IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10215-F

WALTER LEE BROWN,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee,

MICHAEL J. BOWERS,

Respondent.

Appeal from the United States District Court
for the Middle District of Georgia

ORDER:

Walter Brown is a Georgia prisoner serving a total sentence of life plus 21 years' imprisonment after a jury found him guilty of malice murder, felony murder, aggravated assault, and simple assault in 1992. In February 1996, Mr. Brown filed a *pro se* 28 U.S.C. § 2254 petition, which the district court denied in December 1997. Mr. Brown appealed, and a judge of this Court denied him a certificate of appealability ("COA").

In the two decades that followed, Mr. Brown filed four motions for relief from judgment, pursuant to Fed. R. Civ. P. 60(b). Each time, the district court denied his motion, he appealed, and a judge of this Court denied him a COA on appeal. In June 2018, Mr. Brown filed this, his fifth, Rule 60(b) motion, arguing that the district court should set aside its order, under Rule

APPENDIX A

60(b)(3), because the state committed fraud upon the court regarding claims that he raised in his § 2254 petition. He also stated that he was entitled to relief under Rule 60(b)(4) because the judgment was void as a result of the "fraud perpetrated upon the Court." These arguments echoed those he made in his past Rule 60(b) motions. The district court denied Mr. Brown's motion as untimely. It also denied him a COA and leave to proceed *in forma pauperis* ("IFP") on appeal, both of which he now seeks in this Court.

A COA is required to appeal the denial of a Rule 60(b) motion arising from a § 2254 proceeding. *Gonzalez v. Sec'y for Dep't of Corr.*, 366 F.3d 1253, 1263 (11th Cir. 2004) (*en banc*), *aff'd on other grounds sub nom. Gonzalez v. Crosby*, 545 U.S. 524 (2005). To merit a COA, a petitioner 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 Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Under Rule 60(b), a court may relieve a party from a final judgment on several grounds, including, *inter alia*: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to file a motion for a new trial under Fed. R. Civ. P. 59(b); (3) fraud, misrepresentation, or misconduct by an opposing party; and (4) the judgment is void. Fed. R. Civ. P. 60(b).

Generally, a Rule 60(b) motion "must be made within a reasonable time," and what constitutes a "reasonable time" depends upon the circumstances of each case, including whether the parties have been prejudiced by the delay and whether a good reason has been presented for failing to take action sooner. Fed. R. Civ. P. 60(c)(1); *BUC Int'l Corp. v. Int'l Yacht Council Ltd.*, 517 F.3d 1271, 1275 (11th Cir. 2008). However, if the Rule 60(b) motion is brought pursuant to 60(b)(1), (b)(2), or (b)(3), the motion must be made no more than one year after the

entry of the judgment or order or the date of the proceeding being challenged. Fed. R. Civ. P. 60(c)(1).

Here, the district court did not abuse its discretion by denying Mr. Brown's fifth Rule 60(b) motion. To the extent that Mr. Brown's motion was brought pursuant to Rule 60(b)(3), it was untimely because he filed it over 20 years after the entry of the judgment denying his § 2254 petition. *See* Fed. R. Civ. P. 60(c)(1). To the extent that Mr. Brown's motion was brought pursuant to Rule 60(b)(4), it was not filed within a reasonable time because Mr. Brown made the same argument that he made in the past and provided no justification for his 20-year delay. *See id*; *BUC Int'l Corp.*, 517 F.3d at 1275. Because reasonable jurists would not debate the district court's denial of Mr. Brown's fifth Rule 60(b) motion as untimely, his motion for a COA is DENIED. His IFP motion is DENIED AS MOOT.

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

WALTER LEE BROWN,	:	
	:	
Petitioner,	:	
	:	
v.	:	No. 5:96-CV-58 (CAR)
	:	
JOHNNY C. SIKES,	:	
	:	
Respondent.	:	
	:	

ORDER ON REPORT AND RECOMMENDATION

Before the Court is the United States Magistrate Judge's Recommendation [Doc. 110] to deny Petitioner Walter Lee Brown's Motion to Reopen Judgment Denying Habeas Corpus Petition under Rule 60(b) [Doc. 107]. Petitioner has timely filed an Objection to the Recommendation.[1] This Court has fully considered the record in this case, made a *de novo* determination of the portions of the Recommendation to which Petitioner objects, and finds the Objection to be without merit.

Petitioner objects to the Recommendation to deny Petitioner's Motion as untimely arguing that Rule 60(d) authorizes a district court to "entertain an independent action to set aside a judgment for fraud on the court even if more than a year has passed."[2]

[1] Petitioner filed two Objections to the Recommendation [Docs. 112, 113]. However, only the first Objection was timely filed and both Objections are substantively identical, so the Court will consider them as one Objection.

[2] *Day v. Benton*, 346 F. App'x 476, 478 (11th Cir. 2009) (internal quotations and citations omitted).

APPENDIX B

Petitioner's argument is without merit. As this Court previously determined in its January 24, 2016 Order, Petitioner's allegations of fraud do not meet the requirements of an independent action under Rule 60(d), and thus they are untimely.

This is Petitioner's fifth Rule 60(b) motion asking the Court to reconsider the denial of his habeas petition for reasons the Court has already considered and rejected. As the Eleventh Circuit has previously held, Petitioner's claims are barred by the law of the case doctrine because Petitioner has "raised the same claims in his previous Rule 60(b) motions."[3] Petitioner fails to meet the requirements that would allow this Court to reconsider his argument: he presents no new evidence, no change in law, and fails to show that the Court's previous decision was clearly erroneous and would result in a manifest injustice.[4]

For these reasons, the Report and Recommendation [Doc. 110] is **ADOPTED** and **MADE THE ORDER OF THIS COURT**, and Petitioner's Motion to Motion to Reopen Judgment Denying Habeas Corpus Petition [Doc. 107] is **DENIED**. Additionally, because

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[3] [Doc. 104, p. 11].

[4] *This That And The Other Gift And Tobacco, Inc. v. Cobb Cty., Ga.*, 439 F.3d 1275, 1283 (11th Cir. 2006) ("When a court decides a question of law, the only means by which the law-of-the-case doctrine can be overcome is if: (1) since the prior decision, 'new and substantially different evidence is produced, or there has been a change in the controlling authority'; or (2) 'the prior decision was clearly erroneous and would result in a manifest injustice.'") (quoting *Oladeinde v. City of *1284 Birmingham,* 230 F.3d 1275, 1288 (11th Cir. 2000)).

Petitioner has failed to make a substantial showing of the denial of a constitutional right, a certificate of appealability is **DENIED**.

SO ORDERED, this 19th day of December, 2018.

S/ C. Ashley Royal
C. ASHLEY ROYAL, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

WALTER LEE BROWN,	:	
Petitioner,	:	
	:	
v.	:	**Case No. 5:96-cv-00058-CAR-CHW**
	:	
JOHNNY C. SIKES,	:	**Proceedings Under 28 U.S.C. § 2254**
Respondent.	:	**Before the U.S. Magistrate Judge**
	:	

REPORT AND RECOMMENDATION

In February 1996, Petitioner Walter Lee Brown commenced this Section 2254 habeas action challenging his 1992 conviction in the Macon County Superior Court on charges of murder and assault. The Court denied the Section 2254 petition in 1997. (Doc. 31).

Now before the Court is Petitioner's motion for relief from judgment filed under Federal Rule of Civil Procedure 60(b)(3). (Doc. 107). In the motion, Petitioner argues that the State Attorney General's Office committed "fraud on the Court" by "withholding and concealment of discovery information" that would have demonstrated the need for an evidentiary hearing regarding the trial court's ruling on the suppression of evidence. (Doc. 107, pp. 6–9). This argument should be rejected as untimely under Federal Rule of Civil Procedure 60(c)(1), which provides that motions made under Rule 60(b)(1)–(3) "must be made ... no more than a year after the entry" of judgment.

Petitioner also cites Federal Rule of Civil Procedure 60(b)(4) ("the judgment is void"), but Petitioner's Rule 60(b)(4) argument merely restates his Rule 60(b)(3) argument that the Court's judgment is "void ... requiring Rule 60(b)(4) relief as a result of the fraud perpetrated upon the Court." (Doc. 107, p. 21). Because Petitioner does not raise a genuine Rule 60(b)(4) argument, the 1-year limitation period applies. Even if Petitioner had raised a genuine Rule 60(b)(4) argument,

APPENDIX C

however, Petitioner provides no explanation for his 20-year delay. Accordingly, Petitioner fails Rule 60(c)'s general requirement that Rule 60(b) motions "be made within a reasonable time." Fed. R. Civ. P. 60(c)(1). Therefore, it is **RECOMMENDED** that Petitioner's Rule 60(b) motion (Doc. 107) be **DENIED**.

Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, **WITHIN FOURTEEN (14) DAYS** after being served with a copy thereof. The District Judge shall make a de novo determination of those portions of the Recommendation to which objection is made. All other portions of the Recommendation may be reviewed for clear error.

The parties are further notified that, pursuant to Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice."

SO RECOMMENDED, the 25th day of October, 2018.

s/ Charles H. Weigle
Charles H. Weigle
United States Magistrate Judge

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

For rules and forms visit
www.ca11.uscourts.gov

June 21, 2019

Walter Lee Brown
Georgia SP - Inmate Legal Mail
300 1ST AVE S
B2-17B
REIDSVILLE, GA 30453

Appeal Number: 19-10215-F
Case Style: Walter Brown v. Warden
District Court Docket No: 5:96-cv-00058-CAR-CHW

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: Dionne S. Young, F
Phone #: (404) 335-6224

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10215-F

WALTER LEE BROWN,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee,

MICHAEL J. BOWERS,

Respondent.

Appeal from the United States District Court
for the Middle District of Georgia

Before: WILSON and JILL PRYOR, Circuit Judges.

BY THE COURT:

Walter Lee Brown has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's May 7, 2019, order denying a certificate of appealability and leave to proceed on appeal *in forma pauperis*, following the denial of his *pro se* motion for relief from judgment, Fed. R. Civ. P. 60(b), challenging dismissal of a 28 U.S.C. § 2254 petition. Upon review, Brown's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

APPENDIX D

General Docket

United States Court of Appeals for the Eleventh Circuit

Court of Appeals Docket #: 19-10215 **Docketed:** 01/16/2019
Nature of Suit: 3530 Habeas Corpus **Termed:** 05/07/2019
Walter Brown v. Warden
Appeal From: Middle District of Georgia
Fee Status: Fee Not Paid

Case Type Information:
1) Private Civil - Prisoner
2) State Habeas Corpus
3) -

Originating Court Information:
District: 113G-5 : 5:96-cv-00058-CAR-CHW
Civil Proceeding: C. Ashley Royal, Senior U.S. District Court Judge
Secondary Judge: Charles H. Weigle, U.S. Magistrate Judge
Date Filed: 02/20/1996
Date NOA Filed:
01/16/2019

Prior Cases:

12-12384	**Date Filed:** 05/03/2012	**Date Disposed:** 09/18/2012	**Disposition:** Other
12-16533	**Date Filed:** 12/21/2012	**Date Disposed:** 07/10/2013	**Disposition:** Dismissed
14-11906	**Date Filed:** 04/29/2014	**Date Disposed:** 08/04/2014	**Disposition:** Other
15-12351	**Date Filed:** 05/29/2015	**Date Disposed:** 09/17/2015	**Disposition:** Other
17-10668	**Date Filed:** 02/13/2017	**Date Disposed:** 10/30/2017	**Disposition:** Other
17-10727	**Date Filed:** 02/16/2017	**Date Disposed:** 04/20/2017	**Disposition:** Dismissed

Current Cases:
None

APPENDIX D

WALTER LEE BROWN (State Prisoner: 385886)	Petitioner -	Walter Lee Brown
		[NTC Pro Se]
Appellant		Georgia SP - Inmate Legal Mail
		B2-17B
		300 1ST AVE S
		REIDSVILLE, GA 30453

versus

WARDEN Appellee	Respondent -	Clint Christopher Malcolm [COR LD NTC Government] Attorney General's Office Firm: 404-656-3300 40 CAPITOL SQ ATLANTA, GA 30334 Christopher Michael Carr [COR NTC Government] Attorney General's Office Firm: 404-656-3300 40 CAPITOL SQ ATLANTA, GA 30334 Allison Beth Vrolijk [NTC Government] Attorney General's Office Firm: 404-656-3300 40 CAPITOL SQ ATLANTA, GA 30334

WALTER LEE BROWN,

Petitioner - Appellant,

versus

WARDEN,

Respondent - Appellee,

MICHAEL J. BOWERS,

Respondent.

06/21/2019		ORDER: Motion for reconsideration of single judge's order filed by Appellant Walter Lee Brown is DENIED. [8781769-2] CRW and JP [Entered: 06/21/2019 04:43 PM]
05/23/2019		*MOTION for reconsideration of single judge's order entered on 05/07/2019 filed by Appellant Walter Lee Brown. Opposition to Motion is Unknown [8781769-1]* [Entered: 05/23/2019 04:29 PM]
05/07/2019		ORDER: Motion for certificate of appealability filed by Appellant Walter Lee Brown is DENIED. [8719798-2]; Motion to proceed in forma pauperis filed by Appellant Walter Lee Brown is DENIED as MOOT. [8719769-2] JP [Entered: 05/07/2019 04:09 PM]

03/14/2019		*MOTION for certificate of appealability filed by Appellant Walter Lee Brown. Opposition to Motion is Unknown [8719798-1]* [Entered: 03/14/2019 02:13 PM]
03/14/2019		Appellant's Certificate of Interested Persons and Corporate Disclosure Statement filed by Appellant Walter Lee Brown. [Entered: 03/14/2019 02:05 PM]
03/14/2019		*MOTION to proceed IFP filed by Appellant Walter Lee Brown. Opposition to Motion is Unknown [8719769-1]* [Entered: 03/14/2019 02:03 PM]
03/12/2019		USDC order denying IFP as to Appellant Walter Lee Brown was filed on 03/10/2019. Docket Entry 120. [Entered: 03/12/2019 10:21 AM]
02/25/2019		Certificate of Interested Persons and Corporate Disclosure Statement filed by Attorney Clint Christopher Malcolm for Appellee Warden. On the same day the CIP is served, the party filing it must also complete the court's web-based stock ticker symbol certificate at the link here http://www.ca11.uscourts.gov/web-based-cip or on the court's website. See 11th Cir. R. 26.1-2(b). [19-10215] (ECF: Clint Malcolm) [Entered: 02/25/2019 12:52 PM]
02/22/2019		APPEARANCE of Counsel Form filed by Clint C. Malcolm for Appellee [19-10215] (ECF: Clint Malcolm) [Entered: 02/22/2019 01:32 PM]
02/14/2019		NOTICE OF CIP FILING DEFICIENCY to Christopher Michael Carr for Warden and Allison Beth Vrolijk for Warden. You are receiving this notice because you have not completed the Web-Based Stock Ticker Symbol CIP via the court's public web-page and have not filed the CIP via the electronic filing system (CM/ECF). Failure to comply with 11th Cir. Rules 26.1-1 through 26.1-4 may result in dismissal of the case or appeal under 11th Cir. R. 42-1(b), return of deficient documents without action, or other sanctions on counsel, the party, or both. [Entered: 02/14/2019 12:23 PM]
02/05/2019		This APPELLANT has been notified that upon expiration of fourteen (14) days from this date, this appeal will be dismissed by the clerk without further notice unless the required filing fee has been received or a motion to proceed on appeal in forma pauperis is filed in the District Court. The appellant is being served with this letter. [Entered: 02/05/2019 03:01 PM]
01/31/2019		NOTICE OF CIP FILING DEFICIENCY to Walter Lee Brown. You are receiving this notice because you have not completed the Certificate of Interested Persons (CIP). Failure to comply with 11th Cir. Rules 26.1-1 through 26.1-4 may result in dismissal of the case or appeal under 11th Cir. R. 42-1(b), return of deficient documents without action, or other sanctions on counsel, the party, or both. [Entered: 01/31/2019 11:18 AM]
01/17/2019		USDC order denying COA as to Appellant Walter Lee Brown was filed on 12/19/2018. Docket Entry 114. [Entered: 01/17/2019 03:39 PM]
01/16/2019		HABEAS APPEAL DOCKETED. Notice of appeal filed by Appellant Walter Lee Brown on 01/16/2019. Fee Status: Fee Not Paid. No hearings to be transcribed. [Entered: 01/17/2019 03:35 PM]

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

WALTER LEE BROWN,	:	
	:	
Petitioner,	:	
	:	
v.	:	No. 5:96-CV-58 (CAR)
	:	
JOHNNY C. SIKES,	:	
	:	
Respondent.	:	
	:	

ORDER ON FOURTH MOTION TO SET ASIDE JUDGMENT AND MOTION FOR DISQUALIFICATION AND RECUSAL

Before the Court are Petitioner Walter Brown's Motion to Set Aside Judgment [Doc. 82] denying his 28 U.S.C. § 2254 petition under Federal Rule of Civil Procedure 60(b) and Motion for Disqualification and Recusal [Docs. 83] of the undersigned pursuant to 28 U.S.C. §§ 455(a) and (b)(1). For the reasons set forth below, Petitioner's Motions [Docs. 82 & 83] are **DENIED**.

In 1992, a jury in Macon County Superior Court found Petitioner guilty of malice murder, felony murder, aggravated assault, and simple assault. That court sentenced Petitioner to life plus 21 years' imprisonment. In 1996, Petitioner filed a *pro se* 28 U.S.C. § 2254 petition in this Court, challenging his state court conviction and alleging eleven grounds for relief. Of these eleven grounds, four included Fourth Amendment claims related to the denial of several motions to suppress. On December 15, 1997, this Court

APPENDIX F

adopted the Magistrate Judge's Recommendation to deny Petitioner's habeas petition, finding, in relevant part, that Petitioner's Fourth Amendment claims were barred by *Stone v. Powell*.[1] A few weeks later, this Court also denied Petitioner's motion for reconsideration and motion for a certificate of appealability.

Thereafter, Petitioner filed an appeal with the Eleventh Circuit Court of Appeals. On April 21, 1998, the Eleventh Circuit denied a certificate of appealability due to Petitioner's failure to make a substantial showing of the denial of a federal right.[2] For the next fourteen years, Petitioner filed no other motion. Then, between 2012 and 2015, Petitioner filed three motions pursuant to Rule 60(b) to set aside the judgment entered in 1997. This Court dismissed each motion as successive petitions over which the Court lacked subject matter jurisdiction. Petitioner appealed all three dismissals and filed motions for certificate of appealability with the Eleventh Circuit.

The Eleventh Circuit dismissed the first appeal for want of prosecution. As to the second appeal, the Eleventh Circuit denied Petitioner's request for a certificate of appealability for failure to make the requisite showing of a denial of a federal right.[3] As to the third appeal, in ruling on the motion for a certificate of appealability, the Eleventh Circuit stated this Court erred in dismissing the Rule 60(b) motion as a second

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[1] 428 U.S. 465 (1976).

[2] *Brown v. Sikes*, No. 98-8040 (11th Cir. April 16, 1998) ("Because appellant has failed to make a substantial showing of the denial of a federal right, his motion for a certificate of probable cause is DENIED."); [Doc. 38].

[3] *Brown v. Bowers*, No. 14-11903-D (11th Cir. Aug. 4, 2014); [Doc. 68].

or successive habeas petition.[4] Nonetheless, the Eleventh Circuit determined Petitioner could not show this Court "abused its discretion because [Petitioner's] claims are barred under the law of the case doctrine."[5] Thus, the Eleventh Circuit again denied Petitioner's motion for a certificate of appealability.

Now, Petitioner brings his fourth Motion to Set Aside Judgment pursuant to Rule 60(b), raising the same arguments as those in his previous Rule 60(b) motions. In general, Petitioner contends Respondent fraudulently represented to the Court that Petitioner's evidence claims received a full and fair hearing in state court, and this misrepresentation caused the Court to unlawfully accord a presumption of correctness to the state court's findings and determine the Fourth Amendment claims were *Stone*-barred. Additionally, Petitioner seeks recusal under 28 U.S.C. §§ 455(a) and (b)(1), arguing disqualification and recusal are warranted because the undersigned gives the appearance of bias and prejudice against him based on the previous Rule 60(b) motions. The Court will first address the Motion for Recusal and then discuss Petitioner's Rule 60(b) Motion.

Motion for Disqualification and Recusal

"Recusal is required in certain circumstances, including when the judge 'has a

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[4] *Brown v. Warden*, No. 15-12351-E (11th Cir. Sept. 17, 2015); [Doc. 80].

[5] *Id.*

personal bias or prejudice concerning a party ....'"[6] "The bias or prejudice must be personal and extrajudicial; it must derive from something other than that which the judge learned by participating in the case."[7] Additionally, under 28 U.S.C. § 455(a), "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[8] The standard under subsection (a) is objective and requires the court to ask "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality."[9] "[A] judge's rulings in the same or a related case are not a sufficient basis for recusal," except in rare circumstances where the previous proceedings demonstrate pervasive bias and prejudice.[10]

Here, Petitioner contends the undersigned "willfully and intentionally relied upon an erroneous interpretation of the applicable standard of law" in determining Petitioner's previous Rule 60(b) motions were successive. Petitioner points to the "fact" that the Eleventh Circuit determined the undersigned "abused its discretion" in

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[6] *United States v. Patterson*, 292 F. App'x 835, 837 (11th Cir. 2008) (per curiam) (quoting 28 U.S.C. § 455(b)(1)).

[7] *United States v. Amedeo*, 487 F.3d 823, 828 (11th Cir. 2007), *cert. denied*, 552 U.S. 1049 (2007) (internal quotation marks omitted).

[8] 28 U.S.C. § 455(a).

[9] *United States v. Patti*, 337 F.3d 1317, 1321 (11th Cir. 2003) (internal quotation marks omitted) (quoting *United States v. Kelly*, 888 F.2d 732, 745 (11th Cir. 1989)).

[10] *Bolin v. Story*, 225 F.3d 1234, 1239 (11th Cir. 2000); *see also Liteky v. United States*, 510 U.S. 540, 555 (1994) ("[J]udicial rulings alone almost never constitute valid basis for a bias or partiality recusal motion.").

dismissing these motions as evidence the undersigned cannot make a fair judgment in this case.[11] Petitioner's contentions are without merit for several reasons.

First, contrary to Petitioner's assertion, the Eleventh Circuit specifically stated Petitioner could not show this Court abused its discretion. Second, Petitioner does not point to any statements in the previous Orders or present any evidence to support his accusation that the undersigned "willfully and intentionally" applied "an erroneous interpretation" of the law to dismiss Petitioner's Rule 60(b) motion. Lastly, Petitioner does not provide any evidence of a personal, non-judicial bias, nor does he state with specificity any impartiality in the previous proceedings that would demonstrate pervasive bias or prejudice. Recusal in this case is not warranted simply because the Court previously erred in dismissing the Rule 60(b) motions as successive.

Accordingly, Petitioner's Motion for Disqualification and Recusal [Doc. 83] is **DENIED**.

Motion to Set Aside Judgment

Rule 60(b) provides a limited basis for a party to seek relief from a final judgment if the "judgment is void" or "for any other reason that justifies relief."[12] In the context of a habeas action, a Rule 60(b) motion that "seeks to add a new ground for relief," or "attacks the federal court's previous resolution of a claim on the merits," constitutes a

[11] [Docs. 83 & 83-1].
[12] Fed. R. Civ. P. 60(b)(4), (6).

second or successive habeas petition and is therefore subject to successive petition restrictions.[13] Conversely, where a Rule 60(b) motion "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings," the motion should not be considered a second or successive habeas petition.[14] Such motion "properly may: (1) assert that a federal court's previous habeas ruling that precluded a merits determination was in error; (2) allege a clerical error in the habeas judgment, which technically falls under Rule 60(a); or (3) allege a fraud upon the federal habeas court under Rule 60(b)(3)."[15]

In this case, Petitioner primarily argues that (1) the state perpetrated a fraud upon this Court, (2) this Court erred in dismissing Petitioner's Fourth Amendment claims as *Stone*-barred, and (3) the dismissal was void because it was inconsistent with due process. Thus, Petitioner has properly raised these claims in this Rule 60(b) motion that cannot be dismissed as a second or successive petition.[16] Nonetheless, Petitioner's claims still fail.

As an initial matter, Petitioner's Rule 60(b) Motion is untimely. Under Rule 60(c), a Rule 60(b) motion alleging fraud, misrepresentation, or misconduct by an

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[13] *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005).

[14] *Id.*

[15] *Brown*, No. 15-12351-E (11th Cir. Sept. 17, 2015) (citing *Gonzalez*, 545 U.S. at 532 n. 4-5); [Doc. 80].

[16] *See id.* ("Habeas petitioners may properly raise a claim of fraud upon the court in a Rule 60(b) motion. *See Gonzalez*, 545 U.S. at 532 n.5.... Additionally, [Petitioner's] challenges to the district court's determination that his Fourth Amendment claims were *Stone*-barred are challenges to a ruling that precluded a merits determination. *See id.* at 532 n.4....").

opposing party must be made "no more than a year after the entry of judgment or order of the date of the proceeding."[17] Here, judgment was entered in 1998, but Petitioner did not bring a Rule 60(b) motion alleging fraud upon the court until 2012. This clearly extends well past the one year limitation, and is therefore untimely. However, because Rule 60(d) authorizes this Court to "entertain an independent action to relieve a party from a judgment" even if the year has passed, the Court will consider the merits of Petitioner's claims.[18]

Under Rule 60(d), "[f]raud upon the court... embraces only '... fraud which does or attempts to, defile the court itself ... so that the [judiciary] cannot [properly decide the] cases that are presented for adjudication.'"[19] "[O]nly the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court."[20] An action for fraud on the court should be available only to "prevent a grave miscarriage of justice."[21] Further, Petitioner "must show an 'unconscionable plan or

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[17] Fed. R. Civ. P 60(b)(3), (c)(1).

[18] Fed. R. Civ. P. 60(d); *see also Day v. Benton*, 346 F. App'x 476, 478 (11th Cir. 2009) (per curiam).

[19] *Day*, 346 F. App'x at 478; *see also Travelers Indem. Co. v. Gore*, 761 F.2d 1549, 1551 (11th Cir. 1985) (per curiam) ("'Fraud upon the court' should, we believe, embrace only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.").

[20] *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978).

[21] *United States v. Beggerly*, 524 U.S. 38, 47, 118 S.Ct. 1862, 1868, 141 L.Ed.2d 32 (1998).

scheme' to improperly influence the court's decision."[22] "Conclusory averments of the existence of fraud made on information and belief and unaccompanied by a statement of clear and convincing probative facts which support such belief do not serve to raise the issue of the existence of fraud."[23]

Petitioner argues Respondent perpetuated fraud on this Court by misrepresenting that the state court had actually resolved the merits of the factual dispute regarding his motions to suppress. Such fraud, in turn, led the Court to incorrectly determine Petitioner's Fourth Amendment claims were *Stone*-barred. However, this argument wholly ignores that the Magistrate Judge reviewed all of the pleadings, motions, and exhibits therein, and this Court's conducted a *de novo* review of these claims after Petitioner filed an objection.[24] This Court's decision was not based solely on representations in Respondent's briefs.[25] Further, Petitioner does not present any evidence to show Respondent had an unconscionable scheme to improperly influence the Court or that any alleged misrepresentations were material.[26] Ultimately,

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[22] *Galatolo v. United States*, 394 F. App'x 670, 673 (11th Cir. 2012) (per curiam) (citing *Rozier*, 573 F.2d at 1338).

[23] *Booker v. Dugger*, 825 F.2d 281, 284-85 (11th Cir. 1987) (quotation omitted).

[24] [Docs. 29, 31, & 37].

[25] [Doc. 29] (Petitioner was "afforded a full and fair opportunity to litigate his Fourth Amendment claims at the state court level, [and thus, was] precluded from litigating his Fourth Amendment claims" under *Stone*.).

[26] *See Galatolo* 394 F. App'x at 673 ("[The petitioner] also has failed to provide clear and convincing probative facts indicating that the Government had an unconscionable scheme to improperly influence the court."); *Gonzalez v. Secretary for Dep't of Corrections*, 366 F.3d 1253, 1285 (11th Cir. 2004) ("There can be no fraud unless the falsehood is material, and here the alleged falsehood is immaterial.").

Petitioner cannot establish fraud upon this Court that led to the denial of his habeas petition. Accordingly, because Petitioner fails to establish the "sufficiently extraordinary" circumstances necessary to warrant relief under Rule 60(b), his Motion [Doc. 82] is **DENIED**.[27]

Based on the foregoing, Petitioner's Motion for Disqualification and Recusal [Doc. 83] and Motion to Set Aside Judgment [Doc. 82] are **DENIED**, and Petitioner's Motion for Ruling on the Motion for Disqualification and Recusal [Doc. 85] is **MOOT**. Additionally, because Petitioner has failed to make a substantial showing of the denial of a constitutional right, a certificate of appealability is **DENIED**.

SO ORDERED, this 24th day of January, 2017.

S/ C. Ashley Royal
C. ASHLEY ROYAL, JUDGE
UNITED STATES DISTRICT COURT

[27] *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1317 (11th Cir. 2000).

Additional material from this filing is available in the Clerk's Office.