APPENDIX A:

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W.D.N.Y.
11-cv-153
Geraci, 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 4th day of May, two thousand twenty-two.

Present:

Guido Calabresi,
José A. Cabranes,
Joseph F. Bianco,
Circuit Judges.

Reggie D. Caswell,

Petitioner-Appellant,

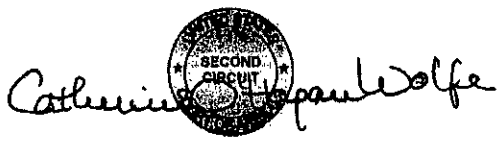
v. 21-3068

Steven Racetti,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability, in forma pauperis status, and appointment of counsel. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has failed to show that "(1) jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 60(b) motion, and (2) jurists of reason would find it debatable whether the underlying habeas petition, in light of the grounds alleged to support the [Rule] 60(b) motion, states a valid claim of the denial of a constitutional right." *Kellogg v. Strack*, 269 F.3d 100, 104 (2d Cir. 2001) (per curiam).

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



APPENDIX B:

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

REGGIE CASWELL,

Petitioner,

v.

STEVEN RACETTI,

Respondent.

Case # 11-CV-00153-FPG

DECISION AND ORDER

INTRODUCTION

This is a proceeding pursuant to 28 U.S.C. § 2254, commenced by *pro se* petitioner Reggie Caswell. Presently before the Court is Caswell's Motion to Vacate the Judgment Pursuant to Fed. R. Civ. P. 60(b) ("Rule 60(b) Motion"). ECF No. 36. For the reasons discussed below, the Rule 60(b) Motion is DENIED.

BACKGROUND

The lengthy factual background and procedural history of this matter has been set forth in the Court's previous orders, *e.g.*, ECF No. 75, and Respondent's memoranda, *e.g.*, ECF No. 71, and need not be repeated in detail here. Briefly, the Petition, ECF No. 1, was denied on March 26, 2012, ECF No. 29, and the Second Circuit denied a certificate of appealability, ECF No. 43. Caswell filed a Rule 60(b) Motion, ECF No. 36, which was denied, ECF No. 40, and he appealed to the Second Circuit.

In a summary order, ECF No. 45, the Second Circuit found that the District Court (Telesca, D.J.) had not adjudicated all the claims in the Rule 60(b) Motion. Judge Telesca had identified

claims pursuant to Fed. R. Civ. P. 60(b)(2), (3), and (6) based on allegations that Respondent's failure to provide certain trial exhibits and other documents in connection with preparation of the appellate record affected the integrity of the habeas proceeding ("the defective appellate record claim"). However, the Second Circuit found, "[t]he district court did not address Appellant's claim that the apparent delay in hearing his state court appeal from an order re-sentencing him warrants habeas relief [("the appellate delay claim")]." ECF No. 45 at 1 (citing Dkt. 11-cv-153, [ECF No.] 1 at 29-31, [ECF No.] 3 at 56-57, [ECF No.] 37 at 8-9"). Because not all the Rule 60(b) claims had been adjudicated, the Second Circuit found, the order dismissing that motion was not a final order over which it could exercise appellate jurisdiction. *Id.* The Second Circuit remanded the matter so that the District Court could consider all claims in Rule 60(b) Motion "in the first instance." ECF No. 45 at 2.

Following remand, the case was stayed, ECF No. 48, while Caswell was pursuing his appeal of his 2010 resentencing in state court. The matter subsequently was transferred to the undersigned. On September 9, 2021, this Court issued a Decision and Order, ECF No. 75, granting Caswell's motion to lift the stay, ECF No. 58. The Court denied his accompanying requests for discovery and an evidentiary hearing and set a briefing schedule for additional submissions on the Rule 60(b) Motion.

Respondent, however, missed the filing deadline and sought a retroactive extension of time to file his response to the Rule 60(b) Motion. ECF No. 79. Via text order, ECF No. 80, the Court granted the request. Respondent filed his Memorandum in Opposition, ECF No. 82, along with the

Supplemental State Court Record, ECF No. 82-1, containing the records relating to Caswell's appeal of his 2010 resentencing.[1]

Caswell filed a Response in Opposition, ECF No. 83, in which he objected to Respondent's motion for a retroactive extension of time; requested that Respondent not be permitted to file additional pleadings; and demanded that the Petition be granted. Because ECF No. 83 was received after the Court granted the extension of time, the Court will construe it as a request for reconsideration and for default judgment against Respondent. Caswell also filed a Reply Affirmation, ECF No. 84, in response to Respondent's opposition to the Rule 60(b) Motion.

DISCUSSION

I. Motion to Strike

As Caswell notes, Respondent missed the October 11, 2021 deadline to respond to the Rule 60(b) Motion. In his application for a retroactive extension of time, Respondent averred that the assistant attorney general ("A.A.G.") assigned to the matter was in the process of winding down her tenure at the Attorney General's Office effective November 2, 2021, and Respondent did not realize the omission until November 3, 2021. ECF No. 79 at 2-3. Respondent apologized to the Court and Caswell, and requested an extension of time until November 12, 2021, in order to give

[1] The Appellate Division, Fourth Department, of New York State Supreme Court held that the 2010 resentencing was infirm because the Monroe County Supreme Court had deprived Caswell of his right to counsel by permitting him to represent himself without properly ruling on his multiple requests for assignment of counsel. *See* ECF No. 82-1 at 197; *People v. Caswell*, 134 N.Y.S.3d 879, 880 (4th Dep't 2020) (citations omitted). The matter accordingly was remitted for resentencing. *Id.* In 2021, Caswell was resentenced on Count 4 to an indeterminate term of 1 ½ to 3 years, concurrent with the longer persistent violent felony offender sentences on his other convictions. Caswell sought leave to appeal, which was denied by the New York Court of Appeals because the Appellate Division's order was not adverse to him. ECF No. 82-1 at 516. The Monroe County Supreme Court also denied Caswell's request to argue the newly imposed sentence. ECF No. 82-1 at 517.

the newly assigned A.A.G. time to marshal certain relevant state-court documents and familiarize himself with the case. *Id.* at 4.

Subject to certain exceptions not relevant here, Fed. R. Civ. P. 6(b) provides in pertinent part that "[w]hen an act may or must be done within a specified time, the court may, for good cause, extend the time . . . on motion made after the time has expired if the party failed to act because of excusable neglect." Fed. R. Civ. P. 6(b)(1)(B). "'Excusable neglect' under Rule 6(b) is a somewhat 'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of [the] movant.' Rather, it may encompass delays 'caused by inadvertence, mistake or carelessness,' at least when the delay was not long, there is no bad faith, there is no prejudice to the opposing party, and the movant's excuse has some merit." *LoSacco v. City of Middletown*, 71 F.3d 88, 93 (2d Cir. 1995) (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993); internal citations omitted)).

"The standard for granting [a motion for reconsideration] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked." *Shrader v. CSX Transp. Inc.*, 70 F.3d 255, 257 (2d Cir. 1995).

Caswell argues that Respondent's delay stretches back seven years to 2013, when the Rule 60(b) Motion was first filed. He correctly notes that Respondent did not file a response in opposition at that time. However, Judge Telesca never ordered Respondent to respond and did not set a briefing schedule for the motion. Thus, there was no court-imposed deadline that Respondent missed. As to the other factors involved in assessing excusable neglect, Caswell has not demonstrated that he was prejudiced by the delay or that Respondent acted in bad faith. The Court

therefore finds no basis for reconsideration of its grant of an enlargement of time under Rule 6(b)(1)(B). *See LoSacco*, 71 F.3d at 93 (upholding district court's enlargement of time for attorney to file bill of costs of time on ground of excusable neglect where counsel awarded attorney fees was on vacation when circuit court affirmed award, and bill of costs was filed nine days late). Accordingly, the Court adheres to its prior order granting the extension and will not strike Respondent's Memorandum in Opposition.

II. Motion for Default Judgment

Caswell asserts that Respondent's failure to respond to the Rule 60(b) Motion within the original deadline entitles him to default judgment granting the Petition. Caswell cites no legal authority for this proposition. It is well settled that even the willful failure to respond to a petition for habeas corpus does not entitle the petitioner to a default judgment. *See Bermudez v. Reid*, 733 F.2d 18, 22 (2d Cir. 1984) (although state's disregard of district court's orders to respond to habeas corpus petition was inexcusable, default judgment granting petition was improper and district court should have reached merits of petitioner's claim); *see also Gordon v. Duran*, 895 F.2d 610, 612 (9th Cir. 1990) ("The failure to respond to claims raised in a petition for habeas corpus does not entitle the petitioner to a default judgment."); *Aziz v. Leferve*, 830 F.2d 184, 187 (11th Cir. 1987) ("[A] default judgment is not contemplated in habeas corpus cases."). Caswell's argument is meritless and his request for entry of default is denied.

III. Rule 60(b) Motion

A. Applicable Legal Principles

Rule 60(b) provides, in relevant part, that:

> the court may relieve a party . . . from a final judgment, order, or proceeding 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 . . . , misrepresentation, or misconduct by 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 that justifies relief.

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

"In the habeas context, Rule 60(b) may be invoked 'only when the . . . motion attacks the integrity of the habeas proceeding and not the underlying criminal conviction.'" *Tripathy v. Schneider*, No. 20-CV-6366-FPG, 2021 WL 274440, at *1 (W.D.N.Y. Jan. 13, 2021) (quoting *Harris v. United States*, 367 F.3d 74, 77 (2d Cir. 2004); footnote omitted). Because Caswell "has already filed one § 2254 proceeding, the Court must determine whether the current filing is 'a *bona fide* Rule 60(b) motion [or] a disguised second or successive habeas petition,' *Hall v. Haws*, 861 F.3d 977, 985 (9th Cir. 2017), subject to 28 U.S.C. § 2244(b)." *Id.* Though "there is no bright-line rule" for making this determination, *id.*, the Court is guided by the Supreme Court's decision in *Gonzalez v. Crosby*, 545 U.S. 524 (2005). *See Tripathy*, 2021 WL 274440, at *1.

"A 'claim' as used in § 2244(b) is an asserted federal basis for relief from a state court's judgment of conviction." *Gonzalez*, 545 U.S. at 530. If a Rule 60(b) motion contains such a "claim," then it is an "application for habeas relief" subject to 28 U.S.C. § 2244(b). *See id.* at 531. For example, a motion "that seeks to add a new ground for relief will . . . qualify" as an "application for habeas relief," as will an attack on "the federal court's previous resolution of a claim on the merits, since alleging that the court erred in denying habeas relief on the merits is effectively

indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief." *Id.* at 532. On the other hand, a petitioner is not "making a habeas corpus claim . . . when he merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *Id.* at 532 n.4.

When a district court is presented with a Rule 60(b) motion that both asserts entitlement to habeas relief and attacks the integrity of the habeas proceeding, "the Court may deny, as outside the scope of Rule 60(b), the parts of the motion that assert a federal basis for substantive habeas relief, instead of sending that portion of the motion to the Second Circuit for possible certification under 28 U.S.C. § 2244(b)(3)(A)." *Tripathy*, 2021 WL 274440, at *2 (citing *Gitten v. United States*, 311 F.3d 529, 534 (2d Cir. 2002) ("[A]fter a district court has denied as meritless the portion of the 60(b) motion that the court considers to come within the scope of Rule 60(b), the court always has the alternative of simply denying, as beyond the scope of Rule 60(b), the balance of the motion, i.e., the portion believed to present new attacks on the conviction."); *Harris*, 367 F.3d at 82)).

B. The Rule 60(b) Claims

The Rule 60(b) Motion contains two claims—the defective appellate record claim that Judge Telesca adjudicated in the original order denying relief from judgment; and the unreasonable appellate delay claim that the Second Circuit found had not been decided. Because the Second Circuit has remanded the Rule 60(b) Motion for this Court to consider the issues "in the first instance," the Court has evaluated the defective appellate record claim anew.

1. Defective Appellate Record

Caswell appears to assert claims under subsections (2), (3), and (6) based on essentially the same factual allegations regarding the allegedly incomplete record on direct appeal:

> Was the integrity of the Habeas Corpus proceedings defective pursuant to Rule 60(b)(2)(3)(6) [sic] when the Court was deprived of jurisdiction to address said state law issues despite the fact that Petitioner '. . . was deprived of a sufficient appeal record . . .' (see, Point XI of Pet.) in order to demonstrate said issues on direct appeal in violation of the 28 U.S.C. § 2254(d)(1)(2)(e)(1)(2) [sic], U.S.C. 1st 5th 6th 8th 14th.

ECF No. 37 at 2. As Judge Telesca noted, Caswell is referring to the prosecution's alleged failure, in connection with his preparation of the record on direct appeal of his conviction and persistent violent felony offender sentencing, to provide him with Trial Exhibits #9 and #22, Sentencing Exhibits #4 - #7, and the bill of indictment related to his predicate felony conviction in Illinois. Judge Telesca found that all evidentiary items had been provided to the defense at the time of the relevant proceedings in state court and, accordingly, were not newly discovered evidence for purposes of Rule 60(b)(2). ECF No. 40 at 3-5. The Court agrees.

Furthermore, to the extent that Caswell is reiterating his unsuccessful habeas claim that he was denied his due process right to a complete appellate record, ECF No. 29 at 37, such a claim is outside the scope of Rule 60(b) because it "attacks the federal court's previous resolution of a claim on the merits," *Gonzalez*, 545 U.S. at 532 (emphasis and footnote omitted). Caswell's attempt to bring these allegations within the ambit of Rule 60(b) by arguing that the purportedly defective appellate record affected Judge Telesca's analysis of the Petition is unavailing. Whether or not certain exhibits were produced on appeal was irrelevant to Judge Telesca's finding that some

of Caswell's claims were purely state-law claims and, as such, were not cognizable on federal habeas review. In other words, Respondent's alleged failure to produce certain exhibits in connection with Caswell's state-court direct appeal did not affect the integrity of the federal habeas proceeding.

Turning to the argument under Rule 60(b)(3), ECF No. 37 at 6-7, asserting fraud, misconduct, and misrepresentation by the prosecutor, Judge Telesca noted that this was alleged to have occurred in a separate civil rights lawsuit. *See Caswell v. Green*, No. 1:10-CV-0166 MAT, 2013 WL 4015013 (W.D.N.Y. Aug. 6, 2013) (granting summary judgment to defendants on plaintiff's claim that the Monroe County District Attorney and the assistant district attorneys who prosecuted his case failed to turn over trial and sentencing exhibits), *appeal dismissed*, No. 13-3374 (2d Cir. Nov. 20, 2013) (finding that appeal lacked an arguable basis in law or fact). The Court agrees with Judge Telesca's characterization of the allegations as "meritless." ECF No. 40 at 6.

Moreover, while a "failure to disclose or produce materials requested in discovery can constitute 'misconduct' within the purview of Rule 60(b)(3)," *Catskill Dev., L.L.C. v. Park Place Ent. Corp.*, 286 F. Supp. 2d 309, 314 (S.D.N.Y. 2003), Caswell has not explained how alleged omissions by defendants in a different lawsuit affected the integrity of *this* habeas proceeding. And, to the extent that his argument under Rule 60(b)(3) simply repackages his unsuccessful habeas claim based on the purported denial of a complete appellate record, it "attacks the federal court's previous resolution of a claim on the merits," *Gonzalez*, 545 U.S. at 532, and will be denied as outside the scope of Rule 60(b), *see Gitten*, 311 F.3d at 534.

that appellate delay caused substantial prejudice to the disposition of his appeal." *Id.*[2] Nonetheless, the Court is unable to reach the merits of the appellate delay claim because it does not allege a defect in the integrity of the habeas proceeding, but instead "seeks to add a new ground for relief," *Gonzalez*, 545 U.S. at 532. As such, it is outside the scope of Rule 60(b) and will be denied on that basis. *See Gitten*, 311 F.3d at 534.

CONCLUSION

For the foregoing reasons, the Rule 60(b) Motion, ECF No. 36, is DENIED. Caswell's requests in ECF No. 83 for reconsideration of the order granting an enlargement of time, ECF No. 79; to strike Respondent's response, ECF No. 82; and for default judgment granting the Petition, ECF No. 1, are DENIED. Because Caswell has failed to make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), a certificate of appealability is DENIED.

IT IS SO ORDERED.

Dated: December 6, 2021
Rochester, New York

HON. FRANK P. GERACI, JR.
United States District Judge
Western District of New York

[2] The Second Circuit has recognized, however, that "[t]he Supreme Court has not yet directly addressed the issue of whether the Constitution guarantees a speedy criminal appeal, once an opportunity for an appeal is provided." *Id.* at 718. Under AEDPA, circuit law cannot form the basis for habeas relief. *Rodriguez v. Miller*, 537 F.3d 102, 106–07 (2d Cir. 2007) (citation omitted).

APPENDIX C:

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APPENDIX C:

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 24th day of June, two thousand twenty-two.

Reggie D. Caswell,

Petitioner - Appellant,

v.

Steven Racetti,

Respondent - Appellee.

ORDER

Docket No: 21-3068

Appellant, Reggie D. Caswell, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request as a motion for reconsideration, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the motion and petition are denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

APPENDIX D:

APPENDIX D:

APPENDIX D:

APPENDIX D:

APPENDIX D:

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

REGGIE CASWELL,

Petitioner,

v.

STEVEN RACETTI,

Respondent.

Case # 11-CV-00153-FPG

DECISION AND ORDER

UNITED STATES DISTRICT COURT
FILED
SEP 09 2021
MARY C. LOEWENGUTH, CLERK
WESTERN DISTRICT OF NY

INTRODUCTION

Pro se petitioner Reggie Caswell ("Caswell" or "Petitioner") commenced this proceeding pursuant to 28 U.S.C. § 2254, challenging the judgment of conviction entered against him on April 11, 2006, in New York State Supreme Court, Monroe County (Kehoe, A.J.). The Court (Telesca, D.J.) denied the Petition on March 26, 2012, ECF No. 29, and the Second Circuit dismissed the appeal, ECF No. 35. Caswell's Motion to Vacate the Judgment Pursuant to Federal Rule of Civil Procedure 60(b) ("Rule 60(b) Motion"), ECF Nos. 36, 37, 38, & 39, was denied. ECF No. 40. The Second Circuit, however, remanded the Rule 60(b) Motion after finding that Judge Telesca failed to consider a claim raised therein. ECF No. 45. Judge Telesca stayed the matter, ECF No. 48, pending Caswell's completion of his appeal of a 2010 resentencing proceeding.

Caswell now has filed a combined Motion for an Evidentiary Hearing, Motion for Discovery, Motion to Lift the Stay, and Motion for Expansion of the Record ("Motion for Miscellaneous Relief"). ECF No. 58. Respondent has opposed the Motion for Miscellaneous Relief in its entirety. ECF No. 71. Caswell filed a Reply. ECF No. 72. For the reasons discussed below, the Motion for Miscellaneous Relief is GRANTED to the extent that the stay is LIFTED, and it is DENIED in all other respects.

BACKGROUND

I. The Trial, Conviction, Original Sentencing, and Direct Appeal

The conviction here at issue stems from Caswell's involvement in two separate incidents that occurred on the evening of August 27, 2005, in the Park Avenue area of the City of Rochester. Caswell went into the East Avenue Liquor Store and, under the guise of buying a bottle of gin, grabbed co-owner Nelson Habecker ("Habecker") by the shoulder and forced him behind the cash register. Caswell stuck what was later learned to be his hand in Habecker's back, warned him not to move, and threatened to kill him. Guessing correctly that Caswell was not holding a gun, Habecker turned around, at which point Caswell started throwing punches at him. During the ensuing struggle both men fell to the ground, knocking dozens of liquor bottles off the shelf and onto the floor. Habecker activated the silent alarm to notify the police. Caswell then ran out of the store, bleeding from a head would he had sustained from the breaking glass.

Caswell ran into a house located at 1341 Park Avenue, where he robbed the homeowners, a married couple, of their cash and attempted to force them to drive him away from the scene. The husband testified that Caswell, who was bloodied and smelling of alcohol, threatened him by sticking a hard object into his back.

Meanwhile, Habecker, who had followed Caswell from the liquor store, used a passerby's cell phone to call 911 and alert the police to Caswell's location. The police arrived before Caswell could make his getaway and arrested him. The police recovered fifty-one dollars in cash from Caswell, who told the police, "[Y]ou got the money back, so you caught me red handed." Shortly afterwards, all three victims identified Caswell as the perpetrator.

Caswell was indicted on the following charges: Robbery in the Second Degree (N.Y. Penal Law § 160.10(2-b); Count One), two counts of Burglary in the Second Degree (*id.* §§ 140.25(1-d), 140.25(2); Counts Two and Three), and Attempted Robbery in the Third Degree (*id.* §§ 110.00

and 160.05; Count Four). Counts One through Three related to the incident involving the couple at their home; Count Four related to the attempted robbery of the liquor store. *E.g.*, ECF No. 15-4 at 22.

Caswell represented himself at trial. He did not present any witnesses. The gist of the defense theory was that Caswell's actions at the liquor store were justified because Habecker made unwanted sexual advances on him, and that it was physically impossible for him to have robbed the couple on Park Avenue given the amount of time that allegedly elapsed between his exit from the liquor store and his arrest. The jury returned a guilty verdict as to all charges.

On the convictions for second-degree robbery and second-degree burglary, the Monroe County Supreme Court ("Trial Court") adjudicated Caswell as a persistent violent felony offender ("PVFO"), *see* N.Y. Penal Law § 70.08, and sentenced him to concurrent indeterminate terms of 25 years to life. On the conviction for attempted third-degree robbery, the Trial Court also sentenced Caswell as a PVFO to an indeterminate term of 20 years to life, to be served consecutively to the other sentences.

Caswell represented himself on direct appeal. The Appellate Division, Fourth Department, of New York State Supreme Court ("Appellate Division") unanimously affirmed the conviction. *People v. Caswell*, 56 A.D.3d 1300, 867 N.Y.S.2d 638 (4th Dept. 2008), *leave denied*, 11 N.Y.3d 923, *reconsideration denied*, 12 N.Y.3d 781, *cert. denied sub nom. Caswell v. New York*, 129 S. Ct. 2775 (2009).

II. The Motion Pursuant to C.P.L. §§ 440.10 and 440.20

On April 21, 2009, Caswell filed a *pro se* motion to vacate the judgment of conviction pursuant to New York Criminal Procedure Law ("C.P.L.") § 440.10 as well as a *pro se* motion to

set aside the sentence pursuant to C.P.L. § 440.20. In a December 7, 2009 order, ECF No. 15-7[1] at 25-28, the Trial Court rejected all the claims except for Caswell's argument that his PVFO sentence on the attempted third-degree robbery conviction (Count Four) was illegal. As the prosecution conceded, this conviction, which was for a Class E nonviolent felony offense and "based on conduct distinct from the facts underlying the other three counts, does not constitute a basis for the imposition of persistent violent felony offender treatment." ECF No. 15-7 at 27-28. Therefore, the Trial Court determined, the sentence of 20 years to life on the attempted third-degree robbery conviction had to be vacated and Caswell resentenced. *Id.*

III. The 2010 Resentencing

On January 8, 2010, Caswell appeared *pro se* before the Trial Court for resentencing on Count Four. The Trial Court sentenced him as a second felony offender to an indeterminate term of two to four years to be served consecutively to the other sentences. *E.g.*, ECF No. 16 at 20; ECF No. 71 at 4-5. None of the sentences were affected by the December 7, 2009 order and, as such, remained the same.

In an application dated January 28, 2010, Caswell filed a notice of appeal as to the resentencing and the portion of the C.P.L. § 440.20 motion that was denied. ECF No. 19 at 33. That day, Caswell also sent a letter to the Appellate Division, resubmitting his application for leave to appeal the denial of the C.P.L. § 440.10 motion. *See* ECF No. 15-7 at 45, 64.

On March 22, 2010, a justice of the Appellate Division issued an order denying leave to appeal denial of the C.P.L. §§ 440.10 and 440.20 motions. ECF No. 15-7 at 146. On March 31, 2010, the Appellate Division Clerk's Office sent Caswell a letter reiterating that his motion for leave to appeal the C.P.L. §§ 440.10 and 440.20 motions had been denied and, accordingly, he

[1] The state court records are docketed at ECF Nos. 15-1 through 15-9.

was "not entitled to assignment of counsel as nothing [was] currently pending before the Court[.]" ECF No. 58 at 31, ¶ 6 (citing ECF No. 1 at 49). Caswell asserts that this letter was the product of the Appellate Division's mistaken consolidation of his direct appeal of the 2010 resentencing, to which he was entitled as of right, with his discretionary appeal of the Trial Court's denial of the C.P.L. § 440.10 motion and the remainder of the C.P.L. § 440.20 motion. The Appellate Division did not assign counsel to perfect the direct appeal of the 2010 resentencing until early 2020, as discussed further below.

IV. The 2011 Federal Habeas Petition

Caswell filed his Petition on February 8, 2011, raising about a dozen claims in points numbered "I" through "XII." *See* ECF No. 1 at 3-4 (Points I – IX); 6 (Points X – XII). As relevant to the issues before the Court on the pending motions, Caswell asserted under Point XI that he was deprived of a meaningful appeal because the assistant district attorney handling his appeal refused to provide him with copies of People's Trial Exhibits #9 and #22; People's Sentencing Hearing Exhibits #4 - #7; and the Illinois Bill of Indictment. ECF No. 1 at 27-28. According to Caswell, lack of access to Trial Exhibits #9 and #22[2] precluded him from showing that he was "actually

[2] Judge Telesca observed in the order denying the Petition that "People's Exhibit #9 is the original liquor store surveillance videotape. When played on a normal VCR, its speed is substantially faster than real time. People's Exhibit #22 is a fair and accurate recording of the same images that appear in Exhibit #9, but it depicts those images in real time and may be played on a regular VCR. At trial, both exhibits were introduced into evidence, but only People's Exhibit #22 was played for the jury. T.350." ECF No. 29 at 40 (citing ECF No. 16 (Respondent's Memorandum of Law) at 67 n.12; citations to transcript omitted).

The liquor store owner testified that People's Exhibit #22 depicted in "real time speed" the events that occurred in his store at about 6:20 p.m. on August 27, 2005; Exhibit #9 showed the same events but at a faster speed. T.347, ECF No. 15-9 at 350. In addition, the prosecution also introduced several photographs captured from frames of the videotape, about which Habecker testified. For instance, Exhibit #27 depicted Caswell "grabbing [him] and beginning to shove [him] back[,]" and Exhibit #28 showed Caswell "beginning to hit [him]" and "pushing [him]." T.348, 354, ECF No. 15-9 at 351, 357. Notably, when the prosecutor requested to have People's Exhibits #9 and #22 and the photographs introduced into evidence, and then to have #22 played for the jury, Caswell had "no objections[.]" T.350-51, ECF No. 15-9 at 353-54. The prosecutor played Exhibit #22 and stopped at various frames to have Habecker describe what was being depicted, including Caswell "beginning [their] scuffle" and then Caswell "running out" of the store with Habecker chasing him. T.352, ECF No. 15-9 at 355. Caswell did not object during Habecker's direct testimony about

innocent," and lack of access to the Sentencing Exhibits and the Illinois Bill of Indictment meant he was unable to demonstrate "*per se* reversible error" in his PVFO sentence. *Id.* Under Point XII, Caswell claimed he was illegally sentenced as a PVFO based on an Illinois felony conviction that does not have all the essential elements of a violent crime under N.Y. Penal Law § 70.08(1)(B). ECF No. 1 at 29, Point XII & *id.*(1)(c). In addition, he alleged under Point XII that the Trial Court erroneously imposed consecutive sentences when resentencing him. ECF No. 1 at 30, Point XII(1)(d).

In his Memorandum of Law, ECF No. 16, Respondent argued that Caswell did not exhaust his claim that the sentencing court erred in imposing a consecutive sentence because, although Petitioner filed a notice of appeal of the January 8, 2010 resentencing, the appeal had not been perfected. *Id.* at 26. Respondent also contended that Caswell had not exhausted his claim that his prior felony conviction in Illinois was improperly used to impose PVFO status because Caswell had not sought leave to appeal the Trial Court's denial of that claim, which had been raised in the C.P.L. § 440.20 motion. *Id.* at 25-26. Respondent urged the Court to deny the unexhausted claims as plainly meritless under the authority of 28 U.S.C. § 2254(b)(2). *Id.* at 26 (citations omitted).

Caswell objected to Respondent's failure-to-exhaust argument, asserting that "any alleged appeal that 'remains pending but unperfected' in the Appellate Division, Fourth Department after that court rejected Petitioner's motion to appeal and request for counsel, 'renders such process ineffective to protect the rights of [your] Applicant' (28 U.S.C. § 2254(b)(1)(B)(ii))[.]" ECF No. 18 at 3, ¶ 7(e) (emphasis and brackets in original).

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the video, nor did he ask that Exhibit #9 also be played for the jury. Moreover, during his cross-examination of Habecker, Caswell did not question him about the surveillance videotape at all.

Judge Telesca found that Respondent appeared to be correct as to Caswell's failure to exhaust certain sentencing claims but, because the claims clearly did not warrant habeas relief, declined to discuss the exhaustion issue further. ECF No. 29 at 8-9. Instead, Judge Telesca opted to dismiss them as meritless under the authority of 28 U.S.C. § 2254(b)(2). *See id.* at 9 ("[I]n habeas corpus cases, potentially complex and difficult issues about the various obstacles to reaching the merits should not be allowed to obscure the fact that the underlying claims are totally without merit.") (quotation omitted). Judge Telesca found that all the claims regarding the PVFO sentences raised purely state-law questions that were not cognizable on federal habeas. *See id.* at 33, 36. Judge Telesca dismissed the Petition's remaining claims as non-cognizable or meritless and declined to issue a certificate of appealability. *Id.* at 41.

V. The Appeal of the Judgment Dismissing the Petition

Caswell timely filed a notice of appeal. ECF No. 31. On June 15, 2012, the Second Circuit issued a summary order denying Caswell's motions for a certificate of appealability, to proceed *in forma pauperis*, to expedite his appeal, and for appointment of counsel, finding that he had failed to make a substantial showing of the denial of a constitutional right. *Caswell v. Racetti*, 12-1718 (2d Cir. June 15, 2012), ECF No. 36 at 1 (citations omitted). Accordingly, the Circuit dismissed the appeal. *Id.* This order was entered as a mandate on July 30, 2012. ECF No. 34; duplicated at ECF No. 35.

VI. The Rule 60(b) Motion

Caswell filed the Rule 60(b) Motion on March 8, 2013. *See* ECF Nos. 36 (Notice of Motion); 37 (Affidavit); 38 (Memorandum of Law); 39 (Affirmation). He asserted one claim under "Point I," as follows:

> Was the integrity of the Habeas Corpus proceedings defective pursuant to Rule 60(b)(2)(3)(6) [sic] when the Court was deprived of jurisdiction to address said state law issues despite the fact that Petitioner '. . . was deprived of a sufficient appeal record . . .' (see, Point XI of Pet.) in order to demonstrate said issues on direct appeal in violation of the 28 U.S.C. § 2254(d)(1)(2)(e)(1)(2) [sic], U.S.C. 1st 5th 6th 8th 14th.

ECF No. 37 at 2. Judge Telesca denied the Rule 60(b) Motion in a Decision and Order, ECF No. 40, entered March 27, 2014. Caswell's claim under Rule 60(b)(2), ECF No. 37 at 2-6, was construed as a reiteration of his assertion that he was deprived of a meaningful appeal because the prosecution allegedly did not provide him with Trial Exhibits #9 and #22, Sentencing Exhibits #4 - #7, and the bill of indictment related to his Illinois felony conviction. Judge Telesca found that all evidentiary items had been provided to the defense at the time of the relevant proceedings in state court and, accordingly, were not newly discovered evidence for purposes of Rule 60(b)(2). ECF No. 40 at 3-5. Judge Telesca construed the Rule 60(b)(3) claim, ECF No. 37 at 6-7, as asserting fraud and misrepresentation by the prosecutor, but in connection with a proceeding separate from the habeas petition—namely, a civil rights lawsuit in which Caswell sued the Monroe County District Attorney and the assistant district attorneys who prosecuted his case, arguing that they had failed to turn over the items referenced in the Rule 60(b)(2) claim. *See Caswell v. Green*, No. 1:10-CV-0166 MAT, 2013 WL 4015013, *3 (W.D.N.Y. Aug. 6, 2013) (granting summary judgment to defendants), *appeal dismissed*, No. 13-3374 (2d Cir. Nov. 20, 2013) (finding that appeal lacked an arguable basis in law or fact). Judge Telesca found the Rule 60(b)(3) claim meritless. ECF No. 40 at 6. As to the Rule 60(b)(6) claim, ECF No. 37 at 7-9 Judge Telesca found that the requisite "extraordinary circumstances" were "absent in this case, where Caswell has been permitted to argue these meritless claims repeatedly, in multiple state and federal fora." ECF No. 40 at 7. Judge Telesca dismissed the Rule 60(b) motion in its entirety and denied a certificate of appealability. *Id.*

VII. The Second Circuit's Remand of the Rule 60(b) Motion

Caswell appealed Judge Telesca's denial of the Rule 60(b) Motion. ECF No. 41. In a summary order dated September 29, 2014, the Second Circuit dismissed the appeal for lack of jurisdiction because "[t]he district court did not address Appellant's claim that the apparent delay in hearing his state court appeal from an order re-sentencing him warrants habeas relief." ECF No. 45 (Mandate) at 1 (citing "Dkt. 11-cv-153, doc. 1 at 29-31, doc. 3 at 56-57, doc. 37 at 8-9"). As support for its assertion that Caswell had raised a claim of appellate delay in hearing his resentencing appeal, the Second Circuit cited the Petition, ECF No. 1; the Memorandum of Law in Support of the Petition, ECF No. 3; and the Affidavit in Support of the Rule 60(b) Motion, ECF No. 37.

However, the pages cited in ECF No. 1 do not explicitly assert a claim of appellate delay; they simply recount the procedural history of the C.P.L. §§ 440.10 and 440.20 motions and the 2010 resentencing. The pages cited in ECF No. 3 relate to Caswell's claim that he was denied a meaningful direct appeal of his conviction (not an appeal of the 2010 resentencing) because he did not have access to certain exhibits in preparing the appellate record.

ECF No. 37, however, does mention the appeal of the 2010 resentencing. Caswell states that "counsel still has not been assigned and no appeal brief has been filed. As such, I continue to suffer an illegal indeterminate life sentence, and this Court made no ruling on *the issue* when said habeas corpus pet. was denied." *Id.* at 8-9 (emphasis supplied). The Second Circuit apparently construed "the issue," *id.* at 9, as being one of appellate delay, rather than the correctness of the PVFO sentence as to which Judge Telesca had "made no ruling" because it was not cognizable. The Second Circuit went on to observe that "[t]he Appellate Division, Fourth Department, has granted [Caswell] counsel to proceed on his appeal in that court[,]" and his "brief in his state-court

appeal is due by October 2014." *Id.* According to the Second Circuit, Judge Telesca had not ruled on all the claims presented in Caswell's Rule 60(b) motion, which meant that the order denying the Rule 60(b) motion was a non-final order over which it lacked jurisdiction. *Id.* at 1-2(citations omitted). Accordingly, the panel remanded the matter "so that the district court can consider all claims raised in [Caswell]'s Rule 60(b) motion in the first instance." *Id.* at 2.

VIII. The Stay Order

On June 9, 2015, Judge Telesca ordered this case stayed during the pendency of Caswell's appeal "with regard to a sentencing issue that he had mentioned in his motion to vacate," ECF No. 48 at 1, finding that it could not "comply with the Second Circuit's order until such time as Petitioner's appeal in the Fourth Department is completed." *Id.* at 2. Caswell was ordered to provide notice within 30 days of the "final order issued in the state courts disposing of the appeal," and the Court then would lift the stay. *Id.*

IX. Perfection of the Appeal of the 2010 Resentencing

At some point in 2020, the Appellate Division appointed appellate counsel, and the appeal of the 2010 resentencing was perfected. Caswell also filed a *pro se* supplemental appellate brief reiterating his unsuccessful arguments from the C.P.L. §§ 440.10 and 440.20 motions.

In an order issued December 23, 2020, the Appellate Division agreed with appellate counsel's chief contention that Caswell was deprived of his right to counsel when the Trial Court "permitted defendant to represent himself at the resentencing proceeding without properly ruling on defendant's multiple requests for assignment of counsel[.]" *People v. Caswell*, 134 N.Y.S.3d 879, 880 (4th Dep't. 2020) (citations omitted). The Appellate Division found that this omission by the Trial Court "had an adverse impact on the resentencing proceeding because the absence of counsel prevented defendant from, *inter alia*, adequately contesting his adjudication as a second

felony offender and arguing against the imposition of the maximum sentence permissible under the law." *Id.* The Appellate Division accordingly reversed the resentence and remitted the matter for resentencing on the attempted third-degree robbery conviction (Count Four) and appointment of counsel. *Id.* The sentences on Counts One through Three were not disturbed by the December 23, 2020 remittitur.

In his *pro se* supplemental appellate brief, Caswell raised a number of claims asserting that the Trial Court erroneously denied the remainder of the C.P.L. § 440.20 motion. However, as noted above, leave to appeal the denial of the C.P.L. § 440.20 motion had been denied; thus, the Appellate Division held, those "contentions . . . [were] not properly before [it] on appeal from the resentence." *Id.* at 880 (citations omitted).

X. The 2021 Resentencing

The Trial Court appointed counsel to represent Caswell but declined to hold a new predicate felon hearing. On May 12, 2021, the Trial Court resentenced him on the attempted third-degree robbery conviction (Count Four) to an indeterminate term of 1½ to 3 years' imprisonment, to be served consecutively to the sentences on Counts One through Three. ECF No. 71 at 16; ECF No. 72 at 10. Caswell filed a notice of appeal from that resentencing on May 17, 2021, and appellate counsel has been assigned. *Id.*

In papers dated May 24, 2021, Caswell also moved in the Trial Court to reargue his resentencing pursuant to New York Civil Practice Law and Rules ("C.P.L.R.") § 2221(d). *See* ECF No. 71 at 70-105. He asserts, among other things, that even though his PVFO sentences were not at issue in the 2021 resentencing, the Trial Court should have conducted a new predicate felon hearing instead of relying on the original hearing held in 2006. Caswell also has reiterated his arguments that his PVFO sentences on Counts One through Three are illegal for the reasons

articulated in his Petition, including that they were affirmed in the absence of a complete appellate record. It is unclear to the Court whether the reargument motion is still pending.

XI. Petitioner's Motions in Federal Court

A. The Motion to Stay

Caswell asserts that he has complied with the conditions in the stay order, ECF No. 40, and requests that the Court lift the stay and decide the Rule 60(b) Motion in accordance with the Second Circuit's Mandate. *See* ECF No. 58 at 8. Respondent opposes lifting the stay because Caswell "is still litigating in state court some of the same claims he raised in his habeas petition and Rule 60(b) motion—or, at the least, issues that are intertwined with those claims." ECF No. 71 at 17; *see also id.* at 19-22. Respondent notes that Judge Telesca stayed the case for the pendency of the appeal of the 2010 resentencing, ECF No. 71 at 20 (citing ECF No. 48 at 1), and asserts that "that appeal has not concluded" because "Petitioner is now returning to the Fourth Department to appeal his new resentencing, imposed in May 2021, and has moved to re-argue the [Trial] Court's resentence on the ground that it should not have based the resentence on the original PVFO hearing, which was held in 2006." *Id.*

As an initial matter, the Court notes that the 2021 resentencing is a new, intervening judgment, separate from the 2010 resentencing. *See Magwood v. Patterson,* 561 U.S. 320, 341-42 (2010) (habeas petitioner who was sentenced to death obtained a resentencing at which death penalty was reimposed; he filed another habeas petition arguing that he did not receive fair notice at trial that he could be sentenced to death; Supreme Court held that, even though petitioner had filed a previous habeas petition challenging the initial death sentence, the resentencing led to a new judgment, and petitioner's first habeas application challenging that new judgment could not be second or successive); *see also, e.g.*, *Riley v. Conway*, No. 06–CV–1324 (DLI)(JO), 2011 WL

839477, at *4 (E.D.N.Y. Mar. 7, 2011) (after petitioner's resentencing (not as a result of a conditional grant of a petition for a writ of habeas corpus but rather upon a remand directed by the Appellate Division), petitioner brought a second petition; district court held that "where a state prisoner's Section 2254 petition is his first collateral attack on the 'intervening judgment' between his first and second § 2254 petitions, the petition is not successive under 28 U.S.C. § 2244(b)") (citing *Magwood*, 561 U.S. at 339, 342). Caswell is entitled to challenge it by means of a new direct appeal, which he is apparently doing.

Contrary to Respondent's contention, the appeal of the 2010 resentencing has concluded. A search of Westlaw reveals that the Appellate Division denied Caswell's Motion No. (1181/20) for reargument of its December 23, 2020 order on March 19, 2021. *People v. Caswell*, 140 N.Y.S.3d 819 (Mem), 2021 N.Y. Slip Op. 01704 (4th Dep't 2021). And, on March 23, 2021, a judge of the New York Court of Appeals denied leave to appeal the December 23, 2020 order. *People v. Caswell*, 36 N.Y.3d 1096 (2021). Thus, the appeal referenced in the stay order—*i.e.*, the direct appeal of the 2010 resentencing—has concluded.

Respondent also contends that the stay should remain in place because the issues Caswell has raised in his reargument motion filed in the Trial Court, and the issues he is likely to raise in his direct appeal of the 2021 resentencing, "overlap with those pleaded in his habeas petition and in his Rule 60(b) motion[,]" ECF No. 71 at 20, namely, various "procedural and substantive challenges to the PVFO proceeding" and an argument that "the prosecutor's refusal to provide copies of the PVFO sentencing hearing exhibits deprived him of a meaningful appeal." *Id.* Respondent observes that Caswell is likely to continue litigating the same arguments in state court until the direct appeal and reargument motion "have run their course." ECF No. 71 at 21. If the stay is lifted, Respondent argues, this Court and the state court will consider the same issues

simultaneously, thereby frustrating judicial efficiency and the principles of comity underlying the exhaustion requirement. *Id.*

Given the substance of Caswell's current filings in this Court and the Appellate Division, Respondent's prediction about Caswell's future litigation plans is reasonable. As Respondent points out, Caswell is continuing to litigate claims regarding the PVFO sentences on Counts One through Three and his alleged actual innocence that have already been decided unfavorably to him at least once by the state courts (on direct appeal of the conviction and original sentencing, and in the C.P.L. §§ 440.10 and 440.20) and federal courts (in the order denying the Petition and the order denying a certificate of appealability and dismissing the appeal). It bears noting, however, that the two resentencing proceedings concerned *only* the sentence on Count Four—not the PVFO sentences on Counts One through Three, or the claim of actual innocence.

The Second Circuit did not remand the case for reconsideration of the Petition; it only remanded it for consideration of the Rule 60(b) Motion. As set forth above, Caswell raises two claims in the Rule 60(b) Motion—(1) the integrity of the habeas corpus proceeding was "defective" because he was deprived of a sufficient appeal record; and, (2) as stated by the Second Circuit in its remand order, the district court failed to consider a claim allegedly raised in the Petition that he suffered an unreasonable appellate delay in connection with his appeal of the 2010 resentencing. Thus, the scope of the current remand order is narrower than suggested by both parties. It does not give Caswell license to relitigate his Petition anew.[3]

[3] Indeed, it is well settled that relief under Rule 60(b) in the habeas context is available only where the movant "attacks the integrity of the habeas proceeding and *not the underlying criminal conviction.*" *Harris v. United States*, 367 F.3d 74, 77 (2d Cir. 2004) (citing *Rodriguez v. Mitchell*, 252 F.3d 131 (2d Cir. 2001); emphasis supplied). Caswell's claims of actual innocence and illegal PVFO sentences constitute attacks on the criminal judgment authorizing his incarceration. Therefore, those claims are "beyond the scope of Rule 60(b)," *Gitten v. United States*, 311 F.3d 529, 534 (2d Cir. 2002), and vacatur of the judgment cannot be granted on them, *see Harris*, 367 F.3d at 82 (citation omitted).

The appeal of the 2010 resentencing has completed, meaning that the primary condition of the stay has been fulfilled. Therefore, the Court GRANTS the Motion for Miscellaneous Relief to the extent it will LIFT the stay.

B. Motions for Discovery, an Evidentiary Hearing, and Expansion of the Record

"A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). However, "[a] judge may, for *good cause*, authorize a party to conduct discovery under the Federal Rules of Criminal Procedure or Civil Procedure, or in accordance with the practices and principles of law." Rules Governing § 2255 Proceedings, Rule 6(a), 28 U.S.C.A. foll. § 2255 (emphasis supplied). To show "good cause," a petitioner must present "'specific allegations'" that provide "'reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief. . . .'" *Bracy*, 520 U.S. at 908-09 (quoting *Harris*, 394 U.S. at 300; first ellipsis in original).

When deciding whether to grant an evidentiary hearing in a § 2254 proceeding, the district court "must consider whether such a hearing could enable an application to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). Thus, "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Id.*

Caswell "seeks the following evidence maintained by the Respondent: a) Resp. Trial Exhibit #9 DVD. . . [;] b) Resp. Trial Exhibit #22 DVD. . . [; and] c) Resp. Sent. Exhibits #1 - #7 (i.e., 1988 Plea/Sentence Trans. [regarding the Onondaga County predicate felony conviction] along with purported waiver of indictment and approval of said waiver along with 1993 Illinois

State Bill of Indictment demonstrating Point XI [of the Petition]." ECF No. 58 at 18-19, ¶ 15(a). Point XI of the Petition asked, "was defendant deprived of a meaningful appeal based on upon the [People's appellate attorney's] refusal to provide defendant/appellant with a copy of People's Trial Exhibit #9] in violation of various state and federal rights, including *Brady v. Maryland*, 373 U.S. 83 (1963). ECF No. 1 at 6.

Caswell asserts that People's Trial Exhibits #9 and #22 will enable him to demonstrate his actual innocence, *see* ECF No. 58 at 11-12, 31-47; and that the sentencing exhibits will enable him to demonstrate that his sentence is "illegal and unconstitutional." *Id.* at 17, 49-56. He also mentions that the notice of predicate felony hearing with which he was initially served was incorrect because it cited the persistent felony offender statute (N.Y. Penal Law § 70.10) instead of the PVFO statute (N.Y. Penal Law § 70.08). Caswell then wants to "expand the record" to include this discovery material, which he intends to use in an evidentiary hearing focused on proving he is actually innocent and that his PVFO sentences are illegal.

Caswell's request for discovery warrants denial for multiple reasons. First and foremost, Caswell admits that he already has been provided with the requested items. *See* ECF No. 58 at 16, ¶ 12(h). Indeed, he has attached copies of the sentencing exhibits as Exhibits A, B, and C to his Reply Affirmation in support of the Motion to Lift the Stay. *See* ECF No. 72 at 22-64. Therefore, the request for discovery is moot. *See, e.g., Smith v. McGinnis*, No. 01CIV1363RCCHBP, 2003 WL 21383385 (S.D.N.Y. June 16, 2003) (government's compliance with *pro se* habeas petitioner's motion to compel discovery rendered petitioner's motion moot; government answered petitioner's motion to compel by letter agreeing to produce specific documents sought by petitioner and attaching copies of requested documents). Caswell's request for discovery is DENIED as moot.

With respect to the evidentiary hearing, the claims that Caswell wishes to litigate have been rejected by Judge Telesca as not cognizable on federal habeas review. *See* ECF No. 29 at 16 (actual innocence not cognizable), 36-37 (claims based on errors in applying state recidivist sentencing enhancement statute not cognizable). The Second Circuit dismissed the appeal of the judgment dismissing the Petition after finding that Caswell had failed to make a substantial showing of the denial of a constitutional right and was not entitled to a certificate of appealability. This outcome is unsurprising given that neither the Supreme Court nor any circuit court of appeal has ever recognized "actual innocence" as a constitutional ground for obtaining release via habeas corpus. *See Herrera v. Collins*, 506 U.S. 390, 400 (1993) ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. . . .") (citations omitted); *see also Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 71 (2009) (stating that whether a "federal constitutional right to be released upon proof of 'actual innocence'" "exists is an open question").

Similarly, the Second Circuit has held that "[w]hether a New York court erred in applying a New York recidivist sentencing enhancement statute is a question of New York State law, not a question of fact. And it is well-established that '[i]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.'" *Saracina v. Artus*, 452 F. App'x 44, 46 (2d Cir. 2011) (unpublished opn.) (quoting *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991)). Indeed, the Second Circuit has "previously held that whether a foreign conviction can serve to enhance a New York State sentence is a question of state law not cognizable on federal habeas review." *Id.* (citing *United States ex rel. Dennis v. Murphy*, 265 F.2d 57, 58 (2d Cir. 1959) (*per curiam*) ("The use of a Canadian conviction in the application of the state multiple offender law is

one of state procedure and presents no federal question."); *United States ex rel. Read v. Martin*, 263 F.2d 606, 606–07 (2d Cir. 1959) (*per curiam*) ("[T]he question of using a Canadian conviction for robbery not challenged for fairness in the application of the state second offender law, N.Y. Penal Law § 1941, seems preeminently one of state procedure.")).

The Second Circuit has consistently rejected as non-cognizable claims that petitioners were erroneously sentenced as persistent felony offenders or persistent violent felony offenders. *See Saracina*, 452 F. App'x at 45 (petitioner asserted he was wrongly adjudicated a persistent felony offender and subjected to recidivist sentencing under New York State law; he argued that such a claim was cognizable on federal habeas review because the state court made an unreasonable factual determination or, in the alternative, violated his Due Process rights; circuit rejected petitioner's cognizability argument as without merit); *James v. Keyser*, No. 120CV03468JPCSDA, 2021 WL 1040474, at *2 (S.D.N.Y. Mar. 18, 2021) (claim that "the trial court improperly sentenced [p]etitioner as a persistent violent felony offender . . . is not cognizable"); *Coons v. Superintendent*, No. 9:11-CV-1502 NAM/CFH, 2014 WL 316757, at *11 (N.D.N.Y. Jan. 28, 2014) (holding that whether a Florida conviction should be employed as one of two prior felony convictions for purposes of determining the petitioner's persistent felony offender status was a matter of state law not cognizable on habeas review).

Holding an evidentiary hearing with respect to claims on which the Court could not possibly grant habeas relief would be an abuse of discretion and a waste of judicial resources. Therefore, the request for an evidentiary hearing is DENIED.

Because the Court has denied the requests for discovery and an evidentiary hearing, the request to expand the record is moot and is DENIED as such.

CONCLUSION

For the foregoing reasons, the Motion for Miscellaneous Relief, ECF No. 58 is GRANTED solely to the extent that the stay, ECF No. 40, is LIFTED; and it is DENIED in all other respects. Specifically, the request for discovery is DENIED AS MOOT, the request for an evidentiary hearing is DENIED AS MERITLESS, and the request to expand the record is DENIED AS MOOT. The Clerk of Court is directed to lift the stay and restore the matter to the Court's active docket. Respondent's response to the Rule 60(b) Motion is due thirty (30) days from the date of entry of this Decision and Order, and Caswell's reply is due twenty (20) days from the date of his receipt of Respondent's response.

IT IS SO ORDERED.

Dated: September 8, 2021
Rochester, New York.

HON. FRANK P. GERACI, JR.
United States District Judge
Western District of New York

APPENDIX E:

APPENDIX E:

APPENDIX E:

APPENDIX E:

APPENDIX E:

Cover Letter

Reggie Caswell #06B1117
Coxsackie Corr. Fac.
11260 Route 9W
P.O. Box 999
Coxsackie, New York 120521-0999

May 14, 2022

RE: Caswell v Racetti Sec. Cir. #21-3068
Petition for Rehearing and Rehearing En Banc
pursuant FRAP 35 and 40, L.R. 35

United State Court of Appeals
Second Circuit
Clerk of Court
40 Foley Square
New York, New York 10007

Dear Clerk of Court,

Enclosed please find the original and three copies of said Petition for Rehearing and Rehearing En banc timely and properly submitted (with Exhibit A, this Court's decision dated: May 4th, 2022) with Affirmation of Service demonstrating that the Respondent have in fact been served with a copy of this instant pleading.

Accordingly, can this Honorable Court please accept said pleading for filing and notify me at the address above that said pleading was accepted and will be considered by this Honorable Court.

Thank You,

28 U.S.C. § 1746
Reggie Caswell #06B1117

c.c: Mr. Paul B. Lyons A.A.G.
R.C./file

AFFIRMATION OF SERVICE

CASWELL V RACETTI
Sec. Cir. #21-3068

I REGGIE D. CASWELL, hereby declares pursuant to the 28 U.S.C. § 1746 that:

1) That on this 14th day of May, 2022, I placed inside a postage paid first class wrapper said: Petition for Rehearing and Rehearing En Banc pursuant to FRAP 35 and 40, L.R.35 and did cause same to be placed inside an Official United States mailbox addressed to the following parties:

United States Court of Appeals
Second Circuit
Clerk of Court
40 Foley Square
New York, New York 10007

N.Y.S. Attorney General
Mr. Paul B. Lyons AAG
28 Liberty Street
New York, New York, 10005

Dated: May 14, 2022

28 U.S.C. § 1746
Reggie D. Caswell #06B1117
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11260 Route 9W
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UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

REGGIE D. CASWELL,

Appellant/Petitioner,

-v-

STEVEN RACETTI,

Respondent.

PETITION

FOR REHEARING AND REHEARING EN BANC pursuant to FRAP 35 and 40, L.R. 35.

Sec. Cir. # 21-3068

Lower Court Doc. 1:11-cv-153 (FPG)(LGF) WDNY

PETITION

FOR REHEARING AND REHEARING EN BANC

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PETITION FOR REHEARING AND REHEARING IN BANC

Petitioner REGGIE D. CASWELL, submits this pro se petition respectfully requesting a rehearing of the decision of this Court entered in May 4, 2022 (attached hereto as **Exhibit A**) and respectfully suggest that a rehearing be in banc pursuant to Rules 35(a) and 40(b) of the Federal Rules of Appellate Procedure.

STATEMENT PURSUANT TO RULE 35(b):

The petition suggest that this Court's decision is in conflict with the decisions of the United States Supreme Court, see, **Bracy v Gramley** 520 U.S. 899 (1997), **Keeney v Tamayo-Reyes** 504 U.S. 1 (1992), **Lackawanna v Coss** 532 U.S. 394 (2001), **Penson v Ohio** 488 U.S. 75 (1988), **Gideon v Wainwright** 372 U.S. 335 (1963), **Williams v Taylor** 529 U.S. 420 (2000). As such, the full Court's consideration is therefore necessary to secure uniformity.

Moreover, these proceedings involves a "question of exceptional importance" (see infra). Namely, that the state can not grant a defendant the statutory right to appeal his conviction as a poor person and pro se. Then, deprive the pro se Appellant of copies of the Respondents trial and sentencing exhibits in order to allow the pro se Appellant to demonstrate his "Actual Innocence" and that all four sentences imposed are illegal and Unconstitutional. Well, the state can not do so without violating the Due Process and Equal Protection Clauses of the United States Constitution, see, **Martinez v Court of App. Cal.** 528 U.S. 152, at 163 (2000)(states can permit a pro se appeal, "keeping the best interest of both the prisoner and government in mind"), also cf. **Griffin v Illinois** 351 U.S. 12 (1956), **Draper v Washington** 372 U.S. 487 (1963), **Mayer v City of Chicago** 404 U.S. 189 (1971).

REHEARING

The basis for the rehearing is that the Court has overlooked or misapprehended the followings points of fact and law:

Omitted from this Court's decision denying Appellant's C.O.A. was any reference to the recently exhausted state court appeal which according to this Court's decision dated: September 29, 2014 (Sec. Cir. #14-1211) was required to be heard in conjunction with Appellant's Fed. R. Civ. P. 60(b) motion, see, **People v Caswell** 189 A.D.3d 2153 (4 Dept. 2020) lv. dis. 36 N.Y.3d 1096 (2021).

In Appellant's Reply Affirmation (acknowledged by the lower court, see, Decision attached to C.O.A. as **Exhibit B**) Appellant attached copies of the pro se appeal record "R-333-60" along with copies of Respondents Sentencing Exhibits #4-#7 demonstrating with "Clear and convincing evidence," see, 28 U.S.C. § 2254(e)(1), that the Appellate Division decision affirming all four illegal sentences was not supported by the record, see, **Sumner v Mata** 455 U.S. 591, 597 (1982), **Parker v Dugger** 498 U.S. 309, 320 (1991), **Townsend v Sain** 372 U.S. 293 (1963),

Here it should be noted that the Respondent Sentencing Exhibits #4-#7, were only provided **after** remand by this Court in **Caswell v Green** 424 Fed. Appx. 44 (2 Cir. 2011)(seeking Preliminary Injunction to obtain copies of Respondents Trial/Sentencing Exhibits), decided long after Appellant's pro se direct appeal was affirmed and habeas corpus relief denied.

It should be further noted that under New York State law, all vital sentencing exhibits must be included in the direct appeal record, see, **People v Samms** 95 N.Y.2d 52, 57 (2000). The failure to do so, will bar further review, see, C.P.L. § 440.20(2), also see, decision denying (in part) Appellant's C.P.L. § 440.20 motion.

Hence, the precise reasons why the Respondent repeatedly refused to provide Appellant with copies of their sentencing

exhibits/trial exhibits (after being order to do) which proved to have catastrophic consequences:

PREJUDICE

Resp. Tr. Exhibits #9 and #22 (DVDS):

At trial, the Respondent submitted into evidence two Surveillance Videos (DVDS) depicting what they thought was an attempt robbery of a liquor store instead of a physical atlercation between Appellant and the co-store owner. Trial Exhibit #9 reflects that Appellant and the co-owner of the store were outside speaking to each other and also reflects that both parties proceed inside the store at the same time.

Appellant has NO SHIRT, NO HAT, NO GLOVES AND NO WEAPON not to mention the fact that it's broad daylight outside. Once inside, the store, the co-owner made a sexual advance against Appellant which caused Appellant to strike him with a closed fist before fleeing the store.

Here it should be noted that no one inside the store ever declared or testified that Appellant ever made any demands for money, or attempted to reach for the cash register during the altercation. As such, the defense to the charge of attempt robbery in the third degree has always been that Appellant's actions were indeed Justified pursuant to Penal Law § 35.

After Appellant left the store, Store Employee Scott Schell testified that he immediately locked the door, called 911. He further testified that he was only on the phone to 911 for a minute at which time he ran outside to see Appellant's arrest. Respondent's trial exhibit #9 supports his testimony.

The first three responding Police Officers all testified that they were present at the liquor store within three minutes

after being dispatched and that Appellant was already in custody. Respondent's trial exhibit #9 supports this fact.

However, at trial, the Respondent only played Peoples Trial Exhibit #22 (over objection) which was an edited version of Trial Exhibit #9. After Appellant's conviction, the Respondent held both exhibits (#9 & #22) hostage.

As such, no State Appellate Court or Federal Court has ever seen the DVDS which Appellant has been pleading for Seventeen (17) years. It has been Appellant's contentions that it was/is physically impossible for Appellant to have committed two additional burglaries and two robberies within three (3) minutes of leaving the liquor store, see, Memorandum of Law in Support of Motion to Lift Stay Order and Appellant's Reply Affirmation.

As a result of the Respondent unlawfull actions, Appellant could not demonstrate his "Actual Innocence," Insufficient Evidence, or that the verdict was against the weight of the evidence on his pro se direct appeal, see, **People v Caswell** 56 A.D.3d 1300 (4 Dept. 2008).

In addition, despite having shown "good cause" the District Court held that the DVDS were irrelevant without ever seeing the Videos in open court, see, **Bracy v Gramley** 520 U.S. 899 (1997), **Schlup v Delo** 513 U.S. 298 (1995).

Respondent Sentencing Exhibit #4:

Respondent Sentencing Exhibit #4 was the 1988 Onondaga County Plea and Sentencing Transcripts. At the persistent violent felony offender hearing in 2006, Appellant asserted that said conviction was disqualified and Unconstitutional (and repeated said arguments in People v Caswell 189 A.D.3d 2153 [4 Dept 2020]) in that:

1) The 1988 Transcripts clearly reflect that Appellant did not execute a waiver of indictment in open court in violation of Article 195 of the C.P.L. Thus, the alleged conviction was Unconstitutional and could not be used to enhance Appellant's sentence, see, People v Donnelly 23 A.D.3d 921 (3 Dept. 2005), People v Johnson 187 A.D.2d 990 (4th Dept. 1992), also cf. People v Colon-Colon 169 A.D.3d 187 (4th Dept. 2019), Burgett v Texas 389 U.S. 109 (1967).

2) The 1988 Transcripts further reflects that the trial court failed to assign Appellate Counsel after stating on record that it would do so to appeal the conviction. As such, your Appellant rest squarely upon the holding of the United States Supreme Court decisions of Lackawanna v Coss 532 U.S. 394, 404 (2001)(holding that issue is a viable habeas corpus claim), Penson v Ohio 488 U.S. 75 (1988) citing, Gideon v Wainwright 372 U.S. 335 (1963).

3) Indeed, recently, the United States District Court for the Southern District of New York recently granted a C.O.A. upon the same exact issue in Dockery v Lee 2021WL3667943 (NATHAN, J.). However, in this vein, the distinguishing factor in Appellant's case is that Appellant was never declared to be a predicate offender in New York State. As such, the holdings in People v Wilson 231 A.D.2d 912 (4th Dept. 1996), People v Roberts 111 A.D.3d 1308 (4th Dept. 2013), People v Loughlin 66 N.Y.2d 633 (1985) do not apply. Nor is the alleged conviction open to additional proceedings, People v Cuadrado 9 N.Y.3d 362 (2007).

Respondent Sentencing Exhibit #7:

Respondent Sentencing Exhibit #7 was the 1993 Illinois State Bill of Indictment that was submitted into evidence and used to enhance Appellant's sentence over objection. In other words:

1) Under New York State law, submission into evidence of an out-of-state indictment and consideration of the same warrants automatic reversal, see, People v Muniz 74 N.Y.2d 464 (1989).

2) To add insult to injury, the alleged crime is not a crime in New York State, see, People v Banks 75 Ill.2d 383, 391 (1975)(crime is a "general offense"), People v Strickland 154 Ill. 2d 489, 523 (1992) citing People v Jordan 303 Ill 316, 319 (1922)(offense can be committed as an "afterthought"), also see, State v Simmons 162 Wash. App. 1010 (2011), compare with People v Smith 79 N.Y.2d 309 (1992)(mens rea element), People v Pagan 81 A.D.3d 86 (1 Dept. 2010) aff'd 19 N.Y.3d 91 (2012).

3) Admittedly the sentencing issue regarding Respondent Sentence Exhibit #7 is a state law issue. HOWEVER, the issue rises to a violation of the Equal Protection and Due Process Clause of the 14th. Amendment in that the Respondent knowingly, willingly, and wantonly deprived Appellant of copies of said exhibits maintained by them in order to prevent a reversal of all sentences, see, People v Caswell 56 A.D.3d 1300 (4th Dept. 2008). also see, People v Samms 95 N.Y.2d 52, 57 (2000)(all vital sentencing exhibits must be in the appeal record to permit meaningful appellate review).

That it is for the above reasons that your Appellant request a rehearing by this Court and further seeks Rehearing In Banc based upon the question of "exceptional importance" (infra).

REHEARING EN BANC

The basis for the suggestion of a rehearing in banc is based upon the following question and relevant facts and law:

POINT I

DOES THE EQUAL PROTECTION AND DUE PROCESS CLAUSE PROVIDE THE RIGHT TO A COMPLETE AND SUFFICIENT PRO SE DIRECT APPEAL RECORD, see, U.S.C. 1st. 5th. 14th?

As argued in said Habeas Corpus Petition, Fed. R. Civ. P. 60(b) motion, Caswell v Green 424 Fed. Appx. 44 (2 Cir. 2011), Fed. R. Civ. P. 60(b) Appeal, see, Sec. Cir. Doc.#14-1211 (2014), and in the recently exhausted state court appeal, see, People v Caswell 189 A.D.3d 2153 (4th Dept. 2020) lv. dis. 36 N.Y.3d 1096 (2021). Your Appellant has been seeking an answer to this question in light of the United States Supreme Court decision of Martinez v Court of Appeal of California, Fourth App. Dist. 528 U.S. 152 (2000).

In "keeping the best interests of both the defendant and government in mind" quoting Martinez at 163 (supra), the states that do permit a pro se appeal, make certain that the pro se appellant has a complete and sufficient appeal record, see, Ex Parte Scudder 798 So. 2d 837 (2001)(Alabama Supreme Court), Coleman v Johnsen 235 Ariz. 195 (Arizona Supreme Court), Merriweather v Chatman 285 Ga. 765 (2009)(Georgia Supreme Court), Commonwealth v Staton 608 Pa. 404 (2010)(Pennsylvania Supreme Court), State v Rafay 167 Wash. 2d 644 (2009)(Washington Supreme Court).

No court in this jurisdiction has answered the above question in the affirmative. Despite the fact that the following undisputed facts, with prejudice demonstrated:

Argument:

a) On May 9, 2006, the Appellate Division Fourth Department granted Appellant's motion appeal the judgment of conviction as a poor person and pro se with further orders that Appellant be provided a copy of the record free of charge, see, Order R-1.

b) Shortly after the appellate court's order (supra), Appellant was transferred to a different prison at which time the N.Y.S.D.O.C.C.S. had lost Appellant's property containing copies of the Respondent Sentencing Exhibits #4-#7. Respondent Trial Exhibits #9 and #22 (DVDS) were confiscated as "contraband" while Appellant was being held in the county jail.

c) That on October 3, 2006, the Monroe County Clerks Office provided Appellant with a copy of the transcripts ad pleadings. Omitted from those pleadings were copies of the Respondents Trial/Sentencing Exhibits maintained by them.

d) That on January 23, 2007, after Respondent opposed the motion, the trial court refused to order the Respondent to provide Appellant with copies of their Trial Exhibits #9 and #22 and Sentencing Exhibits #4-#7.

e) That on June 19, 2007, after the Respondent opposed Appellant's appeal of the trial court's decision, the Appellate Division Fourth Department denied the appeal, see, **People v Caswell** A.D.# KA-07-1165 (4th Dept.) citing **People v Gibson** 266 A.D.2d 837 (4 Dept. 1999).

f) That on October 18, 2007, after the Respondent opposed Appellant's appeal of that decision, the New York State Court of Appeals dismissed the appeal, see, **People v Caswell** 9 N.Y.3d 960 (2007).

g) That on February 25, 2008, after Respondent opposed Appellant's second motion submitted to the trial court stressing the need to be provided with copies of said exhibits. The trial court denied the motion for a second time.

h) That on April 16, 2008, after Respondent opposed Appellant's subpeona duces tecum application submitted to the Appellate Division Fourth Department seeking said copies of said exhibits. The Appellate Division denied the motion without opinion.

i) That from 2006-2008, the Respondent opposed each motion, appeal, and application seeking copies of said exhibits maintained by them and refused to provide a single document.

j) It was not until this Court's intervention in Caswell v Green et. al. 424 Fed. Appx. 44 (2 Cir. 2011) that said exhibits were finally provided upon remand (after Appellant's direct appeal and Habeas relief were denied).

PREJUDICE

As a direct result, Appellant could not demonstrate his "Actual Innocence" or that all four sentences imposed were/are illegal, see, Rehearing pgs. 2-6 (supra).

Habeas Corpus Decision:

The District Court denied both of Appellant's motion for Discovery/Hearing seeking the production of said evidence ruling that the DVDS (without ever seeing them) were irrelevant, and that Appellant's, "...Appellate Counsel all sentencing exhibits at R-333-60..." quoting Caswell v Racetti 2012WL1029457 note 5 (W.D.N.Y.).

Although this Court order the District Court to review "all claims" anew in it's Decision dated: September 29, 2014. District Court Judge Geraci simply adopted Judge Telesca decision denying habeas relief in the first instant. Further holding that any issue regarding sentencing is "not a cognizable habeas claim."

In other words, the lower court has decided that if a pro se defendant receives copies of Respondent's trial and sentencing exhibits in the trial court, and, those exhibits are confiscated by the county jail (DVDS), and the sentencing exhibits are lost by the N.Y.S.D.O.C.C.S.

That now, the pro se Appellant forever forfeits his Rights to a complete and sufficient pro se appeal record regardless of the Appellate Division's Order dated: May 9, 2006.

Legal Analysis:

There is no Federal Constitutional Right that imposes on the States to provide appellate review of criminal conviction, see, McKane v Durston 153 U.S. 684 (1894). However, having provided the right to appeal, the appeal must be in accordance with Due Process of Law.

In other words, that state can not grant a defendant to appeal his conviction as a poor person and pro se, then, "...bolt the door to equal justice" by refusing to provide copies of vital trial and sentencing exhibits without violating the Due Process and Equal Protection Clause of the U.S. Constitution, see, Griffin v Illinois 351 U.S. 12 (1956), Mayer v City of Chicago 404 U.S. 189 (1971), Draper v Washington 372 U.S. 487 (1963).

To the extent that the Respondent rely upon the Appellate Division Fourth Department in People v Caswell A.D. KA-07-1165 (4 Dept. 2007) citing People Gibson 266 A.D.2d 837 (4th Dept. 1999). It is Appellant's contentions that Gibson is "contrary to and a unreasonable application of the holdings of the United States Supreme Court" cited above, also see, Williams v Taylor 529 U.S. 363 (2000), Carey v Musladin 549 U.S. 70 (2006)(holdings of the U.S. Supreme Court govern habeas corpus proceedings).

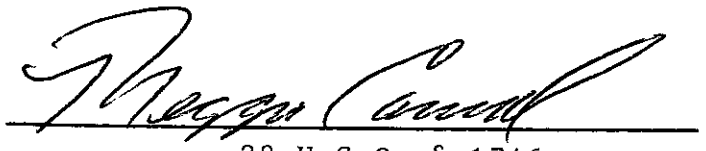
Without question, "the proceedings in the appellate tribunal are to be regarded a part of the process of law under which he is held in custody, and is to be considered in the determining of any question of the deprivation of his life and liberty contrary to the 14th. Amendment..." quoting Frank v Mangum 237 U.S. 309, 327 (1915), also see, Pully v Harris 465 U.S. 37, 41 (1984).

CONCLUSION

Appellant has completed the maximum sentence under the law and is entitled to immediate release from imprisonment had it not been for the Respondent refusal to provide copies of their trial and sentencing exhibits as clearly demonstrated herein.

WHEREFORE, Appellant prays that Rehearing and Rehearing En Banc be Granted and the decision of this Court attached hereto as Exhibit A be vacated and for the Granting of any further relief just and proper.

Dated: May 14, 2022



28 U.S.C. § 1746

Reggie D. Caswell #06B1117
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11260 Route 9W
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Coxsackie, New York 120521-0999

EXHIBIT A

A

EXHIBIT A

W.D.N.Y.
11-cv-153
Geraci, 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 4th day of May, two thousand twenty-two.

Present:

Guido Calabresi,
José A. Cabranes,
Joseph F. Bianco,
Circuit Judges.

Reggie D. Caswell,

Petitioner-Appellant,

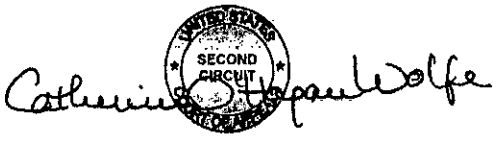
v. 21-3068

Steven Racetti,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability, in forma pauperis status, and appointment of counsel. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has failed to show that "(1) jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 60(b) motion, and (2) jurists of reason would find it debatable whether the underlying habeas petition, in light of the grounds alleged to support the [Rule] 60(b) motion, states a valid claim of the denial of a constitutional right." *Kellogg v. Strack*, 269 F.3d 100, 104 (2d Cir. 2001) (per curiam).

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



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