No. 21-3671

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DWAYNE STOUTAMIRE,

Petitioner-Appellant,

v.

TIM SHOOP, Warden,

Respondent-Appellee.

ORDER

(Appendix B)

Before: WHITE, Circuit Judge.

Dwayne Stoutamire, an Ohio prisoner proceeding pro se, appeals the district court's order denying his motion for relief from judgment filed pursuant to Federal Rule of Civil Procedure 60(b) in his habeas corpus proceeding filed under 28 U.S.C. § 2254. Stoutamire has filed an application for a certificate of appealability ("COA"), *see* Fed. R. App. P. 22(b)(1), and a motion to proceed in forma pauperis on appeal, *see* Fed. R. App. P. 24(a)(5).

In May 2007, an Ohio 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. These convictions stem from two separate incidents: (1) a robbery shooting that occurred on January 9, 2007; and (2) a domestic dispute that occurred on February 19, 2007, during which Stoutamire abducted and assaulted his girlfriend, Jessica Gordon, at gunpoint. The trial court sentenced Stoutamire to a total term of thirty-four years of imprisonment. Stoutamire's direct appeal and requests for state post-conviction relief were unsuccessful.

In December 2010, Stoutamire filed a § 2254 petition. The district court denied Stoutamire's petition, concluding, in relevant part, that several of Stoutamire's claims—namely, his prosecutorial-misconduct, ineffective-assistance, and judicial-bias claims—were procedurally

defaulted and that Stoutamire had failed to show cause and prejudice or actual innocence[1] to overcome the procedural default. This court subsequently granted Stoutamire a COA on one of his habeas claims—that the trial court violated his constitutional rights by denying his motion for a severance. *Stoutamire v. Morgan*, Nos. 12-3099/3225 (6th Cir. Nov. 29, 2012) (order). Following briefing, this court affirmed the district court's judgment. *Stoutamire v. Morgan*, Nos. 12-3099/3225 (6th Cir. Oct. 10, 2013) (order).

On December 18, 2014, Stoutamire filed a motion for relief from judgment under Rule 60(b) and (d), arguing, in part, that the district court had 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 COA. *Stoutamire v. Morgan*, No. 15-3141 (6th Cir. Aug. 18, 2015) (order).

On October 12, 2017, Stoutamire filed another motion for relief from judgment under Rule 60(b) and (d), in which he argued 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 denied Stoutamire's motion and declined to issue him a COA. In so doing, the district court found that Stoutamire's actual-innocence claim "merely rehashe[d] the same arguments and evidence already presented and rejected several times." This court likewise declined to issue Stoutamire a COA. *Stoutamire v. La Rose*, No. 18-3216 (6th Cir. July 27, 2018) (order).

In May 2021, Stoutamire filed two motions—a motion to disqualify the district judge under 28 U.S.C. § 455(a) and yet another Rule 60(b) motion, in which Stoutamire again argued that the district court should excuse the procedural default of several of his habeas claims because he is actually innocent of his crimes of conviction. The district court denied both motions, finding with

---

[1] *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) (holding that actual innocence can be asserted as a gateway to hear otherwise procedurally defaulted or out-of-time claims if the petitioner persuades the "district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt" (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995))).

respect to the latter that Stoutamire had "failed to offer any new *reliable* evidence of his actual innocence (the only new evidence appears to be a single self-serving affidavit by Stoutamire himself)." The district court also declined to issue Stoutamire a COA. This appeal followed.

Stoutamire now seeks a COA from this court to challenge the district court's denial of his Rule 60(b) motion. "[T]his court will not entertain an appeal from the denial of a Rule 60(b) motion in [a § 2254] proceeding unless the petitioner first obtains a COA." *Johnson v. Bell*, 605 F.3d 333, 339 (6th Cir. 2010). In the context of a Rule 60 motion, "the COA question is . . . whether a reasonable jurist could conclude that the District Court abused its discretion in declining to reopen the judgment." *Buck v. Davis*, 137 S. Ct. 759, 777 (2017).

Rule 60(b) allows for relief from a final judgment for (1) mistake, (2) newly discovered evidence, (3) fraud by the opposing party, or when a judgment is (4) void or has been (5) satisfied or reversed. *See* Fed. R. Civ. P. 60(b)(1)-(5). Rule 60(b) also includes a "catch-all" provision in subsection (6), which permits a court to grant a motion for "any other reason that justifies relief." Fed. R. Civ. P. 60(b). Rule 60(b)(6) "applies 'only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule.'" *Ford Motor Co. v. Mustangs Unlimited, Inc.*, 487 F.3d 465, 468 (6th Cir. 2007) (quoting *Blue Diamond Coal Co. v. Trs. of UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2007)). Because "clauses 1-5 of the Rule cover almost every conceivable ground for relief," *id.* at 469 (quoting *In re Walter*, 282 F.3d 434, 440 (6th Cir. 2002)), relief under Rule 60(b)(6) is limited to "unusual and extreme situations where principles of equity *mandate* relief," *id.* at 468 (quoting *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990)).

Stoutamire did not specify a particular subsection of Rule 60(b) in his motion, and the district court also did not specify which subsection it thought applied. Given Stoutamire's pro se status, this court construes his Rule 60(b) motion liberally. *See Martin v. Overton*, 391 F.3d 710, 712 (6th Cir. 2004). Citing the circumstantial nature of the State's case against him and the State's witnesses's purported lack of credibility, Stoutamire asserted in his Rule 60(b) motion that he had satisfied the actual-innocence standard that would permit judicial review of his procedurally

defaulted habeas claims. This court construes Stoutamire's motion as seeking relief solely under Rule 60(b)(6) given that subsections (1) through (5) of Rule 60(b) clearly do not apply.

Reasonable jurists could not conclude that the district court abused its discretion in denying Stoutamire's Rule 60(b) motion. In support of his actual-innocence claim, Stoutamire submitted the following exhibits: (1) Allen Reynolds's February 19, 2007, written statement; (2) a police report from January 10, 2007; (3) an Ohio Bureau of Criminal Investigation "evidence submission sheet" from March 28, 2007; (4) a judgment showing that Jessica Gordon had pleaded guilty to theft on November 7, 2005; (5) the transcript of an April 20, 2007, interview of Gordon; (6) Gordon's March 2008 letter to Stoutamire's defense team in which she recants her trial testimony; (7) Ronald W. Jones's February 15, 2007, written statement; (8) an April 25, 2002, journal entry showing that David L. Palm had been convicted of breaking and entering; (9) a March 4, 2003, judgment showing that Palm had pleaded guilty to receiving stolen property; (10) a judgment showing that Sally Jo Palm had pleaded guilty to three counts of attempted forgery and three counts of attempted receiving stolen property on March 25, 2002; (11) a note that the jury sent to the trial court inquiring whether Stoutamire could "be found guilty without handling the gun"; and (12) an affidavit submitted by Stoutamire, in which he attests that he is actually innocent.

Stoutamire previously submitted exhibits (1), (4), (5), and (7) in support of his December 18, 2014, Rule 60 motion, and exhibits (1), (4), (5), (8), (9), and (10) in support of his October 12, 2017, Rule 60 motion. In both instances, the district court considered these exhibits and concluded that they did not demonstrate extraordinary circumstances warranting relief under Rule 60(b). And in both instances this court denied Stoutamire's request for a COA. *Stoutamire*, No. 18-3216, slip op. at 6; *Stoutamire*, No. 15-3141, slip op. at 3. Consequently, under the law-of-the-case doctrine, the district court was precluded from revisiting Stoutamire's actual-innocence claim to the extent it was based on these exhibits. *See United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994) ("Under the doctrine of law of the case, findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation.").

Although it does not appear that Stoutamire previously presented exhibits (2), (3), (6), (11), or (12), these exhibits do not show "exceptional or extraordinary circumstances" warranting relief under Rule 60(b)(6). *Stokes v. Williams*, 475 F.3d 732, 735 (6th Cir. 2007) (quoting *Olle*, 910 F.2d at 365). These exhibits—the police report, evidence submission sheet, jury note, and Gordon's purported recantation letter—all predate Stoutamire's habeas petition by several years and, therefore, do not constitute "new" evidence. *Schlup*, 513 U.S. at 324. Moreover, Stoutamire failed to explain why he could not have filed his own affidavit when he filed his habeas petition.

Accordingly, Stoutamire's COA application is **DENIED**, and his motion for pauper status is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix # A

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

Dwayne Stoutamire,

Petitioner,

-vs-

Warden Christopher La Rose,

Respondent.

Case No. 3:10 CV 2657

ORDER DENYING
RULE 60(B) MOTION

JUDGE JACK ZOUHARY

INTRODUCTION

Petitioner Dwayne Stoutamire filed two motions on May 10, 2021 -- a Motion for Disqualification (Doc. 96) and a Federal Rule 60(b) Motion (Doc. 96-1), the latter Stoutamire admits was inadvertently attached as an exhibit to the Motion for Disqualification. Stoutamire now files a "Notice of Failure to Rule," in which he requests this Court give the 60(b) Motion "due consideration" (Doc. 100). Stoutamire simultaneously filed a Notice of Appeal (Doc. 99) of this Court's most-recent Order denying his Motion for Disqualification (Doc. 98).

Stoutamire previously filed a habeas petition with this Court in January 2011 (Doc. 9). Magistrate Judge Vernelis Armstrong issued a Report and Recommendation ("R&R"), recommending this Court dismiss Stoutamire's petition (Doc. 40). This Court adopted the R&R in its entirety (Doc. 46). Stoutamire has since filed multiple additional 60(b) Motions and numerous Notices of Appeal (Docs. 50, 54, 64, 75, 89). In each of those appeals, this Court's decision has been upheld by the Sixth Circuit.

DISCUSSION

This Court will now respect Stoutamire's request to treat the 60(b) Motion separately. His Motion raises an actual-innocence claim (Doc. 96-1). This is not, however, the first time Stoutamire has raised such a claim. In his initial Petition (Doc. 9), Stoutamire also asserted an actual-innocence argument, which the Magistrate Judge addressed in the R&R (Doc. 40 at 16). The R&R, which this Court adopted, concluded that Stoutamire failed to provide any new reliable evidence that would permit him to prevail on actual-innocence grounds (*id.* at 17). This Court adopted the Report and Recommendation in full (Doc. 46). Stoutamire's appeals were rejected.

Stoutamire's latest 60(b) Motion (Doc. 96-1) likewise fails to offer any new *reliable* evidence of his actual innocence (the only new evidence appears to be a single self-serving affidavit by Stoutamire himself) (Doc. 96-12). *See Cleveland v. Bradshaw*, 760 F.Supp.2d 751, 758 (N. D. Ohio 2011) (for purposes of tolling or excusing a default on the basis of a claim of actual innocence, a petitioner must proffer "new reliable evidence"). *See also Schlup v. Delo*, 115 S. Ct. 851, 865 (1995).

Further, given that this Court has rejected Stoutamire's previous actual-innocence claim, his latest Motion may be considered a successive petition. There are three rules for such petitions: (1) any claims already adjudicated in a previous petition must be dismissed; (2) any claims not previously adjudicated must be dismissed unless they rely on a new rule of law or new facts showing a high probability of innocence; and (3) before this Court can accept a successive petition, the court of appeals must determine it presents a claim sufficient to meet prong two. *See* 28 U.S.C. § 2244(b)(1)–(3).

Stoutamire did not receive certification from the appellate court that any of his claims satisfy the new rule or new evidence exceptions. Stoutamire cannot sidestep the prohibition on successive

habeas petitions by way of Rule 60(b). *See In re Nailor*, 487 F.3d 1018, 1023 (6th Cir. 2007) ("[U]se of Rule 60(b) would impermissibly circumvent the requirement that a successive habeas petition be precertified by the court of appeals as falling within an exception to the successive-petition bar.") (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 532 (6th Cir. 2005)).

CONCLUSION

The Motion (Docs. 96-1 and 100), after due consideration, is denied.

IT IS SO ORDERED.

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

July 2, 2021

Appendix # C

No. 21-3671

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 18, 2022
DEBORAH S. HUNT, Clerk

DWAYNE STOUTAMIRE,

Petitioner-Appellant,

v.

TIM SHOOP, Warden,

Respondent-Appellee.

ORDER

Before: BOGGS, BUSH, and LARSEN, Circuit Judges.

Dwayne Stoutamire, an Ohio prisoner proceeding pro se, petitions for panel rehearing of this court's order of January 24, 2022, denying his application for a certificate of appealability. Stoutamire's application for a certificate of appealability arose from the district court's order denying his motion for relief from judgment filed pursuant to Federal Rule of Civil Procedure 60(b) in his habeas corpus proceeding filed under 28 U.S.C. § 2254. We have reviewed the petition and conclude that this court did not overlook or misapprehend any point of law or fact in Stoutamire's application for a certificate of appealability. *See* Fed. R. App. P. 40(a)(2).

Accordingly, we **DENY** the petition for rehearing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk