In the United States Supreme Court

Dwayne Stoutamire,

Case No._____

v.

Honor Justice Kagan

Christopher LaRose,

From the United States Court
of Appeals for the Sixth Circuit

Case no. 18-3216

Request for a Certificate of Appealabilty

Before I proceed I ask the court to consider the fact that I am Pro Se litigant, so I ask the court to be lenient in its consideration my motion and construe my arguments in their best light. See **Price v. Johnson, 334 U.S. 266, 292 (1948)**

Memorandum in Support

I come before this Honorable court seeking a Certificate of Appealability (COA). This court has stated in, **Hohn v. United States, 524 U.S. 236 (1998)**, that it has jurisdiction to consider the denial of a COA by a lower court.

"we hold this court has jurisdiction under 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a panel of a court of appeals." **Id. at page 253**

I come before the court seeking a COA from the United States Court of Appeals for the Sixth Circuit failure to follow the instruction from this court in, **Miller-El v. Cockrell, 537 U.S. U.S. 322 (2003).**

The court of appeals first failed to recognize that the only issue before the court during a COA inquiry was the debatability of the "district courts" ruling or if that issue before the court deserves further encouragement. **Id. U.S. at page 348**. Looking at the court of appeals denial of my COA, it does not seem to consider any of the district courts reasoning to deny my civil rule 60 motion.

The district court denied my civil rule 60 motion on the position that it believed that it has already ruled on my argument of actual innocence and even the evidence in a number of prior decisions, and all that I was doing was rehashing the same arguments.

"Stoutamire also asks this court to excuse the default of his IATC claim based on actual innocence. But his claim merely rehashes the same arguments and evidence already presented and rejected several times (see Doc. 40 at 16-17; Doc. 46 at 5 and Doc. 74 at 3-5." **(Appendix# A at page 5)**

But the court of appeals does not even attempt to determine if the district courts decision was debatable, but instead ruled to deny my COA on a alternative basis that was not even relied on by the district court. The court of appeals denied my request for a COA on the position that the law of the case doctrine prevents consideration of my actual innocence claim **(appendix# B at page 3)**. The district court does not even rely on this basis to deny my motion for a COA. The court of appeals decision seems more of a merits determination rather then

COA inquiry. This court has stated, when a court sidesteps the COA inquiry by determining the merits of the claim and then basis its denial of a COA on that basis it has in essence determined the appeal without jurisdiction.

When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." **Miller-el, supra,537 U.S. at page 336-337**

Another basis the court of appeals decided the denial of my Civil Rule 60 motion was based off of merits determination rather then a COA inquiry. The district court found that it already has ruled on this argument and evidence concerning my actual innocence **(appendix# A at page 5)**, the court of appeals found that there was in fact four documents that the district court has not ever considered **(appendix# B at page 4- "Stoutamire did not previously present documents (5) through (8)")**. Instead of finding that the district courts decision that it already considered this evidence in support of my actual innocence argument presented in my civil rule 60 motion was debatable, the court of appeals went on to rule on the evidence and found that I did not show a actual innocence claim and found that was the basis to deny me a COA.

This ruling violates the Supreme Courts ruling that the courts can not adjudicate the actual merits first and then rely on that basis to deny a COA because it is in essence deciding an appeal without jurisdiction. The other basis the court of appeals disregarded this courts ruling is when it failed to consider this courts ruling when it stated that a petitioner does not have to show that they will succeed on the merits of the claim in order to obtain a COA.

"A COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in Slack would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with 2253 that a COA will issue in some instances where there is no certainty of ultimate relief...

We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." **Miller-El, supra, 537 U.S. at pages 337-338**

So the court of appeals failed to follow this courts instruction when it considered my request for a COA. The court of appeals failed to determine if the district courts reasoning was debatable and instead denied my COA on positions that was never considered by the district court. The court of appeals relied on issues that I did not know that I would have to defend against before the court of appeals. The court of appeals relied on issues that I did not even have a opportunity to defend against until my motion for rehearing.

Another basis the court can find that the court of appeals made a merits determination rather then a COA inquiry is when the court of appeals found that the district courts ruling that I did not show "extraordinary circumstances" warranting relief under Rule 60, that jurists could not debate the district courts conclusion **(appendix# B at page 4).** But this court stated in, **Buck v. Davis, 137 S.Ct. 759 (2017)**, that consideration of if a person presented extraordinary circumstances to warrant relief is something that should not be considered during a COA inquiry and was a ruling on the merits rather then a COA determination.

I ask the court to grant review of my motion because the court of appeals relied on alternative grounds that was never considered by the district court.

The district courts decision was debatable because the district court found that it has already considered this argument and evidence of actual innocence that was now before the courts in my motion for a civil rule 60 motion. **(Appendix# A at page 5).**

But this issue is debatable because the places cited by the district court does not acknowledge the evidence that is now before the court nor the facts that surrounding my case.

In the rulings relied by the district court it only states that the court has already ruled on this evidence, but the court will see, when it reviews the rulings in the record relied on by the district court- the district never made a ruling under the actual innocence standard of review. The United States Supreme Court stated when a court makes a actual innocence inquiry that court must consider all of the evidence, old and new ("Schlup makes plain that the habeas court must consider all the evidence, old and new,.." **House v. Bell, 547 U.S. 518, 538 (2006)**) and that the court must make its decision based off of a fully developed record ("our review in this case addresses the merits of the schlup inquiry based on a fully developed record,..." **House, supra, 547 U.S. at page 537)**. The court will not find any ruling concerning the evidence that is attached to my civil rule 60 motion which has my actual innocence argument incorporated within it. The court can search the record and it will not find any ruling concerning my actual innocence and "**any**" of the evidence now before the court.

What also shows that the district courts decision, that it believed that it has already reviewed this evidence and argument is debatable. The sixth circuit seen that there was in fact other documents that the district has never had before him **(appendix# B at page 4 –** "Stoutamire did not previously present documents (5) through (8)"**)**,it shows that that the district courts ruling is debatable because there was in fact evidence before the district court that it has never seen, as the court of appeals found and instead went on to makes its own ruling on the evidence that was not considered by the district court.

So I ask that the court to grant me a COA due to these facts because the district court has never considered the argument of my innocence that I have now raised before the court.

If the court of appeals decision is also at issue, the court of appeals decision is also debatable.

Does the law of the case doctrine apply to Civil Rule 60 motion?

The court of appeals denied consideration of a number of documents that was submitted in behalf of my actual innocence claim under the doctrine of law of the case **(Appendix# B at page 3).**

It is debatable that this doctrine applies to my claim, it is debatable even if the district court has ever considered any of these pieces of evidence before. The Supreme Court has stated before the law of the case doctrine can apply the courts must have reviewed the applicable law on the merits.

"The law of the case doctrine turns on whether a court previously decided upon a rule of law." **Christian v. Colt Indus. Operating corp., 486 U.S. 800, 817 (1988)**

As I pointed out earlier, looking at the record before the court it will not see a ruling where the district court has reviewed the old and new evidence under a developed record if the jury could still find me guilty beyond a reasonable doubt, concerning any of the evidence that is now before the court.

I also ask the court to find that this is a issue that is debatable before the court because civil rule 60 is designed to reopen final judgments. If the law of the doctrine could be applied to a civil rule motion it would make that rule unworkable. Civil rule 60 motions is used to re-open the final judgment so the court may consider its prior decision that effect the procedures

before the district court. There is a number of equitable issues that should overpower the application of the law of the case doctrine.

The language of civil 60(b) states that a petitioner may seek relief from a prior judgment.

"Habeas corpus is governed by equitable principles." **Munaf v. Geren, 553 U.S. 674, 693 (2008)**

"habeas corpus is, at its core, an equitable remedy... for this reason, the court has long instructed that statutes and rules governing habeas petitions must be applied with an eye towards the "ends of justice."" **Rivas v. Fischer, 687 f.3d 514, 540 (2d cir. 2012)**

Equitable principles have traditionally governed the substantive law of habeas corpus, and federal courts will not construe a statute to displace courts' traditional equitable authority absent the clearest command." **Lee v. Lambert, 653 f.3d 929, 933 (9th cir. 2011)(en banc)**

The language of civil rule 60(b) states that it is used to seek relief and reopen a prior judgment.

"as a final judgment it would be subject to a motion under Fed. R. Civ. P. 60(b)." **Prop-jets, inc., v. Chandler, 575 f.2d 1322, 1325 (10th cir. 1978)**

"all final judgments, orders, and decrees are subject to the safety valve provided by rule 60(b)." **Balark v. City of Chicago, 81 f.3d 658, 663 (7th cir. 1996)**

"the federal rules of civil procedure provide various methods for ***reforming judgments***." **United States v. Kellogg, 12 f.3d 497, 503 (5th cir. 1994)**

"Rule 60(b) has an unquestionably valid role to play in habeas cases." **Gonzalez v. Crosby, 545 U.S. 524, 534 (2005)**

"federal rule of civil procedure 60(b)(6), ***which permits a court to relieve a party from the effect of a final judgment.***" **Id. U.S. at 528**

"the whole purpose of Rule 60(b) is to make an exception to finality." **Buck v. Davis, 137 S.Ct. 759 ,799 (2017)**

"Rule 60(b) however, provides an exception to finality,..." **United States Student Aid Funds, inc,. v. Espinosa, 559 U.S. 260, 269 (2010)**

"Rule 60(b), which dates back to the earliest promulgation of the federal rules, reflects and confirms the courts' own inherent and discretionary power, firmly established in English practice long before the foundation of our republic,... to set aside judgment whose enforcement would work inequity....

Rule 60(b) is ***inherently equitable in nature***, and empowers district courts to ***"revise judgments"*** when necessary to ensure their integrity." **Tanner v. Yukins, 776 f.3d 434, 438- 439 (6th cir. 2015)**

"furthermore, 60(b) strongly indicates on its face that courts no longer are to be hemmed in by the uncertain boundaries of these and other common law remedial tools. In simple English, the language of the "other reason" clause, for all reasons except the five particularly specified,... vest power in courts adequate to enable them to vacate judgments whenever such

action is appropriate to accomplish justice." **Klapproth v. United States, 335 U.S. 601, 614-615 (1948)**

"federal rules of civil procedure 60(b) provides a procedure whereby, in appropriate cases, ... ***a party may be relieved of a final judgment***...

In particular, rule 60(b), upon which respondent relies, ***grants federal courts broad authority to relieve a party from a final judgment " upon such terms as are just,"***... **Lil jeberg v. Health Services Acquistion corp., 108 S.Ct. 2194, 2204 (1988)**

"The rule concludes with a catchall category-subdivision (b)(6)- providing that a court may "lift a judgment" for any other reason that justifies relief." **Buck, supra, 137 S.Ct. at 772**

"under Rule 60(b)(6), which permits district courts to reopen otherwise final judgments only in "extraordinary circumstances." **Buck,supra, 137 S.Ct. at page 782 (Justice Thomas dissenting)**

"Rule 60(b)(6) authorizes a district court... to relieve a party from a final judgment for any other reason that justifies relief. While rule 60(b)(6) is commonly referred to ***as a grand reservoir of equitable power to do justice***, the rule is only invoked in extraordinary circumstances." **Hernandez v. Thaler, 630 f.3d 420, 429 (5th cir. 2011)**

"the purpose of a Rule 60(b) motion is to allow a district court to reconsider its judgment..." Abdur'Rahman v, Bell, 392 f.3d 174, 179 (6th cir. 2004)

"it is well established that a district court may "vacate" a previously entered judgment disposing of a habeas petition." **D'Ambrosio v. Bagley, 688 f.supp. 2d. 709, 733**

Thus, this issue is debatable because it is clear that civil rule 60 is equitable in nature and is not hampered down by such a doctrine. It is clear that congress has invested the power in the district court to enforce its equitable power to vacate a prior decision. Looking at the language civil rule 60, the rule states that the court can "relieve" a person from the effects of a final judgment.

"rule 60(b)(6) provides that a district court may grant relief from judgment "for any other reason that justifies relief." This provision confers upon the district court a broad equitable power to "do justice." **Johnson v. Bell, 605 f.3d 333, 336 (6th cir. 2010)**

"rule 60(b), which is inherently equitable in nature, empowers district courts to "revise judgments" when necessary to ensure their integrity." **Id.**

"Rule 60(b) confers broad discretion on the trial court to grant relief when appropriate to accomplish justice; it constitutes a grand reservoir of equitable power to do justice In a particular case.. and should be liberally construed when substantial justice will thus be served." **Thompson v. Bell, 580 f.3d 423, 444 (6th cir. 2009), see also, Matarese v. Le fever, 801 f.2d 98, 106 (2d cir. 1986)**

"even after a judgment has become final and even after an appeal has been lost, civil rule 60(b) gives losing parties additional, narrow grounds for "vacating the judgment."" **Gencorp, inc,. v. Olin corp., 477 f.3d 368, 372 (6th cir. 2007)**

"a court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance,.." **Christianson v. Colt Indust. Operating Corp., 486 U.S. 800, 817 (1988)**

This rule is to be reviewed liberally.

"Rule 60(b) is to be given a liberal construction so as to do substantial justice and to prevent the judgment from becoming a vehicle of injustice." **MIF Reality L.P., v. Rochester Assoc., 92 f.3d 752, 755 (8th cir. 1996)**

"district courts may employ subsection (b)(6) as a means to achieve substantial justice..." **Hopper v. Euclid manor nursing home, inc., 867 f.2d 291, 294 (6th cir. 1989)**

"a motion under rule 60(b)(6) is addressed to the trial court's discretion which is "especially broad" given the underlying equitable principle involved." **Id.**

To allow the court of appeals decision to stand will cause a number of problems. The first issue that it will cause is when people present issues under civil rule 60(b)(2), which concerns when a plaintiff finds new evidence. The court of appeals decision, if allowed to stand, will prevent plaintiff's who has discovered newly discovered evidence to present evidence that could bolster the old evidence that was before the district court. The law of the case doctrine concerns issues that was resolved by a court that they believe has been decided properly. But if the law of the case doctrine would be allowed to prevent consideration of previously submitted documents will cause a injustice effect. The court of appeals failed to recognize that the newly presented evidence could have a promising effect on the old evidence that was presented before the district court, putting the old evidence in a different light, bolstering the old evidence.

The funny thing about this is that the court of appeals of appeals is utilizing a judge made practice that does not have any position in any statute or rule. Yet the court of appeals is using it to bar consideration civil rule 60, a rule implemented by congress to allow a individual to re-

open a final judgment. The law of the case doctrine is not even binding on a court, it is only a practice of the court.

"in the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of the courts generally to refuse to reopen what has been decided, not a limit to their power." **Messenger v. Anderson, 225 U.S. 436, 444 (1912)**

"the law of the case doctrine cannot pose an insurmountable obstacle..." **Castro v. United States, 540 U.S. 375, 384 (2003)**

"it simply "expresses" common judicial "practice"; it does not limit the courts' power." It cannot prohibit a court from disregarding an earlier holding in an appropriate case,." **id**

"law of the case doctrine was understandly crafted with the course of ordinary litigation in mind." **Arizona v. California, 460 U.S. 605, 618-619 (1983)**

"noting that the law-of-the-case doctrine does not preclude reconsideration of a previous decided issue where "exceptional circumstances exist,.."" **Carnail v. Marquis, 2018 U.S. app. Lexis 9652 at [*12] (6th cir.)**

The law of the case doctrine does not bind a court, it is not a statute nor a rule that restrains the court from hearing prior determined issues. As I have pointed out earlier the courts have found that the law the case doctrine is " not a limit to their power." So I ask the court to grant me a COA so the courts can determine if the law of the case doctrine could bar consideration of issues raised in a civil rule 60 motion.

Can the law of the case doctrine prevent consideration of evidence considered in a previous consider actual innocence argument?

I ask the court to except review of this issue because it is debatable if the law of the case doctrine could bar consideration of evidence that was presented in behalf of actual innocence argument.

This is a issue that deserves further encouragement because if the court of appeals decision would be allowed to stand would cause a miscarriage of justice. As I pointed out earlier the law of the case doctrine is not a rule that is binding on a court. So if such a rule could be used to prevent consideration of evidence that could be used to show a persons innocence would be ironic and be a clear miscarriage of justice itself.

As I pointed out earlier, Habeas corpus is built off of the nature of equity, a actual innocence claim is also centered on equity, designed to cut through and procedural issues.

"this rule, or fundamental Miscarriage of Justice exception, is grounded in the '***equitable discretion***' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." **McQuiggin v. Perkins, 133 S.Ct. 1924, 1931 (2013), see also, Rivas v. Fischer, 687 f.3d 514, 549 (2d cir. 2012)**

"the actual-innocence gateway is also firmly grounded in the courts' traditional equitable authority-specifically in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." **Rivas, supra, 687 f.3d at page 549**

The federal courts are to be a court of equitable powers, able to "do justice".

"be grounded in the traditional equitable powers of the judiciary,..." **China Agritech, inc., v. Resh, 138 S.Ct. 1800, 1814 fn.2 (2018)**

"a federal court's equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." **Kansas v. Nebraska, 135 S.Ct. 1042, 1053 (2015)**

" courts of equity may, and frequently do, go much farther to give relief in furtherance of the public interest..." **id.**

"we conclude that we must invoke the equitable powers of this court to fashion a remedy,.." **Bush v. Pam Beach County Canvassing Bd., 531 U.S. 70, 76 (2000)**

"certain inherent powers of the courts are said to be rooted in the notion that a federal court, sitting in equity, possesses all of the common law equity tools of a chancery court... to process litigation to a just and equitable conclusion." **Haddix v. Johnson, 144 f.3d 925, 937 (6th cir. 1998)**

This court has stated that the court can use its vast powers too make sure that rules do not be applied in a mechanical manner.

"the exercise of a court's equitable powers... must be made on a case-by-case basis. In emphasizing the need for flexibility, for avoiding mechanical rules, we have followed a tradition in which courts of equity have sought to relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute rules, which, if strictly applied, threatens the evils of archaic rigidity. The flexibility inherent in "equitable procedure" enables courts to meet new situations that demand equitable intervention, and to accord all the relief necessary to correct... particular injustices." **Holland v Florida, 560 U.S. 631, 649-650 (2010)**

Thus, the district court and the court of appeals had the power to look over the application of the law of the case doctrine because that doctrine is only a practice of the court, it is not a rule or law that is binding on the court. Also considering the fact that the writ of habeas corpus and the application of the miscarriage of justice claim is grounded in the application of equity and that all federal courts has a vast amount of equitable powers to justice as long as there is not a rule hindering the court by a rule established by congress.

What also makes this issue deserve further encouragement is the fact that the miscarriage of justice argument is grounded in the basis of the court wanting to see that the "ends of justice" has been met.

"we have consistently reaffirmed the existence and importance of the exception for fundamental miscarriage of justice." **Schlup v. Delo, 513 U.S. 298, 321, 115 S.Ct. 851 (1995)**

"we firmly established the importance of the equitable inquiry required by the ends of justice." **Id. Schlup, supra, 115 S.Ct. at page 863**

"the actual innocence exception serves as an additional safeguard against compelling an innocent man to suffer unconstitutional loss of liberty, guaranteeing that the ends of justice will be served." **Lee v. Lambert, 653 f.3d 929, 934 (9th cir. 2010)(en banc)**

"the supreme court has recognized a "miscarriage of justice" exception to the cause and prejudice requirement, and the court has equated this exception with the "ends of justice" prong of the sanders test." **Rosales-Garcia v. Hollard, 322 f.3d 386, 403 fn.21 (6th cir. 2003)**

"sanders established that federal courts must reach the merits of an abusive petition if "the ends of justice demand." **McClesky v. Zant, 499 U.S. 467, 485 (1991)**

The miscarriage of justice "gateway" is designed so a petitioner can show that it is a possibility that they are actual innocent, and if they can show that, the actual innocence

standard allows a petitioners claims to be able to cut through any red tape and allow those claims that was not considered to be heard on the merits.

The court of appeals decision is debatable and deserves further encouragement because if their decision is allowed to stand would cause a miscarriage of justice and allow the court of appeals to believe that they could just disregard actual innocence arguments off of the basis of the law of the case doctrine. It will allow the application of law of the case doctrine to have more power then that of the miscarriage of justice doctrine, something that was designed to allow the ends of justice to be met.

To deny me the right to allow all of my evidence to be heard goes against this courts ruling in, **House v. Bell**, supra, in which this court stated that all of the evidence, "old and new" ("schlup makes plain that the habeas court must consider all the evidence, old and new,.." **House v. Bell, 547 U.S. 518, 538 (2006)**), [redacted] must be considered off of a fully develop record.

"because a schlup claim involves evidence the trial jury did not have before it, the inquiry requires the federal court to assess how reasonable jurors would react... to the overall, newly supplemented record." **House v. Bell, 547 U.S. at page 538**.

So this shows that the court of appeals decision is debatable and deserves further encouragement because the court of appeals decision applying the law of the case doctrine to the application of the miscarriage justice review will deny the court from considering all of the evidence, old and new, and to deny review of "the overall, newly supplement record".

Surely the court of appeals decision would be a gross application because it will prevent a petitioner from being allowed to utilize ***all*** the evidence that could show his innocence, considering the fact how hard it is for a person in prison to be able to find and discover the evidence to present before the court. The United States Supreme Court has

recognize how hard it is for people to obtain evidence after a trial, that is why such arguments is "rarely successful."

"because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful." **Schlup v. Delo, 115 S.Ct. 851, 865 (1995)**

Also to restrict consideration of prior evidence, the court of appeals failed to consider the fact how the new evidence could have a impact on the old evidence that is being restricted.

"if the verdict is already of questionable validity, additional evidence of relative minor importance might be sufficient to create a reasonable doubt." **United States v. Agurs, 427 U.S. 97, 112-113, 96 S.Ct. 2392, 2402 (1976)**

To allow the court of appeals to not consider old evidence would be a miscarriage of justice in itself.

"Dismissal of a first habeas petition is a particular serious matter, for that dismissal denies the petitioner the protections of the great writ entirely, risking injury to an important interest in human liberty." **Lonchar v. Thomas, 116 S.Ct. 1293, 1299 (1990)**

The actual innocence argument is a safety valve, something that is to protect the integrity of the courts so they will not allow a innocent person languish in prison. To allow the law of the case doctrine to override such a important means to allow review of constitutional claims would make such progress of trying to make sure the innocent go free and the guilty be convicted a charade. The miscarriage of justice gateway is a important structure in the federal courts, do not let it lose its force. This court has stated that it has embraced the concept of fairness.

"fundamental fairness is the central concern of the writ of habeas corpus." **Strickland v. Washington, 466 U.S. 668, 697 (1984)**

"but our system of law has ***"always"*** endeavored to prevent even the "probability" of unfairness. " **In re Murchison, 75 S.Ct. 623, 625 (1954)**

I ask the court what is more unfair then rejecting the consideration of evidence, when considered conjunctively which newly acquired evidence, that could show a person is in fact actual innocent. The actual innocence argument is designed to keep open the courthouse doors for people who are innocent, the court of appeals decision would prevent the whole purpose of the miscarriage of justice argument.

"It is difficult to imagine a stronger equitable claim for keeping open the courthouse doors than one of actual innocence, the ultimate equity on the prisoner's side." **Lee v. Lambert, 653 f.3d 929, 936 (9th cir. 2011)(en banc)**

The federal courts is entrusted with a vast amount of equitable power, from; the habeas corpus statute and from statute **U.S.C.A. 2243**, which states that the courts must "dispose of the matter as law and justice requires". The court is also bestowed with a vast amount of equitable power as long as congress has not implemented a rule of statute that may hamper that power.

So if the court of appeals decision would be allowed to stand would allow a, "a grossly unfair outcome in a judicial proceeding..." (Definition of Miscarriage of Justice, see the Black law Dictionary 10th edition). The law of the case doctrine can not stand under the equitable nature of the miscarriage of justice origin. The actual innocence standard is a gateway to overcome any procedural issues so the court can hear the merits of a constitutional claim so a actual innocent man or woman will not stay in jail. "the miscarriage of justice exception to cause serves as an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty, guaranteeing that the ends of justice will be served in full." **McCLeskey v.Zant, 499 U.S. 467, 495 (1991)**, it "furthers the pursuit of achieving complete

justice by enabling the court to suspend those judgments whose enforcement leads to inequitable results." **Haddix v. Johnson, 144 f.3d 925, 937 (6th cir. 1998).**

So the court of appeals decision is debatable because if the court does not except review it is possible that the court of appeals decision will be problematic.

"As our sister circuits have observed, denying federal habeas relief from an actual innocent petitioner would bee constitutionally problematic." **Lee, supra, 653 f.3d at 936**

So I ask the court to grant review of this issue due to the equitable nature of the habeas corpus statute equitable nature of the miscarriage of justice standard and the equitable powers of the federal courts, the law of the case doctrine should have yielded, "given equity's resistance to rigid rules." **Holland v. Florida, 560 U.S. 631, 649 (2010)** and "because the interest of justice would thus be best served." **Puckett v. United States, 556 U.S. 129, 139 (2009).** This court has stated that a court can look through a procedural rule at any time.

"The court would do well to heed justice Black's admonition: it is ...never... too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the constitution." **Sawyer v. Whitley, 505 U.S. 333, 357 (1992)(J., Blackman, concurring in judgment)**

This court has stated that it is the protectors of the people, so if that is the case I ask the court to not allow such a miscarriage of justice transpire on its watch because no court has reviewed the evidence that I have now presented before the district court or ever made a determination of the evidence to the overall, supplemented record.

"ours is a government of the people, by the people, for the people." **U.S. Term limits, inc., v. Thornton, 115 S.Ct. 1842, 1863-1864)(1995)**

"There can be no doubt that in enacting 2254, Congress sought to interpose the federal courts between the states and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action." **Reed v. Ross, 468 U.S. 1, 10 (1984)**

So I ask the court to grant me a COA it can be determined that the law of the case doctrine does not apply to a miscarriage of justice argument because it will cause a miscarriage of justice in of itself, because it will deny consideration of evidence that must be considered in the overall consideration of the actual innocence inquiry, also to the fact that the district court has never reviewed this evidence in the first place, nor is their any ruling or findings of facts concerning these pieces of evidence that I have presented in support of my innocence. If the court of appeals decision would be allowed to stand would deny me the opportunity to have my constitutional claims to be reviewed.

Conclusion of the case

I hope and pray that the court see the problems the court of appeals decision causes when the law of the case doctrine is applied to Civil Rule 60, and more particularly the miscarriage of justice application. So I ask the court to find that the district courts and the court of appeals decision is debatable because the district court has not ever considered this evidence before, and in the alternative, that it is debatable that the law of the case doctrine can prevent consideration of evidence when the court is reviewing a actual innocence argument. So I ask the court to grant me a COA so these issues because they deserve further review.

"Respectfully submitted,"

Dwayne Stoutamire

Dwayne Stoutamire

Proof of Service

I do hereby certify that a copy of the following motion has been sent ~~by~~ regular U.S. postal mail to christopher LaRose, 2240 Hubbard rd., youngstown, ohio 44505, and to his counsel Stephanie watson, 150 east gay st., 16th floor, columbus, ohio 43215, on this 10th day of December, 2018.

Dwayne Stoutamire

Dwayne Stoutamire # 532-253
2240 Hubbard rd.
youngstown, ohio
44505

(pro se)

Attached Appendix

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Dwayne Stoutamire,

Petitioner,

-vs-

Christopher LaRose,

Respondent.

Case No. 4:10 CV 2657

ORDER

JUDGE JACK ZOUHARY

INTRODUCTION

Pending before this Court is Petitioner *pro se* Dwayne Stoutamire's Motion for Relief under Federal Civil Rules 60(b) and (d) (Doc. 82). The Warden responds (Docs. 83, 85), and Stoutamire replies (Doc. 86). This is Stoutamire's third Motion asking this Court to reconsider its denial of his 2011 Petition for writ of habeas corpus (*see* Docs. 49, 73, 82). This Court described the lengthy procedural history of this case in prior Orders (*see* Docs. 46, 53, 74). Since then, Stoutamire appealed this Court's January 2015 Order denying his previous Rule 60 Motion (Doc. 75). The Sixth Circuit denied his application for a certificate of appealability (Doc. 79), and the Supreme Court declined to grant certiorari (Doc. 81).

In this most recent Motion, Stoutamire seeks to excuse the procedural default of his claims for ineffective assistance of trial counsel by arguing his state court post-conviction counsel was also ineffective. Alternatively, he argues the default should be excused based on actual innocence. This Court addresses each argument in turn.

LEGAL STANDARD

Federal Civil Rule 60(b) allows a party to seek relief from final judgment and request reopening of the case under a limited set of circumstances, including fraud, mistake, and newly discovered evidence. Rule 60(b) applies in habeas proceedings "only to the extent that [it is] not inconsistent with applicable federal statutory provisions and rules." *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005) (internal quotation marks omitted). One such inconsistency frequently examined by courts is whether a Rule 60(b) motion is actually a "second and successive" habeas petition, usually barred from consideration under 28 U.S.C. § 2244(b). The Sixth Circuit instructs that "a motion does not attack a determination on the merits, and is thus not a successive habeas petition, when it 'merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar.'" *Tyler v. Anderson*, 749 F.3d 499, 507 (6th Cir. 2014) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 532 n.4 (2005)). Because Stoutamire only challenges this Court's prior procedural default rulings, the Motion is not a successive petition under Section 2244(b).

Rule 60(b) does not, however, "allow a defeated litigant a second chance to convince the court to rule in his or her favor by presenting new explanations, legal theories, or proof," and granting relief under this Rule "is circumscribed by public policy favoring finality of judgments and termination of litigation." *Tyler*, 749 F.3d at 509. Stoutamire seeks relief under Rule 60(b)(6), a catch-all provision properly invoked only in "exceptional or extraordinary circumstances." *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989). "Consequently, courts must apply Rule 60(b)(6) relief only in 'unusual and extreme situations where principles of equity *mandate* relief.'"

Blue Diamond Coal Co. v. Trustees of the UMWA Combined Benefit Fund, 249 F.3d 519, 524 (6th Cir. 2001) (quoting *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990)).

Stoutamire raises two arguments in support of his request to excuse the procedural default of his ineffective assistance of trial counsel (IATC) claim.

DISCUSSION

Ineffective Assistance of Post-Conviction Counsel

First, Stoutamire contends his state post-conviction counsel was ineffective due to a conflict of interest. Specifically, he claims his post-conviction counsel failed to raise an IATC claim because she worked at the same law firm as trial counsel, and thus her loyalty to her co-worker and her firm's reputation hindered her effective representation of Stoutamire's interests (Doc. 82 at 5). Stoutamire also claims his post-conviction counsel was ineffective for failing to request and review his trial counsel's case file (*id.* at 7). Citing *Buck v. Davis*, 137 S. Ct. 759 (2017), he argues this deficiency constitutes cause to overcome the default of his IATC claim. *See also Trevino v. Thaler*, 569 U.S. 413 (2013); *Martinez v. Ryan*, 566 U.S. 1 (2012).

Habeas petitioners generally cannot claim constitutionally ineffective assistance of counsel in state post-conviction proceedings because there is no constitutional right to an attorney in those proceedings. *Coleman v. Thompson*, 501 U.S. 722, 752 (1991). But the Supreme Court has recognized a "narrow exception" to *Coleman*: ineffective assistance of post-conviction counsel can establish cause for the procedural default of an IATC claim *if* the IATC claim was substantial, and the post-conviction proceeding was the first meaningful opportunity to raise the IATC claim under state law. *Trevino*, 569 U.S. at 1918–21. The Sixth Circuit has questioned whether *Trevino* applies in Ohio. *See Henness v. Bagley*, 766 F.3d 550, 557 (6th Cir. 2014); *McGuire v. Warden*, 738 F.3d

741, 751–52 (6th Cir. 2013). But assuming it does, the record does not suggest Stoutamire's post-conviction counsel was ineffective.

To prevail on a claim for constitutionally deficient counsel based on a conflict of interest, Stoutamire must identify "a conflict of interest that adversely affect[ed] counsel's performance." *Leonard v. Warden*, 846 F.3d 832, 844 (6th Cir. 2017) (quoting *Mickens v. Taylor*, 535 U.S. 162, 172 n.5 (2002)). Stoutmaire claims his post-conviction counsel suffered from such a conflict because she worked for the same law firm as trial counsel. At most, however, the record establishes that the two attorneys had offices in the same building beginning sometime in 2008 (while Stoutamire's post-conviction proceedings were pending) and served as co-counsel in one or more cases several years later (*see* Doc. 86 at 2; Doc. 86-1).

Moreover, post-conviction counsel attempted to raise the IATC claim at issue here, for trial counsel's failure to discover the criminal histories of various witnesses (Doc. 24-2 at 110–13). Though this claim was not clearly included as a distinct cause of action in the original petition (*see* Doc. 24-1 at 221–23), counsel moved to amend to add a separate, more detailed claim (Doc. 24-2 at 98–99). The state court denied the motion to amend but also ultimately denied the IATC claim on the merits (*id.* at 124, 127). The Sixth Circuit also held -- in denying a certificate of appealability on the IATC claim -- that Stoutamire "failed to demonstrate a reasonable probability that, but for [trial] counsel's error, the result of his trial would have been different" (Doc. 59 at 4). Stoutamire thus fails to identify any conflict of interest suggesting his post-conviction representation was constitutionally inadequate.

Actual Innocence

Stoutamire also asks this Court to excuse the default of his IATC claim based on actual innocence. But his claim merely rehashes the same arguments and evidence already presented and rejected several times (*see* Doc. 40 at 16–17; Doc. 46 at 5; Doc. 74 at 3–5). In short, Stoutamire identifies no basis for awarding the type of extraordinary relief available under Federal Civil Rule 60(b)(6).

Federal Civil Rule 60(d)

Finally, it is unclear whether Stoutamire also seeks relief under Federal Civil Rule 60(d), which authorizes this Court to set aside a judgment for fraud on the court. Stoutamire references Rule 60(d) in the caption of his Motion, but he does not cite or discuss it elsewhere in his brief. In any event, this Court declines to grant relief under this provision for the same reasons discussed above. *See Mitchell v. Rees*, 651 F.3d 593 (6th Cir. 2011) (denying habeas petitioner's Rule 60(d)(1) motion and noting that an independent action for relief from judgment is available only to prevent a grave miscarriage of justice, which is a stringent and demanding standard).

CONCLUSION

The Motion for Relief (Doc. 82) is denied. Further, this Court declines to issue a certificate of appealability, finding Stoutamire has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c).

IT IS SO ORDERED.

s/ Jack Zouhary
JACK ZOUHARY
U. S. DISTRICT JUDGE

February 14, 2018

No. 18-3216

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DWAYNE STOUTAMIRE,

Petitioner-Appellant,

v.

CHRISTOPHER LA ROSE, Warden, originally named as Donald Morgan,

Respondent-Appellee.

ORDER

(Appendix # B)

Dwayne Stoutamire, an Ohio prisoner proceeding pro se, appeals a district court order denying his motion for relief from judgment filed pursuant to Federal Rule of Civil Procedure 60(b) and (d) in his habeas corpus proceeding filed under 28 U.S.C. § 2254. He has filed an application for a certificate of appealability and a motion for leave to proceed in forma pauperis.

A jury convicted Stoutamire of felonious assault with a firearm specification, abduction with a firearm specification, aggravated robbery with a firearm specification, and two counts of having weapons under a disability. The trial court sentenced him to a total term of thirty-four years of imprisonment. Stoutamire's direct appeal and requests for post-conviction relief were unsuccessful in state court.

Stoutamire then filed a federal habeas petition raising nine claims, including a claim that trial counsel performed ineffectively. The district court denied Stoutamire's habeas petition, finding, in relevant part, that Stoutamire's ineffective-assistance claim was procedurally defaulted and that Stoutamire failed to show cause and prejudice or actual innocence to overcome the procedural default. This court affirmed the district court's judgment. *Stoutamire v. Morgan*, Nos. 12-3099/3225, slip op. at 3 (6th Cir. Oct. 10, 2013) (order).

In 2014, Stoutamire filed a motion for relief from judgment under Rule 60(b) and (d). He argued, in part, that the district court erred in finding that his actual-innocence claim did not warrant excusing the procedural default of several of his claims. The district court denied Stoutamire's motion, and this court denied his application for a certificate of appealability. *Stoutamire v. Morgan*, No. 15-3141, slip op. at 3 (6th Cir. Aug. 18, 2015) (order).

In October 2017, Stoutamire filed another motion for relief from judgment under Rule 60(b) and (d), arguing that the district court should excuse the procedural default of his ineffective-assistance-of-trial-counsel claim because his post-conviction attorney performed ineffectively and because he is actually innocent. The district court first concluded that Stoutamire's motion was a true Rule 60 motion, rather than a second or successive habeas petition. It then found that Stoutamire did not adequately allege that post-conviction counsel performed ineffectively and that Stoutamire's actual-innocence claim "merely rehashe[d] the same arguments and evidence already presented and rejected several times." Finally, the district court found that Stoutamire was not entitled to relief under Rule 60(d) because he failed to show that such relief was necessary to prevent a grave miscarriage of justice. The district court denied the motion and declined to issue a certificate of appealability.

Stoutamire now contends that he should not be required to obtain a certificate of appealability to appeal the denial of his Rule 60 motion, although he concedes that this court has held otherwise. He argues that the district court erred by finding that his actual-innocence claim simply rehashed prior arguments because he presented additional exhibits that the district court had not previously considered. Stoutamire does not challenge the district court's determination that his ineffective-assistance-of-post-conviction-counsel argument did not warrant relief. He therefore has forfeited that claim. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002); *Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000).

The district court properly found that Stoutamire's post-judgment motion was a true Rule 60 motion rather than a second or successive § 2254 habeas petition because it challenged only the district court's prior procedural-default determination. *See Tyler v. Anderson*, 749 F.3d 499,

507 (6th Cir. 2014). As Stoutamire concedes, he must obtain a certificate of appealability to appeal the district court's denial of his Rule 60 motion. *Johnson v. Bell*, 605 F.3d 333, 339 (6th Cir. 2010).

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In the Rule 60(b) context, an applicant must show that jurists of reason could debate whether the district court properly denied the motion and whether the issues raised deserve further review. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Johnson*, 605 F.3d at 339.

Reasonable jurists could not debate the district court's conclusion that Stoutamire's actual-innocence claim did not warrant relief under Rule 60(b) or (d). In support of his actual-innocence claim, Stoutamire submitted: (1) Allen Reynolds's February 19, 2007, written statement; (2) the transcript of an April 20, 2007, interview of Jessica Gordon; (3) a judgment showing that Gordon pleaded guilty to theft on November 7, 2005; (4) Ronald W. Jones's February 15, 2007, written statement; (5) an April 25, 2002, journal entry showing that David L. Palm had been convicted of breaking and entering; (6) a March 4, 2003, judgment showing that Palm had pleaded guilty to receiving stolen property; (7) a judgment showing that Sally Jo Palm pleaded guilty to three counts of attempted forgery and three counts of attempted receiving stolen property on March 25, 2002; and (8) an undated declaration submitted by Stoutamire.

Stoutamire previously submitted documents (1) through (4) in support of his December 18, 2014, Rule 60 motion. The district court considered these documents and concluded that they presented "no exceptional and extraordinary circumstances entitling [Stoutamire] to relief" under Rule 60(b)(6) and (d), and this court denied Stoutamire's request for a certificate of appealability. *Stoutamire*, No. 15-3141, slip op. at 3. Under the law-of-the-case doctrine, the district court was precluded from revisiting Stoutamire's actual-innocence claim to the extent that it was based on these documents. *See United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994).

Stoutamire did not previously present documents (5) through (8). But reasonable jurists could not debate the district court's conclusion that these documents did not show that "exceptional or extraordinary circumstances" warranted relief under Rule 60(b)(6). *Stokes v. Williams*, 475 F.3d 732, 735 (6th Cir. 2007) (quoting *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990)). Each of the Palms' prior convictions pre-dated Stoutamire's own conviction by several years, and Stoutamire did not explain why he could not have filed his own affidavit—which is self-serving—when he filed his habeas petition.

Finally, reasonable jurists could not debate the district court's conclusion that Stoutamire was not entitled to relief under Rule 60(d)(3), which allows courts to "set aside a judgment for fraud on the court." Fed. R. Civ. P. 60(d)(3). Stoutamire did not allege that an officer of the federal habeas court committed a fraud that deceived the court. *See id.*; *Carter v. Anderson*, 585 F.3d 1007, 1011 (6th Cir. 2009).

Accordingly, this court **DENIES** Stoutamire's application for a certificate of appealability and **DENIES** as moot his motion for leave to proceed in forma pauperis.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk