IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEANGELO MOODY,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 3:17-cv-01452**
	)	**Judge Trauger**
MIKE PARRIS, Warden,	)	
	)	
Respondent.	)	

MEMORANDUM AND ORDER

I. Introduction and Procedural History

The petitioner, Deangelo Moody, is currently serving a sentence of life in prison based on his May 12, 2011 conviction by a Davidson County, Tennessee jury of first-degree felony murder. On November 15, 2017, he filed his pro se Petition for the Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (Doc. No. 1.) The court found that the Petition contained exhausted claims of (1) insufficiency of the evidence and (2) ineffective assistance of counsel, for failing to interview and call as a witness a co-defendant, Ortago Thomas. The court denied those claims on their merits. The court denied the Petition's remaining claims of ineffective assistance and trial court error on grounds of procedural default unexcused by any showing of cause and prejudice, including an insufficient showing of the petitioner's actual innocence based on the post-conviction testimony of Mr. Thomas. (Doc. Nos. 19, 20.)

On March 5, 2020, the court entered judgment denying the Petition and dismissing this action. (Doc. No. 21.) Finding that reasonable jurists could debate "whether the petitioner's exhausted claim of ineffective assistance of counsel has merit, and whether his showing of actual

innocence via Ortago Thomas's testimony is sufficient to excuse his procedural default," the court granted a certificate of appealability (COA) on those issues. (Doc. No. 20.)

The petitioner appealed this court's decision to the United States Court of Appeals for the Sixth Circuit, where counsel was appointed for the petitioner, "[g]iven the procedural complexity of the issues certified for appeal by the district court." *Moody v. Parris*, No. 20-5299, Doc. No. 8-2 at 8 (6th Cir. Aug. 3, 2020). In its order appointing counsel, the Sixth Circuit considered whether to expand the COA to include the remaining claims of the pro se Petition. *Id.* at 3–9. The Sixth Circuit declined to do so, leaving the issues for appeal as certified by this court. Counsel subsequently filed a Motion for Relief from Judgment Under Federal Rule of Civil Procedure 60(b) (Doc. No. 32) and a Motion for Indicative Ruling Under Federal Rule of Civil Procedure 62.1 (Doc. No. 33) in this court. Briefing of the appeal was stayed while these motions were under consideration. *Moody*, Doc. No. 15.

By order entered April 14, 2021 (Doc. No. 47), this court denied the Motion for Indicative Ruling. The court also denied the Motion for Relief from Judgment to the extent it sought relief from the denial of the pro se Petition based on mistake under Rule 60(b)(1). The court declined to issue a COA on this ruling. (*Id.* at 1–2.)

To the extent the Motion for Relief from Judgment sought relief based on new evidence under Rule 60(b)(2), the court ordered the transfer of the motion to the Sixth Circuit for consideration as an application for permission to file a successive petition. (*Id.* at 2.) The new evidence offered to support the requested relief was evidence that the State's key witness, Quontez Caldwell, recanted his trial testimony, first in an affidavit submitted to the state trial court in support of a pro se petition for writ of error coram nobis filed on October 31, 2019 (Doc. No. 32-2), and subsequently in live testimony at a September 2020 hearing on that coram nobis petition,

which had been amended by current counsel.[1] (Doc. No. 32-1 at 30–114; Doc. Nos. 32-3, 32-4.) Based on counsel's repeated assertions that Caldwell's recantation completely eliminated all evidence in support of the petitioner's conviction, the court found that "the petitioner's Rule 60(b)(2) motion 'lead[s] inexorably to a merits-based attack on the prior dismissal of his habeas petition,' in the form of a claim that the convicting evidence was not sufficient in light of Caldwell's recantation—a claim that is successive because it 'reli[es] on a new factual predicate' 'in support of a [sufficiency-of-the-evidence] claim already litigated.'" (Doc. No. 46 at 17–18 (citing *Post v. Bradshaw*, 422 F.3d 419, 424–25 (6th Cir. 2005) and *Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005)).)

By order entered December 17, 2021, the Sixth Circuit ruled that this court erred in transferring the Rule 60(b)(2) motion, since the petitioner "argued that Caldwell's recantation supported his actual-innocence argument[.]" (Doc. No. 52 at 5.) The Sixth Circuit remanded the Rule 60(b)(2) motion to this court "for further proceedings on [the petitioner's] argument that Caldwell's recantation demonstrates that the district court erred in concluding that he did not make the requisite showing of actual innocence to overcome the procedural default of his third, fourth, and fifth habeas claims." (*Id.* at 6.)

At the time that this court initially considered the Rule 60(b)(2) motion, the petitioner's coram nobis petition was still pending before the state trial court.[2] That fact prompted the court to

[1] Attorney Manuel B. Russ filed the amended coram nobis petitions in January and February 2020, respectively, and represented the petitioner at the state-court evidentiary hearing in September 2020. (Doc. No. 32-1, 32-3, 32-4.) Mr. Russ entered his appearance on the record in this case and filed the petitioner's post-judgment motions on November 20, 2021 (Doc. Nos. 30, 32, 33), while the application for admission *pro hac vice* of counsel appointed by the Sixth Circuit was pending. (*See* Doc. Nos. 29, 31.)

[2] According to the Sixth Circuit, at the time of its December 2021 remand order, "[t]he state trial court ha[d] yet to rule on the [coram nobis] application." (Doc. No. 52 at 4.) But that appears not to have been the case; in its September 29, 2021 brief in response to the petitioner's appeal from the denial of his federal habeas petition, the State asserts that the coram nobis petition was denied, that the petitioner appealed, and that the

make the alternative finding that, even if the motion under Rule 60(b)(2) did not present a successive habeas claim, "the court would still defer consideration of the Motion, since any review of the reliability of the new evidence would have to await the judgment of the state court on the petitioner's coram nobis petition." (Doc. No. 46 at 18–19 (citing *Bennett v. Mills*, No. 1:06-cv-254, 2007 WL 2823324, at *6 (E.D. Tenn. Sept. 27, 2007)).) The court concluded that, "[w]ithout knowing the state court's resolution of the matter, this court would be in no position to adjudicate the reliability of the new evidence offered in the petitioner's Rule 60(b)(2) Motion." (*Id.* at 19.) This alternative finding was limited to the issue of the reliability of Caldwell's recantation. No alternative finding was made regarding the petitioner's diligence in discovering this new evidence.

II. Analysis

Under Rule 60(b)(2), relief from this court's March 5, 2020 judgment may be granted based on "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)."[3] Fed. R. Civ. P. 60(b)(2). The burden is on the movant "to show by clear and convincing evidence (1) that [he] exercised due diligence to obtain the evidence and (2) that the evidence is material, i.e., would have clearly resulted in a different outcome" and not been "merely impeaching or cumulative." *Luna v. Bell*, 887 F.3d 290, 294 (6th Cir. 2018) (quoting *Good v. Ohio Edison Co.*, 149 F.3d 413, 423 (6th Cir. 1998)). While the court continues to believe that adjudication of the materiality of the petitioner's new evidence must await

appeal remains pending before the Tennessee Court of Criminal Appeals (TCCA). *Moody v. Parris*, No. 20-5299, Doc. No. 23 at 7 (6th Cir. Sept. 29, 2021) (citing *Deangelo Moody v. State of Tennessee*, No. M2021-00605-CCA-R3-ECN (Tenn. Crim. App. June 2, 2021)). This court has been able to verify that the petitioner's appeal remains pending, with briefing not yet complete. *See* https://www.tncourts.gov/PublicCaseHistory/CaseDetails.aspx?id=82486&Party=True (last visited February 2, 2022).

[3] Rule 59(b) requires that a motion for new trial be filed "no later than 28 days after the entry of judgment." Fed. R. Civ. P. 59(b).

any final credibility determinations made by the state courts in coram nobis proceedings, *see Lowery v. Parris*, No. 3:18-CV-330-CLC-HBG, 2021 WL 1700348, at *6–8 (E.D. Tenn. Apr. 29, 2021); *Braxton v. State of Tennessee*, No. 3:20-cv-00251, 2021 WL 949384, at *4–5 (M.D. Tenn. Mar. 12, 2021), the instant motion may be determined on the due diligence prong of the Rule 60(b)(2) inquiry, as explained below.

"Regarding the first prong, the movant must show that, with 'reasonable diligence,' [he] could not have discovered the allegedly newly discovered evidence before the district court entered its . . . judgment[.]" *C.H. Raches, Inc. v. Gen. Aluminum Mfg. Co.*, 807 F. App'x 534, 539 (6th Cir. 2020) (finding that documents dated weeks prior to judgment were not "newly discovered evidence" under Rule 60(b)(2), where "no persuasive explanation" was offered for failure to submit such evidence to the court prior to entry of judgment). The State argues that the petitioner cannot make this showing, citing the fact that the petitioner filed his pro se coram nobis petition in state court on October 31, 2019, shortly after receiving a letter and notarized affidavit from Caldwell in which Caldwell explained his desire to recant. (*See* Doc. No. 32-2.) The petitioner thus possessed recantation evidence more than four months prior to the entry of judgment in this case but did not file his Rule 60(b)(2) motion until over eight months after entry of judgment, on November 20, 2020. In reply to this argument, the petitioner appears to contend that the early evidence of Caldwell's recantation was not sufficiently developed to enable its submission prior to this court's entry of judgment denying his habeas petition. He identifies Caldwell's live testimony before the coram nobis court as the "newly discovered evidence" upon which his Rule 60(b)(2) motion is based.

However, where the movant is "well aware" of a witness's proposed testimony prior to the entry of judgment, the subsequently adduced testimony cannot be deemed "newly discovered

evidence." *United States v. Glover*, 21 F.3d 133, 138 (6th Cir. 1994) (citing, *e.g.*, *United States v. DiBernardo*, 880 F.2d 1216, 1224–25 (11th Cir. 1989)) (denying motion for new trial under Fed. R. Crim. P. 33); *see also Wsol v. Fiduciary Mgmt. Assocs., Inc.*, No. 99 C 1719, 2001 WL 290613, at *3 (N.D. Ill. Mar. 20, 2001), *aff'd*, 266 F.3d 654 (7th Cir. 2001) (analyzing Rule 60(b)(2) motion by analogy to Fed. R. Crim. P. 33, "which parallels and embodies the same standards as motions for new trial under Fed. R. Civ. P. 60(b)(2)"). The petitioner nevertheless argues that he acted with all reasonable diligence in filing the Rule 60(b)(2) motion in this court less than two months after the coram nobis evidentiary hearing and just two weeks after receiving the transcript of that hearing (Doc. No. 45 at 13), because "[t]o have filed a motion based only on Caldwell's affidavit, as the State suggests, would have been *unreasonable*" in light of Sixth Circuit precedent "that a recanting witness's bare affidavit could not satisfy the actual-innocence exception where the witness 'never recanted in open court[,]' 'never subjected his recantation to cross-examination[,]' and 'refused to subject himself to any adverse consequences.'" (*Id.* at 14 (emphasis in original) (quoting *Davis v. Bradshaw*, 900 F.3d 315, 333 (6th Cir. 2018)).) He argues that these are "the boxes he was attempting to check" when he sought to develop the evidence of Caldwell's recantation during coram nobis proceedings.

The petitioner's argument misses the mark. As described in *Davis*, 900 F.3d at 332–34, the extent to which a recanting witness gives his testimony in open court, under cross-examination, and with exposure to risk of adverse consequences goes to the reliability of the recantation evidence. *See id.* (discussing such factors in analyzing reliability of trial witness's recantation and concluding that recantation affidavit was "unreliable and thus insufficient to support Davis's innocence"). But for purposes of determining whether the petitioner was duly diligent in bringing such evidence forward, habeas courts considering recanting-witness affidavits have focused on

"when the petitioner knew or could have discovered that the witness was willing to recant his or her testimony, not when the affidavit is executed," *Bates v. Metrish*, No. 07-11073, 2010 WL 1286413, at *9 (E.D. Mich. Mar. 30, 2010) (collecting cases), and not when the recantation testimony is eventually heard in open court. Caldwell's recantation of critical trial testimony and the petitioner's pursuit of relief in state court should have, in the exercise of reasonable diligence, been brought to this court's attention prior to its entry of judgment against the petitioner or, at the latest, within the time allowed for seeking relief under Rule 59(b). The decision to focus on coram nobis proceedings, and not to introduce the evidence before this court in a timely fashion, precludes the post-judgment relief the petitioner now seeks. Relief from "'free, calculated, [and] deliberate choices'" is not available through Rule 60(b), "and lack of due diligence counsels against granting" such post-judgment relief. *Jenkins v. Artuz*, 210 F. Supp. 2d 173, 176 (E.D.N.Y. 2002) (quoting *Ackermann v. United States*, 340 U.S. 193, 198 (1950)); *see also C.H. Raches, Inc.*, 807 F. App'x at 540 (finding that Rule 60 cannot be used to relieve "the consequences of decisions deliberately made, although subsequent events reveal that such decisions were unwise") (quoting *Fed.'s Inc. v. Edmonton Inv. Co.*, 555 F.2d 577, 583 (6th Cir. 1977)); *cf. In re Byrd*, 269 F.3d 544, 549 (6th Cir.), *amended*, 269 F.3d 561 (6th Cir. 2001) (finding no grounds to authorize second-or-successive habeas petition because, e.g., affidavit proof of actual innocence was known to petitioner but he "chose not to cite [it] in his first federal habeas petition").

Even though the petitioner was proceeding pro se when he initially decided to pursue relief in state court in 2019, he clearly discovered evidence of Caldwell's recantation in ample time to seek post-judgment relief under Rule 59(b) following this court's March 2020 denial of his habeas petition, so the plain language of Rule 60(b)(2) precludes its operation here. And even were that not the case, the petitioner's lack of diligence in waiting eight months after judgment entered—

and more than a year after discovering Caldwell's desire to recant—to bring *any* recantation evidence before this court requires the denial of his Rule 60(b)(2) motion, irrespective of the reliability of Caldwell's recantation.

III. Conclusion

For the reasons stated herein and following remand of the matter from the Sixth Circuit, the petitioner's motion for relief from judgment (Doc. No. 32) is **DENIED** to the extent that it seeks relief under Rule 60(b)(2) based on new evidence of actual innocence sufficient to overcome the procedural default of his habeas claims.

Because this constitutes a "final order adverse to" the petitioner, the court must "issue or deny a certificate of appealability." Habeas Rule 11(a). A certificate of appealability may issue only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Furthermore, where a habeas petition is dismissed on procedural grounds, a certificate of appealability will not issue unless "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Dufresne v. Palmer*, 876 F.3d 248, 253 (6th Cir. 2017) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

As reasonable jurists would not debate the court's procedural ruling that the petitioner was not reasonably diligent in presenting his new evidence, the court **DENIES** a certificate of appealability. The petitioner may, however, seek a certificate of appealability directly from the Sixth Circuit Court of Appeals. Fed. R. App. P. 22(b)(1).

It is so **ORDERED**.

Aleta A. Trauger
United States District Judge