IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 20-11212-D

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARTIN L. HARRELL,

Defendant-Appellant.

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

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ORDER:

Martin L. Harrell, a federal prisoner serving a total sentence of 240 months' imprisonment for Hobbs Act conspiracy, conspiracy to commit arson and mail fraud, arson, witness tampering, and misleading statements, moves for a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP") in his appeal of the district court's order denying as untimely his *pro se* Rule 60(b)(6), Fed. R. Civ. P., motion for relief from the district court's judgment denying his 28 U.S.C. § 2255 motion to vacate.

Harrell filed his Rule 60(b)(6) motion on August 23, 2018, stating that the motion was based on the district court's failure to consider the claims of prosecutorial misconduct in his amended § 2255 motion before denying his original § 2255 motion on September 21, 2012. He subsequently filed motions "to compel the court to act on petitioner's motion for relief from judgment," "for recusal of prosecutors and magistrate judge," and "for a modified hearing."

A magistrate judge issued a report and recommendation ("R&R"), recommending that the district court deny the Rule 60(b)(6) motion as untimely because the six-year period between the district court's denial of Harrell's § 2255 motion and his Rule 60(b)(6) motion was not a reasonable delay under Rule 60. The magistrate judge noted that Harrell did not provide any justification for the delay and did not raise any new facts that would require the district court to alter its earlier denial of his motion to amend. The magistrate judge also recommended that the district court deny Harrell's motion for recusal and deny as moot his motion to compel and motion for a modified hearing. The district court adopted the R&R over Harrell's objections, denied the Rule 60(b)(6) motion, and denied the remaining motions as moot. It also denied his motions for a COA and leave to proceed IFP on appeal.

As background, Harrell timely filed a *pro se* § 2255 motion on August 11, 2008, raising one claim that counsel was ineffective at trial and on appeal due to a conflict of interest. On August 18, 2011, Harrell moved to amend his § 2255 motion to add a claim that the government had withheld exculpatory evidence. The district court denied the motion to amend as untimely because it was filed more than one year after Harrell's judgment became final, Harrell did not establish any basis for tolling the one-year limitation period, and his proposed amended claims did not relate back to his original claim of ineffective assistance of counsel.

Harrell filed a second motion to amend his § 2255 motion on March 30, 2012, seeking leave to amend his § 2255 motion to add an exculpatory-evidence claim and an ineffective-assistance-of-counsel claim. A magistrate judge recommended denying Harrell's second motion to amend because it was untimely and also recommended denying the § 2255 motion. The district court adopted the magistrate judge's recommendation over Harrell's

objections. It entered its judgment denying the § 2255 motion on September 24, 2012. The district court denied him a COA, and so did we.

A COA is required to appeal from the denial of a Rule 60(b) motion arising from a § 2255 proceeding. *Jackson v. Crosby*, 437 F.3d 1290, 1294 (11th Cir. 2005). 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). Relief under Rule 60(b)(6) "is an extraordinary remedy which may be invoked only upon a showing of exceptional circumstances." *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 680 (11th Cir. 1984). Rule 60(b)(6) motions must be filed within a "reasonable time." Fed. R. Civ. P. 60(c). A determination of what constitutes a reasonable time generally depends on the circumstances of each case, and in making the determination, courts should consider "whether the parties have been prejudiced by the delay and whether a good reason has been presented for failing to take action sooner." *BUC Int'l Corp. v. Int'l Yacht Council Ltd.*, 517 F.3d 1271, 1275 (11th Cir. 2008) (quotation marks omitted) (analyzing the timeliness of a Rule 60(b)(5) motion).

Here, Harrell filed his Rule 60(b)(6) motion almost six years after the district court entered the judgment denying his § 2255 motion, and he did not present any reason for this delay. *Id.* Moreover, Harrell's Rule 60(b)(6) motion did not present "exceptional circumstances" that would justify relief from the district court's earlier judgment, but instead sought to relitigate his earlier motion to amend his § 2255 motion, which the district court had denied as untimely. *Griffin*, 722 F.2d at 680. Accordingly, Harrell's motion for a COA is DENIED because he has not made the requisite showing, and his IFP motion is DENIED AS MOOT.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

The Court further finds no substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). Therefore, a Certificate of Appealability is denied.

**SO ORDERED**, this 21st day of February, 2020.

*s/ Hugh Lawson*
**HUGH LAWSON, SENIOR JUDGE**

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 20-11212-D

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARTIN L. HARRELL,

Defendant-Appellant.

---

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

---

Before: ROSENBAUM and JILL PRYOR, Circuit Judges.

BY THE COURT:

Martin L. Harrell has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's June 2, 2020, order denying a certificate of appealability and leave to proceed on appeal *in forma pauperis* in his appeal from the dismissal of his Fed. R. Civ. P. 60(b)(6) motion for relief from the judgment denying his 28 U.S.C. § 2255 motion to vacate sentence. Upon review, Harrell's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF GEORGIA**
**ALBANY DIVISION**

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|---|---|---|
| MARTIN L. HARRELL, | : | |
| | : | |
| Petitioner, | : | Criminal Case No. **1:07-CR-45-01 (HL)** |
| | : | |
| VS. | : | |
| | : | 28 U.S.C. § 2255 Case No. **1:08-CV-90021 (HL)** |
| UNITED STATES OF AMERICA, | : | |
| | : | |
| Respondent. | : | |

**ORDER AND RECOMMENDATION**

Presently pending are Petitioner's Motion for Relief from Judgment, Motion to Compel the Court to Act on Petitioner's Motion for Relief from Judgment, Motion for Recusal of Prosecutors and Magistrate Judge, and Motion for Modified Hearing. (Docs. 712, 714, 715).

***Motion for Recusal of Prosecutors and Magistrate Judge (Doc. 715)***

On April 19, 2019, Petitioner filed a Motion for Recusal of Prosecutors and Magistrate Judge. (Doc. 715).

Recusal of Prosecutors

In his Motion, Petitioner asks the Court to disallow Assistant United States Attorneys (AUSA(s)) Leah McEwen and Jim Crane from further participation in this case. *Id.* An AUSA may be disqualified from participating "in a particular investigation or prosecution if such participation may result in a personal, financial, or political conflict of interest, or appearance thereof." 28 U.S.C. § 528. Petitioner asserts that disqualification is warranted because Ms. McEwen and Mr. Crane obstructed justice through: "perjury, knowing subordination or perjury, manufacturing false evidence, hiding/lying about exculpatory evidence, and possible other crimes

that are out of the ability of the Petitioner who is untrained in the law to comprehend." *Id.*

While Petitioner does not assert any facts regarding these allegations in his Motion for Recusal, more factual details can be found within Plaintiff's Motion for Relief from Judgment. (*See* Doc. 712). In his Motion for Relief from Judgment, Petitioner outlines prosecutorial misconduct based upon the United States Attorney's Office receiving a file from the Georgia Bureau of Investigation ("GBI") that contained exculpatory evidence which was not given to Petitioner. *Id.* pp. 6-7. Petitioner further asserts that the information found in the GBI file demonstrates that the government knowingly solicited perjured testimony during trial. *Id.* at 8.

The only evidence put forth by Petitioner that relates to these allegations is a GBI face sheet. (Doc. 712-1, p. 5). This document contains a handwritten notation indicating that the U.S. Attorney's Office was in possession of tapes, CD's, floppy disks, and photographs. *Id.* This evidence does not demonstrate the existence of perjury, the knowing solicitation of perjury, manufacturing false evidence, or hiding/lying about exculpatory evidence. As such, Petitioner has not presented any circumstances that warrant the disqualification of Ms. McEwen or Mr. Crane. *See United States v. Hameen*, 2018 WL 6571232, at * 2-3 (M.D. Fla. Dec. 13, 2018) (denying a motion for disqualification when there was no evidence to support the allegations that the AUSAs solicited perjured testimony or committed discovery violations). Thus, Petitioner's Motion for Recusal (Doc. 715) is **DENIED** to the extent it seeks disqualification of Ms. McEwen and Mr. Crane.

Recusal of Magistrate Judge

In his Motion, Petitioner also seeks the recusal of the undersigned from having any involvement in this case. (Doc. 715).

In pertinent part, 28 U.S.C. § 455 provides that

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . .

Under subsection (a), the Court is to ask "whether an objective, disinterested lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain significant doubt about the judge's impartiality." *United States v. Patti*, 337 F.3d 1317, 1321 (11th Cir. 2003) (internal quotation marks omitted). "[I]t is well settled that the allegation of bias must show that the bias is personal as distinguished from judicial in nature." *Bolin v. Story*, 225 F.3d 1234, 1239 (11th Cir. 2000) (internal quotation and citation omitted).

Petitioner asserts that recusal is warranted because the undersigned "has relied on the untrue words written and spoken from Jim Crane and Leah McEwen." (Doc. 715). As such, Petitioner has provided no factual basis to justify recusal as he has not pointed to any specific facts or made any showing that demonstrates bias or prejudice on behalf of the undersigned. Thus, Petitioner's Motion for Recusal (Doc. 715) is also **DENIED** to the extent that it seeks recusal of U.S. Magistrate Judge Thomas Langstaff.

***Motion for Relief from Judgment (Doc. 712)***

On August 23, 2018, Petitioner filed a *pro se* Motion for Relief from Judgment. (Doc. 712). In his Motion, Petitioner seeks relief under Federal Rule of Civil Procedure 60(b) from this Court's Order denying his § 2255 Motion to Vacate. *Id.* at 1. Specifically, Petitioner asserts there were defects in the integrity of the § 2255 proceeding because the Court erroneously denied his motions to amend as untimely. *Id.* 20-21.

**Procedural Background**

Petitioner previously filed a *pro se* Motion to Vacate pursuant to 28 U.S.C. § 2255 on August 11, 2008. (Doc. 465). The Court found that the factual basis of Petitioner's claims required development, and thus scheduled an evidentiary hearing and appointed the Federal Defender to represent Petitioner. (Docs. 469, 470). The evidentiary hearing was held on January 15, 2009. (Doc. 486). Petitioner subsequently requested a supplemental evidentiary hearing due to a deficiency in the transcription of the prior hearing. (Doc. 519, 526). The Court granted Petitioner's request and scheduled a supplemental hearing. (Doc. 553).

Prior to the supplemental hearing, Petitioner filed a *pro se* motion to amend his pending § 2255 motion. (Doc. 562). Petitioner sought to add claims regarding the government's failure to disclose exculpatory evidence. *Id.* The Court considered the motion, but it was ultimately denied as the additional claims were found to be untimely. (Doc. 578). Petitioner subsequently retained Paul Hamilton as counsel (Doc. 583), who represented Petitioner in the supplemental hearing on November 1, 2011 (Doc. 584).

After the hearing, the Petitioner filed a motion to substitute attorney as he retained Melvin Horne as counsel. (Doc. 606). The Court granted the motion. (Doc. 607). Mr. Horne then filed motions to amend the pending § 2255 motion and strike Petitioner's previous *pro se* motion to amend. (Docs. 609, 610). This second motion to amend, filed by counsel, sought to add the same claims set forth in Petitioner's first, *pro se* motion. (*See* Doc. 562, 609). The Court denied the motions as it again found the additional claims were untimely. (Doc. 621).

The undersigned recommended denying Petitioner's Motion to Vacate, and the recommendation was adopted by the district judge. (Docs. 622, 655). Petitioner filed a notice of appeal regarding the denial of his § 2255 motion and petitioned for a certificate of appealability.

(Docs. 666, 667). The Eleventh Circuit denied his motion for certificate of appealability. (Doc. 673). On August 23, 2018, Petitioner filed the instant Motion for Relief from Judgment. (Doc. 712).

**Discussion**

Rule 60(b) motions are impermissible successive habeas petitions if the prisoner (1) raises a new ground for substantive relief, or (2) attacks the habeas court's previous resolution of a claim on the merits. *Gonzales v. Crosby*, 545 U.S. 524, 531-32 (2005). A Rule 60(b) motion is proper in an instance where a petitioner seeks to attack a habeas ruling that precluded the merits determination, or attacks a defect in the federal habeas proceeding's integrity. *Id.* at 533-36.

Petitioner does not attack the Court's decision on the merits of his § 2255 petition, but instead challenges its denial of his motions to amend. (Doc. 712, pp. 20-21). In ruling on Petitioner's motions to amend, the Court found the additional claims were untimely. (Docs. 578, 621). As a result, the Court did not reach the merits of the additional claims. Thus, Petitioner's Motion for Relief from Judgment (Doc. 712) is a Rule 60(b) motion and not a successive § 2255 motion. *Santa v. United States*, 492 F. App'x 949, 951 (11th Cir. 2012) (motion that does not attack the district court's merits determination, but rather challenges the court's failure to reach merits is a Rule 60(b) motion, not a successive § 2255 motion).

Rule 60(b) of the Federal Rules of Civil Procedure permits the court to relieve a party from a final judgment, order, or proceeding under certain circumstances. Here, Petitioner asserts that he is entitled to relief under Rule 60(b)(6), which permits relief from judgment for "any other reason that justifies relief." However, Rule 60(c)(1) states that a "motion under Rule 60(b) must be made within a reasonable time[.]" The Eleventh Circuit has stated that what constitutes a reasonable time depends on the facts of each case, and that courts should consider whether the movant had a good

reason for the delay in filing his Rule 60(b) motion and whether the non-movant would be prejudiced. *Ramsey v. Walker*, 304 F. App'x 827, 828 (11th Cir. 2008).

Here, the Court denied Petitioner's § 2255 motion on September 21, 2012, and judgment was entered on September 24, 2012. (Docs. 655, 656). Petitioner appealed the Court's denial of his § 2255 motion on November 17, 2012, and the Eleventh Circuit denied his certificate of appealability on July 25, 2013. (Docs. 666, 673). Nearly six years after the Court denied Petitioner's § 2255 petition, and five years after the Eleventh Circuit denied his certificate of appealability, Petitioner filed the pending Rule 60(b) motion. (*See* Doc. 712). The Court cannot find Petitioner's nearly six-year delay reasonable under Rule 60(b). Petitioner provides no justification for his delay, and does not raise any new facts that would require the Court to alter its earlier denial of his motions to amend. *Ramsey*, 304 F. App'x at 827 (Rule 60(b) motion filed six years after denial of § 2254 petition not reasonable); *Jackson v. United States*, 2005 WL 8146433, *1 (S.D. Ga. Sept. 19, 2005) ("Petitioner's failure to act for more than three years after the resolution of his appeal hardly constitutes action within the 'reasonable time' demanded by Rule 60."). Thus, the undersigned **RECOMMENDS** that Petitioner's Motion for Relief from Judgment (Doc. 712) **BE DENIED**.

***Motion to Compel Court to Act on Petitioner's Motion for Relief from Judgment (Doc. 714), Motion for Modified Hearing (Doc. 715)***

In light of the undersigned's above recommendation, Petitioner's Motion to Compel Court to Act on Petitioner's Motion for Relief from Judgment (Doc. 714) and Motion for Modified Hearing (Doc. 715) are **DENIED as MOOT**.

**Conclusion**

Accordingly, the undersigned **RECOMMENDS** that Petitioner's Motion for Relief from Judgment (Doc. 712) be **DENIED**. Additionally, Petitioner's Motion for Recusal (Doc. 715) is

**DENIED**, and Petitioner's Motion to Compel and Motion for Modified Hearing (Docs. 714, 715) are **DENIED as MOOT**.

The undersigned finds no substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Therefore, the undersigned recommends that the Court deny a certificate of appealability in its final Order. If the Petitioner files an objection to this Recommendation, he may include therein any arguments he wishes to make regarding a certificate of appealability.

Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to these recommendations, 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 as to those portions of the Recommendation to which objection is made; all other portions of the Recommendation may be reviewed by the district judge for clear error.

The parties are hereby 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 ORDERED and RECOMMENDED,** this 8th day of May, 2019.

***s/ THOMAS Q. LANGSTAFF***
UNITED STATES MAGISTRATE JUDGE