

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14988-K

KEITH LAPELL BIGGINS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

ORDER:

Keith Lapell Biggins is a federal prisoner serving a life sentence after a jury convicted him in 1995 of conspiracy to distribute and possess with intent to distribute cocaine base ("crack"), and possession of crack with intent to distribute. He filed a direct appeal, and this Court affirmed his convictions and sentences.

In 2001, Biggins filed a 28 U.S.C. § 2255 motion to vacate, arguing that the government withheld exculpatory evidence and used perjured testimony at trial, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The district court denied the motion, finding that it was untimely because it was outside the limitation period, and Biggins failed to provide any facts as to when or how he obtained the newly discovered evidence or why it could not have been discovered earlier with due diligence. Biggins was denied a certificate of appealability ("COA").

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In 2005, Biggins filed a Fed. R. Civ. P. 60(b)(6) motion challenging the denial of his initial § 2255 motion as time-barred. The district court summarily dismissed the motion, finding that Biggins still had not provided specifics, such as when and how he obtained each affidavit, or explained why a reasonable investigation would not have uncovered the facts previously. Biggins again was denied a COA.

In 2017, Biggins filed the instant Rule 60(b)(6) motion, seeking to reopen his initial § 2255 proceeding. He claimed actual innocence, and alleged that he had secured further evidence of perjury at trial, such that he was entitled to a review of the merits of his claims. He contended that, under *McQuiggin v. Perkins*, 569 U.S. 383 (2013), a claim of actual innocence should nullify § 2255's limitations period.

The district court denied the motion. It found that Biggins not only had failed to file the motion within a reasonable time, but also that he had failed to show the requisite extraordinary circumstances needed to obtain relief under Rule 60(b)(6), noting that, although he had presented evidence that a few of the many trial witnesses claimed they had given false testimony, he had not shown that, in light of that evidence, no juror would have found him guilty beyond a reasonable doubt, as required by *McQuiggin*. In the same order, it denied a COA. Biggins appealed, and now seeks a COA from this Court.

A COA is required to appeal any denial of a Rule 60(b) motion for relief from a judgment in a 28 U.S.C. § 2255 proceeding. *Jackson v. Crosby*, 437 F.3d 1290, 1294 (11th Cir. 2006). To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Rule 60(b)(6) of the Federal Rules of Civil Procedure provides, in part, that a court may relieve a party from a final judgment, order, or proceeding for any reason that justifies relief.

Fed. R. Civ. P. 60(b)(6). A Rule 60(b)(6) motion must be made within a "reasonable time" see Fed. R. Civ. P. 60(c)(1), and requires a showing of "extraordinary circumstances" that will "rarely occur in the habeas context." *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005).

Here, the instant Rule 60(b)(6) motion was made 15 years after the denial of his § 2255 motion and is based upon the same information raised in that motion and his prior Rule 60(b) motion, which have already been considered and denied. Moreover, his actual-innocence claim does not clear the hurdle of the time-bar. As correctly found by the district court, the evidence Biggins offered in support of the instant motion was insufficient to show that the outcome of the trial would have different. *See McQuiggin*, 569 U.S. at 386.

Because Biggins has failed to make a substantial showing of the denial of a constitutional right, his motion for a COA is DENIED. 28 U.S.C. § 2253(c)(2).

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-14988-K

KEITH LAPELL BIGGINS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

Before: WILSON and ROSENBAUM, Circuit Judges.

BY THE COURT:

Keith Lapell Biggins has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's February 5, 2018, order denying a certificate of appealability. Upon review, Biggins's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA,

v.

4:93cr4028-WS/CAS

KEITH LAPELL BIGGINS,

4:01cv296-WS/CAS

Defendant.

ORDER DENYING DEFENDANT'S RULE 60(b) MOTION
TO REOPEN SECTION 2255 PROCEEDINGS

Before the court is the magistrate judge's report and recommendation (doc. 1121) docketed September 26, 2017. The magistrate judge recommends that Keith Lapell Biggins's Rule 60(b)(6) motion to reopen his original § 2255 proceedings be denied as Biggins "has shown no legal basis for reopening" those proceedings. Biggins has filed objections to the report and recommendation. Attached to his objections are exhibits that, according to Biggins, demonstrate his "actual innocence" of the crimes of conviction.

Biggins contends that the magistrate judge failed to consider the Supreme Court's 2013 decision in *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013). In that

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case, the Supreme Court held that evidence of actual innocence can overcome the one-year limitations period for filing a federal habeas corpus action. The Supreme Court cautioned, however, that “tenable actual-innocence gateway pleas are rare:

‘[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.’ ” *Id.* at 1928 (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)).

In 2002, Biggins’s § 2255 motion, which included an actual innocence argument (albeit in a footnote), was summarily dismissed as barred by the relevant statute of limitations. The claims raised by Biggins’s in that original § 2255 motion were *not* considered on the merits. Biggins suggests that, under *McQuiggin*, he should now—more than fifteen years after his original § 2255 motion was dismissed—be permitted to reopen his § 2255 proceedings to have his claim of actual innocence considered on the merits. This court disagrees.

Federal Rule of Civil Procedure 60(b) entitles the moving party to relief from judgment on several grounds, including the catch-all category “any other reason justifying relief from the operation of the judgment.” Fed. R. Civ. P. 60(b)(6). Biggins seeks relief under Rule 60(b)(6). A motion under Rule 60(b)(6) must be brought “within a reasonable time,” Fed. R. Civ. P. 60(c)(1); and requires

a showing of “extraordinary circumstances,” *Gonzalez*, 545 U.S. at 535. The Supreme Court has explained that “[s]uch circumstances will rarely occur in the habeas context.” *Id.*

Having considered Biggins’s motion, his objections, and the affidavits and other exhibits attached to Biggins’s objections, this judge—the same judge who sat through Biggins’s three-week trial—has determined that Biggins’s motion to reopen must be denied.¹ Not only has Biggins failed to file his Rule 60(b) motion “within a reasonable time” as required by Rule 60(c)(1); he has also failed to demonstrate the requisite extraordinary circumstances to obtain relief under Rule 60(b)(6). To be sure, Biggins has produced evidence that a few of the many trial

¹ This court assumes, without deciding, that Biggins’s Rule 60(b) motion is not subject to dismissal as a successive habeas petition. In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), the Supreme Court explained that when a Rule 60(b) motion asserts grounds entitling a petitioner to habeas relief or asserts that a previous ruling regarding those grounds was in error, he is making a habeas claim subject to the restrictions imposed on successive petitions by the AEDPA. *Id.* at 532 n.4. “He is not doing so 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.” *Id.*; see also *Spitznas v. Boone*, 464 F.3d 1213, 1216 (10th Cir. 2006) (explaining that a Rule 60(b) motion “is a second or successive petition if it in substance or effect asserts or reasserts a federal basis for relief from the petitioner’s underlying conviction. Conversely, it is a ‘true’ 60(b) motion if it either (1) challenges only a procedural ruling of the habeas court which precluded a merits determination of the habeas application; or (2) challenges a defect in the integrity of the federal habeas proceeding.”).

witnesses claim that they gave false testimony and/or later recanted their testimony against Biggins. Having reviewed Biggins's newly produced evidence along with the evidence he submitted in 2001 with his original § 2255 motion, the court finds that Biggins has failed to make an adequate showing of factual innocence under *McQuiggin*. Biggins is not entitled to relief under Rule 60(b)(6).

Accordingly, it is ORDERED:

1. The magistrate judge's report and recommendation (doc. 1121) is ADOPTED and incorporated into this order.
2. Biggins's Rule 60(b) motion (doc. 1119) to reopen his § 2255 proceedings is DENIED.
3. A certificate of appealability is DENIED.

DONE AND ORDERED this 18th day of October, 2017.

s/ William Stafford
WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA,

vs.

Case Nos.: 4:93cr4028/WS/CAS
4:01cr296/WS/CAS

KEITH LAPELL BIGGINS,
Defendant.

REPORT AND RECOMMENDATION

This matter is before the court upon Defendant's "Motion to Reopen the Proceeding[s] in Movant's Original Title 28 U.S.C. § 2255 Proceeding[s]"¹ and Memorandum in support thereof. (ECF Nos. 1119, 1120). Defendant seeks to have the court consider on their merits claims that were dismissed in 2002 as untimely. After a review of the record, the undersigned concludes that Defendant's motion should be denied.

¹ At the time of this writing, the motion contained on the court's electronic docket contains only three pages, and appears to be incomplete.

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BACKGROUND and ANALYSIS

Defendant Keith Lapell Biggins is currently serving a term of life imprisonment after his 1995 conviction of controlled substance offenses. He has filed numerous postconviction motions seeking review of his conviction and sentence. After an unsuccessful appeal, he filed a motion to vacate pursuant to 28 U.S.C. § 2255 in June of 2001, and this motion was denied as untimely. (ECF Nos. 768, 787, 788). It is this motion Defendant now seeks to reopen. He unsuccessfully appealed the denial of his § 2255 motion and filed a second § 2255 motion which was summarily denied as successive. (ECF Nos. 850, 851, 856).² Defendant's motions for a reduction in his sentence pursuant to 18 U.S.C. § 3582, and later pursuant to the crack cocaine amendments were also denied. (ECF Nos. 921, 934; 1067, 1069). Defendant filed a third motion to vacate pursuant to 28 U.S.C. § 2255, contending that he was actually

² The Eleventh Circuit previously denied Defendant's application for leave to file a second or successive § 2255 motion. (ECF No. 855).

innocent, citing *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013). (ECF No. 1071). The court denied this motion as well, over Defendant's objection. (ECF Nos. 1073-1075). Most recently, the court denied Defendant's motion for a reduction in his sentence pursuant to Amendment 782, initially and on reconsideration, and the Eleventh Circuit summarily affirmed. (ECF Nos. 1076, 1085, 1087, 1096, 1114).

Defendant now seeks to "reopen the proceedings" with respect to his original § 2255 motion pursuant to Rule 60(b). Defendant filed the motion to reopen more than fifteen years after the § 2255 motion in question was denied as untimely. In the instant motion, Defendant claims, as he did in his initial § 2255 motion, that his conviction resulted from the Government's use of perjured testimony. Affidavits purporting to establish this were filed along with his initial § 2255 in 2001. (ECF Nos. 778, 784). He now claims to have secured further evidence of the perjury since the initial motion was filed, although he has not submitted proof thereof. (ECF No. 1120 at 5-6). Rather he asks the court to re-open the original § 2255 motion and consider the claims raised therein on their merits.

In recommending that Defendant's original § 2255 motion be denied, the magistrate judge acknowledged the existence of the affidavits, but

noted that Defendant had not shown that he could not have discovered the facts contained therein within the limitations period. (ECF No. 787 at 4-6). Defendant's objections to the recommendation were considered by the court, although they were received the day after the court's order adopting the recommendation. (ECF Nos. 788-791). Defendant also filed a motion for reconsideration, which was denied. (ECF Nos. 792-793). The Eleventh Circuit denied his request for a certificate of appealability and for a panel rehearing. (ECF Nos. 807, 809).

The basis for Defendant's motion to reopen appears merely to be that he has not had a merits review of his claims. The fact that Defendant's initial motion was untimely has been determined, and Defendant availed himself of multiple opportunities to seek review of this finding before two courts. Defendant has shown no legal basis for reopening the § 2255 proceedings at this late date, and his motion is denied.

CERTIFICATE OF APPEALABILITY

Rule 11(a) of the Rules Governing Section 2255 Proceedings provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that

satisfy the showing required by 28 U.S.C. § 2253(c)(2).” A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rule 11(b), § 2255 Rules. An appeal of the denial of a Rule 60(b) motion requires a certificate of appealability. *Williams v. Chatman*, 510 F.3d 1290, 1294 (11th Cir. 2007); *Gonzalez v. Sec’y for Dept. of Corrections*, 366 F.3d 1253, 1263 (11th Cir. 2004).

After review of the record, the court finds no substantial showing of the denial of a constitutional right. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000) (explaining how to satisfy this showing) (citation omitted). Therefore, it is also recommended that the court deny a certificate of appealability in its final order.

The second sentence of Rule 11(a) provides: “Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue.” If there is an objection to this recommendation by either party, that party may bring this argument to the attention of the district judge in the objections permitted to this report and recommendation.

Based on the foregoing, it is respectfully **RECOMMENDED**:

1. The “Motion to Reopen the Proceeding[s] in Movant’s Original Title 28 U.S.C. § 2255 Proceeding[s]” (ECF No. 1119) be **DENIED**.

2. A certificate of appealability be **DENIED**.

At Tallahassee, Florida, this 26th day of September, 2017.

s/ Charles A. Stampelos
CHARLES A. STAMPELOS
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

Objections to these proposed findings and recommendations must be filed within fourteen (14) days after being served a copy thereof. Any different deadline that may appear on the electronic docket is for the court's internal use only, and does not control. A copy of objections shall be served upon all other parties. If a party fails to object to the magistrate judge's findings or recommendations as to any particular claim or issue contained in a report and recommendation, that party waives the right to challenge on appeal the district court's order based on the unobjected-to factual and legal conclusions. See 11th Cir. Rule 3-1; 28 U.S.C. § 636.

UNITED STATES DISTRICT COURT

FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA

v.

Case Number TCR 93-04028-003

KEITH LAPELL BIGGINS
Defendant.

JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987)

The defendant, **KEITH LAPELL BIGGINS**, was represented by **Rene Sotorrio; Miami, Florida.**

The defendant was found guilty on count(s) **1, 2, and 3** after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

TITLE & SECTION	NATURE OF THE OFFENSE	DATE CONCLUDED	COUNT NUMBER
21 USC 846	Conspiracy to Distribute and Possess With Intent to Distribute Cocaine Base and Cocaine	8/9/94	1
21 USC 841(a) & 841(b)(1)(A)	Possession With Intent to Distribute Cocaine Base and Cocaine	9/30/90 1/31/91	2&3

As pronounced on **January 9, 1995**, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$ **150.00**, for count(s) **1, 2, and 3**, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this 13th day of January, 1995.

William Stafford
William Stafford

United States District Judge

OFFICE OF CLERK
U.S. DISTRICT CT.
NORTHERN DIST. FLA.
TALLAHASSEE, FLA.

95 JAN 13 PH 4: 14

Defendant's SSN: 594-09-0161

Defendant's Date of Birth: 03/02/69

Defendant's address: 3310 N. W. 176th Terrace; Miami, Florida 33056

FILED

Defendant: **KEITH LAPELL BIGGINS**
Case Number: **TCR 93-04028-003**

IMPRISONMENT

It is the judgment of the Court that the defendant, as to Count 1, 2, and 3 is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of **Life as to each Count with said Counts to run concurrently.**

The Court makes the following recommendations to the Bureau of Prisons: **The Court recommends that the defendant be designated to an institution in south Florida consistent with the needs and policies of the Bureau of Prisons.**

The defendant is remanded to the custody of the United States Marshal.

RETURN:

I have executed this Judgment as follows:

Defendant delivered:

on _____ to _____

at _____, with a certified copy of this

Judgment.

United States Marshal

By _____
Deputy Marshal

Defendant: **KEITH LAPELL BIGGINS**
Case Number: **TCR 93-04028-003**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **five (5)** years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district of release within 72 hours of release from the custody of the Bureau of Prisons.
2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.
3. The defendant shall not own or possess a firearm or destructive device.
4. The defendant shall submit to testing to determine whether or not he is using drugs or alcohol.
5. The defendant shall provide any financial information requested by the probation officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: **KEITH LAPELL BIGGINS**
Case Number: **TCR 93-04028-003**

Judgment--Page 4 of 4

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	46
Criminal History Category:	I
Imprisonment Range:	Life
Supervised Release Range:	5 years
Fine Range:	\$ 25,000 to \$ 4,000,000
Restitution:	\$ N/A

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The above sentence conforms to the guideline range for custody and meets the goals of punishment and general deterrence. The sentence of life imprisonment is mandated by the guidelines and takes into account the seriousness and violent nature of the offense conduct and the defendant's role in the commission of these offenses.

GRANTED A TRUE COPY
ROBERT A. MOSSING, CLERK

By: 

Deputy Clerk