

United States Court of Appeals  
FOR THE  
SECOND CIRCUIT

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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 23<sup>rd</sup> day of December, two thousand twenty.

Present:

Raymond J. Lohier, Jr.,  
Susan L. Carney,  
William J. Nardini,  
*Circuit Judges.*

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Luis C. Paulino,

*Petitioner-Appellant,*

v.

20-1578

Thomas Griffin, Superintendent,

*Respondent-Appellee.*

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Appellant, pro se, moves for a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motion is 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

  
*Catherine O'Hagan Wolfe*

(Appendix "A")

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
LUIS C. PAULINO,

Petitioner,

16-cv-3839 (PKC) (BM)

-against-

ORDER

THOMAS GRIFFIN,

Respondent.

-----X  
CASTEL, U.S.D.J.

Petitioner, Luis C. Paulino, filed a pro se habeas petition under 28 U.S.C. § 2254 challenging several aspects of his conviction in New York Supreme Court, Bronx County. Upon reference, Magistrate Judge Barbara Moses, filed a Report and Recommendation recommending denial of Paulino's petition. The Court, upon consideration of Paulino's objections, adopted Magistrate Judge Moses's Report and Recommendation in full and judgment was then entered. (Docs. 28 & 29). Subsequently, Paulino filed a motion under Rule 60(b), Fed. R. Civ. P., requesting relief from this judgment as well as a notice of appeal, both of which were dated April 27, 2020 and were docketed by the Court on May 14, 2020. (Docs. 31 & 32).

As an initial matter, the Court retains jurisdiction over Paulino's Rule 60(b) motion. "Under the Federal Rules of Appellate Procedure, . . . if a party (1) files a motion under Federal Rule of Civil Procedure 60(b) within 28 days after judgment is entered and (2) files a notice of appeal before the district court disposes of that motion, then the notice of appeal does not become 'effective' until after the district court rules on the motion." Banks v. Braun, No. 19-cv-6591 (CM), 2019 WL 6050426, at \*1 (S.D.N.Y. Nov. 15, 2019) (internal citations omitted) (citing Fed. R. App. P. 4(a)(4)). This rule applies even when petitioner files a notice of appeal simultaneously with the Rule 60(b) motion. Sankara v. City of New York, 745 Fed. App'x 426, 427 (2d Cir. 2018)

(Appendix "B-1")

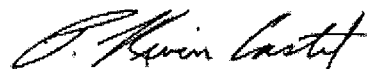
(summary order). Though received by the Court on a later date, Paulino's Rule 60(b) motion was dated within the prescribed 28-day period and the Court will presume it to be timely. Paulino's notice of appeal was signed and submitted on the same day. Accordingly, the Court retains jurisdiction to resolve petitioner's Rule 60(b) motion despite the simultaneous notice of appeal.

Rule 60(b) permits a party to seek relief from a judgment for "mistake, inadvertence, surprise, or excusable neglect," among other reasons. Fed. R. Civ. P. 60(b). Here, Paulino contends that the Court, in adopting Magistrate Judge Moses's Report and Recommendation, failed to liberally construe his submissions and to consider the strongest constitutional arguments that could be advanced as required for pro se petitions. (Doc. 31 at 2, 4). However, in reviewing and adopting Magistrate Judge Moses's Report and Recommendation, the Court did liberally construe Paulino's submissions and provided appropriate consideration to the fact Paulino's substantive arguments were not being advanced by a trained lawyer. Accordingly, the Court finds no mistake or inadvertence in its April 6, 2020 Opinion and Order and denies petitioner's Rule 60(b) motion.

#### CONCLUSION

The Court DENIES petitioner's Rule 60(b) motion.

SO ORDERED.



P. Kevin Castel  
United States District Judge

Dated: New York, New York  
August 18, 2020

(Mailed to Luis Paulino on August 18, 2020)

( Appendix "B-2" )

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

-----X  
LUIS C. PAULINO,

Petitioner,

16 CIVIL 3839 (PKC) (BM)

-against-

**JUDGMENT**

THOMAS GRIFFIN

Respondent.  
-----X

It is hereby **ORDERED, ADJUDGED AND DECREED**: That for the reasons stated in the Court's Opinion and Order dated April 6, 2020, the R&R is adopted in its entirety; Paulino has not made a substantial showing of the denial of a constitutional right and, accordingly, a certificate of appealability will not issue; the Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from the Order would not be taken in good faith and so in forma pauperis status is denied; judgment is entered for the respondent, and the case is closed.

**DATED:** New York, New York  
April 8, 2020

RUBY J. KRAJICK

BY:

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Clerk of Court

*David J. Thomas*  
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Deputy Clerk

(Appendix "B-3")