IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

UNITED STATES OF AMERICA,

Plaintiff, : Case No. 3:08-cr-175

District Judge Thomas M. Rose
- vs - Magistrate Judge Michael R. Merz

JEREMY E. LEWIS,

Defendant. :

REPORT AND RECOMMENDATIONS

This case is before the Court on Defendant's 17th Motion for Relief from Judgment, this time brought under Fed. R. Civ. P. 60(b)(1) for legal error (ECF No. 293).

The instant Motion "attacks" the Sixth Circuit's March 23, 2017, Order in *Lewis v. United States*, Case No. 16-4077 (6th Cir. Mar. 23, 2017)(unreported; copy at ECF No. 263). As Mr. Lewis has been advised before, this Court does not have authority to vacate, set aside, or ignore a decision of the circuit court of appeals. Apparently trying to avoid that problem, Lewis asserts we have authority to vacate our own judgment of August 26, 2011, dismissing Lewis's § 2255 proceeding (ECF No. 127), relying on *Standard Oil Co. v. United States*, 429 U.S. 17 (1976).

In *Standard Oil* the Supreme Court abolished the practice of requiring a litigant in a case that had been reviewed on appeal, to obtain leave of the appellate court to entertain a motion for relief from judgment. The Court wrote:

> In our view, the arguments in favor of requiring appellate leave are unpersuasive. Like the original district court judgment, the appellate mandate relates to the record and issues then before the court, and does not purport to deal with possible later events. Hence, the district judge is not flouting the mandate by acting on the motion. See 11 C. Wright & A. Miller, Federal Practice and Procedure § 2873, pp. 269-270 (1973). Cf. *SEC* v. *Advance Growth Capital Corp.*, 539 F. 2d 649, 650 (CA7 1976). Furthermore, the interest in finality is no more impaired in this situation than in any Rule 60(b) proceeding. Finally, we have confidence in the ability of the district courts to recognize frivolous Rule 60(b) motions. Indeed, the trial court "is in a much better position to pass upon the issues presented in a motion pursuant to Rule 60(b)," *Wilkin* v. *Sunbeam Corp.*, 405 F. 2d 165, 166 (CA10 1968). Accord, *Wilson Research Corp.* v. *Piolite Plastics Corp.*, 336 F. 2d 303, 305 (CA1 1964); 11 Wright & Miller, *supra,* at 269.
>
> The appellate-leave requirement adds to the delay and expense of litigation and also burdens the increasingly scarce time of the federal appellate courts. We see no reason to continue the existence of this "unnecessary and undesirable clog on the proceedings," *S. C. Johnson & Son, Inc.* v. *Johnson,* 175 F. 2d 176, 184 (CA2 1949) (Clark, J., dissenting). We therefore deny the motion to recall because the District Court may take appropriate action without this Court's leave.

429 U.S. at 18-19.

This Court has not attempted to enforce the long-abolished appellate-leave requirement on Lewis. In fact, the Court has entertained on the merits each of Lewis's prior sixteen Fed. R. Civ. P. 60(b) or (d) motions.

But there is an important difference between the pre-authorization which the appellate-leave requirement demanded and the law of the case doctrine.

Lewis asserts the law of the case doctrine does not bar reconsideration of the dismissal in this case because the Sixth Circuit's March 23, 2017, decision is contrary to prior published Sixth Circuit precedent, to wit, *Shelton v. United States*, 800 F.3d 292 (6th Cir. 2015). In entering it

Order of March 23, 2017, the Sixth Circuit noted that Lewis had cited *Shelton*, but decided that nonetheless the decision of this Court rejecting Lewis' claim of lack of appropriate notice under *Day v. McDonough* and *Shelton* was not debatable among reasonable jurists and it therefore denied Lewis a certificate of appealability. This Court considered and rejected the applicability of *Shelton* in rejecting Lewis's eleventh Motion for Relief from Judgment:

> *Shelton* was not handed down until more than four years after the Motion to Vacate was dismissed1. *Shelton* does not hold that the notice procedure is required by the Constitution or is to be applied retroactively to cases already closed long before it was handed down.

(Report, ECF No. 240, PageID 1759, adopted at ECF No. 247.)

The Magistrate Judge agrees with Lewis that this Court does not need circuit court permission to consider the instant Motion. But it is the law of this case, confirmed by the Sixth Circuit, that *Shelton* does not require us to reopen the judgment of August 26, 2011.

Conclusion

In *Standard Oil* the Supreme Court expressed its confidence in the ability of District Courts to "recognize frivolous Rule 60(b) motions." This is just such a motion and it should be denied. Because reasonable jurists would not disagree with this conclusion, Petitioner should be denied a

certificate of appealability and the Court should certify to the Sixth Circuit that any appeal would be objectively frivolous and therefore should not be permitted to proceed *in forma pauperis*.

March 1, 2018.

s/ *Michael R. Merz*
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(d), this period is extended to seventeen days because this Report is being served by mail. .Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140, 153-55 (1985).

IN THE UNITED STATES DISTRICT COURT
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WESTERN DIVISION AT DAYTON

UNITED STATES OF AMERICA,	:	
	:	Case No. 3:08-cr-175
Plaintiff,	:	
	:	District Judge Thomas M. Rose
- vs -	:	Magistrate Judge Michael R. Merz
	:	
JEREMY E. LEWIS,	:	
	:	
Defendant.	:	

DECISION AND ORDER OVERRULING OBJECTIONS (DOCS. 299, 309); ADOPTING REPORT AND RECOMMENDATIONS (DOC. 295), SUPPLEMENTAL REPORT AND RECOMMENDATIONS (DOC. 301), AND REPORT AND RECOMMENDATIONS; ORDER TO SHOW CAUSE (DOC. 305); DENYING SEVENTEENTH AND EIGHTEENTH MOTIONS FOR RELIEF FROM JUDGMENT (DOCS. 293, 304 (AS SUPPLEMENTED BY DOC. 312)); AND DENYING MOTION DENYING PLENARY JURISDICTION TO MAGISTRATE JUDGE (DOC. 310) AND MOTION FOR PERMENANT [SIC] INJUNCTION UNDER FED. R. CIV. P. 65 (DOC. 311)

The Seventeenth Motion for Relief from Judgment

This criminal case is before the Court on Defendant's 17th Motion for Relief from Judgment, brought under Fed. R. Civ. P. 60(b)(1)(ECF No. 293). The Magistrate Judge recommended denying the Motion based on the law of the case, to wit, the Sixth Circuit's denial

to Lewis of a certificate of appealability on his claims under *Day v. McDonough*, 547 U.S. 198 (2006 and *Shelton v. United States*, 800 F.3d 292 (6th Cir. 2015)(Report, ECF No. 295, citing *Lewis v. United States*, Case No. 16-4077 (6th Cir. Mar. 23, 2017)(unreported; copy at ECF No. 263)). Lewis objected (ECF No. 299), the Court recommitted the matter (ECF No. 300), the Magistrate Judge filed a Supplemental Report (ECF No. 301), and Lewis filed Supplemental Objections (ECF No. 307) which the Magistrate Judge struck as untimely filed (ECF No. 308).

Having reviewed the Report *de novo* as required by Fed. R. Civ. P. 72(b)(3), the Court concurs with and adopts the Magistrate Judge's recommendation as filed. Lewis's 17th Motion for Relief from Judgment is DENIED on the basis of the law of the case cited by the Magistrate Judge. Because reasonable jurists would not disagree with this conclusion, Lewis is DENIED a certificate of appealability and the Court certifies to the Sixth Circuit that any appeal would be objectively frivolous and therefore should not be permitted to proceed *in forma pauperis*.

The Eighteenth Motion for Relief from Judgment

The case is also before the Court on Lewis' 18th Motion for Relief from Judgment, this time under Fed. R. Civ. P. 60(b)(6)(ECF No. 304). Although this claim is already made in the Motion as filed, Lewis has also moved to supplement and add a claim to this Motion (Motion, ECF No. 312).

Lewis claims he is actually innocent of the crime of which he was convicted because (a) the Indictment does not contain the language about forced accompaniment included in the statement of facts in support of the plea (ECF No. 304, PageID 1996) and (b) because the

Indictment does not state an offense under 18 U.S.C. § 2113(a) because it does not name the person who was subjected to the forced accompaniment (ECF No. 312, PageID 2025-26)

As the Report notes, Lewis's actual innocence argument has been heard and denied many times on the merits, as the Sixth Circuit has found. *Lewis v. United States*, Case No. 16-4077 (6th Cir. Mar 23, 2017)(unpublished; copy at ECF No. 263)("A review of the record reveals that Lewis has had multiple opportunities to present his timeliness, equitable tolling, and actual innocence arguments to the district court. In addition, Lewis has received a determination on the merits as to each.") The lack of merit in Lewis's actual innocence claim is also the law of the case and the Report recommends denying Lewis's 18th Motion for Relief from Judgment on that basis (Report, ECF No. 305, PageID 1999). Lewis has filed timely Objections to the Report (ECF No. 309).

Having reviewed the matter *de novo* as required by Fed. R. Civ. P. 72(b)(3), the Court OVERRULES the Objections and ADOPTS the recommendation in the Report. Lewis's "actual innocence" Motion for Relief from Judgment (ECF No. 304 as supplemented by ECF No. 312) is DENIED. Because reasonable jurists would not disagree with this conclusion, Petitioner is denied a certificate of appealability and the Court hereby certifies to the Sixth Circuit that any appeal would be objectively frivolous and therefore should not be permitted to proceed *in forma pauperis*.

Sanctions Under Fed. R. Civ. P. 11

Mr. Lewis's Position

As part of the Supplemental Report and Recommendations recommending denial of Lewis's 17th Motion for Relief from Judgment, the Magistrate Judge notified Lewis of the provisions of Fed. R. Civ. P. 11 and warned him

> The Magistrate Judge believes Mr. Lewis has now been told respectfully but repeatedly, by this Court and the Sixth Circuit, that he is not entitled to relief from this Court's judgment dismissing his § 2255 Motion. Further filings attempting to obtain relief from that judgment will be dealt with under Rule 11.

(ECF No. 301, PageID 1988). Lewis failed to heed that warning and filed yet another frivolous motion for relief from judgment, his Eighteenth. Therefore, along with his Report on the 18th Motion, the Magistrate Judge ordered Lewis to show cause in writing not later than April 19, 2018, why the Court should not impose a monetary sanction pursuant to Fed. R. Civ. P. 11(c)(3) for filing the Eighteenth Motion for Relief from Judgment (Order to Show Cause, ECF No. 305, PageID 2000.) Lewis responded in his Objections, but also in his Motion Denying Plenary Jurisdiction to the Magistrate Judge (ECF No. 310) and his Motion for Permanent Injunction (ECF No. 311). The Court construes these Motions (ECF Nos. 310, 311) as responses to the Order to Show Cause, and DENIES them to the extent they might be considered motions for any additional relief.

In his Motion Denying Plenary Jurisdiction, Lewis correctly notes that imposing a sanction under Fed. R. Civ. P. 11 is the functional equivalent of ruling on a dispositive motion (ECF No. 310, PageID 2023, citing *Bennett v. General Caster Service of N. Gordon Co., Inc.*, 976 F.2d 995

(6th Cir. 1992)(*per curiam*). However, Magistrate Judge Merz has not purported to impose Rule 11 sanctions, but has merely ordered Lewis to show cause why they should not be imposed, a matter ultimately reserved for the District Judge.

In his Motion for Permanent Injunction, Lewis seeks to have the Court "restrain the Magistrate Judge back to his place of lawful authority in these proceedings given to him under [28 U.S.C. §] 636(b)(1)(b)." ECF No. 311, PageID 2024. Lewis argues the Magistrate Judge had no authority to issue a Rule 11 show cause order because neither the Court not Assistant United States Attorney Vipal Patel has issued such an order. *Id.*

In that portion of his Objections responding to the Show Cause Order (ECF No. 309, PageID 2019-21), Lewis makes no effort to show cause why he should not be sanctioned except to repeat his arguments on the merits and ask the Court to strike the Report and require the Magistrate Judge to refile the Report and discuss the "specific allegations in Mr. Lewis's indictment." *Id.* at PageID 2021.

Analysis

Lewis's motions for relief from judgment in this case became Magistrate Judge Merz's responsibility pursuant to this Court's General Order DAY 13-01 which provides in pertinent part

> **Referral of Cases by Category**
>
> Pursuant to 28 U.S.C. §636(b), the following categories of cases filed at the Dayton location of court are referred by this Order to the United States Magistrate Judge to whom the case has been assigned who is authorized to perform in each such case any and all functions authorized for full-time United States Magistrate Judges by statute. In each such case the Magistrate Judge shall proceed in accordance with Fed. R. Civ. P. 72. . . .

> **6. Post-Conviction Relief:** All cases collaterally attacking a criminal judgment, including without limitation those filed under 28 U.S.C. §§2241, 2254, or 2255. All such cases shall be assigned and are referred by this Order to Magistrate Judge Merz.

The Dayton General Order of Assignment and Reference was amended to its present form to refer post-conviction relief cases exclusively to Magistrate Judge Merz on May 30, 2013. Prior to that, such cases were assigned to any one of the three Magistrate Judge's at Dayton. Lewis's Motion to Vacate under 28 U.S.C. § 2255 was initially referred to Magistrate Judge Newman, but transferred to Magistrate Judge Merz December 22, 2011 (ECF No. 139). General Order DAY 13-01 permits Magistrate Judges to transfer cases among themselves for any reason, but particularly to balance the workload.

When a Magistrate Judge is assigned and referred a case, she or he has authority to manage that case generally, including entering any appropriate orders that are not dispositive. In § 2255 cases this includes routine scheduling and discovery orders, but can also include more substantive matters, such as taking evidence in an evidentiary hearing. In situations where the Court is authorized to act on its own motion, Magistrate Judge case management authority includes the power to order a party to show cause why he or she should not be sanctioned.

Effective December 1, 1993, Fed. R. Civ. P. 11 was amended to read:

> (b) By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> > (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

The standard of conduct imposed on parties and attorneys by amended Rule 11 is reasonableness under the circumstances. *INVST Financial Group v. Chem-Nuclear Systems, Inc.*, 815 F.2d 391, 401 (6th Cir. 1987); *See also Business Guides, Inc., v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533 (1991); *Smith v. Detroit Federation of Teachers*, 829 F.2d 1370 (6th Cir. 1987); *Mihalik v. Pro Arts, Inc.*, 851 F.2d 790 (6th Cir. 1988). The court must test the signer's conduct by inquiring what was reasonable to believe at the time of signing, and must avoid using the "wisdom of hindsight." *Mann v. G&G Mfg., Inc.*, 900 F.2d 953 (6th Cir. 1990); *Century Products, Inc., v. Sutter*, 837 F.2d 247 (6th Cir. 1988); *INVST, supra*, at 401; *Davis v. Crush*, 862 F.2d 84, 88 (6th Cir. 1988). The Rule includes both a duty to investigate the facts, *Albright v. Upjohn,* 788 F.2d 1217 (6th Cir. 1986), and the law, *INVST, supra*, at 402.

Sanctions are appropriate when a person "intentionally abuses the judicial process or knowingly disregards the risk that his actions will needlessly multiply proceedings." *Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater*, 465 F.3d 642, 646 (6th Cir. 2006).

For almost seven years, this Court has patiently dealt with Lewis's attempts to overturn his conviction. It has dealt on the merits with each motion he has filed, explaining why he is not

entitled to relief. On several occasions the Sixth Circuit Court of Appeals has done the same thing. At some point refiling the same arguments becomes an abuse of the judicial process and Lewis has reached that point.

In imposing sentence in this case, the Court did not impose a fine, in part because Lewis owed $1711.00 in restitution and was otherwise indigent. Imposing a fine that remains unpaid is unlikely to deter Lewis. The Court finds the proper sanction in this case is to deny Lewis any further opportunity to waste judicial time on his repeated arguments. Accordingly, Lewis is ORDERED not to file any further motions to obtain relief from judgment in this case and the Magistrate Judge is ordered to strike any such attempts without preparing a report and recommendations.

DONE and **ORDERED** in Dayton, Ohio, this Thursday, April 26, 2018.

s/Thomas M. Rose

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE

NOT RECOMMENDED FOR PUBLICATION

Nos. 18-3434/3643/3645

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JEREMY E. LEWIS,	)	
	)	
Petitioner-Appellant,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE SOUTHERN DISTRICT OF
UNITED STATES OF AMERICA,	)	OHIO
	)	
Respondent-Appellee.	)	

ORDER

Before: GUY, DONALD, and LARSEN, Circuit Judges.

Jeremy E. Lewis, a pro se federal prisoner, appeals various district court orders in these consolidated cases, which stem from his protracted efforts to relitigate the order denying his 28 U.S.C. § 2255 motion to vacate his sentence. In No. 18-3434, Lewis appeals the district court's order denying his motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure and imposing sanctions against him under Rule 11 in the form of filing restrictions. In No. 18-3643, Lewis appeals the district court's order striking one of his Rule 60 motions. In No. 18-3645, Lewis appeals the district court's order denying his motion to vacate the Rule 11 sanctions order.

We granted Lewis a certificate of appealability (COA) on the issue of whether the district court abused its discretion as to the scope of its injunctive order and denied Lewis a COA as to all other questions. Lewis has also filed two motions to add a claim for the first time on appeal, as well as various motions. In No. 18-3645, Lewis filed an unscheduled brief which, liberally construed, seeks authorization under 28 U.S.C. §§ 2244(b)(3) and 2255(h) to file a second or

successive motion to vacate his sentence under § 2255(a). This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2009, Lewis pleaded guilty to armed bank robbery with forced accompaniment, in violation of 18 U.S.C. § 2113(a), (d), and (e), and discharging a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii). The district court sentenced Lewis to 168 months of imprisonment for bank robbery and to a consecutive term of 120 months of imprisonment for discharging a firearm during the bank robbery. We dismissed Lewis's appeal because it was untimely. *See United States v. Lewis*, No. 10-3911 (6th Cir. Dec. 8, 2010) (order). In 2011, Lewis filed a motion to vacate under § 2255, but the district court concluded that it was barred by the statute of limitations and dismissed it sua sponte. We denied Lewis a COA. *See Lewis v. United States*, No. 12-3315 (6th Cir. May 23, 2012) (order).

By the district court's count, Lewis has filed eighteen motions under Rule 60 seeking relief from the district court's original judgment dismissing his motion to vacate as untimely. The district court denied every one of these motions, and we have not granted Lewis a COA to review any of those denials.

In February and April 2018, Lewis filed two Rule 60 motions, challenging the determination that his original motion to vacate was untimely and claiming that he is actually innocent of the forced-accompaniment element of his bank-robbery conviction. Not only did the district court deny those motions, it also reached the end of its patience with Lewis. The district court found that Lewis had intentionally abused the judicial process with his repeated attempts to overturn his convictions and therefore sanctioned him under Rule 11. Since Lewis was an indigent prisoner, the district court found that a monetary sanction would not deter his vexatious conduct. The court concluded that an appropriate sanction would "deny Lewis any further opportunity to waste judicial time on his repeated arguments." The district court therefore ordered Lewis "not to file any further motions to obtain relief from judgment in this case." And to enforce this order, the

court ordered the magistrate judge assigned to the case "to strike any such attempts without preparing a report and recommendations."

We granted Lewis a COA on the question of whether the district court abused its discretion as to the scope of its injunctive order because it does not provide for a screening mechanism to determine whether any motion for relief from judgment filed by Lewis is frivolous or vexatious. Lewis then filed a bevy of motions in this court while his appeal was pending. We erred in granting Lewis a COA and will therefore vacate the COA and dismiss this appeal in its entirety for lack of jurisdiction.

Section 2255 petitioners may not appeal as of right a district court's denial of their petitions; they "must first seek and obtain a COA." *Miller-El v. Cockrell*, 537 U.S. 322, 335–36, (2003); 28 U.S.C. § 2253(c)(1)(B). Courts may issue a COA "only if the applicant has made a substantial showing of a denial of a *constitutional* right." *Id.* § 2253(c)(2) (emphasis added). Here, we granted Lewis a COA on "the issue whether the district court abused its discretion as to the scope of its injunctive order" under Rule 11. *Lewis v. United States*, Nos. 18-3434, -3643, -3645 (6th Cir. Apr. 23, 2019) (Order). We may grant a COA "[w]hen the district court denies a habeas petition on procedural grounds," it is true, but only when there is an "underlying constitutional claim" and the "prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (emphasis added). Here, there is no debatable underlying constitutional claim and no argument that we might liberally construe as contending that the district court's abuse of discretion implicated any of Lewis's constitutional rights.

We therefore **VACATE** the COA and **DISMISS** this appeal for lack of jurisdiction.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Nos. 18-3434/3643/3645

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 29, 2020
DEBORAH S. HUNT, Clerk

JEREMY E. LEWIS,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

BEFORE: GUY, DONALD, and LARSEN, 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 cases. 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