UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3rd day of July, two thousand eighteen.

Ralph Hall,

Petitioner - Appellant,

v.

Darwin Le Claire, Norman Bezio,

Respondents - Appellees.

ORDER

Docket No: 15-3549

Appellant, Ralph Hall, filed a motion for panel reconsideration, or, in the alternative, for reconsideration *en banc*. The panel that determined the appeal has considered the request for reconsideration, and the active members of the Court have considered the request for reconsideration *en banc*.

IT IS HEREBY ORDERED that the motion is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

Appendix ("A"-2-2)

Rec'd 01/26/2018

MANDATE

S.D.N.Y.-N.Y.C.
10-cv-3877
Preska, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3rd day of May, two thousand eighteen.

Present:

Pierre N. Leval,
Gerard E. Lynch,
Christopher F. Droney,
Circuit Judges.

Ralph Hall,

Petitioner-Appellant,

v. 15-3549

Darwin Le Claire, Norman Bezio,

Respondents-Appellees.

Appellant, pro se, moves for a certificate of appealability, in forma pauperis status, and to reactivate and renew his motions. Upon due consideration, it is hereby ORDERED that the motions are DENIED and the appeal is DISMISSED because Appellant has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

MANDATE ISSUED ON 07/10/2018

Appendix (A1-2)

Rec. 02/06/2018

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RALPH HALL,

Petitioner,

-against-

DARWIN LeCLAIRE (AND) NORMAN BEZIO,

Respondents.

10-CV-3877 (LAP) (KNF)

ORDER

LORETTA A. PRESKA, United States District Judge:

Petitioner, who is incarcerated and proceeds *pro se*, brings this motion in which he seeks reconsideration, and relief under Rule 60(b) of the Federal Rules of Civil Procedure. (ECF No. 335.) He seeks relief from the Court's October 20, 2015 order and subsequent judgment adopting an October 3, 2014 Report and Recommendation ("Report" or "R&R") by Magistrate Judge Kevin Nathaniel Fox, and denying Petitioner's amended petition for a writ of *habeas corpus* on the merits. (ECF Nos. 330 & 331.) The Court construes Petitioner's motion as one seeking relief from the Court's order and judgment under Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure, and under Local Civil Rule 6.3. For the reasons discussed below, the Court denies the motion.

BACKGROUND

Below is a short summary of this action's procedural history. It is necessary to recount this procedural history to demonstrate the Court's reasons for denying the present motion.

A. The amended petition and subsequent state-court criminal appeal

On June 3, 2010, the Court received from Petitioner an amended petition seeking relief under 28 U.S.C. § 2254. (ECF No. 4.) In it, Petitioner asserted the following grounds for *habeas*

(Appendix "B") 1-11

corpus relief: (1) the Appellate Division's excessive delay in deciding Petitioner's direct appeal violated his right to due process, and his appeal was prejudiced by the delay; (2) the trial court erred when it failed to incorporate into the trial record at sentencing Petitioner's *pro se* motion to vacate the judgment of conviction; (3) the grand jury proceeding was defective, and (4) Petitioner's appellate counsel was ineffective.

This action was subsequently reassigned to the Honorable Richard Owen of this Court. By order dated September 14, 2010, Judge Owen ruled that the delay in Petitioner's then-pending direct criminal appeal in the New York Supreme Court, Appellate Division, First Department, did not, at that time, violate Petitioner's right to due process. (ECF No. 10.) But in that same order, Judge Owen allowed Petitioner leave to reassert that claim if, "one year from [the date of that order,] Petitioner's appeal is still adjourned." (*Id.* at 7.) Less than one year later, on April 21, 2011, the Appellate Division affirmed Petitioner's conviction. *People v. Hall*, 84 A.D.3d 79 (1st Dept. 2011). On February 24, 2012, the New York Court of Appeals denied Petitioner leave to appeal. *People v. Hall*, 18 N.Y.3d 924 (2012). And on October 1, 2012, the Supreme Court of the United States denied Petitioner *certiorari*. *Hall v. New York*, 568 U.S. 855 (2012).

B. The "Refile Petition" and the "Petition to Refile"

On July 28, 2011, after the Appellate Division had affirmed the conviction, but before the New York Court of Appeals has denied leave to appeal, this Court received a document titled "Refile Petition" from Petitioner.[1] (ECF No. 17.). Petitioner asserted that that submission "constitute[d] [the] refiling of [his] petition." (*Id.* at 5.) He stated that "the absence of [his] pre-

[1] Petitioner has filed numerous submissions in this action. The Court will only address those submissions it deems significant for this purposes of this order.

sentence motion and proceedings from [the] record on appeal [is a] . . . constitutional default [that] . . . clearly constitute[s] grounds for federal intervention." (*Id.* at 2, ¶ 3.)

On September 28, 2011, apparently while Petitioner's leave petition was still pending in the New York Court of Appeals, this Court received a "Petition to Refile" from Petitioner.[2] In it, Petitioner asserted that: (1) the "state court deprived [him] of due process and [a] meaningful direct appeal"; (2) the "state court failed to review [an] adequate record on direct appeal to include [sic]" a state-court motion filed on October 7, 2005; (3) the "state court [] deprived [him] of [his] right to [include in the] timely appeal [his] pre-sentence motion . . . [and a] rebut[tal] [of] the absence of [that] motion from [the] record on appeal"; and (4) his "appellate counsel failed to advocate on direct appeal [about] the absence of the [pre-sentence motion from the] record for appellate review." (ECF No. 21, at 5-6.)

In an order dated June 26, 2013, Judge Owen noted that Petitioner had filed numerous submissions in the state courts "alleging misconduct by the state courts and . . . improper delay." (ECF No. 171, at 2.) Judge Owen also directed the respondent to answer the amended petition. (*Id.* at 3.) In another June 26, 2013 order, Judge Owen referred the action to Magistrate Judge Fox. (ECF No. 170.) The action was subsequently reassigned back to me.

In August 2013, respondent filed an answer (ECF Nos. 195-197), and Petitioner filed a traverse in response to the respondent's answer (ECF No. 198). On October 3, 2014, Magistrate

[2] This submission was initially filed as another § 2254 *habeas corpus* petition commencing *Hall v. Bezio*, No. 11-CV-6850 (LAP). By order dated November 17, 2011, the Court directed the Clerk of Court to administratively close *Hall*, No. 11-CV-6850 (LAP), and file this submission in this action as a "Petition to Refile," with a file date of September 28, 2011.

Judge Fox issued his R&R. (ECF No. 253.) It recommended that the Court deny the amended petition.

C. The Report's findings

The Report concluded that Petitioner was not entitled to *habeas corpus* relief on the ground of excessive appellate delay. This was because he had "not established that the . . . delay caused substantial prejudice to the disposition of his appeal." (*Id.* at 13-14.)

The Report also concluded that Petitioner was not entitled to *habeas corpus* relief as to his ground concerning the trial court's failure to incorporate into the trial record his *pro se* motion filed at sentencing. It stated that because Petitioner was asserting that the trial court had only violated state law, there was no basis to grant federal *habeas corpus* relief under § 2254. (*Id.* at 15.) In addition, it stated that "absence of a stenographic record of the contents of [Petitioner's] . . . motion" did not prejudice his ability to appeal, as his motion's arguments "were known to his appellate counsel and incorporated into the appellate brief," and also "were made part of the appellate record[,] . . . reviewed by the Appellate Division[,] and denied." (*Id.* at 16.)

The Report further concluded that Petitioner was not entitled to *habeas corpus* relief as to his ground that the grand jury proceeding was defective. It noted that Petitioner was precluded from asserting a claim about a defective grand jury proceeding because he had been subsequently convicted by a petit jury. (*Id.*)

And the Report concluded that Petitioner was not entitled to *habeas corpus* relief as to his ground that his appellate counsel was ineffective. It stated that Petitioner's appellate counsel's representation was not constitutionally inadequate. (*See id.* at 18.) It also stated that, but for such representation, the result of his appeal would not have been different. (*Id.* at 19.)

D. The order adopting the R&R

Petitioner filed timely objections to the R&R. (ECF Nos. 255 & 256.) In an order dated October 20, 2015, the Court overruled them, adopted the R&R in its entirety, and denied the amended petition on the merits. (ECF. No. 330.)

The Court found no merit to Petitioner's objection that the respondent failed to answer the amended petition. (*Id.* at 10-11.) It also found no merit to his objection to the Report's reliance on *Estelle v. McGuire*, 502 U.S. 62 (1991), for the proposition that a violation of a state statute is not a basis for granting federal *habeas corpus* relief. (*Id.* at 11-13.)

In addition, the Court overruled Petitioner's objection "that his due process rights ha[d] been violated by the failure of the appellate court to review the trial court records." (*Id.* at 13.) The Court specifically understood his objection "to allege that the Appellate Division, in reviewing Petitioner's case upon direct appeal, did not have a record of the trial proceedings" that included his "*pro se* motions." (*Id.*) The Court held that he failed "to provide support for this allegation beyond conclusory statements[,]" and that "evidence in fact show[ed] that such motions *were* on the record." (*Id.*) (emphasis in original). The Court noted that Petitioner's "[a]ppellate counsel was . . . provided with those motion papers as part of the record on appeal[,]" and that "the Appellate Division decision in Petitioner's direct appeal note[d] that it had received and reviewed [Petitioner's] *pro se* brief, though it rejected the claims on the merits." (*Id.* at 14.)

The Court also overruled Petitioner's objection regarding his assertion that his appellate counsel had been ineffective. It held that Petitioner had failed to satisfy the Supreme Court's test for such a claim, as articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). (*See id.* at 14-18.) The Court specifically held that "Petitioner ha[d] not made more than conclusory allegations

of prejudice as a result of any procedural deficiency." (*Id.* at 17.) It noted that "the Appellate Division . . . . apparently found no procedural error, as the case was adjudicated on the merits." (*Id.*) It also noted that, as to Petitioner's claim that his appellate counsel failed to advocate his chosen grounds, his counsel was not required to do so. (*Id.* at 18.) It further noted, as did the R&R, that many of the grounds Petitioner raised in his *pro se* state-court submissions were duplicative of those raised by his appellate counsel, and that the Appellate Division also considered the grounds raised in his *pro se* appellate brief but rejected them on the merits. (*Id.*) Thus, in overruling that objection, the Court held that Petitioner failed to establish that his appeal was prejudiced as a result of his appellate counsel's actions. (*See id.*)

As to Petitioner's claim of excessive appellate delay, the Court noted that Petitioner did not object to that portion of the R&R, and thus abandoned that claim. (*See id.* at 18-19.)

Petitioner objected "that the state court corrective process was rendered ineffective." (*Id.* at 19.) He asserted that the Appellate Division's delay in deciding his direct appeal was an example of state-court ineffectiveness. But the Court again noted that Petitioner had abandoned his claim of excessive appellate delay. (*See id.*) It also held that "Petitioner ha[d] not supported his contention that the corrective process was rendered ineffective by anything other than conclusory allegations." (*Id.* at 19-20.) The Court thus overruled that objection.

Petitioner also objected on equal protection and privileges and immunities grounds. The Court rejected his assertion that his rights under the equal protection and privileges and immunities clauses had been violated when the trial court allegedly failed to comply with state law, and failed to include his *pro se* motion in the trial record. (*Id.* at 20-21.) The Court noted that Petitioner's appellate counsel has stated in an affirmation that she had received a copy of that motion as part of the record on appeal. (*Id.* at 21.) Petitioner also asserted another such

constitutional violation arising from the trial court's alleged failure to comply with state law and make a record when it issued a decision on a motion to suppress evidence. (*Id.* at 21.) The Court found that the trial court had actually made such a record. (*Id.* at 21-22.) Petitioner further asserted another such constitutional violation as to the appellate court's alleged failure to comply with state law and order the trial court to provide certain information concerning the trial court's decisions. (*Id.* at 22.) The Court found the cited state law inapplicable, and that Petitioner had brought "forth nothing substantive from which the Court could conclude that he is the victim of constitutional violations somehow related to this law." (*Id.*)

Finally, Petitioner objected to the Report's consideration of his amended petition, rather than his "Refile Petition" or his "Petition to Refile." (*Id.* at 23.) In overruling that objection, the Court noted that Judge Owen, in his September 14, 2010 order, only granted Petitioner leave to refile as to his claim of excessive appellate delay – which he later abandoned – and that his "Refile Petition" and his "Petition to Refile" "were not limited to" that claim. (*Id.*) The Court held that the Report "was warranted in responding to the [a]mended [p]etition, as that is the petition filed in accordance with proper procedure and with the Court's leave." (*Id.*)

E. The present motion

On November 5, 2015, the Court received from Petitioner the present *pro se* motion and a notice of appeal. (ECF Nos. 334 & 335.) Petitioner's motion is not very clear. He seems to argue that the Court's November 17, 2011 order in *Hall*, No. 11-CV-6850 (LAP), which directed the Clerk of Court to administratively close that action and file the "Petition to Refile" in this action, "modified" Judge Owen's September 14, 2010 order to allow Petitioner to assert additional *habeas corpus* grounds, not just a claim of excessive appellate delay. (*See* ECF No. 335, at 2, ¶ 3.) He also seems to assert that in his "Petition to Refile," he has asserted *habeas corpus* grounds

that were not previously appropriate for consideration because he had not exhausted state-court remedies as to those grounds until after Judge Owen had issued his September 14, 2010 order. (*See id.* at 5, ¶¶ 8-9.) And he apparently contends that the Court recognized that his "Petition to Refile" constituted a supplement to his amended petition when the Court recognized, in its October 20, 2015 order, that the "Petition to Refile" had been "consolidated with the current case." (*See id.* ¶¶ 8-11; ECF No. 330, at 5 n.1.)

Petitioner asserts that the respondent's answer and the R&R both "failed[,] for the most part[,] to address claims raised in" the "Petition to Refile," which he describes as his "modified[] consolidated amended petition." (ECF No. 335, at 7, ¶ 11.) He also asserts that the Court's October 20, 2015 order informed him, "for the first time," that his "Petition to Refile had been dismissed . . . ." (*Id.* at 4, ¶ 6.) And he apparently argues that the Court's "consolidation" of his additional *habeas corpus* grounds in his "Petition to Refile" should have allowed Magistrate Judge Fox to consider them in the R&R (*id.* at 5, ¶ 8), and that he "should not be penalized for [the Court's] consolidation of his claims" (*id.* ¶ 9).

Petitioner then asserts allegations concerning his appellate counsel's ineffectiveness, the trial court's failure to incorporate his *pro se* motion into the trial-court record, and the state court's failure to correct the record on appeal. (*See id.* at 7-28.) He seems to argue that Magistrate Judge Fox erred in not considering the additional grounds raised in his "Petition to Refile," and that the Court erred by not considering them either.

DISCUSSION

A. Rule 59(e) & Local Civil Rule 6.3

The standards governing a motion to alter or amend a judgment under Rule 59(e) and a motion for reconsideration under Local Civil Rule 6.3 are the same. *R.F.M.A.S., Inc. v. Mimi So*,

640 F. Supp. 2d 506, 508-09 (S.D.N.Y. 2009). The movant must demonstrate that the Court overlooked controlling decisions or factual matters that had been previously put before it. *Id.* at 509; *see Padilla v. Maersk Line, Ltd.*, 636 F. Supp. 2d 256, 258-59 (S.D.N.Y. 2009). "Such motions must be narrowly construed and strictly applied in order to discourage litigants from making repetitive arguments on issues that have been thoroughly considered by the court." *Range Road Music, Inc. v. Music Sales Corp.*, 90 F. Supp. 2d 390, 391-92 (S.D.N.Y. 2000); *see also SimplexGrinnell LP v. Integrated Sys. & Power, Inc.*, 642 F. Supp. 2d 206, 210 (S.D.N.Y. 2009) ("[A] motion for reconsideration is not an invitation to parties to treat the court's initial decision as the opening of a dialogue in which [a] party may then use such a motion to advance new theories or adduce new evidence in response to the court's ruling.") (internal quotation marks and citation omitted).

B. Rule 60(b)

Under Rule 60(b), a party may seek relief from a district court's order or judgment 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), misrepresentation, or other misconduct of 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 justifying relief.

Fed. R. Civ. P. 60(b).

"[A] Rule 60(b)(6) motion must be based upon some reason other than those stated in clauses (1)-(5)." *United Airlines, Inc. v. Brien*, 588 F.3d 158, 175 (2d Cir. 2009) (quoting *Smith v. Sec'y of HHS*, 776 F.2d 1330, 1333 (6th Cir. 1985)) (alteration in original, internal quotation marks omitted). A Rule 60(b)(6) motion must show both that the motion was filed within a

"reasonable time" and that "extraordinary circumstances [exist] to warrant relief." *Old Republic Ins. Co. v. Pac. Fin. Servs. of Am., Inc.*, 301 F.3d 54, 59 (2d Cir. 2002) (internal quotation marks and citation omitted).

C. Analysis

The operative pleading for this action is Petitioner's amended petition. (ECF No. 4.) Judge Owen, in his September 14, 2010 order, only granted Petitioner leave to refile his claim of excessive appellate delay. (ECF No. 10.) The Court's November 17, 2011 order in *Hall*, No. 11-CV-6850 (LAP), while directing the Clerk of Court to file the "Petition to Refile" in this action, did not modify, rescind, or vacate Judge Owen's September 14, 2010 order. Thus, because the amended petition is the operative pleading, Magistrate Judge Fox only considered those grounds raised in the amended petition.

The Court, at no point, considered the "Refile Petition" or the "Petition to Refile" as a supplement to the amended petition. But in any event, the grounds asserted in both of them are duplicative of those asserted in the amended petition or in Petitioner's objections to the R&R. Thus, in the Court's October 20, 2015 order adopting the R&R, the Court considered and adjudicated all of Petitioner's asserted grounds for *habeas corpus* relief

In the present motion, Petitioner has failed to show that the Court has overlooked controlling decisions or factual matters that would cause the Court to vacate its October 20, 2015 order and subsequent judgment. The Court therefore denies Petitioner's motion, to the extent that he seeks relief under Rule 59(e) and Local Civil Rule 6.3.

And as to Rule 60(b) relief, even under a liberal interpretation of the present motion, Petitioner has failed to allege facts demonstrating that any of the grounds listed in the first five clauses of Rule 60(b) apply. In addition, as to Rule 60(b)(6) relief, Petitioner has failed to allege

any facts demonstrating that extraordinary circumstances exist to warrant relief. Thus, to the extent that Petitioner seeks any relief under Rule 60(b), the Court denies the motion.

CONCLUSION

The Clerk of Court is directed to mail a copy of this order to Petitioner and note service on the docket. The Court construes the present motion as one for relief from the Court's October 20, 2015 order and subsequent judgment under Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure, as well as under Local Civil Rule 6.3. (ECF No. 335.) The Court denies the present motion.

Because the amended petition makes no substantial showing of a denial of a constitutional right, a certificate of appealability will not issue. *See* 28 U.S.C. § 2253. Thus, to the extent that Petitioner seeks a certificate of appealability, the Court also denies that request. (ECF No. 362.)

The Court certifies under 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith, and therefore *in forma pauperis* status is denied for the purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED.

Dated: January 29, 2018
New York, New York

Loretta A. Preska

LORETTA A. PRESKA
United States District Judge