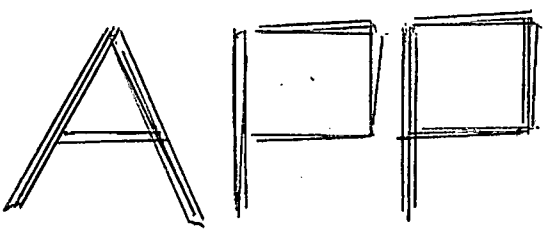
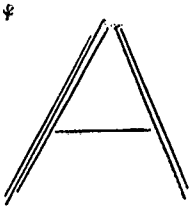




In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-13671

DEEPAK DESHPANDE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

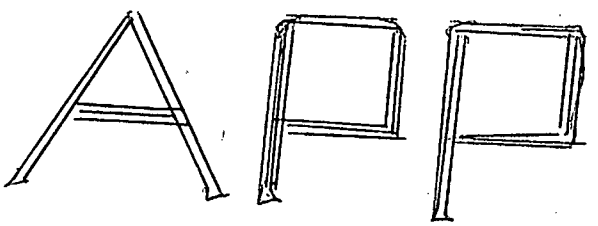
Respondent-Appellee.

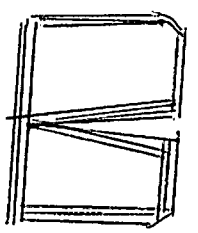
Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:21-cv-00671-CEM-LHP

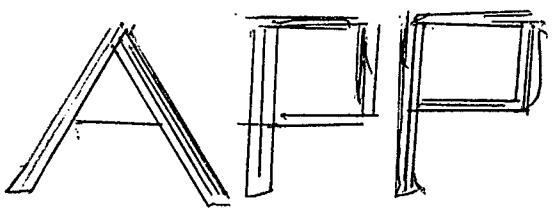
Before WILSON, and JILL PRYOR, Circuit Judges.

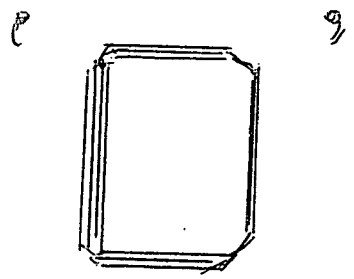
BY THE COURT:

Deepak Deshpande, a federal prisoner seeking a certificate of appealability in order to appeal the district court's denial of his *pro se* 28 U.S.C. § 2255 motion to vacate, has filed a motion for reconsideration of this Court's July 17, 2024, order denying his motions for a certificate of appealability and to supplement the record on appeal and denying as moot his motions for leave to proceed *in forma pauperis* and to notify this Court of a pending decision in the district court. Upon review, Deshpande's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.









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ORDER:

Deepak Deshpande, who pled guilty to producing child pornography and enticing a minor to engage in sexual activity, filed a 28 U.S.C. § 2255 motion, raising eight claims: (1) various pre-plea issues related to his search and arrest; (2) the district court lacked subject matter jurisdiction over the offenses, the proceedings were brought in an improper venue, and the indictment and grand jury proceedings were defective; (3) his guilty plea was not knowing and voluntary, and his plea agreement constructively amended the indictment; (4) the government breached his plea agreement; (5) his sentencing hearing violated his constitutional rights; (6) the government engaged in prosecutorial misconduct before the grand jury, during his plea, and at his sentencing hearing; (7) the statutes of conviction were unconstitutional as applied, and he was factually innocent of the offenses; and (8) cumulative ineffective assistance of counsel. He argued that, to the extent that Grounds 1 through 7 were procedurally defaulted, he could overcome the procedural bar due to ineffective assistance of counsel.

The district court found that Mr. Deshpande failed to establish counsel's ineffectiveness as to Grounds 1 through 7, rendering them procedurally barred, and his claim of cumulative ineffectiveness thus failed. It thus denied him a certificate of appealability ("COA") and dismissed the case with prejudice.

Mr. Deshpande then filed a Fed. R. Civ. P. 59 motion and a subsequent motion to disqualify the judge, both of which the district court denied. Mr. Deshpande now moves this Court for a COA, leave to proceed *in forma pauperis* ("IFP"), to supplement the

record, and to notify this Court of a decision pending in the district court.

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted). Where the district court denied a habeas petition on procedural grounds, the petitioner must show that reasonable jurists would debate (1) whether the petition states a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *Id.* at 484-85.

As a preliminary note, the district court properly found that Mr. Deshpande had procedurally defaulted all of his claims by failing to raise them on direct appeal. *See McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011). Nevertheless, procedural default may be excused if the movant shows (1) cause for the default and actual prejudice from the alleged error, or (2) that he is actually innocent of the crimes for which he was convicted. *Id.* "Ineffective assistance of counsel may satisfy the cause exception to a procedural bar," if the ineffective assistance of counsel claim has merit. *See United States v. Nyhuis*, 211 F.3d 1340, 1344 (11th Cir. 2000).

Here, reasonable jurists would not debate the district court's denial of Mr. Deshpande's § 2255 motion. First, as to Ground 3,

the record reflects that Mr. Deshpande's guilty plea satisfied Fed. R. Crim. P. 11's three core concerns, as the court ensured that (1) the guilty plea is voluntary and free from coercion, (2) he understood the nature of the charges, and (3) he understood the consequences of his plea. *See United States v. Symington*, 781 F.3d 1308, 1314 (11th Cir. 2015).

Moreover, because Mr. Deshpande's guilty plea was knowing and voluntary, it waived any non-jurisdictional defects that occurred before the entry of the plea. *See United States v. Patti*, 337 F.3d 1317, 1320 (11th Cir. 2003). Accordingly, he waived his pre-plea challenges raised in Grounds 1, 2, 3, 6, and 7.

As to Mr. Deshpande's assertions in Grounds 4 and 6 that the government breached his plea agreement and engaged in misconduct by doing so, reasonable jurists would not debate the denial of these claims, as the plea agreement refutes his contentions. Consequently, Mr. Deshpande's claim of prosecutorial misconduct fails, as he failed to establish that the government breached the plea agreement or entered it in bad faith.

To the extent that Mr. Deshpande contended in Grounds 5 and 6 that his sentencing hearing violated his constitutional rights and that the government engaged in misconduct at the hearing, reasonable jurists likewise would not debate the district court's denial of these claims. Mr. Deshpande did not establish that: (1) the government failed to disclose exculpatory evidence; (2) the government presented false or fabricated evidence at his sentencing hearing; (3) the district court violated *Alleyne v. United States*, 570 U.S.

99 (2013); (4) his term of supervised release constituted cruel and unusual punishment; (5) he was not permitted the opportunity to object to sentencing enhancements; or (6) the district court improperly applied certain sentencing enhancements.

Because Grounds 1 through 7 failed, Mr. Deshpande's cumulative-error claim in Ground 8 also fails, as this claim has no weight without a culmination of any other errors. Accordingly, because each of Mr. Deshpande's claims was meritless, he failed to establish cause to overcome the procedural bar, as counsel was not ineffective for failing to raise meritless issues. *See Bolender v. Singletary*, 16 F.3d 1547, 1573 (11th Cir. 1994).

Moreover, reasonable jurists would not debate the district court's denial of Mr. Deshpande's Rule 59(e) motion, as he simply sought to relitigate issues that the district court had already decided. *See Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007). He also has no non-frivolous issues as to the denial of his motion to disqualify, as he merely disagreed with the district court's treatment of his § 2255 motion and its decisions at his sentencing hearing. *See Liteky v. United States*, 510 U.S. 540, 554-55 (1994).

Accordingly, Mr. Deshpande's motion for a COA is DENIED, and his motion for IFP status is DENIED as moot. The motions to supplement the record are also DENIED, as his motion for a COA can be resolved based on the record that was before the district court. *See Schwartz v. Millon Air, Inc.*, 341 F.3d 1220, 1225 n.4 (11th Cir. 2003). Moreover, Mr. Deshpande's motion to notify

it of the district court's decision is DENIED as moot, as the court has since ruled on the motion.

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DEEPAK DESHPANDE,

Petitioner,

v.

Case No. 6:21-cv-671-CEM-LHP
6:18-cr-131-CEM

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS CAUSE is before the Court on Petitioner Deepak Deshpande's Motion to Reopen, Set Aside, Alter or Amend Judgment ("Motion to Reopen," Doc. 48) and Motion to Disqualify and Recuse ("Motion to Disqualify," Doc. 51). For the following reasons, Petitioner's Motion to Reopen and to Disqualify will be denied.

Petitioner requests the undersigned to recuse himself from this action under 28 U.S.C. §§ 144 and 455(a). (Doc. 51). Petitioner submitted an Affidavit in Support of the Motion to Disqualify (Doc. 51-1). Petitioner contends that the undersigned should recuse himself from this action because the undersigned has a deep-seated favoritism toward the Government as evidenced by the Court's rulings in his criminal case and in this action. (*Id.* at 4-21).

Pursuant to 28 U.S.C. § 144,

> 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. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Likewise, 28 U.S.C. § 455 provides in relevant part that a federal judge must disqualify himself if his "impartiality might reasonably be questioned," or if 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), (b)(1).

The test under § 455(a) is "whether an objective, disinterested, lay observer fully informed of the facts on which recusal was sought would entertain a significant doubt about the judge's impartiality." *United States v. Chandler*, 996 F.2d 1073 (11th Cir. 1993). Furthermore, for disqualification to be warranted under 28 U.S.C. § 455, a "judge's bias must be personal and extrajudicial; it must derive from something other than that which the judge learned by participating in the case." *McWhorter v. City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990) (citing *Jaffe*

v. Grant, 793 F.2d 1182, 1188 (11th Cir. 1986)). Consequently, generally, "a judge's rulings in the same or a related case may not serve as the basis for a recusal motion." *Id.* An exception to this rule "is the situation in which 'such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party.'" *Jaffe*, 793 F.2d at 1189 (quoting *United States v. Phillips,* 664 F.2d 971, 1002–03 (5th Cir. 1981)).

Here, contrary to Petitioner's argument otherwise, the undersigned has no bias against him. Rather, the matters that Petitioner contends show the undersigned's purported bias derived from participation in Petitioner's underlying criminal proceeding and this case. Adverse orders and rulings do not themselves evidence bias. *Byrne v. Nezhat*, 261 F.3d 1075, 1103 (11th Cir. 2001) (concluding "adverse rulings alone do not provide a party with a basis for holding that the court's impartiality is in doubt."). The undersigned does not harbor any bias against Petitioner, and a reasonable person, fully informed of the facts, would not question the undersigned's impartiality. Nor has Petitioner demonstrated that the undersigned has any personal bias or prejudice against him or personal knowledge of disputed evidentiary facts concerning the proceeding. Thus, Petitioner has failed to show that recusal is warranted, and Petitioner's Motion to Disqualify will be denied.

Petitioner further requests under Federal Rule of Civil Procedure 59 that the Court alter the Order denying his 28 U.S.C. § 2255 Motion and reopen this case.

(Doc. 48). Federal Rule of Civil Procedure 59 permits courts to alter or amend a judgment based on "'newly-discovered evidence or manifest errors of law or fact.'" *Anderson v. Fla. Dep't of Envitl. Prot.,* 567 F. App'x 679, 680 (11th Cir. 2014) (quoting *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007)). "A movant 'cannot use a Rule 59(e) motion to relitigate old matters' or 'raise argument[s] or present evidence that could have been raised prior to the entry of judgment." *Levinson v. Landsafe Appraisal Services, Inc.*, 558 F. App'x 942, 946 (11th Cir. 2014) (quoting *Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005)).

Petitioner is attempting to relitigate old matters. Moreover, Petitioner has not demonstrated any manifest errors of law or fact. Consequently, Petitioner's Motion to Reopen (Doc. 48) will be denied.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** as follows:

1. Petitioner's Motion to Reopen, Set Aside, Alter or Amend Judgment (Doc. 48) is **DENIED**.
2. Petitioner's Motion to Disqualify and Recuse (Doc. 51) is **DENIED**.
3. This Court should grant an application for certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner has failed to

make a substantial showing of the denial of a constitutional right.[1]

Accordingly, a Certificate of Appealability is **DENIED** in this case.

DONE and **ORDERED** in Orlando, Florida on August 21, 2023.

CARLOS E. MENDOZA
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

[1] "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." *Rules Governing Section 2255 Proceedings for the United States District Courts*, Rule 11(a).

Additional material from this filing is available in the Clerk's Office.