IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BILLY RAY IRICK,	)	
	)	
Petitioner-Appellant,	)	
	)	**No. 10-6363**
v.	)	**CAPITAL CASE**
	)	
RICKY BELL, Warden,	)	
	)	
Respondent-Appellee.	)	

RESPONSE TO APPLICATION FOR CERTIFICATE OF APPEALABILITY

Respondent Ricky Bell submits this response to Petitioner Billy Ray Irick's ("Irick") Protective Application for a Certificate of Appealability. Irick sought relief from the judgment dismissing his habeas petition in the district court pursuant to Fed. R. Civ. P. 60(b)(6), alleging as an "extraordinary circumstance" that the state courts had altered their procedural rules for exhausting the claims litigated before them. Before this Court, Irick seeks a certificate of appealability on an altogether different question. Rather than suggesting that he fairly presented his claims to the Tennessee Court of Criminal Appeals, he contends that the district court erred in failing to provide him with an evidentiary hearing on the question whether his actual innocence by reason of insanity excused his procedural default. To the extent that Irick's claim is cognizable, it fails because (1) he requested no evidentiary hearing below; (2) his claim is based not an extraordinary circumstance, but on evidence discovered nine years after judgment was entered; and (3) his evidence does not show that he is actually innocent. As reasonable

jurists would not debate these points, his application for a certificate of appealability should be denied.

BACKGROUND

Billy Ray Irick ("Irick") was sentenced to death for the felony murder and aggravated rape of a seven-year-old girl in 1986. *See State v. Irick*, 762 S.W.2d 121, 131-32 (Tenn. 1988). His direct appeal and petition for post-conviction relief in the state courts were unsuccessful. *See id.*; *Irick v. State*, 973 S.W.2d 643, 657-58 (Tenn. Crim. App. 1998), *perm. app. denied*, June 15, 1998.

Irick filed a petition for a writ of habeas in the United States District Court for the Eastern District of Tennessee and amended it on October 1, 1999. (R. 57, Pet.; R. 95, Am. Pet.) The district court granted summary judgment in favor of the Warden on March 30, 2001. (R. 146, mem. op.; R. 147, order of 3/30/01.) In so doing, the district court adjudicated a gateway claim of actual innocence that Irick pressed in order to excuse the default of ineffective assistance of counsel claims relating trial counsel's asserted failure to discover mental health evidence. (R. 146, mem. op. at 56-63.) The court found that Irick's showing—lay affidavits attesting to his bizarre behavior in 1985 and the opinion of a non-examining psychologist that he was "probably psychotic" then—did not amount to reliable evidence demonstrating his insanity. (R. 146, mem. op. at 62.) The district court refused to grant a certificate of appealability. (Docket No. 147, order of 3/30/01, at 1.)

This Court granted a certificate of appealability on two *Brady* and prosecutorial misconduct claims, but denied it as to his actual innocence by reason of insanity claim. (R. 167, order of 2/1/08, at 4.) The Court would later affirm the judgment of the district court. *Irick v. Bell*, 565 F.3d 315, 319 (6th Cir. 2009). The United States Supreme Court denied Irick's petition for a writ of certiorari. *Irick v. Bell*, 130 S. Ct. 1504 (Feb. 22, 2010), *pet. reh'g denied*, 130 S. Ct. 2142 (Apr. 19, 2010).

On November 11, 2001, while his appellate proceeding was underway, Irick filed a motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b) in the district court. (R. 159, mot. relief j., at 1-2.) That motion relied on the promulgation of Tenn. Sup. Ct. R. 39, which provides, with retroactive effect, that litigants need only present their claims to the State's intermediate appellate court in order to preserve them for federal review. (*Id.*) Irick sought to revive claims concerning the felony murder aggravating circumstance, flight instruction, prejudice or sympathy instruction, and trial counsel's failures respecting a mental health defense. (*Id.*)

Acting pursuant to then existing-law, the district court transferred Irick's motion to this Court. (R. 163, order of 1/25/02, at 4.) Following a clarification of the law, this Court transferred the motion back on July 20, 2010. (R. 193, order of 7/20/10, at 2.) Irick thereupon filed a motion requesting leave to amend his Rule 60(b) motion to include certain *Brady* claims, requesting additional time for briefing and "that a hearing be held at which time counsel may present their arguments for the court's

consideration," and urging the district court to grant the Rule 60 motion and "reopen" the habeas proceeding. (R. 192, mot. relief j., at 4.)

The district court granted this motion in part and denied it in part. (R. 195, order of 8/6/10, at 1.) Observing that Irick had failed to present his ineffective assistance of counsel claim respecting mental health evidence to the State's intermediate appellate court, the Tennessee Court of Criminal Appeals, the court declined it any further consideration. (R. 195, order of 8/6/10, at 5.) Despite Irick's having delayed approximately nine years since the promulgation of Tenn. Sup. Ct. R. 39, the district court granted him leave to include his *Brady* claims in his Rule 60 motion. (R. 195, order of 8/6/10, at 5-6.) The court set a compact schedule during which Irick was to submit his amended motion and the parties were to file briefs, following which the court would "consider the specific claims" that were still at issue. (*Id.*)

On August 20, 2010, Irick filed a motion to reconsider the exclusion of his ineffective assistance of counsel claims, which he styled as a Rule 60(b) motion. (R. 202, mot. reconsider, at 1.) Irick argued, in part, that actual innocence by reason of insanity excused the default of his ineffective assistance of counsel claims. (R. 202, mot. reconsider, at 5-7.) He relied on the same affidavits that he had presented a decade earlier, together with the April 30, 2010, report of psychiatrist Peter Brown. (R. 202, mot. reconsider, at 5.) Although Dr. Brown's own examination of Irick yielded no evidence of a formal thought disorder, he opined—largely on the basis of the 1999

affidavits—that it was "more likely than not" that Irick was insane at the time of the crime. (R. 202, mot. reconsider ex. 2.) Irick again requested that his habeas proceeding be reopened and that Dr. Brown's report be made a part of the record. (R. 202, mot. reconsider, at 7.)

Simultaneously with the submission of his motion to reconsider, Irick filed his amended motion for relief from judgment. (R. 200, am. mot. j, at 1-2.) In his supporting memorandum, Irick relied on his original summary judgment papers with respect to all claims except his newly included *Brady* claims. (R. 201, supp. mem. mot. relief j., at 1-6.) These principally related to evidence of Irick's drinking on the night of the offense. (R. 201, supp. mem. mot. relief j., at 2.) Irick contended that this evidence was material because, when coupled with his evidence of mental illness, it established "settled insanity" that could negate the *mens rea* element of the general intent crime of rape. (R. 201, supp. mem. mot. relief j., at 4-6.)

On September 28, 2010, the district court denied Irick's motion to reconsider the exclusion of ineffective assistance of counsel claims from his pending Rule 60(b) motion. (R. 206, mem. op, at 1.) Regarding the actual innocence aspect of Irick's motion, the district court found that reconsideration was inappropriate because he had failed to explain why the matters contained in Dr. Brown's April 30, 2010, report were earlier unavailable to him. (R. 206, mem. op, at 8-9.)

On October 8, 2010, Irick filed a motion to expand the record. (R. 207, mot.

expand r., at 1-2.) He requested that the district court make Dr. Brown's report a part of the record. (R. 207, mot. expand r., at 1.) Additionally, Irick asked that the affidavit of Dr. Clifton R. Tennison, which had been filed with the court in connection with a motion to appoint experts for purposes of state clemency proceedings, be made a part of the record because it related to his actual innocence claim. (R. 207, mot. expand r., at 1.) In his affidavit, Dr. Tennison, a witness at the 1986 trial, explained that, in view of the information contained in the 1999 affidavits, "no confidence" should be placed in his opinion as to Irick's competency, and that he would have recommended that Irick be evaluated on an inpatient basis. (R. 207, mot. expand r. ex. 2.)

On October 21, 2010, the district court denied Irick Rule 60 relief. (R. 210, order of 10/21/10, at 1-2.) In its memorandum opinion, the district court allowed the report of Dr. Brown and the affidavit of Dr. Tennison to be made a part of the record. (R. 209, mem. op., at 2-3.) The court then gave full consideration to Irick's actual innocence claim and concluded that the new materials were not sufficiently compelling to place the case in the class of extraordinary and rare cases qualifying under the actual innocence exception. (R. 209, mem. op., at 3-11.) Turning to the underlying claims, the district court found none had been presented to the Tennessee Court of Criminal Appeals and hence that the promulgation of Tenn. Sup. Ct. R. 39 could not save them. (R. 209, mem. op., at 16, 18, 20, 25.) The district court nonetheless examined each claim on the merits and concluded that none would warrant habeas relief even if it could consider

them. (R. 209, mem. op., at 17, 19, 21-24, 27-37.) Finding that any appeal "would not be taken in good faith and would be totally frivolous," the district court denied a certificate of appealability. (R. 210, order of 10/21/10, at 1-2.)

Irick now seeks a certificate on the question whether the district court "erred in not granting petitioner an evidentiary hearing" on his gateway claim of actual innocence by reason of insanity. (App. at 4.)

ARGUMENT

No Certificate Should Issue

Irick must obtain a certificate of appealability in order to appeal the denial of his Rule 60(b) motion. *United States v. Hardin*, 481 F.3d 924, 926 (6th Cir. 2007). In order to get a certificate, he must demonstrate a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A certificate may issue only if "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," although a showing that the appeal would succeed is not required. *Miller-El v. Cockrell*, 537 U.S. 322, 337, 338 (2003) (quoting *Slack v.* McDaniel, 529 U.S. 473, 484 (2000)). The decision whether to grant an evidentiary hearing rests in the discretion of the district court. *See Post v. Bradshaw*, 621 F.3d 406, 418 (6th Cir. 2010).

I. Irick requested no evidentiary hearing.

As an initial matter, Irick's claim fails because he did not move the district court for an evidentiary hearing in connection with his Rule 60 motion. To be sure, Irick

requested an opportunity to present the arguments of counsel in support of his motion (R. 192, mot. relief j., at 4), but at that point his request for relief from the judgment rested on a change in state procedural law. It was not until his motion for reconsideration (R. 202, mot. reconsider, at 5) that Irick sought to rejuvenate his gateway claim of actual innocence and presented the report of Dr. Brown. And it was not until his motion to expand the record (R. 207, mot. expand r., at 1-2) that Irick advanced the affidavit of Dr. Tennison in support of his actual innocence claim. At no point did Irick suggest that either mental health professional needed to appear before the district court in order for the court to determine whether his otherwise defaulted claims were viable. As Irick requested no evidentiary hearing, reasonable jurists would not debate whether the district court erred in failing to grant him one.

II. Irick's mental health evidence does not amount to a showing of "extraordinary circumstances".

Relief under Rule 60(b)(6) requires a showing of "extraordinary circumstances," one of which, this Court has held, is the promulgation of Tenn. Sup. Ct. R. 39. *See Thompson v. Bell*, 580 F.3d 423, 443 (6th Cir. 2009). But Rule 60(b)(6) applies only in exceptional circumstances which are not addressed by the first five numbered clauses of the Rule. *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990). One such clause is Fed. R. Civ. 60(b)(2), which concerns newly discovered evidence. Motions made pursuant to this clause must be brought "no more than a year after the entry of the judgment," and in all events, within a reasonable time. Fed. R. Civ. P. 60(c)(1).

Irick's gateway claim of actual innocence is not the proper subject of a Rule 60 motion. To the extent that he relies on the 1999 affidavits, his argument amounts to a contention that the district court improperly adjudicated his actual innocence claim in 2001—and there is nothing extraordinary about that. To the extent that he relies on the report of Dr. Brown and the affidavit of Dr. Tennison, those materials are "newly discovered evidence" within the meaning clause (b)(2) of Rule 60. A motion predicated on those materials was required to have been filed in 2002. *See* Fed. R. Civ. P. 60(c)(1). Moreover, both Dr. Brown's report and Dr. Tennison's affidavit are substantially based on the matters contained in the 1999 affidavits. Irick can articulate no reasonable explanation for his decade-long delay in presenting his new evidence to the district court.

Simply put, the district court could not possibly have granted Irick Rule 60(b) relief on his actual innocence claim. The terms of the Rule leave no room for debate among reasonable jurists on the question.

III. Irick's showing is not a credible gateway claim of actual innocence.

The district court rather generously addressed the substance of Irick's actual innocence claim and correctly concluded that his showing did not amount to reliable evidence that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). Credible gateway claims have involved new forensic DNA or bloodstain evidence, confessions, recantations, or eyewitness testimony pointing to a different suspect. *See,*

e.g., id. at 331; *House v. Bell*, 547 U.S. 518, 540-48 (2006); *In re Davis*, 130 S.Ct. 1, 1 (2009) (mem.). Procuring a new mental health diagnosis during habeas proceedings, by contrast, does not bring a case within the ambit of "extraordinary" cases permitting further review. As the United States Court of Appeals for the Ninth Circuit has remarked:

> "Because psychiatrists disagree widely and frequently on what constitutes mental illness, a defendant could ... always provide a showing of factual innocence by hiring psychiatric experts who would reach a favorable conclusion." Accordingly, "it is clear that the mere presentation of new psychological evaluations ... does not constitute a colorable showing of actual innocence."

Boyde v. Brown, 404 F.3d 1159, 1168 (9th Cir. 2005) (citations omitted) (alterations in original).

Irick's showing is considerably less compelling than those that might properly be viewed as categorically falling outside the purview of the actual innocence doctrine. Irick's experts do not merely base their opinions on observations of present abnormality that must be projected back in time. Rather, they rely on decade-old lay affidavits that themselves recount events that transpired a decade earlier. Evidence of this character is not reliable, it does not establish factual innocence, and reasonable jurists would not debate the point.

CONCLUSION

For the foregoing reasons, the Protective Application for a Certificate of Appealability should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2010, a true and exact copy of the foregoing document has been filed by the court's electronic filing system and served on: Howell G. Clements, Clements & Cross, 1010 Market Street, Suite 401, Chattanooga, TN 37402 and C. Eugene Shiles, Spears, Moore, Rebman, & Williams, P.O. Box 1749, Chattanooga, TN 37401 and that all parties required to be served have been served.

/s/ James E. Gaylord
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