[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-10990
Non-Argument Calendar

D.C. Docket No. 2:04-cv-00138-SCJ

WILLIE GEORGE MOORE,

Petitioner-Appellant,

versus

BILLY TOMPKIS,

Respondent-Appellee.

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

(August 30, 2021)

Before ROSENBAUM, BRANCH, and ANDERSON, Circuit Judges.

PER CURIAM:

Willie Moore, a Georgia prisoner proceeding *pro se*, appeals the district court's dismissal of his filing that was construed as an impermissibly successive 28 U.S.C. § 2254 petition. After careful review, we affirm the dismissal of his successive § 2254 petition and deny his request for authorization to file another one.

I.

Moore is currently serving a life sentence in Georgia state prison stemming from convictions for armed robbery, possession of a firearm after a felony conviction, and possession of a sawed-off shotgun. In July 2004, after pursuing direct appeal and postconviction remedies in state court, Moore filed a *pro se* § 2254 petition for a writ of habeas corpus. He alleged a variety of claims, including prosecutorial misconduct, insufficient evidence to support his convictions, unconstitutional identification procedure, unconstitutional search and seizure, and ineffective assistance of both trial and appellate counsel.

In June 2005, the district court granted the state's motion to dismiss Moore's § 2254 petition as untimely under 28 U.S.C. § 2244(d)(1). Moore appealed that decision nearly five years later in 2010, but we dismissed the appeal *sua sponte* because his notice of appeal was not timely filed.

Since that time, Moore has twice filed applications with this Court for leave to file a second or successive habeas petition. *See* 28 U.S.C. § 2244(b)(3). First, in December 2016, Moore raised a single claim of actual innocence, asserting a

miscarriage of justice. We denied the application, stating that he did not rely on a new rule of constitutional law or new evidence as required by § 2244(b)(2)(A). Then, in April 2019, Moore filed a new application raising five claims and relying on *McQuiggin v. Perkins*, 569 U.S. 383 (2013), as a new rule of constitutional law. We dismissed Moore's application, concluding that he had raised these claims in his original § 2254 petition.

In January 2020, Moore filed the subject of this appeal, a "Brief in Support of Habeas Corpus" in which he alleged similar claims of prosecutorial misconduct, insufficient evidence to support his convictions, unconstitutional identification procedure, *Miranda*[1] violations, and ineffective assistance of trial counsel. The district court determined that it lacked jurisdiction because Moore had not obtained this Court's permission to file a second or successive § 2254 petition, and therefore dismissed the action in March 2021. Moore timely appealed.

II.

Moore spends the majority of his briefing arguing that the district court erred in dismissing his original § 2254 petition as untimely. But whether that decision was erroneous is not properly before us. Moore's first and only appeal of that decision was dismissed for lack of jurisdiction in 2010, and he does not identify any basis on which we could review the 2005 judgment at this time.

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

To mention just one barrier to our exercise of jurisdiction, Moore's March 2021 notice of appeal is plainly untimely to appeal that judgment. *See* Fed. R. App. P. 4(a)(1)(A) (a notice of appeal is timely if it is filed "within 30 days after entry of the judgment or order appealed from"); *Bowles v. Russell*, 551 U.S. 205, 214 (2007) ("[T]he timely filing of a notice of appeal in a civil case is a jurisdictional requirement."); *Browder v. Dir., Dep't of Corr. of Ill.*, 434 U.S. 257, 264–67 (1978) (applying Fed. R. App. P. 4(a)'s 30-day time limit in the context of a § 2254 proceeding). Accordingly, we may not revisit the judgment denying Moore's original § 2254 petition, including the issue of whether Moore is entitled to equitable tolling of the original limitations period, in the context of this appeal.

III.

As for the only matter properly before us—the dismissal of Moore's Brief in Support of Habeas Corpus as an unauthorized successive § 2254 petition—Moore does not dispute the district court's ruling. And because the Brief in Support raised claims challenging his convictions and sentence, the district court correctly concluded that it lacked jurisdiction over Moore's unauthorized successive § 2254 petition. *See Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003) ("Without authorization, the district court lacks jurisdiction to consider a second or successive petition.").

Instead, Moore requests authorization from this Court to file a second or successive § 2254 petition so that the district court can consider both equitable tolling and his substantive claims for relief with regard to his original § 2254 petition. He further asserts that he has a constitutional right to attack his illegal convictions under *McClesky v. Zant*, 499 U.S. 467 (1991), that he has made a credible showing of actual innocence, and that the untimeliness of his original habeas petition should be excused under *McQuiggin v. Perkins*, 569 U.S. 383 (2013), because he is entitled to equitable tolling.

Under 28 U.S.C. § 2244(b), a state prisoner who wishes to file a second or successive habeas corpus petition must move the court of appeals for an order authorizing the district court to consider such a petition. *See* 28 U.S.C. § 2244(b)(3)(A). We "may authorize the filing of a second or successive application only if [we] determine[] that the application makes a prima facie showing" that a claim either (1) "relies on a new rule of constitutional law . . . that was previously unavailable"; or (2) is based on newly discovered evidence showing "that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2), (b)(3)(C).

But we must dismiss a claim presented in an application to file a second or successive § 2254 petition that was presented in a prior application or in an original § 2254 petition. 28 U.S.C. § 2244(b)(1) ("A claim presented in a second or

successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."); *In re Everett*, 797 F.3d 1282, 1288 (11th Cir. 2015) ("A prisoner's original § 2254 petition is a 'prior application' for purposes of § 2244(b)(1)). A claim is the same, for purposes of § 2244(b)(1), when the basic gravamen of the legal argument is the same. *In re Everett*, 797 F.3d at 1288.

We construe Moore's brief on appeal as an application for leave to file a successive § 2254 petition. *See, e.g.*, *United States v. MacDonald*, 641 F.3d 596, 616 (4th Cir. 2011) (recognizing that appellate courts may construe a prisoner's appellate brief as an application for leave to file a successive § 2254 petition).

Nevertheless, we must dismiss the application because the claims Moore apparently seeks to raise—that his convictions were obtained by prosecutorial misconduct, unconstitutional identification procedures, unconstitutional searches and seizures, and ineffective assistance of trial counsel, and that insufficient evidence supported his convictions—were presented in his original § 2254 petition, in a prior application for leave to file a successive petition, or both.[2] *See* 28 U.S.C. § 2244(b)(1); *In re Everett*, 797 F.3d at 1288.

[2] In addition, Moore's reliance on the Supreme Court's decisions in *McQuiggin* and *Zant* is misplaced. In *In re Bolin*, 811 F.3d 403, 411 (11th Cir. 2016), we found that *McQuiggin* did not warrant granting a defendant authorization to file a successive § 2254 petition. As for *Zant*, that decision was issued before Moore filed his original habeas petition and so was not "previously unavailable." 28 U.S.C. § 2244(b)(2)(A).

For these reasons, the district court's dismissal of Moore's successive habeas petition is **AFFIRMED**, and his construed application for leave to file a successive habeas petition is **DISMISSED**.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-10990-AA

WILLIE GEORGE MOORE,

Petitioner - Appellant,

versus

BILLY TOMPKIS,

Respondent - Appellee.

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

BEFORE: ROSENBAUM, BRANCH, and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Appellant Willie George Moore is DENIED.

ORD-41

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

WILLIE GEORGE MOORE, Petitioner,	:	
	:	CIVIL ACTION NO.
v.	:	2:04-CV-0138-SCJ
BILLY THOMPKIS, Respondent.	:	

ORDER

Petitioner, currently an inmate at Telfair State Prison in Helena, Georgia, initiated this 28 U.S.C. § 2254 action seeking a writ of habeas corpus in July 2004, challenging his 1997 Barrow County convictions and sentences for armed robbery, possession of a firearm by a convicted felon, and possession of a sawed-off shotgun. Respondent filed a motion to dismiss the petition as time-barred pursuant to 28 U.S.C. § 2244(d), [Doc. 4], which this Court granted on June 14, 2005, finding that the petition was untimely and that Petitioner had not shown extraordinary circumstances warranting equitable tolling of the limitations period. [Doc. 13]. Petitioner filed a notice of appeal nearly five years later in March 2010, and the Eleventh Circuit dismissed his appeal for lack of jurisdiction. [Docs. 21, 24]. Over the years, Petitioner has made various unsuccessful attempts to revive his challenges to his convictions. [Docs. 27, 41, 42, 43].

Petitioner has now filed a post-judgment "Brief in Support of Habeas Corpus," [Doc. 45], in which he further argues that he is entitled to equitable tolling of the § 2244(d) limitations period and raises five grounds for substantive relief. The Magistrate Judge reviewed this filing and issued a Report and Recommendation (R&R), [Doc. 51], in which he concludes that it is an unauthorized successive § 2254 petition raising substantive habeas challenges to his 1997 Barrow County convictions and sentences. See Gonzalez v. Crosby, 545 U.S. 524, 531-32 (2005) (explaining that post-judgment motions are properly construed as impermissible successive habeas petitions if the petitioner either (1) raises a new ground for substantive relief, or (2) attacks the habeas court's previous resolution of a claim on the merits). Under 28 U.S.C. § 2244(b), a state prisoner who wishes to file a second or successive habeas corpus petition must move the court of appeals for an order authorizing the district court to consider such a petition. 28 U.S.C. § 2244(b)(3)(A). The Magistrate Judge determined that because Petitioner has not obtained preauthorization from the Eleventh Circuit to file a second or successive § 2254 petition, this Court lacks jurisdiction to consider his "Brief in Support of Habeas Corpus." Hubbard v. Campbell, 379 F.3d 1245, 1247 (11th Cir. 2004). Petitioner has objected. [Doc. 55].

A district judge has broad discretion to accept, reject, or modify a magistrate judge's proposed findings and recommendations. United States v. Raddatz, 447 U.S.

667, 680 (1980). Pursuant to 28 U.S.C. § 636(b)(1), the Court reviews any portion of the Report and Recommendation that is the subject of a proper objection on a *de novo* basis and any non-objected portion under a "clearly erroneous" standard. "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive or general objections need not be considered by the district court." Marsden v. Moore, 847 F.2d 1536, 1548 (11th Cir. 1988).

In his objections, Petitioner contends that he has filed an application with the Eleventh Circuit to file a second or successive § 2254 petition, and he never heard back from the appellate court. However, the record indicates that the Eleventh Circuit has twice denied his applications for such authorization. [Docs. 42, 43]. In any event, as Petitioner has not established that he has obtained authorization, this Court lacks jurisdiction to review his claims.

Accordingly, the R&R, [Doc. 51], is hereby **ADOPTED** as the order of this Court, and the claims raised in Petitioner's filing, [Doc. 45], are **DENIED**.

IT IS SO ORDERED, this 2nd day of March, 2021.

s/Steve C. Jones
HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

WILLIE GEORGE MOORE, GDC # 0000411406, Petitioner, v. BILLY TOMPKIS, Respondent.	: : : : : : : :	PRISONER HABEAS CORPUS 28 U.S.C. § 2254 CIVIL ACTION NO. 2:04-CV-0138-SCJ-JCF

ORDER AND FINAL REPORT AND RECOMMENDATION

Petitioner Willie George Moore, a state prisoner currently confined at Telfair State Prison in Helena, Georgia, has filed a post-judgment "Brief in Support of Habeas Corpus" in these, his 2004 28 U.S.C. § 2254 habeas corpus proceedings. (Doc. 45.) The matter is before the Court on the "Brief in Support of Habeas Corpus," as well as Petitioner's application for leave to proceed *in forma pauperis* ("IFP") (Doc. 46) and Petitioner's three motions requesting status updates or a ruling (Docs. 46, 48, 50.) For the reasons stated below, **IT IS RECOMMENDED** that the "Brief in Support of Habeas Corpus" [45] be **DISMISSED** for lack of subject matter jurisdiction as an impermissibly second or successive § 2254 petition. Petitioner's IFP application is **DENIED AS UNNECESSARY**. To the extent that the instant

Report and Recommendation provides the requested update, Petitioner's motions for status are **GRANTED**.

I. PROCEDURAL HISTORY

Petitioner filed his original § 2254 petition in July 2004, challenging his 1997 Barrow County convictions and sentences for armed robbery, possession of a firearm by a convicted felon, and possession of a sawed-off shotgun. (Doc. 1 at 1.) The State responded and moved to dismiss the petition as time-barred. (Doc. 4.) On June 14, 2005, this Court granted the State's motion and dismissed the § 2254 petition, finding that it was untimely filed and that Petitioner had not shown extraordinary circumstances warranting equitable tolling of the limitations period. (Doc. 13 at 4-7.) Petitioner filed a notice of appeal nearly five years later in March 2010, and the Eleventh Circuit dismissed his appeal for lack of jurisdiction. (Docs. 21, 24.)

In September 2013, Petition filed what he styled as a "Motion for the One Year Limitation of the Antiterrorism and Effective Death Penalty Act of 1996 to be Relaxed," which this Court construed as an assertion of actual innocence under McQuiggin v. Perkins, 596 U.S. 383 (2013), and denied. (Doc. 27 at 2-3.) Petitioner appealed and the Eleventh Circuit denied him a certificate of appealability ("COA").

In February 2017 and May 2019, Petitioner sought the Eleventh Circuit's authorization to file a second or successive § 2254 petition. The Eleventh Circuit denied Petitioner's applications in both instances. (Docs. 42, 43.)

The instant "Brief in Support of Habeas Corpus" followed on February 10, 2020. (Doc. 45.)

II. IFP AND STATUS MOTIONS

Petitioner seeks leave to proceed without prepayment of the statutory filing fee for habeas corpus actions. (Doc. 46.) This Court previously granted Petitioner IFP status in this action in its Order of August 12, 2004. (Doc. 3 at 1.) Accordingly, Petitioner's motion for IFP status [46] is **DENIED AS UNNECESSARY**.

Petitioner also has filed three motions requesting status updates or for the court to rule on his "Brief in Support of Habeas Corpus." (Docs. 47, 48, 50.) Because the instant Report and Recommendation provides the requested update, Petitioner's motions [47], [48], [50] are **GRANTED**.

III. "BRIEF IN SUPPORT OF HABEAS CORPUS"

Petitioner has filed what he characterizes as a "Brief in Support of Habeas Corpus." (Doc. 45 at 1.) In his filing, Petitioner states that he was not able to timely file his § 2254 petition because the Georgia Supreme Court's denial of his application

for a certificate of probable cause was delayed in the mail and he was in disciplinary confinement at the time he needed to file his federal petition. (Id. at 3-4.) Petitioner then proceeds to enumerate at length five grounds for substantive habeas relief, namely: (1) his conviction was obtained based on an unconstitutional identification; (2) his trial counsel was constitutionally ineffective; (3) the prosecution engaged in misconduct; (4) his conviction was obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966), and; (5) there was insufficient evidence to convict him. (Id. at 4-25.)

A review of Petitioner's "Brief in Support of Habeas Corpus" confirms that it is an unauthorized successive § 2254 petition raising substantive habeas challenges to his 1997 Barrow County convictions and sentences. See Gonzalez v. Crosby, 545 U.S. 524, 531-32 (2005) (explaining that post-judgment motions are properly construed as impermissible successive habeas petitions if the petitioner either (1) raises a new ground for substantive relief, or (2) attacks the habeas court's previous resolution of a claim on the merits). Under 28 U.S.C. § 2244(b), a state prisoner who wishes to file a second or successive habeas corpus petition must move the court of appeals for an order authorizing the district court to consider such a petition. 28 U.S.C. § 2244(b)(3)(A). Because Petitioner has not obtained

authorization from the Eleventh Circuit to file a second or successive § 2254 petition, this Court lacks jurisdiction to consider his "Brief in Support of Habeas Corpus". Hubbard v. Campbell, 379 F.3d 1245, 1247 (11th Cir. 2004). Accordingly, **IT IS RECOMMENDED** that the "Brief in Support of Habeas Corpus" [45] be **DISMISSED** for lack of subject matter jurisdiction as impermissibly second or successive.[1]

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[1] The undersigned notes that a brief portion of the instant filing challenges this Court's procedural determination that the original § 2254 petition was untimely filed. (See Doc. 45 at 3-4.) To the extent that this portion of the instant filing could liberally be construed as a Rule 60(b) motion for relief from this Court's prior judgments, a Rule 60(b) motion may not be used to rehash or relitigate issues previously decided. See, e.g., Gilley v. Monsanto Co., Inc., 428 F. App'x 883, 885 (11th Cir. 2011) (affirming denial of Rule 60(b)(3) motion where "allegations of fraud were merely a rehash of arguments previously considered and rejected by . . . the district court"). Here, Petitioner's arguments that he was entitled to equitable tolling of the limitations period based on a delay in receiving his CPC denial and his disciplinary confinement were considered and rejected by this Court in its Order of June 14, 2005. (Compare Doc. 13 at 4-7, with Doc. 45 at 3-4.) Similarly, to the extent that Petitioner argues that he is factually innocent of the offenses of conviction based on the merits of his habeas claims, this Court already determined that Petitioner "essentially restates his version of the facts surrounding his conviction" and does not include newly discovered evidence. (Compare Doc. 45 at 1, with Doc. 27 at 2-3.) Accordingly, because Petitioner cannot relitigate arguments already rejected by this Court in a Rule 60(b) motion, it is recommended that this Court decline to so construe the instant filing.

IV. CONCLUSION

For the reasons stated above, **IT IS RECOMMENDED** that the "Brief in Support of Habeas Corpus" [45] be **DISMISSED** for lack of subject matter jurisdiction as an impermissibly second or successive § 2254 petition.[2]

Petitioner's motion for leave to proceed IFP [46] is **DENIED AS UNNECESSARY**.

To the extent that the instant Report and Recommendation provides the requested update, Petitioner's motions for status [47], [48], [50] are **GRANTED**.

The Clerk of Court is **DIRECTED** to terminate the referral to the undersigned United States Magistrate Judge.

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[2] Ordinarily, a district court must issue or deny a COA when it enters a final order adverse to the applicant in a habeas corpus proceeding. *See* 28 U.S.C. foll. § 2254, Rule 11(a); see also 28 U.S.C. § 2253(c). However, the Eleventh Circuit has held that a dismissal for lack of jurisdiction as impermissibly second or successive is not a "final order" within the meaning of § 2253(c). Hubbard, 379 F.3d at 1247. Accordingly, no COA ruling is required.

SO ORDERED AND RECOMMENDED, this 27th day of January, 2021.

/s/ J. Clay Fuller
J. Clay Fuller
United States Magistrate Judge