

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13112-K

DIEGO O. NUNEZ,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

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

ORDER:

Diego Nunez is a Florida prisoner serving a 25-year sentence for conspiracy to traffic in heroin and trafficking in heroin. In 2007, Mr. Nunez filed a *pro se* 28 U.S.C. § 2254 petition for a writ of habeas corpus, raising four claims of ineffective assistance of counsel. He claimed that counsel: (1) failed to interview and depose two of his codefendants; (2) failed to hire a certified drug expert to assist in explaining to the trial judge and the jury the effects of heroin on a drug abuser in order to undermine the credibility of two of the state's witnesses; (3) conceded Mr. Nunez's guilt to lesser offenses during closing arguments without advising him of such a strategy or obtaining his consent; and (4) failed to seek the suppression of illegal wiretap transcripts and evidence that was illegally seized from a hotel room. Mr. Nunez also moved the district court for leave to *proceed in forma pauperis* ("IFP").

The district court denied Mr. Nunez's motion for IFP status. After the state responded and Mr. Nunez replied, the district court denied Mr. Nunez's § 2254 petition in May 2009, determining that Mr. Nunez failed to show that he was entitled to habeas relief on the merits of each claim. Mr. Nunez appealed the denial of his § 2254 petition, and moved this Court for a COA. A judge of this Court denied Mr. Nunez's motion for a certificate of appealability ("COA") because he failed to make a substantial showing of the denial of a constitutional right.

In January 2017, Mr. Nunez filed a motion for relief from the district court's judgment denying his § 2254 petition, pursuant to Fed. R. Civ. P. 60(b). Mr. Nunez argued that there was a "complete catastrophe to the integrity of the criminal justice system" during his habeas proceeding because the district court did not first have a magistrate judge review his § 2254 petition before issuing its ruling. He asserted that he was entitled to "one full round of federal habeas corpus review," which included review by a magistrate judge. He also argued that the state prevented him from adequately showing that he was entitled to relief on Claim 4 of his § 2254 petition because the state withheld the affidavit in support of the wiretap. He also argued that the police destroyed the search warrant for his hotel room and falsified a number of documents presented during his criminal proceeding. He argued that these documents constituted newly discovered evidence, and that, based on this new evidence, it was more likely than not that no reasonable juror would have convicted him. Mr. Nunez relied on *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), which held that a state prisoner may show cause to overcome a procedural default on a claim raised in federal habeas proceedings through a claim of ineffective assistance of counsel, to support his newly-discovered-evidence argument, and noted that he did not have counsel during his post-conviction proceedings in state or federal court.

Mr. Nunez further argued that (1) the district court judge should have disqualified herself from reviewing his § 2254 petition because she authorized the government's application for a wiretap in the criminal investigation of Nunez and his codefendants, (2) he should be permitted to raise procedurally defaulted claims for the first time in a second or successive § 2254 petition, (3) the court's order denying his § 2254 petition was a "grave miscarriage of justice," and (4) he had diligently pursued his rights. Thus, he argued he was entitled to relief from the court's judgment denying his § 2254 petition under Rule 60(b)(6). Mr. Nunez also requested an evidentiary hearing on his Rule 60(b) motion.

The district court denied Mr. Nunez's Rule 60(b) motion, finding that Mr. Nunez had not filed his motion within a reasonable time because he filed it almost eight years after the entry of the court's order denying his § 2254 petition. Additionally, the court determined that Mr. Nunez failed to provide support for the relief he requested and failed to show there were extraordinary circumstances warranting relief under Rule 60(b).

In May 2017, Mr. Nunez filed a motion for rehearing of his Rule 60(b) motion. He argued that he raised extraordinary circumstances that warranted relief under Rule 60(b)(6). He also argued that the court misapprehended the permissible time frame for filing a Rule 60(b)(6) motion because *Martinez* constituted a change in law with regard to Claim 4 of his § 2254 petition. Finally, he argued that the court misapprehended the significance of the state's withholding of the affidavit in support of the wiretap warrants. Mr. Nunez also moved to have the district court judge disqualified from the remainder of his habeas proceedings and moved the court for a COA. The district court denied Mr. Nunez's motions for rehearing, for disqualification of the district court judge, and a COA.

Mr. Nunez then moved the court for leave to appeal IFP, which the district court denied. Nunez now seeks to appeal the district court's orders denying his Rule 60(b) motion, and his motions for rehearing, for disqualification of the district court judge, and for a COA.¹ He also moves this Court for a COA and IFP status.

Denial of Motion for Rehearing:

This Court has held that petitioners must obtain a COA in order to appeal "any denial of a Rule 60(b) motion for relief from a judgment in a [28 U.S.C.] § 2254 . . . proceeding." *Gonzalez v. Sec'y for Dep't of Corr.*, 366 F.3d 1253, 1263 (11th Cir. 2004) (*en banc*) ("*Gonzalez I*"), *aff'd on other grounds sub nom. Gonzalez v. Crosby*, 545 U.S. 524 (2005) ("*Gonzalez II*"). 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). 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).

This Court reviews the district court's "denial of a motion for reconsideration for an abuse of discretion." *Richardson v. Johnson*, 598 F.3d 734, 740 (11th Cir. 2010). "A motion for reconsideration cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Id.* (quotations omitted). Rather, the three primary grounds justifying the grant of a motion for reconsideration are "(1) an intervening change in the controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice." *Delaware Valley Floral Group, Inc. v. Shaw Rose Nets, LLC*, 597 F.3d 1374, 1383 (11th Cir. 2010) (quotation omitted).

¹ This Court only has jurisdiction to review the district court's denial Mr. Nunez's motions for rehearing of his Rule 60(b) motion and for disqualification of the district court judge.

Reasonable jurists would not debate the district court's denial of Mr. Nunez's motion for rehearing of his Rule 60(b) motion. In his motion for rehearing, Mr. Nunez improperly reiterated the arguments raised in his Rule 60(b) motion—that (1) there were extraordinary circumstances warranting relief under Rule 60(b)(6); (2) the state withheld evidence, preventing him from adequately supporting Claim 4 in his § 2254 petition; and (3) that he was entitled to relief on Claim 4 in accordance with *Martinez*. *Richardson*, 598 F.3d at 740. As to Mr. Nunez's argument that the district court improperly denied his Rule 60(b) motion as untimely because *Martinez* constituted a change in law, this argument fails because *Martinez* did not apply to Mr. Nunez's situation, as the district court denied all of his claims raised in his § 2254 petition on the merits, not based on procedural default. Additionally, the Supreme Court issued its decision in *Martinez* almost five years before Mr. Nunez filed his Rule 60(b) motion or his motion for rehearing. Consequently, Mr. Nunez could not rely on *Martinez* to show that the court abused its discretion in denying his Rule 60(b) motion because he did not file the motion within a reasonable time. As Mr. Nunez offered no new evidence or arguments of merit as to why the district court should reconsider its previous order denying his Rule 60(b) motion, the district court did not abuse its discretion in denying the motion. *Id.*

Denial of motion for disqualification of district court judge:

This Court reviews a district court's denial of a recusal motion for an abuse of discretion. *Loranger v. Stierheim*, 10 F.3d 776, 779 (11th Cir. 1994). Under 28 U.S.C. § 455(a), a judge is required to "disqualify h[er]self in any proceeding in which h[er] impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Similarly, a judge must recuse herself if she has a personal bias or prejudice against a party. *Id.* § 455(b)(1). Absent a showing of pervasive bias and prejudice, a judge's bias or prejudice must be personal in nature and extrajudicial, and derive

from something other than what the judge learned by virtue of participating in the case. *McWhorter v. City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990). The standard under § 455 is an objective one, requiring the court to ask whether a disinterested observer, fully informed of the facts underlying the grounds upon which recusal was sought, would entertain significant doubt as to the judge's impartiality. *Id.*

Here, Mr. Nunez argued that the district judge was disqualified from overseeing his habeas proceedings because she had authorized the government's application for a wiretap, which ultimately resulted in his arrest and conviction. Mr. Nunez did not attribute the court's alleged bias against him to any extrajudicial source, but instead to the district court judge's prior involvement in his criminal investigation. Such alleged bias stemming from a judicial proceeding does not suffice to trigger mandatory recusal under § 455 absent a showing of pervasive bias and prejudice. *McWhorter*, 906 F.2d at 678. Mr. Nunez has not offered any evidence of pervasive bias and prejudice, and his conclusory statements that the district court judge was biased against him in his habeas proceedings fail to provide a factual basis upon which a reasonable person would entertain significant doubt as to the court's impartiality. *Id.* Thus, the district court did not abuse its discretion in denying Mr. Nunez's motion for disqualification. *Loranger*, 10 F.3d at 779.

Accordingly, because reasonable jurists would not debate the district court's denial of Mr. Nunez's motion for rehearing on his Rule 60(b) motion and his motion for disqualification of the district court judge, his motion for a COA is DENIED. 28 U.S.C. § 2253(c)(2); *Slack*, 529 U.S. at 484. His motion for IFP status is DENIED AS MOOT.


UNITED STATES CIRCUIT JUDGE

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No. 17-13112-K

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versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

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

Before: MARTIN and JILL PRYOR, Circuit Judges.

BY THE COURT: •

Diego Nunez has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's October 18, 2017, order denying his motions for a certificate of appealability and leave to proceed on appeal *in forma pauperis*. Upon review, Nunez's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

APRIL 18, 2012

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DIEGO NUNEZ,

Petitioner,

v.

Case No: 6:07-cv-1836-Orl-22GJK

SECRETARY, FLORIDA
DEPARTMENT OF CORRECTIONS
and ATTORNEY GENERAL, STATE OF
FLORIDA,

Respondents.

ORDER

This cause is before the Court on Petitioner's Motion for Relief From Judgment or Order Pursuant to Federal Rule of Civil Procedure 60(b)(6) ("Motion for Relief," Doc. 27). The Court entered an Order (Doc. 15) on May 13, 2009, dismissing this case without prejudice, and the corresponding Judgment (Doc. 17) was entered on May 14, 2009. The Eleventh Circuit Court of Appeals denied Petitioner's request for a certificate of appealability on September 9, 2009. (Doc. 23).

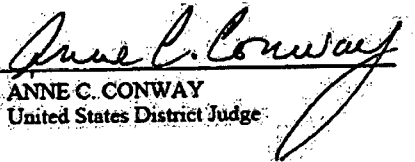
Petitioner brings the Motion for Relief under Federal Rule of Civil Procedure 60(b)(6). Rule 60(b)(6) is the catchall provision of Rule 60 and authorizes relief for "any other reason justifying relief from the operation of the judgment." Motions under Rule 60(b)(6) must be filed within a reasonable time after the entry of the judgment or order. See Fed. R. Civ. P. 60(c)(1). However, relief under Rule 60(b)(6) is an extraordinary

remedy and requires a showing of extraordinary circumstances. *Gonzalez v. Crosby*, 545 U.S. 524, 536 (2005).

Here, the Motion for Relief was filed almost eight years after the entry of the order of dismissal, and, thus, was not filed within a reasonable time. Moreover, Petitioner has failed to provide support for the relief requested, and he has failed to show any extraordinary circumstances that would warrant reconsideration of the order of dismissal or would otherwise warrant relief under Rule 60(b)(6). In short, nothing presented by Petitioner in the Motion for Relief persuades the Court that the dismissal of the Petition for Writ of Habeas Corpus was erroneous.

Accordingly, it is **ORDERED** that Petitioner's Motion for Relief (Doc. 27) is **DENIED**. Further, because Petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability is denied with regard to the denial of this motion.

DONE and ORDERED in Orlando, Florida on April 18, 2017.


ANNE C. CONWAY
United States District Judge