No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

STEVE HENLEY,

Petitioner,

vs.

RICKY BELL, Warden,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 09-5085

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEVE HENLEY,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE
	)	
RICKY BELL, Warden,	)	
	)	
Respondent-Appellee.	)	

Before: SILER, COLE, and COOK, Circuit Judges.

PER CURIAM. Petitioner Steve Henley moves this Court to declare a certificate of appealabilty ("COA") unnecessary to appeal the denial of a motion made under Rule 60 of the Federal Rules of Civil Procedure, or in the alternative, to grant a certificate of appealability. He also moves for a stay of his execution, scheduled for February 4, 2009, pending the disposition of his Rule 60 claim. We hold that a COA is necessary to appeal the denial of his Rule 60 motion, refuse to issue one, and dismiss his motion for stay of execution as moot.

In *United States v. Hardin*, 481 F.3d 924, 926 (6th Cir. 2007), we held that a COA is required to appeal the denial of a Rule 60 motion in a habeas corpus proceeding. That holding governs Henley's current claim; he may not appeal denial of his Rule 60 motion without a certificate of appealability.

In the alternative, Henley petitions this Court to issue a COA. "To obtain a certificate of appealability, a prisoner must demonstrate that reasonable jurists could disagree with the district court's resolution of his constitutional claims or that the issues presented warrant encouragement to proceed further." *Banks v. Dretke*, 540 U.S. 668, 674 (2004). Having reviewed the parties' briefs and the district court's opinion, we conclude that Henley has not met this standard. Consequently, we decline to issue a COA for the reasons expressed in the district court's well-reasoned opinion of January 29, 2009.

Because we decline to issue a certificate of appealability, we also dismiss as moot Henley's motion to stay his execution pending the disposition of this case.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

STEVE HENLEY,	)	
	)	
Petitioner,	)	
v.	)	**No. 3:98-0672**
	)	**JUDGE ECHOLS**
RICKY BELL, Warden, Riverbend Maximum Security Institution,	)	
	)	
	)	
Respondent.	)	

ORDER

Petitioner Steve Henley filed a Motion for Equitable Relief From Judgment (Docket Entry No. 144), to which Respondent Ricky Bell filed a response in opposition (Docket Entry No. 150), and Petitioner filed a reply. (Docket Entry No. 151.) Respondent agrees that Petitioner's motion does not constitute a successive habeas application under Gonzales v. Crosby, 545 U.S. 524 (2005). For the reasons stated below, the motion is hereby DENIED.

Petitioner, an inmate on death row, filed a habeas corpus petition under 28 U.S.C. § 2254 in this Court on July 23, 1998. Lengthy district court litigation on the petition ended on January 7, 2005. Petitioner appealed the denial of the habeas petition to the Sixth Circuit, which affirmed on May 15, 2007. Henley v. Bell, 487 F.3d 379 (6th Cir. 2007). The Supreme Court denied a petition for a writ of certiorari on June 23, 2008, and this Court received notice of the denial of certiorari on July 7, 2008. (Docket Entry No. 132.)

Pursuant to Federal Rule of Civil Procedure 60(b)(3), 60(b)(6), 60(d)(1) and 60(d)(3), Petitioner moves the Court to reopen proceedings on certain portions of his Amended Petition. He alleges that the prosecution violated due process by presenting the false and misleading testimony

of accomplice Terry Flatt about how long Flatt would have to serve in prison (¶¶ 36-46) and by withholding evidence that the prosecution and Flatt made a deal that the District Attorney would not oppose Flatt's parole, which was granted just five years later (¶¶ 47-50 & 56).

At Petitioner's trial, Flatt testified he pled guilty to two counts of second-degree murder, two counts of armed robbery and one count of aggravated arson for an effective twenty-five year sentence at 30% release eligibility in exchange for his cooperation and testimony in Petitioner's case. (Trial Tr. 894, 898-900.) On cross-examination, defense counsel asked Flatt if he could compute 30% of 25 years, and Flatt answered, "No, sir. Not off hand." When counsel said, "Seven years, six months?" Flatt testified, "I would say you're right. I have figured it, but I'm not the one carrying a pencil, and I'm not for sure about anything. I could have to pull the whole 25 years." (Trial Tr. at 899-900.) Flatt also testified that 30% of 25 years was the only agreement he knew of, except that he would get credit for time served from July 31, 1985, which amounted to "[s]ix months and 26 days." (Trial Tr. at 900.) On redirect, the prosecutor clarified that Flatt was only eligible for parole in seven and a half years and asked, "That doesn't mean anything, does it?" (Trial Tr. at 947.) Flatt answered, "No, sir." The prosecutor asked if Flatt had any guarantee he was going to get out in seven and a half years, and Flatt testified, "No guarantees until I do 25, if I have to." (Trial Tr. at 948.)

This Court previously observed in an earlier opinion in this federal habeas case that Flatt was eligible for early release in 1990, and the District Attorney did not oppose his release at that time. Flatt remained in prison, however, and was released in March 1991 after serving five years of his sentence. (Docket Entry No. 113, Memorandum at 58.)

In ruling on the federal habeas petition, this Court held that Petitioner's due process claims concerning Flatt's supposedly false testimony about his bargain with the prosecution and the prosecution's purported failure to disclose the deal with Flatt to Petitioner were procedurally defaulted because Petitioner did not raise the claims in state court, he could no longer raise the claims in state court, and Petitioner failed to establish cause and prejudice or actual innocence to overcome the procedural default. On appeal, the Sixth Circuit, characterizing Petitioner's due process claims as brought under Brady v. Maryland, 373 U.S. 83 (1963), and controlled by the analysis in Banks v. Dretke, 540 U.S. 668, 691 (2004), affirmed this Court's procedural default ruling, stating: "Even assuming these circumstances suggest a surreptitious deal, Henley never explains why he did not present them in state post-conviction proceedings–which pended more than six years after Flatt's parole release." Henley, 487 F.3d at 388-389.

In his present post-judgment motion brought under Rule 60(b)(3), Rule 60(b)(6), and Rule 60(d)(1) & (3), Petitioner presents the Declaration of Chris Armstrong, an investigator with the Office of the Federal Public Defender for the Middle District of Tennessee. (Docket Entry No. 145-1.) Mr. Armstrong declares the following under penalty of perjury:

> 2. After having met with Terry Wayne Flatt on October 1, 2008, I called Mr. Flatt from my office on October 3, 2008 to ask him whether, as part of the (sic) Flatt's deal to testify against Steve Henley, the District Attorney agreed not to oppose his parole.
>
> 3. Mr. Flatt called me back and said that he was 90% certain that part of his agreement with the District Attorney was that the D.A. wouldn't oppose his parole when he came before the Parole Board.
>
> 4. I later met with Mr. Flatt on October 9, 2008, and Flatt reiterated that he was "almost positive" that, as part of the deal, the D.A. agreed not to oppose his parole.
>
> 5. Flatt, though, refused to sign any statement concerning the agreement about parole.

As Respondent points out, Mr. Armstrong's declaration contains rank hearsay as to what Flatt told Armstrong, and the declaration acknowledges that Flatt refused to sign any statement, let alone a statement under oath, describing an agreement he had with the prosecution to testify against Petitioner in exchange for early release from prison. There is no allegation in the declaration that Respondent's counsel in this habeas case knew of the prosecution's deal with Flatt, if there was one, and kept silent about it during this federal habeas proceeding. Mr. Armstrong does not claim to have any personal knowledge of the events which occurred before or during Petitioner's trial, Fed.R.Evid. 602, and Flatt did not submit an affidavit or declaration confirming fraud on this Court.

Relief under Rule 60 "is circumscribed by public policy favoring finality of judgments and termination of litigation.'" Info-Hold, Inc. v. Sound Merchandising, Inc., 538 F.3d 448, 454 (6th Cir. 2008) (quoted cases omitted). As the party seeking relief, Petitioner bears the burden to establish "the grounds for such relief by clear and convincing evidence." Id. To demonstrate that a fraud has been committed upon the Court warranting post-judgment relief under Rule 60(b)(3) or Rule 60(d)(3), Petitioner must show conduct (1) on the part of an officer of the court, (2) that is directed to the "judicial machinery," (3) that is intentionally false, willfully blind to the truth, or in reckless disregard for the truth, (4) that is a positive averment or concealment when one is under a duty to disclose, and (5) that deceives the court. Workman v. Bell, 10 F.3d 849, 852 (6th Cir. 2001). To meet these elements, Petitioner "must present much more than the flimsy hearsay and inconclusive affidavit[] submitted in support of this motion." See Mendoza v. City of Rome, 872 F.Supp. 1110, 1124 (N.D.N.Y. 1994). Where Flatt declined to provide Petitioner's investigator with a sworn statement, the Court harbors no expectation that Flatt would testify to the contents of Mr. Armstrong's declaration at an evidentiary hearing.

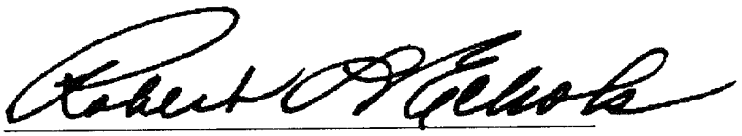
Petitioner relies for support on the unpublished decision in Okros v. Angelo Iafrate Constr. Co., 2008 WL 4682613 (6th Cir. Oct. 17, 2008), but that case is inapposite here. In Okros the defendant proved through indisputable documentary evidence that the plaintiff's attorney perpetrated a fraud on the district court and the defendant during trial in a civil employment action. Id. at **1-5. Here, Petitioner has produced only the hearsay declaration of his investigator and no direct, admissible evidence of any fraud perpetrated on this Court during the habeas proceeding.

Besides lacking in merit, Petitioner's motion under Rule 60(b)(3) is also time-barred, as it was not brought within one year after this Court's entry of judgment in the habeas proceeding in January 2005. Fed.R.Civ.P. 60(c)(1) ("A motion under Rule 60(b) must be made within a reasonable time–and for reasons (1), (2) and (3) no more than a year after the entry of the judgment or order or the date of the proceeding."). The Court does not accept Petitioner's contention that he is entitled to equitable tolling for the period between final judgment in this habeas case and his investigator's most recent contact with Flatt. The limited information now presented does not conclusively show that Flatt had a deal with the prosecution, but even if it did, the Sixth Circuit already assumed the existence of a deal when it issued its opinion in May 2007 and noted Petitioner failed to raise the claims in state court during the six years his post-conviction proceedings were pending. Henley, 487 F.3d at 389. Where Petitioner failed to convince the court of appeals in 2007 that there was any justifiable reason for his failure to raise timely claims about Flatt within the six years after Flatt left prison, he likewise does not convince this Court that the hearsay evidence now presented shows clearly and convincingly that *Respondent's counsel in the federal habeas action* knew about the prosecution's deal with Flatt and perpetrated a fraud on this Court by failing to disclose it.

Petitioner's request for relief under Rule 60(b)(6) likewise fails. Supreme Court cases require that a movant seeking relief under Rule 60(b)(6) show "extraordinary circumstances" to justify the reopening of a final judgment, and "[s]uch circumstances will rarely occur in the habeas context." Gonzalez v. Crosby, 545 U.S. 524, 535 (2005) (citing cases). See also Hopper v. Euclid Manor Nursing Home, Inc., 867 F.2d 291, 294 (6th Cir. 1989) (observing Sixth Circuit adheres to view that courts should apply Rule 60(b)(6) only in exceptional or extraordinary circumstances). The hearsay declaration of Petitioner's investigator submitted in support of the Rule 60(b)(6) motion fails to satisfy this very high standard for obtaining relief from a final habeas corpus judgment.

Finally, for all of the same reasons stated above, Petitioner has not shown any basis for this Court to entertain an independent action to relieve him from the final judgment under Rule 60(d)(1). Accordingly, the Motion for Equitable Relief From Judgment is DENIED.

It is so ORDERED.



ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

STEVE HENLEY,	)	
	)	
Petitioner,	)	
v.	)	**No. 3:98-0672**
	)	**JUDGE ECHOLS**
RICKY BELL, Warden, Riverbend Maximum Security Institution,	)	
	)	
	)	
Respondent.	)	

ORDER

Petitioner Steve Henley filed a Motion To Hold Certificate of Appealability Inapplicable Or, In The Alternative, For A Certificate Of Appealability. (Docket Entry No. 156.) Respondent Ricky Bell has not had an opportunity to respond to the motion.

On January 27, 2009, the Court denied Petitioner's Motion For Equitable Relief From Judgment, (Docket Entry No. 144), which was brought under Federal Rule of Civil Procedure 60(b)(3), 60(b)(6), 60(d)(1) and 60(d)(3). Petitioner has filed a Notice of Appeal (Docket Entry No. 155) and now asks the Court to dispense with the requirement of a Certificate of Appealability or, alternatively, to grant a Certificate of Appealability.

As Petitioner himself points out, the Sixth Circuit, following eight other federal circuits, has clearly held that an inmate seeking to appeal from the denial of a Rule 60(b) motion is required to obtain a Certificate of Appealability. United States v. Hardin, 481 F.3d 924, 926 (6th Cir. 2007). See also Harbison v. Bell, 503 F.3d 566 (6th Cir. 2007). The published Hardin case is binding precedent on district courts, and this Court will follow the case without re-visiting here whether a Certificate of Appealability is required to appeal a decision denying a Rule 60(b) motion.

Having determined that Petitioner requires a Certificate of Appealability to proceed on appeal, the Court denies the motion for a Certificate of Appealability. "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy [28 U.S.C.] § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Where the district court dismisses a claim on procedural grounds without reaching the merits of the underlying constitutional claim, a Certificate of Appealability "should issue when 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." Id. Stated another way, a prisoner 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." Banks v. Dretke, 540 U.S. 668, 705 (2004) (citing Miller-El v. Cockrell, 537 U.S. 322, 327 (2003)).

In the Rule 60(b) motion, Petitioner argued that a fraud had been perpetrated on this Court during the habeas proceeding because the State's attorneys knew, and did not reveal, that the prosecution made a deal with co-defendant Terry Flatt to not oppose his early release from prison in exchange for his testimony against Petitioner. In addition to ruling that certain aspects of the motion were time-barred, the Court determined that Petitioner did not present any evidence that the attorneys for the State handling Petitioner's federal habeas petition had any knowledge of a deal with Flatt and withheld it from the Court. The Court also noted that Flatt refused to submit a sworn statement that such a deal existed, and the Sixth Circuit previously held that Petitioner procedurally

defaulted any claims concerning the existence of a deal because he failed to raise them in state post-conviction proceedings that continued six years after Flatt left prison. See Workman v. Bell, 484 F.3d 837 (6th Cir. 2007) (denying motion for stay of execution where inmate did not show district court abused its discretion in denying a Rule 60(b) motion alleging fraud on the court during federal habeas proceeding and thus, petitioner could not show likelihood of success on the merits to warrant a stay).

The Court finds that its January 27 Order denied Petitioner's Rule 60(b) motion on procedural grounds. As such, the Court further finds that Petitioner has not shown 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, 529 U.S. at 484. Even if the Court's January 27 Order could be even remotely construed as a ruling on the merits of Petitioner's claim, Petitioner has not demonstrated "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack, 529 U.S. at 484.

Accordingly, Petitioner's Motion To Hold Certificate of Appealability Inapplicable Or, In The Alternative, For A Certificate Of Appealability (Docket Entry No. 156) is hereby DENIED.

It is so ORDERED.

ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE