Appendix - **A**, Decision of the U.S. Court of Appeals for the 11th Circuit

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-12275-F

JOSEPH MICHAEL DEGRAW,

Petitioner - Appellant,

versus

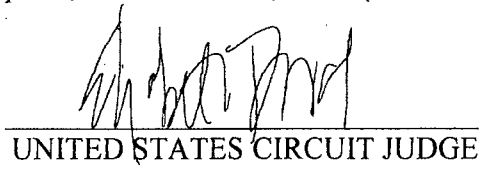
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Joseph Degraw seeks a certificate of appealability ("COA") to appeal the district court's denial of his 28 U.S.C. § 2254 petition and dismissal of his Fed. R. Civ. P. 60(b) motion for relief from the judgment as an impermissibly successive habeas petition over which it lacked jurisdiction. Because Degraw has failed to make a substantial showing of the denial of a constitutional right, his motion for a COA to appeal the denial of his § 2254 petition is DENIED. 28 U.S.C. § 2253(c)(2). However, because Degraw's Rule 60(b) motion was an impermissibly second or successive § 2254 habeas corpus petition, his motion for a COA to appeal its dismissal is DENIED AS UNNECESSARY. *See Hubbard v. Campbell*, 379 F.3d 1245, 1247 (11th Cir. 2004).



UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-12275-BB

JOSEPH MICHAEL DEGRAW,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Before: NEWSOM and BRANCH, Circuit Judges.

BY THE COURT:

Joseph Degraw has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's March 3, 2022 order. Upon review, Degraw's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-12275-BB

JOSEPH MICHAEL DEGRAW,

Petitioner - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER: Pursuant to the 11th Cir. R. 42-2(c), this appeal is hereby DISMISSED for want of prosecution because the appellant Joseph Michael Degraw has failed to file an appellant's brief within the time fixed by the rules, effective April 25, 2022.

DAVID J. SMITH
Clerk of Court of the United States Court
of Appeals for the Eleventh Circuit

FOR THE COURT - BY DIRECTION

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

April 25, 2022

Clerk - Southern District of Florida
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 21-12275-BB
Case Style: Joseph Degraw v. Secretary, Florida Department of Corrections
District Court Docket No: 2:20-cv-14034-KAM

The enclosed copy of the Clerk's Order of Dismissal for failure to prosecute in the above-referenced appeal is issued as the mandate of this court. *See* 11th Cir. R. 41-4. Pursuant to 11th Cir. R. 42-2(c) and 42-3(c), when an appellant fails to timely file or correct a brief or appendix, the appeal shall be treated as dismissed on the first business day following the due date. This appeal was treated as dismissed on 04/25/2022.

Eleventh Circuit Rules 42-2(e) and 42-3(e) govern motions to set aside dismissal and remedy the default. Such motions must be filed within 14 days of the date the clerk issues the Order of Dismissal. Except as otherwise provided by FRAP 25(a) for inmate filings, a motion to set aside dismissal and remedy the default is not timely unless the clerk receives the motion within the time fixed for filing. *See* FRAP 25(a)(2)(A)(i).

Any pending motions are now rendered moot in light of the attached order.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Tonya L. Richardson, BB
Phone #: (404) 335-6174

Enclosure(s)

DIS-2CIV Letter and Entry of Dismissal

Appendix - **B,** Decision of the U.S. District Court of the Southern District of Florida

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 20-14034-MARRA

JOSEPH MICHAEL DEGRAW

Petitioner,

v.

SEC'Y FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

ORDER DENYING MOTION TO SET ASIDE JUDGMENT

Petitioner has filed a Motion to Set Aside Judgment Pursuant to Federal Rule of Civil Procedure 60(b) [DE 19]. He seeks to reopen or set aside the judgment [18] rendered on April 14, 2021. He argues that this Court misapplied *Strickland* [DE 19 at 2–3] and that he "has not had the best of luck with getting proper help from fellow inmate law clerks in the litigation of these 2254 proceedings." DE 19 at 3. He also asserts he was "hindered by the restrictions the prison imposed on him and fellow inmates which completely cut access to the law clerks and law library." DE 19 at 3–4. He now asks for an opportunity to amend his Petition to make his claims "facially sufficient." DE 19 at 4.

Under such circumstances, the motion is properly brought under Rule 60(b), and the district court need not obtain prior authorization from the appellate court to entertain the claims for relief. *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005).

Here, the Petitioner seeks relief pursuant to Federal Rule of Civil Procedure 60(b), based solely on his allegations that his retained counsel was ineffective in pursuing his federal habeas petition. Rule 60(b) provides in relevant part, as follows:

> Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentations, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

In habeas proceedings a proper Rule 60(b) "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." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005).

Here, Petitioner's claim that the Court misapplied *Strickland* is not properly raised in a Rule 60(b) Motion because he attempts to attack the substance of the resolution of this case rather than point to some defect in the proceedings.

Petitioner's claims that his access to the law library was limited and the law clerks did not provide the best assistance likewise will not warrant relief. In *Gonzalez* the Supreme Court addressed this issue and said:

> In some instances, a Rule 60(b) motion will contain one or more "claims." For example, it might straightforwardly assert that owing to "excusable neglect," Fed. Rule Civ. Proc. 60(b)(1), the movant's habeas petition had omitted a claim of constitutional error, and seek leave to present that claim. *Cf. Harris v. United States,* 367 F.3d 74, 80-81 (C.A.2 2004) (**petitioner's Rule 60(b) motion sought relief from judgment because habeas counsel had failed to raise a Sixth Amendment claim**). Similarly, a motion might seek leave to present "newly discovered evidence," Fed. Rule Civ. Proc. 60(b)(2), in support of a claim previously denied. *E.g., Rodwell v. Pepe,* 324 F.3d 66, 69 (C.A.1 2003). Or a motion might contend that a subsequent change in substantive law is a "reason justifying relief," Fed. Rule Civ. Proc.

> 60(b)(6), from the previous denial of a claim. *E.g., Dunlap v. Litscher,* 301 F.3d 873, 876 (C.A.7 2002). Virtually every Court of Appeals to consider the question has held that such a pleading, although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly. *E.g., Rodwell, supra,* at 71-72; *Dunlap, supra,* at 876. We think those holdings are correct.

Gonzalez, 545 U.S. at 530–31 (emphasis added). The court also noted that "an attack based on the movant's own conduct, or his habeas counsel's omissions . . . ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably." *Id.* at 532, n.5. In *Harris*, which was cited by the Supreme Court, the Second Circuit found that:

> [A]n attack on the integrity of a previous habeas proceeding using subsection (6) of Rule 60(b) is viable only in "extraordinary circumstances," and that such circumstances will be particularly rare where the relief sought is predicated on the alleged failures of counsel in a prior habeas petition. That is because a habeas petitioner has no constitutional right to counsel in his habeas proceeding, *see Coleman v. Thompson*, 501 U.S. 722, 752–53, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991), and therefore, to be successful under Rule 60(b)(6), must show more than ineffectiveness under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To obtain relief under Rule 60(b)(6), a habeas petitioner must show that his lawyer abandoned the case and prevented the client from being heard, either through counsel or pro se.

Harris, 367 F.3d at 77. In the instant case Petitioner has not alleged that counsel abandoned him and prevented him from being heard. His only allegation is that he did not have full access to the law library when preparing his claims and he has not received help from fellow inmate law clerks. His motion is more properly construed as an attempt to file a successive habeas petition. Petitioner must seek leave from the Eleventh Circuit in order to file a second or successive petition. *See* 28 U.S.C. § 2244(b)(3).

Based upon the foregoing, it is **ORDERED AND ADJUDGED** that the Motion to Set

Aside Judgment **[DE 19]** is **DENIED FOR LACK OF JURISDICTION**.

DONE AND ORDERED in Chambers at West Palm Beach, Florida this 24th day of June, 2021.

KENNETH A. MARRA
United States District Judge

cc:

Joseph Michael Degraw
C10445
Everglades Correctional Institution
A1-246-S
Inmate Mail/Parcels
1599 SW 187th Avenue
Miami, FL 33194
PRO SE