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United States Court of Appeals
Tenth Circuit

October 20, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JERRY D. SELLERS,

Petitioner - Appellant,

v.

DON LANGFORD, Warden,

Respondent - Appellee.

No. 22-3056
(D.C. No. 5:19-CV-03136-SAC)
(D. Kan.)

ORDER[*]

Before **HOLMES**, Chief Judge, **KELLY** and **ROSSMAN**, Circuit Judges.

Petitioner-Appellant Jerry Dale Sellers, a Kansas state prisoner proceeding pro se,[1] seeks a certificate of appealability ("COA") to challenge the district court's denial of his "Motion to Recall Mandate" brought under Federal Rule of Civil Procedure 60. Mr. Sellers's motion sought relief from the district court's order dismissing as untimely his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons given below, we **DENY** Mr. Sellers's request for a COA as to his claim of actual innocence

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[*] This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with FED. R. APP. P. 32.1 and 10TH CIR. R. 32.1.

[1] Because Mr. Sellers litigates this matter pro se, we will "liberally" construe his filings, but "we will not 'assume the role of advocate.'" *United States v. Parker*, 720 F.3d 781, 784 n.1 (10th Cir. 2013) (quoting *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008)).

based on newly discovered evidence, **VACATE** the portion of the district court's order addressing the merits of Mr. Sellers's claim of fraud on the court, **DENY** Mr. Sellers authorization to file a second-or-successive habeas petition asserting his fraud-on-the-court claims, and **DISMISS** this matter.

I

In September 2007, the State of Kansas charged Mr. Sellers with two counts of rape, or in the alterative, aggravated indecent liberties with a child; one count of attempted aggravated criminal sodomy or, in the alternative, attempted criminal sodomy; one count of aggravated criminal sodomy, or in the alternative, criminal sodomy; and two counts of indecent liberties with a child. On November 18, 2008, pursuant to a plea agreement, Mr. Sellers entered adverse pleas to two counts of indecent liberties with a child, and the other charges were dropped.[2] Specifically, Mr. Sellers pleaded no contest to one of the counts and entered an *Alford* plea to the other.[3] The District Court of Saline County accepted both pleas and sentenced Mr. Sellers to a total of 152 months in prison. Mr. Sellers then filed a series of challenges to his sentence and underlying conviction.[4]

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[2] Mr. Sellers's criminal case had originally proceeded to a jury trial, but the judge declared a mistrial on the third day of proceedings. A new trial was scheduled for November 18, 2008, but on that date, Mr. Sellers instead reached a plea agreement with state prosecutors.

[3] *See North Carolina v. Alford*, 400 U.S. 25 (1970).

[4] First, Mr. Sellers timely appealed his sentences and the denial of his request for a downward sentencing departure, but the Supreme Court of Kansas dismissed the appeal on July 9, 2010, because Mr. Sellers had received presumptive sentences. *See State v. Sellers*, No. 102,166, 233 P.3d 744 (tbl.), 2010 WL 2816251, at *1 (Kan. July 9, 2010) (per curiam) (unpublished). Second, on April 19, 2011, Mr. Sellers filed a motion

On July 25, 2019, Mr. Sellers filed a petition for habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the District of Kansas. The district court concluded that the action was time-barred by 28 U.S.C. § 2244(d)(1)(A) because Mr. Sellers did not file his petition within one year of his conviction becoming final. *See Sellers v. Langford*, No. 19-3136-SAC, 2021 WL 122848, at *3 (D. Kan. Jan. 13, 2021). Specifically, the district court rejected Mr. Sellers's arguments that the action was not time-barred because (1) he was actually innocent of the charges and (2) he had filed a second motion for post-conviction relief in state court, which tolled the statute of limitations.[5] *See id.* The district court declined to issue a COA and dismissed the matter. *See id.* A panel of this Court also denied Mr. Sellers's application for a COA because

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to withdraw his guilty pleas pursuant to KAN. STAT. ANN. § 22-3210(d) (2011) on the ground of manifest injustice, which the District Court of Saline County denied, and the Kansas Court of Appeals subsequently affirmed. *See State v. Sellers*, No. 110,235, 356 P.3d 436 (tbl.), 2015 WL 5613046, at *3 (Kan. Ct. App. Sept. 25, 2015) (per curiam) (unpublished), *review denied*, (Kan. June 21, 2016). Third, on July 8, 2011, Mr. Sellers filed a motion for post-conviction relief under KAN. STAT. ANN. § 60-1507 (2011) based on ineffective assistance of counsel, but, after an evidentiary hearing, the District Court of Saline County denied the motion, and the Kansas Court of Appeals again affirmed. *See Sellers v. State*, No. 112,099, 356 P.3d 1077 (tbl.), 2015 WL 5750517, at *1 (Kan. Ct. App. Oct. 2, 2015) (per curiam) (unpublished), *review denied* (Kan. July 22, 2016). Fourth, Mr. Sellers filed a second motion under KAN. STAT. ANN. § 60-1507 on July 13, 2016, but the District Court of Saline County summarily denied the motion and the Kansas Court of Appeals again affirmed the denial**.** *See Sellers v. State*, No. 118,105, 424 P.3d 570 (tbl.), 2018 WL 4167257, at *4–5 (Kan. Ct. App. Aug. 31, 2018) (per curiam) (unpublished), *review denied* (Kan. Apr. 29, 2019).

[5] The district court did not reach the issue of whether Mr. Sellers "exhausted the remedies available in the courts of the State," a requirement for him to seek federal habeas relief. 28 U.S.C. § 2254(b)(1)(A); *see also Rhines v. Weber*, 544 U.S. 269, 274 (2005).

"no reasonable jurist could conclude [that] the district court's procedural ruling was incorrect." *Sellers v. Langford*, 845 F. App'x 800, 802 (10th Cir. 2021) (unpublished).

Following our denial of Mr. Sellers's request for a COA, Mr. Sellers filed a "Motion to Recall Mandate" under Federal Rules of Civil Procedure 60(b)(2), (b)(3), and (d)(3), which is the motion underlying this order. First, under Rule 60(b)(2), Mr. Sellers sought relief from the dismissal of his habeas petition on the basis that he had new evidence of his actual innocence. According to Mr. Sellers, because he had new evidence of actual innocence, the district court should have granted relief from judgment, tolled the one-year statute of limitations in § 2244(d)(1)(A) under the exception recognized in *Schlup v. Delo*, 513 U.S. 298 (1995), and reached the merits of his petition. Specifically, Mr. Sellers presented two types of new evidence: (1) evidence of communications showing that the Salina Police Department and Saline County District Attorney's Office did not maintain any phone records from the time of Mr. Sellers's criminal case and (2) an affidavit averring that there was a recorded phone call showing that Mrs. Jolana Sellers, Mr. Sellers's ex-wife and a key witness in the case against him, was willing to lie about whether she called the Newton Police Department to inquire about Mr. Sellers's bond status.

Second, Mr. Sellers argued that, under Rules 60(b)(3) and (d)(3), the prosecution perpetrated a fraud on the court by failing to disclose exculpatory evidence, and by presenting false testimony at trial regarding the existence of the phone records.[6]

[6] Rule 60(b)(3) is mentioned only in passing in Mr. Sellers's Motion to Recall Mandate and in his briefing with this Court. *See* R. at 217; Aplt.'s Combined

On February 16, 2022, the district court denied Mr. Sellers's motion. *Sellers v. Langford*, No. 19-3136-SAC, 2022 WL 473972, at *1 (D. Kan. Feb. 16, 2022). The district court rejected Mr. Sellers's actual-innocence argument, noting that none of the evidence submitted by Mr. Sellers "suggests that no reasonable juror would have found him guilty." *Id.* The court also noted that there was "no support for petitioner's bare allegation of fraud on the court." *Id.*

After the district court denied his motion, Mr. Sellers filed a notice of appeal. The district court denied a COA on March 16, 2022. Mr. Sellers now seeks a COA from this Court.

II

A

The Antiterrorism and Effective Death Penalty Act ("AEDPA")[7] places strict limitations on the power of the federal courts to consider second-or-successive applications for writs of habeas corpus. *See* 28 U.S.C. § 2244(b); *Spitznas v. Boone*, 464 F.3d 1213, 1215 (10th Cir. 2006). Specifically, among other limitations, a petitioner may not file a second-or-successive § 2254 petition unless he first obtains an order from the circuit court authorizing the district court to consider the petition. *See* 28 U.S.C. § 2244(b)(3)(A); *Spitznas*, 464 F.3d at 1215. Absent such authorization, "[a] district

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Opening Br. & Appl. to Grant COA at 1, 8. Construing Mr. Sellers's filings liberally, *see Parker*, 720 F.3d at 784 n.1., we infer that that Mr. Sellers's fraud-on-the-court argument arises under Rules 60(b)(3) and (d)(3).

[7] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

court does not have jurisdiction to address the merits of [either] a second or successive [28 U.S.C.] § 2255 or 28 U.S.C. § 2254 claim." *In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008) (per curiam); *see also United States v. Nelson*, 465 F.3d 1145, 1148 (10th Cir. 2006) ("[A] second or successive § 2255 motion cannot be filed in district court without approval by a panel of this court. As a result, if the prisoner's pleading must be treated as a second or successive § 2255 motion, the district court does not even have jurisdiction to deny the relief sought in the pleading." (citations omitted)).[8]

Authorization to consider a second-or-successive habeas petition may be granted in only very narrow circumstances. For claims that were not raised in prior habeas petitions, authorization can be granted only if (1) the claim is based on a new rule of constitutional law that is made retroactive to cases on collateral review by the Supreme Court or (2) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence . . . [and] the facts underlying the claim . . . would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(A)–(B). However, if the claim was presented in a prior application, authorization cannot be granted. *See id.* § 2244(b)(1).

Federal Rule of Civil Procedure 60(b) allows a party to seek relief from a final judgment under a limited set of circumstances, including mistake, newly discovered

[8] The same analysis applies with respect to habeas petitions brought under 28 U.S.C. § 2254 and motions to vacate under 28 U.S.C. § 2255. *See* 28 U.S.C. §§ 2244(b), 2255(h); *Nelson*, 465 F.3d at 1148.

evidence, fraud or misrepresentation by an opposing party, or "any other reason that justifies relief." FED. R. CIV. P. 60(b). Rule 60 does not limit a court's innate power to "set aside a judgment for fraud on the court." FED. R. CIV. P. 60(d)(3). But although Rule 60 "has an unquestionably valid role to play in habeas cases," it does not permit a petitioner to circumvent AEDPA's limitations on when a second-or-successive habeas petition may be filed. *Gonzalez v. Crosby*, 545 U.S. 524, 531–32, 534 (2005); *United States v. Baker*, 718 F.3d 1204, 1208 (10th Cir. 2013).

Thus, whether a district court has jurisdiction to consider a petitioner's Rule 60 motion depends on whether the motion presents "true" Rule 60 claims or whether it presents second-or-successive habeas claims. *Spitznas*, 464 F.3d at 1215–16. In determining whether a Rule 60 motion is a second-or-successive petition or a true Rule 60 motion, "we look at the relief sought, rather than a pleading's title or its form, to determine whether it is a second-or-successive collateral attack on a defendant's conviction." *Baker*, 718 F.3d at 1208.

A Rule 60 motion is properly characterized as a second-or-successive habeas petition "if it in substance or effect asserts or reasserts a federal basis for relief from the petitioner's underlying conviction." *Spitznas*, 464 F.3d at 1215. Consequently, we treat as second-or-successive petitions Rule 60(b) motions that (1) seek to present a new claim of constitutional error omitted from the original petition, (2) seek to present "newly discovered evidence" in order to advance the merits of a denied claim, or (3) "seek vindication[] of" a denied claim by challenging the habeas court's ruling on the merits of that claim. *Id.* at 1216 (alteration in original) (quoting *Gonzalez*, 545 U.S. at 531).

On the other hand, a Rule 60 motion that "challenges only the federal habeas court's ruling on procedural issues should be treated as a true [Rule] 60(b) motion rather than a successive petition," as should challenges to the "integrity of the federal habeas proceeding," so long as those challenges do not seek to re-litigate the merits of the petition. *Id.* "Thus, for example, a motion asserting that the federal district court incorrectly dismissed a petition for failure to exhaust, procedural bar, or because of the statute of limitations constitutes a true [Rule 60] motion." *Id.*

Claims of fraud brought pursuant to Rule 60 fall within this general rule. *See id.*; *Baker*, 718 F.3d at 1207 ("[W]e apply the same analysis, even when the motion asserts a fraud-on-the-court claim."). Thus, a motion asserting fraud in the underlying criminal proceedings (fraud on the trial court) constitutes a second-or-successive habeas petition, while a motion asserting fraud on the habeas court generally constitutes a true Rule 60 motion because it challenges the integrity of the federal habeas proceeding. *See Baker*, 718 F.3d at 1208; *Berryhill v. Evans*, 466 F.3d 934, 937 (10th Cir. 2006). However, a petitioner cannot simply recast a claim of fraud on the trial court as a claim of fraud on the habeas court. *See Berryhill*, 466 F.3d at 938 (concluding that a petition alleging, among other things, fraud on the habeas court, was a second-or-successive petition because "the only factual basis for it lies in the reformulation of [the petitioner's] habeas claims of fraud on the state court in the guise of fraud on the habeas court"); *cf. In re Pickard*, 681 F.3d 1201, 1207 (10th Cir. 2012) (concluding that a claim that the habeas court had been affirmatively deceived presented a true Rule 60 issue).

When a district court is presented with a Rule 60 motion, it should determine whether it is a true Rule 60 motion, a second-or-successive habeas petition, or a "mixed" motion containing both true Rule 60 claims and second-or-successive habeas claims. *See Spitznas*, 464 F.3d at 1216–17; *see also Alford v. Cline*, 696 F. App'x 871, 873 (10th Cir. 2017) (unpublished).[9] "In the case of a 'mixed' motion[] . . . the district court should (1) address the merits of the true Rule 60[] allegations as it would the allegations in any other Rule 60[] motion, and (2) forward the second or successive claims to this court for authorization." *Spitznas*, 464 F.3d at 1217.

When we receive an appeal from a district court's denial of a Rule 60 motion, the approach that we take follows from the nature of the motion. If the district court properly treated the filing as a true Rule 60 motion, we will require the petitioner to obtain a COA before proceeding with the appeal. *Id.* at 1217–18; *see also* 28 U.S.C. § 2253(c). In order to obtain a COA when the district court ruled on procedural grounds, the petitioner must show 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[s]." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

But when the district court ruled on the merits, the petitioner must show only "'that reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were

[9] We rely on unpublished decisions in our analysis only for their persuasive value. *See, e.g.*, *United States v. Engles*, 779 F.3d 1161, 1162 n.1 (10th Cir. 2015).

"adequate to deserve encouragement to proceed further."'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack*, 529 U.S. at 484); *see also Laurson v. Leyba*, 507 F.3d 1230, 1232 (10th Cir. 2007) ("In other words, an applicant must show that the district court's resolution of the constitutional claim was either 'debatable or wrong.'" (quoting *Slack*, 529 U.S. at 484)); *see also Alford v. Cline*, 696 F. App'x at 873 (applying this standard to the denial of a true Rule 60 petition).

However, if the district court erroneously treated a second-or-successive petition as a true Rule 60 claim, "we will vacate the district court's order for lack of jurisdiction and construe the petitioner's appeal as an application to file a second or successive petition." *Spitznas*, 464 F.3d at 1219.

B

AEDPA also places temporal limitations on when habeas petitions may be filed. Specifically, it creates a one-year statute of limitations for a state prisoner to file a petition for habeas review. *See* 28 U.S.C. § 2244(d)(1); *Fontenot v. Crow*, 4 F.4th 982, 1028 (10th Cir. 2021). As relevant here, this statute of limitations begins to run from the latest of either "the date on which the judgment became final" or "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(A), (D). "The time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward [this] period of limitation." *Id.* § 2244(d)(2). But if a state post-conviction action is not properly filed or is untimely, it does not toll the statutory clock. *See Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005).

Additionally, the one-year statute of limitations in § 2244 can be overcome by a credible showing of actual innocence. *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013); *Fontenot*, 4 F.4th at 1029. "'This rule, or fundamental miscarriage of justice exception, is grounded in the "equitable discretion" of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons.'" *Fontenot*, 4 F.4th at 1029 (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)). It bears remembering, though, that "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera*, 506 U.S. at 404.

"To invoke the miscarriage of justice exception to AEDPA's statute of limitations . . . a petitioner 'must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'" *McQuiggin*, 569 U.S. at 399 (quoting *Schlup*, 513 U.S. at 327). This is a demanding standard and, consequently, "tenable actual-innocence gateway pleas are rare." *Id.* at 386. "'It is important to note in this regard that "actual innocence" means factual innocence, not mere legal insufficiency.'" *Pacheco v. Habti*, 62 F.4th 1233, 1241 (10th Cir. 2023) (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)). But although it is a weighty burden, the actual-innocence exception "does not require absolute certainty about the petitioner's guilt or innocence." *House v. Bell*, 547 U.S. 518, 538 (2006); *see also Taylor v. Powell*, 7 F.4th 920, 927 (10th Cir. 2021) ("To qualify for the actual innocence exception, the petitioner need not conclusively demonstrate his innocence.").

It is particularly difficult for a petitioner to show actual innocence when the petitioner pleaded guilty to the charge at issue. *See Taylor*, 7 F.4th at 933; *see also Slinkard v. McCollum*, 675 F. App'x 851, 855 n.3 (10th Cir. 2017) (unpublished). In such circumstances, in addition to showing that he is actually innocent of the charges to which he pleaded guilty, the petitioner must also show that he is actually innocent of other, more serious charges that were initially charged but dropped during the plea-bargaining process. *See Taylor*, 7 F.4th at 933 (citing *Bousley*, 523 U.S. at 624).

III

The district court originally denied Mr. Sellers's habeas petition on the grounds that it was filed after the statute of limitations had expired. Mr. Sellers then filed the Rule 60 motion at issue in this appeal, arguing that (1) there was additional evidence of his actual innocence that would allow him to bypass the one-year statute of limitations[10] and (2) there was fraud on the court. The district court rejected both arguments.

Exercising jurisdiction under 28 U.S.C. § 1291, we conclude that Mr. Sellers's Motion to Recall Mandate is a mixed motion, presenting both true Rule 60 claims—that we now review to assess only whether to grant a COA—as well as second-or-successive habeas claims that the district court did not have jurisdiction to consider without prior authorization from this Court. Specifically, we conclude that Mr. Sellers raised a true

[10] Although Mr. Sellers and the district court phrased the issue as whether Mr. Sellers had shown sufficient indicia of actual innocence to equitably *toll* the statute of limitations, actual innocence is more properly described as an equitable *exception* that can overcome the statute of limitations. *See McQuiggin*, 569 U.S. at 391–92; *Fontenot*, 4 F.4th at 1034; *see also Rivas v. Fischer*, 687 F.3d 514, 547 n.42 (2d Cir. 2012).

Rule 60 claim by arguing that the district court should have bypassed the one-year statute of limitations based on additional evidence of actual innocence. We deny Mr. Sellers's request for a COA as to that claim. With respect to Mr. Sellers's argument that there was fraud on the court, we conclude that this claim constitutes a second-or-successive habeas claim, which the district court lacked jurisdiction to consider absent prior authorization. And because Mr. Sellers has failed to show that his fraud-on-the-court claim is based on a new rule of constitutional law made retroactive by the Supreme Court or that the facts underlying his claim are sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found him guilty, we decline to issue such authorization now.

A

First, we address Mr. Sellers's Rule 60(b)(2) argument that—in light of the additional evidence submitted in conjunction with his Motion to Recall Mandate—the district court should have reached the merits of his petition because of the actual-innocence exception to AEDPA's statute of limitations. We first address whether this aspect of Mr. Sellers's motion presents a true Rule 60 claim and then turn to the question of whether Mr. Sellers is entitled to a COA.

1

The district court properly treated Mr. Sellers's actual-innocence argument as a true Rule 60 claim rather than a second-or-successive habeas claim. Mr. Sellers does not attempt to "assert[] or reassert[] a federal basis for relief from [his] underlying conviction," which is an indication of a second-or-successive habeas claim. *See Spitznas*,

464 F.3d at 1215. Nor does Mr. Sellers challenge a decision on the merits of his original habeas petition. Instead, he "challenges only a procedural ruling of the habeas court which precluded a merits determination of the habeas application," namely its determination that his habeas petition was barred by the statute of limitations. *Id.* Challenges to a district court's imposition of a procedural bar, including a statute of limitations, is a quintessential true Rule 60 claim. *See Gonzalez*, 545 U.S. at 532 n.4 (noting that a petitioner does not assert a second-or-successive habeas claim when "he merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar"); *see also Alford v. Cline*, 696 F. App'x at 873 ("What we have here is a mixed motion. Insofar as it attacks the court's application of the statute of limitations, it is a 'true' Rule 60(b) motion." (quoting *Spitznas*, 464 F.3d at 1216)); *United States v. Williams*, 480 F. App'x 503, 504 (10th Cir. 2012) (unpublished) ("A Rule 60(b) motion challenging the application of the statute of limitations to a § 2255 motion is not a successive habeas petition because it does not contest the merits of a conviction.").

The fact that Mr. Sellers's procedural argument is based on a claim that new evidence shows actual innocence does not change this analysis. Actual innocence is simply a means to avoid the statute-of-limitations procedural bar, not a stand-alone constitutional claim. *See Herrera*, 506 U.S. at 404 ("[A] claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.");

Fontenot, 4. F.4th at 1034 ("A gateway innocence assertion[] . . . is an exception to federal procedural obstacles to relief rather than a substantive claim."). Therefore, Mr. Sellers's argument presents a true Rule 60 issue and the district court had jurisdiction to consider the claim.[11]

2

Even though the district court properly recognized that Mr. Sellers's Rule 60(b)(2) argument presented a true Rule 60 claim, Mr. Sellers may proceed on appeal only if he obtains a COA. *See Spitznas*, 464 F.3d at 1217–18. The district court denied Mr. Sellers's request for a COA. Because Mr. Sellers has not shown that reasonable jurists could debate whether the district court should have granted his Rule 60(b)(2) motion, we do the same.

As noted earlier, claims of actual innocence face a demanding standard and are "rarely successful." *Schlup*, 513 U.S. at 324; *see also House*, 547 U.S. at 538. To pass through the actual-innocence gateway, a petitioner "must establish that, in light of [the] new evidence, 'it is more likely than not that no reasonable juror would have found [the] petitioner guilty beyond a reasonable doubt.'" *House*, 547 U.S. at 536–37 (quoting *Schlup*, 513 U.S. at 327).

[11] This conclusion accords with a number of unpublished decisions issued by panels of this Court, which have treated actual-innocence arguments as presenting true Rule 60 claims. *See Bueno v. Timme*, 594 F. App'x 489, 491 (10th Cir. 2014) (unpublished); *McNelly v. Cline*, 743 F. App'x 906, 906–07 (10th Cir. 2018) (unpublished); *Vargas v. Bear*, 701 F. App'x 683, 685 (10th Cir. 2017) (unpublished); *Wright v. Jones*, 404 F. App'x 323, 325–26 (10th Cir. 2010) (unpublished).

The district court concluded that Mr. Sellers failed to meet this burden, finding "no evidence that is sufficient to allow him to proceed in this time-barred action," and denied Mr. Sellers's Motion to Recall Mandate. *Sellers*, 2022 WL 473972, at *1. No reasonable jurist could disagree with this outcome for two reasons.

First, the additional evidence presented by Mr. Sellers does not come close to clearing the high hurdle for demonstrating actual innocence. Specifically, Mr. Sellers presented letters from the Salina Police Department and Saline County District Attorney's Office, stating, in response to Mr. Sellers's Kansas Open Records Act requests, that they did not currently possess or maintain any Alltel phone records or private cell phone logs from the time period relevant to Mr. Sellers's criminal case. Mr. Sellers contends that these letters show that the prosecution *never* had these phone records in their possession even though electronic communications were relied upon at trial as evidence of Mr. Sellers's guilt.

Mr. Sellers also submitted an affidavit averring that he had listened to an audio recording of an interview from January 2008 between his ex-wife and a police officer. According to Mr. Sellers, his ex-wife told the interviewing officer that she was "willing to say [that] it was not her if asked by the defense [whether she] attempt[ed] to call Newton Police Department to see if [Mr. Sellers] was able to bond out." R. at 253 (Attach. Ex. A to Pet'r's Mot. to Recall Mandate, filed Feb. 9, 2022). Mr. Sellers argues that his ex-wife's statement constitutes impeachment evidence and, because the state's case relied primarily on testimonial evidence—*particularly* from Mr. Sellers's ex-wife,

the mother of the underage victim—this recording is evidence of his actual innocence that should allow him to bypass AEDPA's one-year statute of limitations.

These additional pieces of evidence are insufficient to meet Mr. Sellers's burden to demonstrate actual innocence. The value of the evidence related to the Alltel records and cell phone logs is, at best, minimal. Contrary to how Mr. Sellers frames the materials he attached to his motion, they do not establish that the government did not have the Alltel records and cell phone logs *at the time of his prosecution*. Instead, the proffered evidence establishes only that the district attorney's office and police department *no longer* had the phone records from Mr. Sellers's criminal case in their possession almost thirteen years after he pleaded guilty.[12] This does not bear on whether Mr. Sellers was actually innocent of the charged offenses. *See Bousley*, 523 U.S. at 623; *Pacheco*, 62 F.4th at 1241, 1245.

The evidence that Mr. Sellers's ex-wife was purportedly willing to lie regarding a phone call she made to the police department is, as Mr. Sellers himself admits, "[i]nnocent itself." R. at 253. It could provide only minor impeachment evidence and does not actually show that Mr. Sellers is innocent of the offenses to which he pleaded guilty. *See Frost v. Pryor*, 749 F.3d 1212, 1232 (10th Cir. 2014) ("Simply maintaining

[12] Indeed, in its response to Mr. Sellers's records request, the Saline County District Attorney's Office noted that it could not determine whether the office had "received [the Alltel phone records], discovered them out to acting defense counsel, are in evidence with the court, were destroyed, or held by the investigating law enforcement agency." R. at 238. This also cuts against Mr. Sellers's contention that the new materials show that the records were never in the possession of the prosecution or the police department.

one's innocence, or even casting some doubt on witness credibility, does not necessarily satisfy [the actual-innocence] standard."); *Stafford v. Saffle*, 34 F.3d 1557, 1561 (10th Cir. 1994) ("None of this is persuasive evidence of 'actual innocence.' At most, it is corroborating evidence, impeaching evidence, or evidence merely raising some suspicion or doubt of Stafford's guilt.").

The second reason that no reasonable jurist could disagree with the district court's decision is that Mr. Sellers was convicted after a guilty plea. He entered that plea after a plea-bargaining process that resulted in the State dropping several other charges against him. *See* R. at 61. However, Mr. Sellers does not address how he would be innocent of the *dropped* counts in either his Motion to Recall Mandate or in his briefing with this Court, which is required under our precedent.[13] *See Taylor*, 7 F.4th at 933 (citing *Bousley*, 523 U.S. at 624). And to the extent that Mr. Sellers argues that he would not have pleaded guilty had he known about the new evidence, that would go to the legal sufficiency of his conviction rather than to actual innocence. *See Laurson*, 507 F.3d at 1233 ("[The petitioner's] other arguments do not relate to actual innocence. Actual innocence means 'factual innocence.' A claim that his guilty plea was involuntary does not assert that he did not commit the crime to which he pleaded guilty." (citation omitted) (quoting *Bousley*, 523 U.S. at 623)); *see also Bousley*, 523 U.S. at 623 ("'[A]ctual innocence' means factual innocence, not mere legal insufficiency."); *Holden v. Addison*,

[13] The fact that one of Mr. Sellers's pleas was an *Alford* plea does not change this analysis. *See Lyons v. Lee*, 316 F.3d 528, 533 n.5 (4th Cir. 2003) (applying this standard to an *Alford* plea).

606 F. App'x 469, 470 (10th Cir. 2015) (unpublished) ("[T]o the extent [the petitioner] argues he would not have pleaded guilty had he known the DNA results were inconclusive, this claim goes to legal sufficiency, not factual innocence."). And because that argument does not bear on Mr. Sellers's actual innocence, it cannot provide a basis for circumventing AEDPA's statute of limitations. *See Laurson*, 507 F.3d at 1232–33; *Holden*, 606 F. App'x at 470.

Therefore, because reasonable jurists could not debate that Mr. Sellers's new evidence does not establish a viable claim of actual innocence, we **deny** Mr. Sellers's request for a COA as to this challenge.

B

In addition to Mr. Sellers's argument that his newly discovered evidence supports a claim for actual innocence sufficient to circumvent AEDPA's statute of limitations, he also claims that the new evidence shows that there was fraud on the court under Rules 60(b)(3) and (d)(3). Specifically, Mr. Sellers contends that the newly discovered evidence about the phone records and logs shows that (1) the prosecution allowed witnesses to present fraudulent testimony about the existence of text messages and calls made by Mr. Sellers and (2) the prosecution did not inform Mr. Sellers or the court about potentially exculpatory evidence regarding the phone records and logs. According to Mr. Sellers, this fraud on the court violates his due process rights and "invalidates [his] plea deal." R. at 226. The district court reached the merits of Mr. Sellers's fraud-on-the-court claim and rejected it. *Sellers*, 2022 WL 473972, at *1.

However, for the reasons explained below, we conclude that Mr. Sellers's fraud-on-the-court claim presents a second-or-successive habeas claim rather than a true Rule 60 claim, so we vacate the district court's judgment in part for lack of jurisdiction. And construing Mr. Sellers's application for a COA as a request for authorization to file a second-or-successive habeas petition, we deny his request.

1

Determining whether a motion alleging fraud on the court constitutes a true Rule 60 motion or a second-or-successive habeas petition "requires a more nuanced analysis" than is necessary for other types of post-judgment motions. *Spitznas*, 464 F.3d at 1216. If the petitioner alleges that fraud occurred during the original criminal proceedings, the motion presents a second-or-successive habeas claim. *See Baker*, 718 F.3d at 1207 ("[A] motion alleging fraud on the court in a defendant's criminal proceeding must be considered a second or successive collateral attack because it asserts or reasserts a challenge to the defendant's underlying conviction."). "If the alleged fraud on the court relates *solely* to fraud perpetrated on the federal habeas court, then the motion will be considered a true [Rule 60(b)] motion." *Spitznas*, 464 F.3d at 1216. There, is however, a caveat to that general rule: "if the fraud on the habeas court includes (or necessarily implies) related fraud on the state [trial] court . . ., then the motion will ordinarily be considered a second or successive petition because any ruling would inextricably challenge the underlying conviction proceeding." *Id.*

Mr. Sellers's arguments on the fraud-on-the-court issue are not a model of clarity, and he does not discuss them in detail in his appellate briefing. But a close reading of

Mr. Sellers's arguments in his Motion to Recall Mandate makes plain that Mr. Sellers primarily asserts that fraud was committed during his original criminal conviction, not before the federal habeas court. Specifically, Mr. Sellers argues that (1) a police officer presented fraudulent testimony about the existence of electronic communications made by Mr. Sellers and that this fraudulent testimony "creates a miscarriage of justice"; (2) the prosecution was aware of the police officer's fraudulent testimony but "failed to correct it once it was said in front of the jury"; (3) "[t]he State's failure to release ALL discovery invalidates [Mr. Sellers's] plea deal"; and (4) "[f]raud upon the court calls into question the very legitimacy of a judgment." R. at 224–26. These statements challenge the integrity of the criminal proceedings before the state trial court—not a procedural decision of the federal habeas court or the integrity of the habeas court's proceedings.

As such, these statements demonstrate that Mr. Sellers seeks to assert a second-or-successive habeas claim. *See Baker*, 718 F.3d at 1207; *see also United States v. Card*, 220 F. App'x 847, 849 (10th Cir. 2007) (unpublished) ("[W]e believe the district court could not avoid concluding that [the petitioner's] motion was a successive habeas claim. [The petitioner] asserts fraudulent behavior by prosecutors and law enforcement officials in concealing an illegal search of his home during his underlying federal conviction."); *Clemmons v. Davies*, 198 F. App'x 763, 765 (10th Cir. 2006) (unpublished) ("The claims in [the petitioner's] motion to reconsider, namely the discovery of new evidence and intrinsic fraud relating to the validity of his conviction, assert a federal basis for relief from his underlying conviction.").

Accordingly, Mr. Sellers's fraud-on-the-court claims are subject to the statutory requirements of 28 U.S.C. § 2244(b) for bringing a second or successive habeas petition. Mr. Sellers was required to first seek and obtain from this Court an order authorizing the district court to consider his second-or-successive habeas application before bringing the claim to the district court. *See* 28 U.S.C. § 2244(b)(3)(A). But he did not do so. As a result, the district court lacked jurisdiction to rule on the merits of Mr. Sellers's fraud-on-the court claim. *See In re Cline*, 531 F.3d at 1251. We therefore **vacate** the portion of the district court's judgment addressing that claim.

2

However, this vacatur need not end our inquiry. Mr. Sellers has filed an application for a COA in this case, and we have the discretion to construe that filing as an application for authorization to file a successive habeas petition. *See Spitznas*, 464 F.3d at 1219 & n.8; *see also Berryhill*, 466 F.3d at 938. Exercising that discretion here, we deny Mr. Sellers's request for authorization to file a second-or-successive habeas petition.

Neither of AEDPA's two conditions for granting authorization to file a second-or-successive habeas petition is present in this case. Mr. Sellers does not rely on a new rule of law that was made retroactively applicable by the Supreme Court. *See* 28 U.S.C. § 2244(b)(2)(A). Nor does his claim of fraud on the court come close to "establish[ing] by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *Id.* § 2244(b)(2)(B)(ii). Simply put, there is nothing about the newly discovered evidence of

alleged fraud that would cast sufficient doubt on Mr. Sellers's conviction to meet AEDPA's clear-and-convincing standard, even if we assume that the factual predicate for the claim could not have been discovered through the exercise of due diligence. *See Case v. Hatch*, 731 F.3d 1015, 1040–43 (10th Cir. 2013) (concluding that the petitioner had failed to meet the burden set out in § 2244(b)(2)(B)(ii)).

Because the allegations in his application for a COA do not satisfy the statutory requirements, we thus **deny** Mr. Sellers authorization to file a second or successive § 2254 habeas petition. *See* 28 U.S.C. § 2244(b)(3)(C).

IV

For the foregoing reasons, we **DENY** Mr. Sellers's request for a COA as to his Rule 60(b)(2) claim of actual innocence based on newly discovered evidence, **VACATE** the portion of the district court's order addressing the merits of Mr. Sellers's Rule 60(b)(3) and (d)(3) claim of fraud on the court over which the district court lacked jurisdiction, **DENY** Mr. Sellers authorization to file a second or successive § 2254 habeas petition for his fraud-on-the-court claim, and **DISMISS** this matter.

Entered for the Court

Jerome A. Holmes
Chief Judge