No. 17-2227

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTHONY CIAVONE,

Petitioner-Appellant,

v.

CONNIE HORTON, Warden,

Respondent-Appellee.

ORDER

Before: BOGGS, CLAY, and KETHLEDGE, Circuit Judges.

Anthony Ciavone, a pro se Michigan prisoner, appeals the order of the district court denying his motion for relief from judgment filed pursuant to Federal Rule of Civil Procedure 60(b) and his motion for recusal under 28 U.S.C. § 455. Ciavone sought relief from a January 31, 2014, judgment denying his 28 U.S.C. § 2254 habeas corpus petition, and a June 19, 2015, judgment denying his § 2254 habeas petition after remand. He has filed an application for a certificate of appealability ("COA"), *see* Fed. R. App. P. 22(b)(1), and a motion to proceed in forma pauperis on appeal, *see* Fed. R. App. P. 24(a)(5). In addition, he has filed several motions to remand to add additional claims, to expand the record, for an evidentiary hearing, and to hold the case in abeyance.

In 2004, in front of separate juries, Ciavone was tried with a co-defendant for the robbery and murder of an eighty-five-year-old woman. No physical evidence linked Ciavone to the murder, but he was implicated by three witnesses. Ciavone was found guilty of first-degree murder and felony murder, and was sentenced to a term of life imprisonment for each conviction.

Ciavone appealed through appointed counsel, but later moved to discharge counsel and remand the case for a hearing in connection with a motion for a new trial. The Michigan Court of Appeals granted Ciavone's motion to discharge appellate counsel and his motion to remand. Following an evidentiary hearing, the trial court denied his motion for a new trial.

The Michigan Court of Appeals thereafter affirmed Ciavone's convictions, but vacated one of his two life sentences on the basis of double jeopardy and remanded for an amendment to the order of conviction. *People v. Ciavone*, No. 256187, 2007 WL 4322168 (Mich. Ct. App. Dec. 11, 2007) (per curiam). Ciavone filed a motion for reconsideration, claiming that appellate counsel was ineffective and seeking to expand the remand with a claim that 36th District Court Judge Theodore C. Wallace had fraudulently signed an order stating that Ciavone either had waived a competency evaluation or had been found competent after a hearing—a hearing that, according to Ciavone, never occurred. The appellate court denied his motion. The Michigan Supreme Court denied leave to appeal. *People v. Ciavone*, 764 N.W.2d 254 (Mich. 2009) (mem.). Ciavone then filed two unsuccessful motions for relief from judgment.

In October 2011, Ciavone filed his first habeas petition, raising five claims, including that his right to due process was violated in connection with the state court's failure to have him evaluated for competency and that counsel was ineffective. The district court directed the respondent to produce a transcript of Ciavone's competency hearing, if available. After an investigation, the respondent informed the court that no records were located.

The district court thereafter denied Ciavone's habeas petition. Because the record was unclear as to whether a competency hearing was held, however, the court certified that claim for appeal. We denied Ciavone's application for an expanded COA. *Ciavone v. Woods*, No. 14-1698 (6th Cir. Dec. 8, 2014) (order).

In December 2014, the respondent filed a motion to vacate and remand in this court, explaining that the transcript had now been located. We remanded the action for reconsideration of Ciavone's competency claim in light of the transcript. *Ciavone*, No. 14-1698 (6th Cir. Mar. 25, 2015) (order).

On remand, Ciavone filed nine motions asserting that the new transcript was a forgery. After consideration of the transcript and a letter from the court reporter, the district court concluded that there was no plausible evidence to suggest that the transcript was fraudulent. With the benefit of that transcript, the district court concluded that Ciavone's due-process claim

lacked merit. The district court denied Ciavone's habeas petition but, once again, granted a COA on Ciavone's due-process competency claim. We certified two additional issues for appeal: (1) whether the district court abused its discretion when it considered the December 17, 2003, competency-hearing transcript, in violation of *Cullen v. Pinholster*, 563 U.S. 170 (2011), and (2) if the transcript was properly considered under *Pinholster*, whether the district court abused its discretion by ignoring evidence that the competency hearing transcript was not authentic. After consideration, we concluded that: (1) the district court did not err in considering the transcript; (2) the district court did not abuse its discretion by concluding that the transcript was authentic; (3) the transcript disposed of most of Ciavone's underlying habeas claims; and (4) the remaining claims lacked merit. Accordingly, we affirmed the district court's denial of Ciavone's § 2254 petition. *Ciavone v. Woods*, No. 15-2093, 2016 WL 4174427 (6th Cir. Aug. 8, 2016), *cert. denied*, 137 S. Ct. 2127 (2017).

In 2016, we denied Ciavone permission to file a second or successive habeas petition to raise claims that: (1) his right to due process was violated when he was not present at trial; (2) trial counsel committed fraud on the court during the competency hearing; and (3) his right to due process was violated where he was denied the transcript of the competency hearing when he ordered it. In 2017, we denied him permission to file another successive habeas petition in which he sought to present additional evidence that counsel was ineffective.

On March 2, 2017, Ciavone filed a Rule 60(b) motion for relief from judgment in the district court, and later filed a motion to supplement his motion. He argued that he was entitled to relief from the district court's original denial of his habeas petition in 2014 and the denial after remand in 2015. In particular, he argued that he was entitled to relief from judgment: (1) under Rule 60(b)(3) because of fraud upon the court due to the fabricated competency-hearing transcript and statements counsel made at the hearing on his motion for a new trial; (2) under Rule 60(b)(4) because the trial court's failure to evaluate him for competency resulted in the absence of personal jurisdiction over him; and (3) under Rule 60(b)(6) because the district court never reviewed his new evidence of actual innocence because it incorrectly determined that

appellate counsel was not ineffective for failing to pursue a claim that he was framed. He also filed a motion to recuse and disqualify the district court judge.

The district court determined first that recusal was not warranted. The district court further concluded that the arguments presented in Ciavone's Rule 60(b) motion and supplement were an attempt to relitigate the merits of his already rejected claims, with no additional evidence or support. The district court denied his motion for relief from judgment and denied a COA.

In his COA application, Ciavone requests that this court certify his "jurisdictional defect and actual innocence claims." He argues that the trial court violated an order to have him evaluated for competency and that counsel "fraudulently concealed his newly presented evidence that demonstrate[d] his actual innocence." In one of his motions to remand, he requests that this court additionally certify his claims that newly discovered evidence proves that the parties fabricated the competency hearing transcript and that the district court aided the respondent's attorney in the fabrication of the transcript.

To obtain a COA, a petitioner must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). "[A] COA does not require a showing that the appeal will succeed," *id.* at 337; it is sufficient for a petitioner to demonstrate that "the issues presented are adequate to deserve encouragement to proceed further." *Id.* at 327.

Rule 60(b) allows a party to seek relief from a district court's final judgment or order based on: (1) mistake, (2) newly discovered evidence, (3) fraud, (4) void judgment, (5) satisfied, discharged, or released judgment, or (6) any other reason that justifies relief. *See* Fed. R. Civ. P. 60(b). Reasonable jurists would not debate that Ciavone failed to demonstrate he was entitled to relief from judgment for any of these reasons.

To obtain relief under Rule 60(b)(3), a movant must show by clear and convincing evidence that the district court's judgment was obtained by fraud, misrepresentation, or misconduct by an opposing party. *See Carter v. Anderson,* 585 F.3d 1007, 1011-12 (6th Cir.

2009). Although Ciavone believes that his attorney presented false testimony and that multiple parties conspired to fabricate the transcript of a hearing where he waived a competency evaluation, his personal beliefs do not constitute clear and convincing evidence that misconduct occurred. This is especially true when the federal courts have considered these issues on multiple occasions and found no impropriety.

Ciavone's claim that he was entitled to relief from judgment under Rule 60(b)(4) as the result of a lack of jurisdiction also does not deserve encouragement to proceed further. "Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010). Despite Ciavone's claim to the contrary, a hearing was held at which he waived his right to a competency evaluation, a fact that has been thoroughly researched and discussed. The trial court did not therefore violate any order to have him evaluated for competency and jurisdiction was not lacking.

Nor would reasonable jurists debate that Ciavone was not entitled to relief under Rule 60(b)(6), which is properly invoked in "unusual and extreme situations where principles of equity *mandate* relief." *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990). Although Ciavone argues that the district court never reviewed his new evidence of actual innocence because it incorrectly determined that appellate counsel was not ineffective for failing to pursue a claim that he was framed, he presents no exceptional or extraordinary circumstances in support of his claim. This argument—like his others—is premised on his disagreement with the determinations of the district court that appellate counsel was not ineffective and of this court that a COA was not warranted on the claim.

Although Ciavone characterizes his Rule 60(b) motion as alleging a lack of jurisdiction, fraud upon the court, and the district court's failure to consider all of his evidence, it in substance merely challenges the prior rulings of the federal courts. To the extent that his motion attacks the

resolution of his former claims on their merits, it should have been considered a second or successive § 2254 motion and transferred to this court.

To obtain this court's permission to file a second or successive petition under 28 U.S.C. § 2254 raising a new claim, a petitioner must make a prima facie showing that his application presents a claim that "relies on a new rule of constitutional law, made retroactive . . . by the Supreme Court" or presents facts that "could not have been discovered previously" and would establish the petitioner's actual innocence by clear and convincing evidence. 28 U.S.C. § 2244(b)(2). Ciavone has not met either of these requirements, but has only repeated arguments that have been rejected by this court. Such claims are subject to dismissal pursuant to 28 U.S.C. § 2244(b)(1) and *Charles v. Chandler*, 180 F.3d 753, 758 (6th Cir. 1999) (per curiam). He therefore is not entitled to file a successive § 2254 petition.

Finally, Ciavone claims that Judge Battani should have recused herself in the § 2254 proceeding. He raised this claim in both his Rule 60(b) motion and in a separate motion for disqualification. The district court properly considered his recusal argument. And the appeal from the district court's denial of Ciavone's motion for recusal is properly before this court as a final, appealable order. *See Kemp v. United States*, 52 F. App'x 731, 732–33 (6th Cir. 2002).

This court reviews the district court's denial of a motion for recusal for abuse of discretion. *See Decker v. GE Healthcare Inc.*, 770 F.3d 378, 388 (6th Cir. 2014). Under 28 U.S.C. § 455(a), a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." "A bias sufficient to justify recusal must be a personal bias 'as distinguished from a judicial one,' arising 'out of the judge's background and association' and not from the 'judge's view of the law.'" *United States v. Story*, 716 F.2d 1088, 1090 (6th Cir. 1983) (quoting *Oliver v. Mich. State Bd. of Educ.*, 508 F.2d 178, 180 (6th Cir. 1974)). Recusal is required "if a reasonable, objective person, knowing all of the circumstances, would have questioned the judge's impartiality." *Hughes v. United States*, 899 F.2d 1495, 1501 (6th Cir. 1990).

Ciavone alleged that Judge Battani conspired with the prosecution to authenticate the fabricated competency hearing transcript and could not adjudicate his case fairly because he had filed a judicial misconduct action against her. The only argument he offered in support of his motion for recusal is that the court accepted the authenticity of the disputed transcript despite his protestations, and that his filing of a complaint against the court with the Office of the Circuit Executive rendered the district court incapable of fairly and impartially ruling on his motions. The Supreme Court has held that under § 455(a), opinions formed by judges based on facts introduced or events occurring "in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994). Ciavone's baseless allegations show nothing of the kind. And if we were to hold that the filing of a complaint against a court is all it takes to disqualify a judge, it would create an automatic mechanism for dissatisfied litigants to judge-shop. *See Sullivan v. Conway*, 157 F.3d 1092, 1096 (7th Cir. 1998) ("[I]t is improper for a lawyer or litigant . . . to *create* the ground on which he seeks the recusal of the judge assigned to his case. That is arrant judge-shopping." (emphasis in original)).

In sum, Ciavone's bare allegation that the judge was biased is insufficient to support a request for recusal, and the district court did not abuse its discretion in denying it.

Ciavone's application for a COA and construed motion for leave to file a second or successive petition are **DENIED**. His motion to proceed in forma pauperis is **DENIED** as moot. His remaining pending motions are also **DENIED**. We **AFFIRM** the district court's denial of Ciavone's recusal motion.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 17-2227

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTHONY CIAVONE, Petitioner-Appellant, v. CONNIE HORTON, WARDEN, Respondent-Appellee.	)	ORDER

BEFORE: BOGGS, CLAY, and KETHLEDGE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANTHONY CIAVONE,

Petitioner,

Civil No. 2:11-cv-14641
Honorable Marianne O. Battani

THOMAS MACKIE,

Respondent.
_____/

ORDER DENYING CERTIFICATE OF APPEALABILITY (Dkt. 103), AND DENYING PERMISSION TO APPEAL IN FORMA PAUPERIS (Dkt. 105)

Petitioner was convicted of first-degree murder in the Wayne Circuit Court for the 1999 robbery and murder of an eighty-five-year-old woman, and he was sentenced to a term of life imprisonment. The Court denied Petitioner's habeas petition in 2014 (Dkt. 44), and again in 2015 (Dkt 84). The Sixth Circuit rejected Petitioner's appeal (Dkt. 91), and his motions to file a successive

habeas petitions. (Dkt. 96 and 102). Petitioner filed a motion for relief from judgment, asserting in essence that the Court accepted fraudulent transcripts and engaging in misconduct in denying his petition. The Court denied the motion on September 14, 2017. (Dkt. 101). Petitioner now seeks permission to once again appeal to the Court of Appeals and permission to appeal in forma pauperis.

A habeas petitioner is required to obtain a certificate of appealability before he can appeal the denial of a motion for relief from judgment which seeks to challenge the judgment in a habeas case. *See United States v. Hardin*, 481 F. 3d 924, 926 (6th Cir. 2007). To obtain a certificate of appealability, a prisoner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). An applicant must show that "reasonable jurists could debate that the petition

could have been resolved differently or that the claims raised deserved further review." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

Reasonable jurists would not conclude that the issue raised in Petitioner's motion for relief from judgment deserves further review. As explained in the order denying that motion, Petitioner's arguments that this Court erroneously accepted a forged transcript and engaged in improper conduct are completely without merit. Therefore, a certificate of appealability is **DENIED**.

The standard for obtaining IFP status is less burdensome. A court may grant IFP status if the Court finds that an appeal is taken in good faith. See 28 U.S.C. § 1915(a)(3); Fed. R. App.24 (a); *Foster v. Ludwick*, 208 F. Supp. 2d 750, 765 (E.D. Mich. 2002). The Court finds that Petitioner's appeal cannot be undertaken in good faith because his claims are frivolous, and it will **DENY** his request for leave to appeal in forma pauperis.

SO ORDERED.

Date: December 7, 2017

s/Marianne O. Battani
MARIANNE O. BATTANI
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Order was served upon counsel of record via the Court's ECF System to their respective email addresses or First Class U.S. mail to the non-ECF participants on December 7, 2017.

s/ Kay Doaks
Case Manager

Additional material from this filing is available in the Clerk's Office.