

A, APPENDIX C (1)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

No. 18-10325
Summary Calendar

FILED

July 5, 2019

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KEVIN D. MOORE,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:11-CV-2540

Before DENNIS, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:*

Kevin D. Moore, federal prisoner # 36285-177, was convicted by a jury of transporting and shipping child pornography, 18 U.S.C. § 2252(a)(1) and (b)(1), and possession of child pornography, 18 U.S.C. § 2252(a)(4)(B). *United States v. Moore*, 370 F. App'x 559, 560-62 (5th Cir. 2010). As part of the collateral challenge to this conviction, Moore filed a motion to recuse United States District Judge Reed O'Connor. On appeal, Moore challenges the denial of his

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

motion to recuse. We review the denial of a motion to recuse for abuse of discretion. *Matassarin v. Lynch*, 174 F.3d 549, 571 (5th Cir. 1999).

Under 28 U.S.C. § 455(a), a federal judge must “disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). Under 28 U.S.C. § 144, a judge must reassign a case when a party “makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party.” 28 U.S.C. § 144. Moore’s arguments are insufficient to satisfy the standards under either § 455 or § 144. *See Patterson v. Mobil Oil Corp.*, 335 F.3d 476, 484 (5th Cir. 2003); *Liteky v. United States*, 510 U.S. 540, 548 (1994). Accordingly, Moore has not shown that the district court abused its discretion in denying the motion to recuse. *See Matassarin*, 174 F.3d at 571.

AFFIRMED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-10325

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

KEVIN D. MOORE,

Defendant - Appellant

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

ON PETITION FOR REHEARING

Before DENNIS, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:



UNITED STATES CIRCUIT JUDGE

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APPENDIX B(i)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

KEVIN D. MOORE, 36285-177,)
Petitioner,)
)
v.) 3:11-CV-2540-O (BT)
) 3:07-CR-0125-O (BT)
UNITED STATES OF AMERICA,)
Respondent.)

ORDER

Petitioner Kevin D. Moore filed a motion to recuse the undersigned district judge, (ECF No. 56), and a motion to reverse/strike/overrule (ECF No. 61.) For the following reasons, Petitioner's motions are DENIED.

I.

Petitioner's motion to recuse is governed by 28 U.S.C. §§ 144 and 445. Section 144 states:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time

28 U.S.C. § 144.

Additionally, § 455 states in pertinent part that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," and where "he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455 (a) and (b)(1).

Here, Petitioner failed to timely file his motion under §§ 144 and 455. "A timely motion to

recuse is one filed ‘at the earliest moment after knowledge of the facts demonstrating the basis’ for recusal.” *In re Katrina Canal Breaches Litig.*, 351 Fed. Appx. 938, 944 (5th Cir. 2009) (per curiam) (quoting *Travelers Ins. Co. v. Liljeberg*, 38 F.3d 1404, 1410 (5th Cir. 1994)). Petitioner did not file his motion to recuse until October 25, 2015. This was well after this Court’s July 31, 2013, order denying Petitioner’s §2255 petition, and after the Court’s October 2, 2015, order construing Petitioner’s Fed. R. 60(b) motion as a successive §2255 petition and transferring the petition to the Fifth Circuit Court of Appeals. Petitioner’s motion for recusal under §§ 144 and 455 is therefore untimely.

Petitioner has also failed to establish he is entitled to relief. Petitioner claims the undersigned Judge is biased against him “because Mr. Moore was convicted of a sex offense.” (ECF No. 56 at 3.) He claims this Court showed bias by failing to grant relief on his §2255 petition and motions.

Petitioner’s motion is based on decisions the Court made in this case. For a judge to be disqualified for bias or prejudice, however, “the bias must stem from an extrajudicial source and result in an opinion on some basis other than what the judge learned in the case.” *Crawford v. United States v. Dep’t of Homeland Sec.*, 245 Fed. Appx. 369, 383 (5th Cir. 2007) (citations omitted); *see also Liteky v. United States*, 510 U.S. 540, 555 (1994) (“[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion.”); *United States v. Scroggins*, 485 F.3d 824, 830 (5th Cir. 2007) (finding no abuse of discretion in denying motion to recuse where “[t]he facts . . . do not demonstrate bias and impartiality that are personal—as distinguished from judicial-in nature.”). Petitioner has failed to allege facts showing the Court is biased or prejudiced due to an extrajudicial source, and has failed to establish the Court’s impartiality might reasonably be

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questioned. Petitioner's motion to recuse, (ECF No. 56), is DENIED.

II.

Petitioner also filed a motion to reverse/strike/overrule the Court's finding that his motion for reconsideration, (ECF No. 58), was duplicative. The motion for reconsideration requested reconsideration of the Court's order construing Petitioner's Rule 60(b) motion as a successive §2255 petition and transferring the petition to the Fifth Circuit. (ECF No. 55.) The Court's order construing the Rule 60(b) motion as a successive §2255 petition also directed the Clerk of Court to open a new civil case for the successive petition, cause number 3:15-CV-3198-O. In this new case, Petitioner filed the identical motion for reconsideration, seeking reconsideration of the same order. (ECF No. 5.) Petitioner's motion in this case was therefore duplicative.

To the extent Petitioner challenges the denial of his motion for reconsideration, the claim is without merit. Petitioner's Rule 60(b) motion challenged the legality of his conviction and sentence and was therefore properly construed as a successive §2255 petition. *See Jeffers v. Chandler*, 253 F.3d 827, 830 (5th Cir. 2001) ("Section 2255 provides the primary means of collaterally attacking a federal conviction and sentence."); *Cox v. Warden, Fed. Detention Center*, 911 F.2d 1111, 1113 (5th Cir. 1990) (same). Petitioner's motion is DENIED.

Signed this 23rd day of February, 2018.


Reed O'Connor
UNITED STATES DISTRICT JUDGE