporting brief.<sup>9</sup> As the movant, it is incumbent on McCorvey to plead and prove that her motion was filed within a reasonable time of the judgment. *See Travelers*, 38 F.3d at 1409 n.8 (“[I]n making the 60(b)(6) motions, and concerning the key issue of timeliness, the Liljebergs were obviously required, but failed, to support their motions with affidavits or other sworn proof that they did not know of [the factual basis for their motion] prior to July 23, 1993.”). McCorvey likewise failed to carry her burden in that regard. Based on the Court’s review of McCorvey’s motion and supporting documentation, and taking into account the facts of this case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and prejudice to other parties, the Court finds that McCorvey’s Rule 60(b) motion, thirty years after the fact, was not made within a reasonable time.<sup>10</sup>

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<sup>9</sup>Although McCorvey does discuss “new” evidence at length, that is in the context of the merits of her Rule 60(b) motion. In that connection, she argues only that the “new” evidence was not available in 1973. The current state of the record indicates that with reasonable diligence, the additional evidence she tenders could have been presented long before 2003.

<sup>10</sup>The Court has decided this motion without an evidentiary hearing for two reasons. First an evidentiary hearing would not aid the Court’s determination. No evidence at the hearing will contest that: 2003 - 1973 = 30. Moreover, McCorvey does not request an evidentiary hearing on the issue of the timeliness of her motion, but only on the substantive bases for the motion. *See Wilson v. Johns-Manville Sales Corp.*, 873 F.2d 869, 873 (5th Cir. 1989)

CONCLUSION

Whatever else it may or may not have done, the Supreme Court's *Roe* decision thirty years ago ended *this* lawsuit between *these* parties. Whether or not the Supreme Court was infallible, its *Roe* decision was certainly final in this litigation. It is simply too late now, thirty years after the fact, for McCorvey to revisit that judgment. Other parties in other cases may be able to reexamine those issues, but not McCorvey in this case. Accordingly, McCorvey's Rule 60 Motion for Relief from Judgment is hereby DENIED.

SIGNED this 19th day of June, 2003.

  
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David C. Godbey  
United States District Judge

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("Considering the extensive pleadings and the failure of the plaintiffs to adequately indicate how a hearing would have aided the court's determination, we find that the district court did not abuse its discretion in not holding a hearing."). Secondly, timeliness is not the only infirmity in McCorvey's motion. Before considering McCorvey's argument that *Roe* has been supplanted by law and science (a matter hardly within *this* Court's purview) or whether Rule 60(b)(5) or (6) would afford relief from the judgment (a question problematic on its own procedural merits), the Court would need to address numerous other threshold issues implicitly raised by her motion, including but not limited to: standing, mootness, judicial estoppel, stare decisis, and the binding nature of Supreme Court precedent upon this Court. Given that this motion is plainly untimely, to delay resolution until after an evidentiary hearing would needlessly require the Court and the litigants to devote significant resources to these additional serious threshold questions.