

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

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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April 23, 2019

Clerk - Southern District of Florida
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 18-13923-H
Case Style: Curtis Nairn v. Secretary, Florida Department, et al
District Court Docket No: 0:16-cv-60874-JAL

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Gerald B. Frost, H
Phone #: (404) 335-6182

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-13923-H

CURTIS NAIRN,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

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

ORDER:

Curtis Nairn is a Florida prisoner serving a life sentence of imprisonment after a jury convicted him of second-degree murder. He seeks a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP") to appeal the denial of his second and third Rule 60(b), Fed. R. Civ. P., motions, in which he argued that the district court erred by dismissing as unexhausted Claim 5 in his 28 U.S.C. § 2254 petition without allowing him the opportunity to exhaust the claim in state court.

This Court has held that "a [COA] is required for the appeal of any denial of a Rule 60(b) motion for relief from a judgment in a § 2254 or § 2255 proceeding." *Gonzalez v. Sec'y for Dep't of Corrs.*, 366 F.3d 1253, 1263 (11th Cir. 2004) (*en banc*). To merit a COA, a movant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim and (2) the

procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

The appeal of a Rule 60(b) motion is limited to a determination of whether the district court abused its discretion in denying the motion, and shall not extend to the validity of the underlying judgment *per se*. *Rice v. Ford Motor Co.*, 88 F.3d 914, 918-19 (11th Cir. 1996). Rule 60(b) motions in habeas proceedings may actually be second or successive habeas petitions rather than “true” Rule 60(b) motions. Rule 60(b) motions are impermissibly second or successive collateral attacks if the prisoner either (1) raises a new ground for substantive relief or (2) attacks the habeas court’s previous resolution of a claim on the merits. *Gonzalez v. Crosby*, 545 U.S. 524, 530-32 (2005). However, a Rule 60(b) motion permissibly may assert that a federal court’s previous habeas ruling that precluded a merits determination (*i.e.*, a procedural ruling such as failure to exhaust, a procedural bar, or a statute-of-limitations bar) was in error. *Id.* at 532 n.4.

Here, the district court did not abuse its discretion in denying Nairn’s second and third Rule 60(b) motions because he has not shown that the district court incorrectly found that Claim 5 would be procedurally barred in state court under Florida law, nor has he established any other basis for relief. Moreover, because the district court alternatively denied Claim 5 on the merits, any subsequent argument as to the merits of Claim 5 would be an impermissible attempt to rehash the district court’s previous resolution of the claim on the merits. *See Gonzalez*, 545 U.S. at 530-32.

Accordingly, Nairn’s motion for a COA is DENIED. His motion for IFP status is DENIED AS MOOT.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

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David J. Smith
Clerk of Court

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June 25, 2019

Curtis Nairn
Everglades CI - Inmate Legal Mail
1599 SW 187TH AVE
MIAMI, FL 33194

Appeal Number: 18-13923-H
Case Style: Curtis Nairn v. Secretary, Florida Department, et al
District Court Docket No: 0:16-cv-60874-JAL

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.

The enclosed order has been ENTERED.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Gerald B. Frost, H
Phone #: (404) 335-6182

MOT-2 Notice of Court Action

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-13923-H

CURTIS NAIRN,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
FLORIDA ATTORNEY GENERAL,

Respondents-Appellees.

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

Before: JORDAN and ROSENBAUM, Circuit Judges.

BY THE COURT:

Curtis Nairn has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated April 23, 2019, denying his motion for a certificate of appealability and denying as moot his motion for leave to proceed *in forma pauperis*. Because Nairn has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motion, his motion for reconsideration is DENIED.