CORRECTED ORDER

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11669-FF

FRANK SARCONA,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

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

Before: MARTIN, ROSENBAUM and NEWSOM, Circuit Judges.

BY THE COURT:

Frank Sarcona, proceeding *pro se*, appeals the district court's dismissal of his unauthorized successive motion to vacate his sentence, filed pursuant to 28 U.S.C. § 2255. Sarcona argues on appeal that the district court erred in determining it lacked jurisdiction to hear his § 2255 motion because (1) while his motion was numerically a second § 2255 motion, the facts giving rise to his claims were previously unavailable to him such that he does not need this Court's permission to file the § 2255 motion, and (2) that his ineffective assistance of counsel claim and his *Giglio*[1] violation claim only became ripe after he filed his initial § 2255 motion, eliminating the need to obtain this Court's permission to file a "numerically second" § 2255

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[1] *Giglio v. United States*, 405 U.S. 150 (1972).

motion. The government has moved for summary affirmance, arguing that the district court properly dismissed Sarcona's § 2255 motion because it is an unauthorized successive § 2255 motion.

Summary disposition is appropriate either where time is of the essence, such as "situations where important public policy issues are involved or those where rights delayed are rights denied," or where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more frequently the case, the appeal is frivolous." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

We review questions concerning jurisdiction *de novo*. *Williams v. Chatman*, 510 F.3d 1290, 1293 (11th Cir. 2007). A district court does not have jurisdiction to entertain an unauthorized second or successive § 2255 motion. *Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003). The question of whether a numerically second § 2255 motion was "second or successive" under the AEDPA is considered *de novo*. *Stewart v. United States*, 646 F.3d 856, 858 (11th Cir. 2011).

A prisoner in federal custody may file a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255, claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack. 28 U.S.C. § 2255(a). A second or successive motion must be certified as provided in 28 U.S.C. § 2244 by a panel of the appropriate court of appeals. 28 U.S.C. § 2255(h). This certification must be obtained before the second or successive motion is filed in the district court. 28 U.S.C. § 2244(b)(3)(A). The

grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of *certiorari*. 28 U.S.C. § 2244(b)(3)(E).

Sarcona is correct that we and the Supreme Court have held, under certain circumstances, that a numerically second habeas application is not always a second or successive motion or petition within the meaning of the statute. *Panetti*, 551 U.S. at 943-944; *Stewart*, 646 F.3d at 858. However, this is not a case in which Sarcona was unable to raise his claim previously because it was not ripe, despite his claims that it is, because he did in fact raise this claim previously, as he concedes. Furthermore, Sarcona filed an application with us for permission to file a second or successive § 2255 motion in which the raised the exact claims he is attempting to raise now, and which we denied. Accordingly, Sarcona's newest § 2255 motion appears to be both an unauthorized successive § 2255 motion, and an attempt to appeal the denial of application to file a successive motion, which is prohibited. 28 U.S.C. § 2244(b)(3)(E).

Therefore, the government's position is correct as a matter of law. *See Groendyke Transp., Inc.*, 406 F.2d at 1162. The government's motion for summary affirmance is GRANTED, and its motion to stay the briefing schedule is DENIED as moot.

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Before: MARTIN, ROSENBAUM and NEWSOM, Circuit Judges.

BY THE COURT:

Frank Sarcona, proceeding *pro se*, moves for reconsideration of our November 5, 2018 order granting the government's motion for summary affirmance in his appeal from the district court's dismissal of his unauthorized successive motion to vacate, 28 U.S.C. § 2255. In his initial appeal, Sarcona argued that the district court erred in determining it lacked jurisdiction to hear his § 2255 motion because (1) while his motion was numerically a second § 2255 motion, the facts giving rise to his claims were previously unavailable to him such that he did not need our permission to file the § 2255 motion, and (2) his ineffective assistance of counsel claim and his

APPENDIX B

Giglio[1] violation claim became ripe only after he filed his initial § 2255 motion, eliminating the need to obtain our permission to file a "numerically second" § 2255 motion.

In our November 5, 2018 order granting the government's motion for summary affirmance, we determined that while there were certain instances in which a numerically second habeas application was not a second or successive motion to vacate, Sarcona's motion was not one. We concluded (1) that Sarcona was able to raise his claims in his first motion because he did raise the claims, as he conceded, and (2) that he had previously filed an application with our Court for permission to file a second § 2255 motion raising these exact claims, which we denied. We resolved that Sarcona's § 2255 motion was both an unauthorized successive § 2255 motion and a prohibited attempt to appeal the denial of his application to file a successive § 2255 motion.

In his motion for reconsideration, Sarcona argues that we must vacate our November 5, 2018 order because it violates *Slack v. McDaniel*, 529 U.S. 473 (2000), and *Lambrix v. Sec'y Fla. Dept. of Corr.*, 851 F.3d 1158 (11th Cir. 2017), in that we are required to issue a certificate of appealability ("COA") where (1) the district court denies a § 2255 motion on procedural grounds without reaching the underlying constitutional claim, and (2) the movant shows that jurists of reason would find the issue debatable. He asserts that he presented us with *primâ facie* evidence of two constitutional violations that reasonable jurists would debate, and that because those issues are unadjudicated, the motion is not a second or successive § 2255 motion. (*Id.* at 1-2).

A party may file one motion for reconsideration, and that motion must be filed within 21 days of the order from which reconsideration is sought. *See* 11th Cir. R. 27-2, 27-3. The party seeking reconsideration must identify with particularity each point of law or fact that he believes we overlooked or misapprehended. *See* Fed. R. App. P. 40(a)(2) (addressing petitions for panel

[1] *Giglio v. United States*, 405 U.S. 150 (1972).

rehearing). However, "[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." *See Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir. 2009). This prohibition includes "new arguments that were previously available, but not pressed." *Id.*

Where the district court's decision is a final order dismissing a motion or petition for habeas relief based on a lack of subject matter jurisdiction, we have jurisdiction to review the order pursuant to 28 U.S.C. § 1291, and a COA is not necessary. *Hubbard v. Campbell*, 379 F.3d 1245, 1247 (2004).

Sarcona has identified two cases he feels we overlooked in granting the government's motion for summary affirmance. In *Slack*, the Supreme Court reversed the lower court's decision dismissing a State prisoner's § 2254 petition because his first petition had not been adjudicated on the merits where it was dismissed because he failed to exhaust all state remedies prior to filing his § 2254 petition in federal court. *Slack*, 529 U.S. at 478-79, 485-86. Further, the Supreme Court held that, in order to obtain a COA, the petitioner must make a substantial showing of the denial of a constitutional right and show that reasonable jurists would debate the issue. *Id.* at 483-84. In *Lambrix*, we cited to *Slack's* holding on the requirements to obtain a COA. 851 F.3d at 1169. We eventually held that Lambrix was not entitled to a COA. *Id.* at 1170-73. However, both decisions are inapplicable to Sarcona's case because a COA was not necessary for this Court to review the district court's decision, as it was a final order dismissing a motion for habeas relief based on a lack of subject matter jurisdiction, and we had jurisdiction to review the order pursuant to 28 U.S.C. § 1291. *Hubbard*, 379 F.3d at 1247.

Accordingly, Sarcona's motion for reconsideration is DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-81123-CIV-MARRA/WHITE
(07-CR-80138-MARRA)

FRANK SARCONA,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

FINAL JUDGMENT DENYING SECTION 2255 PETITION

Upon a *de novo* independent review of the file, for the reasons stated in the Report of Magistrate Judge [DE 3], and over Movant's objections,[1] it is hereby

ORDERED AND ADJUDGED as follows:

1. The Magistrate Judge's Report [DE 3] is hereby AFFIRMED.

2. Movant's Motion to Vacate is dismissed for lack of jurisdiction as it is an unauthorized successive motion.

3. A certificate of appealability is denied.

[1] Objections to the Magistrate's Report were due October 25, 2017. On the 13th of November, after a *de novo* review, and noting no objections, the Court affirmed the Magistrate Judge's Report [DE 4]. The next day, the Court received "Motion to the Court of Movant[']s Intension [sic] to Object to Magistrate White's Report and Request for Extension of Time to Reply" [DE 6]. Noting that Sarcona stated that he only received the Magistrate's Report on October 31, 2017, the Court granted Sarcona's Motion for Extension of Time *nunc pro tunc*, and vacated the Final Judgment [DE 7]. Now, with Sarcona's Objections in hand, the Court reviews the matter anew.

APPENDIX C

4. All pending motions not otherwise ruled upon are DENIED AS MOOT. This case is CLOSED.

DONE AND ORDERED in chambers at West Palm Beach, Palm Beach County, this 24th day of January, 2018.

KENNETH A. MARRA
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-81123-CIV-MARRA/WHITE
(07-CR-80138-MARRA)

FRANK SARCONA,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER DENYING MOTION FOR RECONSIDERATION

THIS CAUSE is before the Court upon Petitioner's Motion to Reconsider Pursuant to Fed. R. Civ. P. 59(e) [DE 12]. The Court has carefully considered the motion, entire Court file, and is otherwise fully advised in the premises.

Standard of Review

A motion for reconsideration may be brought pursuant to Federal Rules of Civil Procedure 59(e) or 60(b). *Griffiths v. Parker*, 13-61247-CIV, 2014 WL 11696703, at *1 (S.D. Fla. May 30, 2014). "[I]t is well-settled that 'motions for reconsideration are disfavored' and that relief under Rule 59(e) is an extraordinary remedy to be employed sparingly." *Krstic v. Princess Cruise Lines, Ltd.*, 706 F. Supp. 2d 1271, 1282 (S.D. Fla. 2010) (quoting *In re Garcia*, 01-945-CIV-GOLD, 2002 WL 32372583, at *1 (S.D. Fla. Nov. 4, 2002)). Accordingly, and although not specifically articulated by Rule 59(e), courts have delineated three major grounds justifying reconsideration, to wit: "(1) an intervening change in controlling law; (2) the availability of new

APPENDIX D

evidence; and (3) the need to correct clear error or prevent manifest injustice." *Williams v. Cruise Ships Catering & Serv. Int'l, N.V.*, 320 F. Supp. 2d 1347, 1357 (S.D. Fla. 2004). Indeed, this Court has repeatedly maintained that motions for reconsideration "should only be granted where the movant shows newly discovered evidence, clear error, manifest injustice, or an intervening change in controlling law." *In re Garcia*, 2002 WL 32372583, at *1; *Rotte v. United States*, 14-14036-Marra, 2016 WL 7409774, at *1 (S.D. Fla. 2016). Moreover, "it is an improper use of the motion to reconsider to ask the Court to rethink what the Court . . . already thought through - rightly or wrongly," nor is it the appropriate vehicle for a "party to vent his dissatisfaction with the Court's reasoning." *Compagnoni v. United States*, No. 94-813-CIV, 1997 WL 416482 *1 (S.D. Fla.1997); *In re Garcia*, 2002 WL 32372583, at *1 (citation omitted).

Pursuant to Rule 60(b), the district court may relieve a party from a final judgment, order, or proceeding based on newly discovered evidence. *See* Fed. R. Civ. P. 60(b)(2). The Eleventh Circuit has concluded, nevertheless, that the AEDPA's successive-petition rules apply to Rule 60(b) motions seeking relief from a judgment denying § 2255 relief. *See In re Medina*, 109 F.3d 1556, 1561 (11th Cir. 1997); *see also Felker v. Turpin*, 101 F.3d 657, 661 (11th Cir. 1996) (Rule 60(b) cannot be used to circumvent restraints on successive-habeas petitions); *Mobley v. Head*, 306 F.3d 1096 (11th Cir. 2002) (*Felker* established a "bright line rule" that the successive-petition restrictions in § 2244(b) apply to all Rule 60(b) motions filed by habeas petitioners).

Background

This matter relates to Petitioner's motion to vacate, pursuant to 28 U.S.C. §2255, attacking the constitutionality of his convictions and sentences for conspiracy to commit mail fraud, eight counts of mail fraud, two counts of wire fraud, conspiracy to commit money laundering, eight counts of promoting money laundering, four counts of money laundering transactions, four counts of money laundering transactions over $10,000, three counts of causing misbranded food to be introduced into interstate commerce, and two counts of criminal contempt, entered following a jury verdict in case no. 07-80138-CR-MARRA. On January 6, 2012, the Eleventh Circuit Court of Appeals *per curiam* affirmed the convictions and sentences in a written, but unpublished decision. (Cr-DE#330). Certiorari review was denied on October 1, 2012. (Cr-DE#336).

The movant returned to this court less than a year later, in September 2013, timely filing his first motion to vacate, pursuant to 28 U.S.C. §2255, assigned case no. 13-80993-Civ-Marra. The §2255 motion was denied on the merits on April 24, 2015. *See* case no. 13-80993-CV-MARRA, DE 38. No direct appeal was prosecuted.

Petitioner returns again, filing another §2255 motion, claiming he is entitled to a review on merits under §2255(f) because the claims raised herein are based on newly discovered evidence. DE 1:3. He suggests he was unable to discover the claims sooner because the government had Dr. Forgione, a coconspirator, who testified before the grand jury in his case, imprisoned in a separate facility, making it difficult

for the movant to communicate with the doctor. He argues this matter should not be deemed to be a second or successive §2255 motion because he could not have presented the evidence he now has, which include two sworn affidavits from Dr. George Forgione dated September 9, 2016 and July 20, 2017. DE 1 at 18-21. Petitioner made this same argument in his Objection to Magistrate's Report and Recommendation. DE 5.

Discussion

> Now Petitioner
>
> is asking the court to reconsider its denial of a hearing because in my original 2255 motion this court denied Ground 2, claim 2.1 for ineffective assistance of counsel for counsel's failure to investigate and call an exculpatory witness, my co-defendant Dr. George Forgione, to testify. The court based its denial on, and I quote Magistrate White's decision: "in claims . . . 2.1 . . . The movant provides no affidavit or other objective evidence in this §2255 proceeding that these purported witnesses would have testified as proffered. Such a bar and conclusory allegation, bereft of record in support, is subject to summary dismissal. In addition to not providing any affidavit from the witnesses to establish that they would have provided exculpatory evidence, it is highly likely that none of these witnesses would have testified as proffered."

DE 12 at 5-6. The language quoted above comes from Judge White's Report in Petitioner's first Motion to Vacate case, dated April 24, 2015, which recommended denying Petitioner's first §2255 motion on the merits. *See* case no. 13-80993-CV-MARRA, DE 38 at page 34 of 52. Now Petitioner asserts, "[c]ontrary to Magistrate White's contention[,] Dr. Forgione is prepared to testify according to his two sworn affidavits to everything I claimed he would have testied (sic) to." DE 12 at 6.

Petitioner is free to seek a certificate of appealability based on newly discovered evidence, but he is seeking it from the wrong court. A federal prisoner, like Petitioner, who has already filed a § 2255 motion and received review of that motion, as he has, *is required to move the court of appeals* for an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct sentence. *See* 28 U.S.C. §2255(h); 28 U.S.C. §2244(b)(3)(A).

A second or successive motion must be certified as provided in § 2244 by a panel of the appropriate court of appeals to contain:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h). While Petitioner asserts that this "subsequent § 2255 motion" is not truly a second or successive motion, that issue may not be considered by this Court. As explained in the Report of the Magistrate Judge and in the final judgment, this Court does not have jurisdiction to consider the merits of what plainly appears to be a successive § 2255 motion. *Farris v. U.S.*, 333 F.3d 1211, 1216 (11th Cir. 2003) (Because Farris did not have authorization from the Eleventh Circuit before filing his Rule 60(b) motion, the district court did not err in denying his motion as an unauthorized successive § 2255 motion). As the Report advised, Petitioner should forthwith apply to the United States Eleventh Circuit Court of Appeals for the

authorization required by § 2244(b)(3)(A). The form to apply for such authorization was attached to the Magistrate's Report. DE 3. Accordingly, it is hereby

ORDERED AND ADJUDGED that Petitioner's Motion to Reconsider Pursuant to Fed. R. Civ. P. 59(e) [DE 12] is DENIED.

DONE AND ORDERED in chambers at West Palm Beach, Palm Beach County, this 10th day of April, 2018.

KENNETH A. MARRA
United States District Judge