

APPENDIX:

1. ORDER DENYING MY MOTION TO ATTACK THE JUDGMENT
As void (4-15-20)
2. ORDER DENYING MY MOTION TO ATTACK THE JUDGMENT
As void (5-8-20)
3. ORDER DENYING MY MOTION AND BRIEF FOR A CERTIFICATE
OF APPEALABILITY (2-5-21)
4. ORDER DENYING MY MOTION FOR PANEL REHEARING (3-18-21)
5. Constitutional Provisions and Statutes - full text

United States Court of Appeals for the Fifth Circuit

No. 20-10484

MICHAEL ANTHONY ALMENDAREZ,

Petitioner—Appellant,

versus

**BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF
CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,**

Respondent—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:14-CV-244

Before CLEMENT, ELROD, and HAYNES, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that appellant's motion for leave to file out of time the motion for reconsideration is GRANTED.

A member of this panel previously DENIED appellant's motion for a certificate of appealability and motion to challenge the constitutionality of 2254 as an improper evidentiary device. The panel has considered appellant's motion for reconsideration. The underlying judgment was not void. Therefore,

IT IS FURTHER ORDERED that the motion is DENIED.

United States Court of Appeals
for the Fifth Circuit

No. 20-10484

United States Court of Appeals
Fifth Circuit

FILED

February 5, 2021

Lyle W. Cayce
Clerk

MICHAEL ANTHONY ALMENDAREZ,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice,
Correctional Institutions Division,*

Respondent—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:14-CV-244

ORDER:

Michael Anthony Almendarez, Texas prisoner # 1601384, was convicted of indecency with a child and sexual assault of a child. Almendarez seeks a certificate of appealability (COA) to challenge the denial of his Federal Rule of Civil Procedure 60(b) motions in this 28 U.S.C. § 2254 proceeding. He argues that the district court failed to enforce § 2254(f) by not requiring the State to produce pretrial records; two state court documents were fraudulent; he was not allowed at the suppression hearing; and his Rule 60(b) motions were timely filed because there is no time limit to

challenge a void judgment and because he had good cause for his delay in filing the motions.

A COA may be issued on a prisoner's claim "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To obtain a COA in relation to the denial of his Rule 60(b)(6) motions, Almendarez must show that "a jurist of reason could conclude that the district court's denial of [the Rule 60(b)] motion[s] was an abuse of discretion." *Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011). Almendarez has not made such a showing. Accordingly, his motion for a COA is DENIED. Almendarez's motion to challenge the constitutionality of § 2254(e)(1) as an improper evidentiary device is also DENIED.

/s/ Catharina Haynes

CATHARINA HAYNES
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MICHAEL ANTHONY ALMENDAREZ, §
Petitioner, §
§
v. § Civil Action No. 4:14-CV-244-O
§
LORIE DAVIS, Director, §
Texas Department of Criminal Justice, §
Correctional Institutions Division, §
Respondent. §

ORDER

Petitioner, Michael Anthony Almendarez, has filed a “Second Motion under Rule 60(b)(4), or in the Alternative, a Motion under Rule 59(e), to Alter or Amend,” in which he seeks relief from the Court’s January 19, 2016, judgment denying his habeas petition based on 28 U.S.C. § 2254(f).¹ Mot. 1-2, ECF No. 48. In essence, Petitioner appears to argue that the original habeas proceedings in this Court were defective because the Court failed to apply 28 U.S.C. § 2254(f) to order the state to produce portions of the pre-trial record in the state-court proceedings before deciding the merits of his petition and that the Court’s failure to “give every word of 2254(f) an operative effect” somehow violated due process. *Id.* The Court finds that the motion is untimely. FED. R. CIV. P. 60(c)(1) (providing a motion under Rule 60(b)(4) “must be made within a reasonable time”); FED. R.

¹Under 28 U.S.C. § 2254(f):

If an applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court’s determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason, is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court’s factual determination.

CIV. P. 59(e) (providing a motion under Rule 59(e) "must be filed no later than 28 days after the entry of the judgment"). Therefore, the motion is DENIED. A certificate of appealability from this Order is also DENIED. Petitioner is WARNED that if he persists in filing repetitive or frivolous pleadings, sanctions may be imposed.

SO ORDERED on this 8th day of May, 2020.


Reed O'Connor
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MICHAEL ANTHONY ALMENDAREZ, §
Petitioner, §
§
v. §
§
LORIE DAVIS, Director, §
Texas Department of Criminal Justice, §
Correctional Institutions Division, §
Respondent. §

Civil Action No. 4:14-CV-244-O

ORDER

Petitioner, Michael Anthony Almendarez, has filed a “Motion to Vacate Void Judgment under Rule 60(b)(4), Fed. R. Civ. Proc.” and an application to proceed *in forma pauperis*. Mot. & App., ECF Nos. 45, 46. On January 19, 2016, this Court denied Petitioner’s habeas-corpus petition under 28 U.S.C. § 2254 on the merits. Op. & Order, ECF No. 36. Petitioner appealed, but the Fifth Circuit denied a COA and the United States Supreme Court denied certiorari. Orders, ECF Nos. 43, 44.

Under Rule (60)(b)(4), a judgment may be set aside as “void” if the district court lacked subject matter or personal jurisdiction, or if the court acted in a manner inconsistent with due process of law. *Callon Petroleum Co. v. Frontier Ins. Co.*, 351 F.3d 204, 208 (5th Cir. 2003). “[A] Rule 60(b)(4) challenge to jurisdiction should be sustained only where there is a clear usurpation of power or total want of jurisdiction.” *Id.* at 208 (quoted cases omitted). Petitioner appears to assert that the undersigned never had subject-matter jurisdiction over this habeas action under Article III of the United States Constitution and “perpetuated a void order” because the state trial court violated Texas Code of Criminal Procedure article 28.01 by denying his presence at a pre-trial hearing. Mot., 2, ECF No. 45. According to Petitioner, “by suspending Art. 28.01, [the trial judge] defaulted jurisdiction over the subject matter in that hearing and, by violating his oath [of office], disqualified himself” in

his state criminal case. *Id.* As best as the Court can decipher, Petitioner seeks to challenge the underlying state-court judgment in his criminal case, not the jurisdiction of this Court under 28 U.S.C. § 2254. Thus, the provisions of Rule 60(b)(4) do not apply. *See Adams v. Stephens*, No. 3:14-CV-1276-D, 2014 WL 3778161, at *4 (N.D. Tex. July 31, 2014). Rule 60(b)(4) provides for relief from a *federal* judgment that is void. Furthermore, even if Rule 60(b)(4) were applicable, Petitioner has not shown that this Court lacked jurisdiction over his habeas case or that it acted contrary to due process of law. Accordingly, he is not entitled to relief from judgment under Rule 60(b)(4).

For these reasons, Petitioner's Rule 60(b)(4) motion is DENIED. For the same reasons, a certificate of appealability is also DENIED. Petitioner's application to proceed *in forma pauperis* is GRANTED.

SO ORDERED on this 15th day of April, 2020.



Reed O'Connor
UNITED STATES DISTRICT JUDGE

28 U.S. CODE 2254 (f):

"If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination."

Article VI, cl. 2, U.S. Constitution:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."