

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Case No. 10-6363

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

FILED

NOV 22 2010

LEONARD GREEN, Clerk

BILLY RAY IRICK,

Petitioner-Appellant,

v.

**RICKY BELL WARDEN, Riverbend
Maximum Security Institution**

Respondent-Appellee.

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**ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE EASTERN
DISTRICT OF TENNESSEE**

ORDER

BEFORE: BATCHELDER, Chief Judge; SILER and GILMAN, Circuit Judges.

Billy Ray Irick, a Tennessee death-row prisoner represented by counsel, appeals the district court's judgment denying his Fed. R. Civ. P. 60(b) motion for relief from the 2001 judgment denying his 28 U.S.C. § 2254 habeas corpus petition. The district court denied Irick a certificate of appealability (COA) as to all of the subclaims covered by his Rule 60(b) litigation. Irick has filed a motion for a COA in this court as to those subclaims. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b)(1)-(2). He has also filed a motion to proceed *in forma pauperis*. *See* 28 U.S.C. § 1915(a).

As an initial matter, we note that Irick is required to obtain a COA before he may appeal the denial of his motion brought pursuant to Rule 60(b). In *United States v. Hardin*, 481 F.3d 924, 926 (6th Cir. 2007), we held that a defendant "must obtain a certificate of appealability before his appeal of the denial of his Rule 60(b) motion can be heard." Part of the rationale behind this requirement is to prevent a defendant who has been denied habeas relief in district court from "simply circumvent[ing] the certificate of appealability requirement by filing a motion for relief from

judgment under Rule 60(b), and then styling his appeal as a challenge to the denial of the Rule 60(b) motion rather than the judgment. Allowing such an approach would undermine the requirements of section 2253” *Id.* Therefore, “a COA is necessary not only to appeal the initial denial of a writ of habeas corpus, but also to appeal from the denial of a motion brought pursuant to Rule 60(b).” *Johnson v. Bell*, 605 F.3d 333, 336 (6th Cir. 2010).

Because Irick wishes to appeal the denial of a motion brought pursuant to Rule 60(b), he is required to first obtain a COA. Despite having filed a very lengthy brief, Irick has failed to identify any basis that would entitle him to a COA. The only issues he raises are claims of actual innocence, but the evidence he cites does not amount to a showing of “extraordinary circumstances,” *see* Rule 60(b)(6); nor does it constitute reliable evidence that “it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.” *See Schlup v. Delo*, 513 U.S. 298, 327 (1995). Accordingly, no “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *See Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

For these reasons, we **DENY** Irick’s request for a COA. We **GRANT** his motion to proceed *in forma pauperis*.

ENTERED BY ORDER OF THE COURT



Leonard Green, Clerk

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Leonard Green
Clerk

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Filed: November 22, 2010

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Re: Case No. 10-6363 , *Billy Irick v. Ricky Bell*
Originating Case No. : 98-00666

Dear Counsel:

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Patricia J. Elder
Senior Case Manager
Direct Dial No. 513-564-7034

cc: Ms. Patricia L. McNutt

Enclosure

No mandate to issue