

United States District Court, Northern District of Ohio, ~~07/27/2020~~ ORDER

APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

No. 20-3272

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Jul 27, 2020

DEBORAH S. HUNT, Clerk

FELIX BROWN,

)

Petitioner-Appellant,

)

v.

) ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF
OHIO

KEITH FOLEY, Warden,

)

Respondent-Appellee.

)

O R D E R

Before: SUHRHEINRICH, GIBBONS, and KETHLEDGE, Circuit Judges.

Felix Brown, 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(d) and imposing filing restrictions. 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)*. Brown has filed an application for a certificate of appealability and a motion to proceed in forma pauperis.

Brown was sentenced to an aggregate sentence of 18 years to life imprisonment after being convicted of murder with a firearm specification and having a weapon while under a disability. The state appellate court affirmed Brown's convictions and sentence, and the Ohio Supreme Court declined to accept jurisdiction over the appeal. *State v. Brown*, Nos. 95-T-5349, 98-T-0061, 2000 WL 522339 (Ohio Ct. App. Mar. 31, 2000), *perm. app. denied*, 731 N.E.2d 1141 (Ohio 2000). Brown then filed a petition for a writ of habeas corpus, which the district court denied. *Brown v. Bagley*, No. 1:01-cv-2476, 2003 WL 27388526 (N.D. Ohio Aug. 5, 2003). Brown appealed, and

this court declined to issue a certificate of appealability. *Brown v. Bagley*, No. 03-4214 (6th Cir. Mar. 11, 2004).

Since then, Brown has repeatedly sought to reopen the district court's judgment. Most recently, Brown filed a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(d), arguing that he was denied the benefit of his defense when the district court refused to excuse the procedural default of his claim that he received ineffective assistance of appellate counsel. After determining that Brown presented no new evidence and made no showing of actual innocence, the district court denied the Rule 60(d) motion and permanently enjoined Brown from filing any new motions or other documents without obtaining leave from the court. Brown now argues that the district court erred in denying his Rule 60(d) motion and in imposing filing restrictions.

A certificate of appealability is necessary to appeal the denial of a Rule 60 motion. *Johnson v. Bell*, 605 F.3d 333, 336 (6th Cir. 2010). A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Federal Rule of Civil Procedure 60(d) provides that a district court has the authority to "entertain an independent action to relieve a party from a judgment, order, or proceeding." In order to bring an independent action, a movant must show

- (1) a judgment which ought not, in equity and good conscience, to be enforced;
- (2) a good defense to the alleged cause of action on which the judgment is founded;
- (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.

Mitchell v. Rees, 651 F.3d 593, 595 (6th Cir. 2011) (quoting *Barrett v. Sec'y of Health & Human Servs.*, 840 F.2d 1259, 1263 (6th Cir. 1987)). Moreover, relief under Rule 60(d) is "available only to prevent a grave miscarriage of justice," which has been construed in the habeas context as

requiring a “strong showing of actual innocence.” *Id.* at 595–96 (quoting *United States v. Beggerly*, 524 U.S. 38, 47 (1998); *Calderon v. Thompson*, 523 U.S. 538, 557 (1998)). Although Brown asserts that he has shown cause excusing the procedural default of his jury-instruction claim because the prison failed to mail his Rule 26(B) application in a timely fashion, Brown has failed to offer any evidence of actual innocence. Accordingly, reasonable jurists would not debate the denial of Brown’s Rule 60(d) motion.

A district court has inherent authority to issue an injunctive order to prevent prolific litigants from filing harassing and vexatious pleadings. *See Feathers v. Chevron U.S.A., Inc.*, 141 F.3d 264, 269 (6th Cir. 1998). We review a district court’s order issuing an injunction for an abuse of discretion. *Jones v. Ill. Cent. R.R. Co.*, 617 F.3d 843, 850 (6th Cir. 2010). In this case, the district court issued an order requiring Brown to obtain leave from the court before filing any additional motions or documents in his habeas case after he filed numerous unsuccessful motions and appeals challenging the 2001 denial of his habeas petition. Because Brown continues to reassert arguments that have been rejected by the district court and this court, the district court did not abuse its discretion in imposing filing restrictions. *See Filipas v. Lemons*, 835 F.2d 1145, 1146 (6th Cir. 1987).

Based upon the foregoing, we **DENY** the application for a certificate of appealability, **AFFIRM** the imposition of filing restrictions, and **GRANT** the motion to proceed in forma pauperis for the limited purpose of this appeal.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

United States Sixth Circuit Court of Appeals, ~~09/23/2020~~ ORDER.

APPENDIX B

No. 20-3272

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 23, 2020
DEBORAH S. HUNT, Clerk

FELIX BROWN,

Petitioner-Appellant,

v.

KEITH FOLEY, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: SUHRHEINRICH, GIBBONS, 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, Northern District of Ohio, ~~02/10/2020~~ ORDER

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FELIX O. BROWN JR,)	Case No. 1:01 CV 02476
)	
Petitioner,)	
)	
vs.)	<u>ORDER DENYING</u>
)	<u>RELIEF FROM JUDGMENT</u>
)	
KEITH FOLEY, Warden)	
)	
Respondent.)	

This matter is before the Court on Mr. Brown's Motion for Relief from Judgment under Fed. R. Civ. P. 60(d)(1). (ECF #117). Mr. Brown seeks relief from judgment on the basis that he was denied the benefit of his defense when the federal district court refused to excuse his procedural default of Ground Two of his habeas corpus petition. The Government opposes Mr. Brown's motion and requests that this Court impose non-monetary sanctions to deter Mr. Brown from continuing to file frivolous motions. (ECF #120).

Federal Rule of Civil Procedure 60 provides for "Relief from a Judgment or Order" by motion or by independent action. Rule 60(d) states that "This rule does not limit a court's power to entertain an independent action to relieve a party from a judgment, order, or proceeding . . ." Fed. R. Civ. P. 60(d)(1). An independent action in equity may be an appropriate vehicle for reviewing a time-barred Rule 60(b)(1) motion, but only when the following requirements are met:

- (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of any fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.

Mitchell v. Reese, 651 F.3d 593, 595-97 (6th Cir. 2011). Because “an independent action is available only to prevent a grave miscarriage of justice. . . . Petitioner must make a strong showing of actual innocence.” *Id.* at 595-96. Mr. Brown must show actual innocence by “new reliable evidence.” *Souter v. Jones*, 395 F.3d 577, 590 (6th Cir. 2005).

Mr. Brown presented no new evidence and has made no showing of actual innocence. Because a showing of actual innocence is a required element for an independent action for relief under Rule 60(d), Mr. Brown cannot show that he is eligible for relief under this rule. Indeed, Mr. Brown has had multiple opportunities to present his legal and factual arguments to the Court, and those arguments were not convincing. Nothing in his most recent motion changes the reasoning that supported these prior decisions. All of the facts and legal principles underlying his claims have been considered and addressed. Mr. Brown’s most recent reiteration of his dissatisfaction with the result offers no relevant information that would alter that outcome.

Mr. Brown has established a pattern of filing frivolous motions in this Court which are patently vexatious, and which appear calculated to abuse the judicial process. Mr. Brown first filed his 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus on October 29, 2001, challenging his convictions for murder and having a weapon under disability from the Trumbull County, Court of Common Pleas. (ECF #1). On August 5, 2003, this Court adopted the Magistrate Judge’s Report and Recommendation and dismissed Mr. Brown’s petition. (ECF #36). Mr. Brown then challenged this Court’s Order by Rule 59 motion and by appeal to the Sixth Circuit Court of Appeals. (ECF # 39, 41). This Court denied Mr. Brown’s Rule 59 motion. (ECF #44). The Sixth Circuit then denied Mr. Brown’s application for a certificate of appealability. (ECF #50). For the next seventeen years and up to this date, Mr. Brown filed thirty motions and appeals challenging this Court’s original denial of his habeas corpus petition and denials of his subsequent motions. (ECF # 45, 48, 53, 55, 56, 62, 63, 65, 66, 68, 73, 74, 75, 77, 80, 84, 86, 88, 89, 93, 95, 97, 100, 104, 106, 108, 109, 112, 115, 117).

Mr. Brown long ago ceased to raise any new issues or bases for relief before this Court. As such, his repeated filings are frivolous and vexatious.

Accordingly, Mr. Brown is permanently enjoined from filing any new motions or other documents in this case without seeking and obtaining leave of court from the Chief Judge or the Miscellaneous Duty Judge in accordance with the following:

- (1) He must file a "Motion Pursuant to Court Order Seeking Leave to File" with any document he proposes to file in this case, and he must attach a copy of this Order to it.
- (2) As an exhibit to any motion seeking such leave, he must also attach a declaration, prepared pursuant to 28 U.S.C. § 1746, or a sworn affidavit certifying that (1) the document raises a new issue which Mr. Brown has never previously raised in this Court or any other court; (2) the claim or issue is not frivolous; and (3) the document is not filed in bad faith.

The court may deny any motion for leave to file if the proposed document is frivolous, vexatious or harassing. If the motion is denied, the document shall not be filed. Further, Mr. Brown's failure to comply with the terms of this Order shall be sufficient ground for this Court to deny any motion for leave to file.

Therefore, the Clerk's Office is hereby ordered as follows:

- (1) Any document submitted by Mr. Brown under case number 1:01-cv-02476-DCN prior to him obtaining leave to file shall not be filed unless it is specifically identified as a "Motion Pursuant to Court Order Seeking Leave to File," and unless it contains (1) an affidavit or sworn declaration as required by this Order; (2) a copy of this Order; and (3) the exhibits required by this Order.

For these reasons, Mr. Brown's motion for Relief from Judgment (ECF #117) is DENIED and the above described filing restrictions are imposed. IT IS SO ORDERED.

Donald C. Nugent
DONALD C. NUGENT
Senior United States District Judge

DATE:

February 7, 2020

United States Sixth Circuit Court of Appeals 07/23/2015 ORDER.

APPENDIX D

No. 15-3198

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FELIX BROWN,

Petitioner-Appellant,

v.

KIMBERLY CLIPPER, Warden,

Respondent-Appellee,

FILED

Jul 23, 2015

DEBORAH S. HUNT, Clerk

ORDER

Felix Brown, an Ohio prisoner proceeding pro se, appeals a district court order denying his motion for relief from judgment filed under Federal Rule of Civil Procedure 60(b)(4). Brown's motion sought relief from a district court judgment denying his habeas corpus petition filed pursuant to 28 U.S.C. § 2254. Brown requests a certificate of appealability, *see* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b), and leave to proceed in forma pauperis.

In 1995, a jury found Brown guilty of murder with a firearm specification and having a weapon while under a disability. Brown was sentenced to serve fifteen years to life imprisonment for the murder conviction to be served consecutively to a three-year sentence of imprisonment for the firearm specification. He was sentenced to serve eighteen months of imprisonment for the weapon conviction, to run concurrently with the murder sentence. The Ohio Court of Appeals affirmed Brown's convictions, and the Ohio Supreme Court denied leave to appeal and dismissed Brown's appeal.

In the meantime, Brown filed an application to reopen his direct appeal under Ohio Rule of Appellate Procedure 26(B). The Ohio Court of Appeals denied Brown's application as untimely, and the Ohio Supreme Court denied leave to appeal.

In 2001, Brown filed a § 2254 petition for a writ of habeas corpus, raising five grounds for relief. Upon the recommendation of a magistrate judge and over Brown's objections, the district court denied Brown's habeas petition and denied a certificate of appealability. This Court also denied a certificate of appealability. After the denial of his habeas petition, Brown filed five motions for relief from the judgment denying habeas relief and a motion to amend one of these post-judgment motions under Rule 60(b). The district court denied all of Brown's motions. This Court denied certificates of appealability for the three motions that Brown appealed.

Brown also filed a motion to reopen his habeas petition so the district court could conduct an evidentiary hearing. The district court denied Brown's motion and his subsequent motion to reopen the time to file an appeal from that denial. This Court denied a certificate of appealability to appeal the denial of the motion to reopen the time to file an appeal. This Court also denied Brown's motions for permission to file second or successive habeas petitions in the district court.

In 2014, Brown filed this post-judgment motion—his sixth—seeking relief under Rule 60(b)(4) from the district court's judgment denying habeas corpus relief in 2003. Brown alleged that the judgment denying habeas corpus relief is void because it did not convey "the true basis" of the denial of the second ground for relief raised in his petition. Brown explained that the district court concluded that his second ground for relief was procedurally defaulted, and he presumed that the district court had rejected "the cause and prejudice rebuttal contained in his traverse [as] legally inadequate." Brown argued that he later realized that his presumption was erroneous and that the district court had concluded that he "never presented a cause and prejudice argument – for the delayed mailing of his Ohio App. R. 26(B) application," even though he had. Brown argued that this Court's 2014 order denying a certificate of appealability to appeal the district court order denying his motion to amend one of his post-judgment motions enlightened him "for the first time of the actual basis of" the district court's procedural default ruling regarding his second ground for relief. Because he did not know the basis for the district court's rejection of his second ground for relief until this Court's 2014 order enlightened him,

Brown argues that he was “deprived of the notice contemplated by the due process clause—especially timely notice—such that he must be recognized as having been denied a meaningful opportunity to litigate his cause and be heard in a meaningful time and manner.” The district court denied Brown’s motion and subsequently denied a certificate of appealability.

A certificate of appealability is necessary to appeal the denial of a Rule 60(b) motion in a habeas proceeding. *See Johnson v. Bell*, 605 F.3d 333, 336 (6th Cir. 2010). A certificate of appealability may issue only if the petitioner makes “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When a habeas petition is denied on procedural grounds, the petitioner must show “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).

Rule 60(b)(4) provides for relief from a final judgment if “the judgment is void.” “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). A Rule 60(b)(4) motion “must be made within a reasonable time.” Fed. R. Civ. P. 60(c)(1).

Brown’s Rule 60(b)(4) motion, filed on November 12, 2014, was not filed “within a reasonable time” after the district court’s August 5, 2003 judgment, as eleven years elapsed between the two. Brown was no doubt aware that the district court denied the second ground for relief raised in his habeas petition as procedurally defaulted at the time that the judgment was rendered, yet he did not pursue this motion until eleven years later. Brown’s motion was clearly untimely. *See Bridgeport Music, Inc. v. Smith*, 714 F.3d 932, 943 (6th Cir. 2013); *United States v. Dailide*, 316 F.3d 611, 618 (6th Cir. 2003). Reasonable jurists would not find it debatable

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whether the district court was correct in ruling that Brown was not entitled to relief under Rule 60(b)(4). *See Slack*, 529 U.S. at 484.

Accordingly, the application for a certificate of appealability is denied, and the motion to proceed in forma pauperis is denied as moot.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk