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 25th day of May, two thousand twenty-two.

Before: Rosemary S. Pooler,
Robert D. Sack,
William J. Nardini,
Circuit Judges.

Demetrio LiFrieri,

Petitioner-Appellant,

v.

James Stinson,

Respondent-Appellee.

ORDER

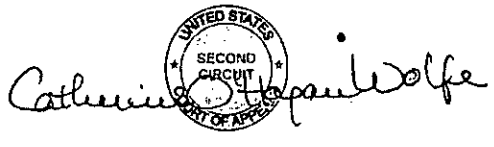
Docket No. 21-2467

Appellant, *pro se*, moves to recall the mandate, for leave to file a late motion for reconsideration or reconsideration *en banc*, and for leave to attach exhibits to his motion for reconsideration or reconsideration *en banc*.

IT IS HEREBY ORDERED that the motions are DENIED. Appellant's motion for reconsideration or reconsideration *en banc* is DENIED as moot.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court



E.D.N.Y. - Bklyn
97-cv-6868
Donnelly, 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 9th day of February, two thousand twenty-two.

Present:

Rosemary S. Pooler,
Robert D. Sack,
William J. Nardini,
Circuit Judges.

Demetrio LiFrieri,

Petitioner-Appellant,

v. 21-2467

James Stinson,

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

UNITED STATES SECOND CIRCUIT COURT OF APPEALS

Catherine O'Hagan Wolfe

APPENDIX A(2)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DEMETRIO LIFRIERI,

Petitioner,

– against –

JAMES STINSON,

Respondent.

MEMORANDUM AND ORDER

97-CV-6868 (AMD)

ANN M. DONNELLY, United States District Judge:

On January 7, 2022, the Court denied the *pro se* petitioner a certificate of appealability ("COA") for two decisions related to his unsuccessful petition for a writ of habeas corpus. Before the Court is the petitioner's letter (ECF No. 137), which I construe as a motion for reconsideration under Rule 60 of the Federal Rules of Civil Procedure. For the reasons that follow, the motion is denied.

BACKGROUND

I assume the parties' familiarity with the facts and incorporate them from the Honorable Jack B. Weinstein's decision denying the petition for a writ of habeas corpus.[1] (ECF No. 49.) Following a jury trial in New York Supreme Court before the Honorable Robert Kreindler, the petitioner was convicted of two counts of murder in the second degree for killing two women and hiding their bodies in his car for roughly two years. (ECF No. 132 at ¶¶ 2-4.) Judge Kreindler sentenced the petitioner to two consecutive prison terms of 25 years to life. (*Id.*)

[1] This case was reassigned to me on January 20, 2021.

On August 19, 2003, Judge Weinstein denied the petition for a writ of habeas corpus. (ECF No. 49.) Judge Weinstein also denied the petitioner's subsequent motions to vacate the conviction and for reconsideration. (ECF Nos. 114, 122.) On May 21, 2021, I denied the petitioner's Rule 60(b) motion seeking reconsideration of Judge Weinstein's August 19, 2003 order. The petitioner appealed, and on October 22, 2021, requested a COA from the Second Circuit. On January 7, 2022, I denied the petitioner a COA for Judge Weinstein's August 19, 2003 order and my May 21, 2021 order.[2] The Second Circuit then denied the petitioner a COA. *LiFrieri v. Stinson*, No. 21-2467 (2d Cir. Feb. 9, 2022). On March 10, 2022, the petitioner filed this letter, in which he "question[s] this Court's [January 7, 2022] Decision, being that he had already applied for a COA in the Second Circuit Court of Appeals[.]" (ECF No. 137 at 1.)

STANDARD OF REVIEW

Rule 60(b) allows the Court to relieve a party from an order in certain circumstances, including "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . . ; (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). "Since 60(b) allows extraordinary judicial relief, it is invoked only upon a showing of exceptional circumstances." *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986); *see also Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008) (Rule 60(b) is "a mechanism for extraordinary judicial relief invoked only if the moving party demonstrates exceptional circumstances."

[2] While the petitioner did not request a COA from this Court, he sought a COA from the Second Circuit. Pursuant to Rule 22.1 of its local rules, the Second Circuit "will not act on a request for a [COA] unless the district court has denied a COA."

(citations and quotation marks omitted)). "A Rule 60(b) motion is properly denied where it seeks only to relitigate issues already decided." *Djenasevic v. New York*, No. 17-CV-6366, 2019 WL 2330854, at *2 (E.D.N.Y. May 30, 2019) (quoting *Maldonado v. Local 803 I.B. of Tr. Health & Welfare Fund*, 490 F. App'x 405, 406 (2d Cir. 2013)).

DISCUSSION

Reconsideration is not warranted because the petitioner has not identified any legal or factual issue that I overlooked that would have altered my decision, or any extraordinary circumstances that would justify relief from the order. *Dicks v. Eur. Am. Bank*, No. 06-CV-6623, 2007 WL 2746701, at *1 (E.D.N.Y. Sept. 18, 2007) ("Reconsideration generally will be denied unless the moving party can point to either controlling decisions or factual matters that the court overlooked, and which, had they been considered, might have reasonably altered the result before the court."). The petitioner repeats the arguments he made in his motion for reconsideration of Judge Weinstein's order. (*See* ECF No. 131 at 2-5; ECF No. 137 at 2-4.) He also appears to argue that my January 7, 2022 order denying him a COA was improper because he made his request for a COA to the Second Circuit. As discussed above, the Second Circuit "will not act on a request for a [COA] unless the district court has denied a COA." 2d Cir. R. 22.1. Accordingly, the petitioner's motion for reconsideration is denied.

CONCLUSION

The petitioner's motion for reconsideration is denied. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal would not be taken in good faith and therefore *in forma pauperis* status is denied for the purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962). The Clerk of Court is respectfully directed to send a copy of this Memorandum and Order to the petitioner.

SO ORDERED.

s/Ann M. Donnelly

ANN M. DONNELLY
United States District Judge

Dated: Brooklyn, New York
March 15, 2022

Other Orders/Judgments

1:97-cv-06868-AMD LiFrieri v. Stinson **CASE CLOSED on 08/29/2003**

APPEAL,MJSELECT

U.S. District Court

Eastern District of New York

Notice of Electronic Filing

The following transaction was entered on 1/7/2022 at 11:28 AM EST and filed on 1/7/2022

Case Name: LiFrieri v. Stinson
Case Number: 1:97-cv-06868-AMD
Filer:
WARNING: CASE CLOSED on 08/29/2003
Document Number: No document attached

Docket Text:
ORDER. The petitioner seeks a certificate of appealability ("COA") from the U.S. Court of Appeals for the Second Circuit. Pursuant to Rule 22.1 of its local rules, the Second Circuit "will not act on a request for a [COA] unless the district court has denied a COA." Upon due consideration, the Court denies any request by the petitioner for a COA. For a COA to issue, the petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A substantial showing does not require a petitioner to demonstrate that he would prevail on the merits, but merely that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Viola v. United States*, No. 96-CV-706, 2006 WL 566104, at *2 (E.D.N.Y. Mar. 7, 2006) (citation and quotation marks omitted). The petitioner made no such substantial showing. Accordingly, this Court denies a COA with respect to the Orders dated March 20, 2018 and August 19, 2003. Ordered by Judge Ann M. Donnelly on 1/7/2022. (Mathew, Joshua)

1:97-cv-06868-AMD Notice has been electronically mailed to:

Victor Barall barallv@brooklynda.org

Donna R. Newman donnanewmanlaw@aol.com

Martin G. Goldberg MGoldbergEsq@Juno.com

Solomon Neubort neuborts@brooklynda.org

Martin Goldberg mgoldbergesq@juno.com

KINGS COUNTY DISTRICT ATTORNEYS OFFICE - GENERIC appealsefile@brooklynda.org

APPENDIX B(2)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DEMETRIO LIFRIERI,	
Petitioner,	**MEMORANDUM DECISION & ORDER**
– against –	
JAMES STINSON,	97-cv-6868 (AMD)
Respondent.	

ANN M. DONNELLY, United States District Judge:

Before the Court is the *pro se* petitioner's motion to vacate two decisions related to his unsuccessful petition for a writ of habeas corpus pursuant to Federal Rule of Civil Procedure 60(b). (ECF No. 131.) The respondent opposes. (ECF No. 132.) For the reasons that follow, the motion is denied.

BACKGROUND

I assume the parties' familiarity with the facts and incorporate them from the Honorable Jack B. Weinstein's decision denying the petition for a writ of habeas corpus.[1] (ECF No. 49.) Following a jury trial in New York Supreme Court before the Honorable Robert Kreindler, the petitioner was convicted of two counts of murder in the second degree for killing two women and hiding their bodies in his car for roughly two years. (ECF No. 132 at ¶¶ 2-4.) Judge Kreindler sentenced the petitioner to two consecutive prison terms of 25 years to life. (*Id.*)

Following an unsuccessful direct appeal in state court, the petitioner filed a writ of habeas corpus in this Court pursuant to 28 U.S.C. § 2254, raising 25 different claims. (ECF No. 1; ECF

[1] This case was reassigned to me on January 20, 2021.

No. 49 at 3.) On June 11, 1998, the petitioner moved in New York Supreme Court for vacatur of his conviction pursuant to N.Y.C.P.L. § 440.10, on the ground that he had not been advised of his right to speak to a member of the Italian consulate upon his arrest as specified by the Vienna Convention on Consular Relations. (ECF No. 132 at ¶ 8.) After the state court denied his motion, the petitioner amended his habeas petition to include his Vienna Convention claim. (ECF No. 18.) On August 19, 2003, Judge Weinstein denied the petition for a writ of habeas corpus. (ECF No. 49.) The Second Circuit denied the petitioner's application to appeal on August 23, 2004. (ECF No. 57.)

On August 4, 2005, the petitioner moved in New York Supreme Court to vacate his conviction. (ECF No. 132 at ¶ 14.) He raised approximately twenty claims, including that he was denied his right to confront a witness under *Crawford v. Washington*, 541 U.S. 36 (2004). The court denied his motion on December 12, 2005. (ECF No. 132 at ¶ 14.) On June 10, 2006, the petitioner filed a motion in the Second Circuit for leave to file a successive habeas petition, relying primarily on the *Crawford* decision. (*Id.* at ¶ 15.) The Second Circuit denied his motion on January 9, 2007. (*Id.* at ¶ 16.)

On March 5, 2008, the petitioner filed his first motion pursuant to Federal Rule of Civil Procedure 60(b) to vacate the denial of his petition for a writ of habeas corpus. (ECF No. 61.) Judge Weinstein denied the motion on July 31, 2009 and the Second Circuit denied the petitioner's application to appeal on August 25, 2010. (ECF Nos. 88, 99.)

The petitioner moved for reconsideration of the denial of his 60(b) motion on October 19, 2017. (ECF No. 104.) In an order dated March 20, 2018, Judge Weinstein denied the petitioner's motion for reconsideration, noting that this "case [had] been thoroughly examined . . . and there [was] no further basis for review." (ECF No. 120.) The petitioner appealed and the

Second Circuit found that "the district court lacked jurisdiction to consider the Rule 60(b) motion because it was in substance a successive § 2254 petition, not a proper Rule 60(b) motion." (ECF No. 128.) Nevertheless, the court denied his appeal, noting that "treating the reconsideration motion as a successive application would be futile because, even in light of Appellant's allegedly new evidence, a reasonable jury still could have convicted him." (*Id.*)

On February 20, 2019, the petitioner filed a motion to set aside his state court conviction. (ECF No. 129.) Judge Weinstein dismissed the motion on March 18, 2019, explaining that the court had "repeatedly considered this remedy and denied it, and related applications." (ECF No. 130.) The petitioner then moved in New York Supreme Court for a writ of error coram nobis to vacate his conviction on the ground of ineffective assistance of appellate counsel on his original appeal in 1996; the court denied his motion on March 11, 2020. *People v. Lifrieri*, 181 A.D.3d 715, *leave to appeal denied*, 36 N.Y.3d 930 (2020).

The petitioner filed this 60(b) motion on January 14, 2021. (ECF No. 131.) He now seeks vacatur of Judge Weinstein's denial of reconsideration of his first 60(b) motion. (ECF No. 131 at 22.) He also seeks vacatur of the decision denying his petition for a writ of habeas corpus in light of his most recent coram nobis motion in state court. (*Id.* at 5.) The respondent opposes. (ECF No. 132.)

LEGAL STANDARD

Rule 60(b) allows the Court to relieve a party from a final judgment in certain circumstances, including "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . . ; (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). "Since 60(b) allows extraordinary judicial relief, it is invoked only upon a showing of exceptional circumstances." *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986); *see also Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008) (Rule 60(b) is "a mechanism for extraordinary judicial relief invoked only if the moving party demonstrates exceptional circumstances" (citations and quotation marks omitted)). "A Rule 60(b) motion is properly denied where it seeks only to relitigate issues already decided." *Djenasevic v. New York*, No. 17-CV-6366, 2019 WL 2330854, at *2 (E.D.N.Y. May 30, 2019) (quoting *Maldonado v. Local 803 I.B. of Tr. Health & Welfare Fund*, 490 F. App'x 405, 406 (2d Cir. 2013) (internal quotation marks omitted)).

Although Rule 60(b) applies to habeas proceedings, a petitioner cannot use it "to avoid the restriction on second or successive habeas corpus petitions," and district courts have "the obligation to characterize the request for relief properly, regardless of the label that the petitioner applies." *Dent v. United States*, No. 09-CV-1938, 2013 WL 2302044, at *2 (E.D.N.Y. May 24, 2013) (citing *Gonzalez v. Crosby*, 545 U.S. 524, 530-31 (2005)). "A Rule 60(b) motion has a 'different objective[]' than a habeas petition." *Carbone v. Cunningham*, 857 F. Supp. 2d 486, 488 (S.D.N.Y. 2012) (quoting *Rodriguez v. Mitchell*, 252 F.3d 191, 198 (2d Cir. 2001)). Specifically, habeas "petitions seek to invalidate an underlying criminal conviction, whereas Rule 60(b) motions only seek to vacate a judgment, such as a judgment dismissing a habeas petition." *Ackridge v. Barkley*, No. 06-CV-3891, 2008 WL 4555251, at *5 (S.D.N.Y. Oct. 7, 2008) (citation omitted). "A motion that 'seeks to add a new ground for relief' or that 'attacks the federal court's previous resolution of a claim on the merits' can only be raised in a successive habeas petition, as compared to a motion identifying 'some defect in the integrity of the federal

habeas proceedings,' which may be considered on a Rule 60(b) motion." *United States v. Spigelman*, No. 05-CR-960, 2017 WL 2275022, at *3 (S.D.N.Y. May 24, 2017) (quoting *Gonzalez*, 545 U.S. at 532) (emphasis omitted). "A Rule 60(b) motion attacks the integrity of a habeas proceeding if it does not 'assert, or reassert, claims of error in the movant's state conviction.'" *Hamilton v. Lee*, 188 F. Supp. 3d 221, 239 (E.D.N.Y. 2016) (quoting *Gonzalez*, 545 U.S. at 531). Examples of proper Rule 60(b) motions include arguments that a district court erroneously avoided deciding the merits of a claim for reasons such as "failure to exhaust, procedural default, or statute-of-limitations bar." *Gonzalez*, 545 U.S. at 532 n.4.

"Under the Antiterrorism and Effective Death Penalty Act ('AEDPA'), successive federal *habeas* petitions requesting relief from a conviction in state court must satisfy strict requirements before a district court can adjudicate them on the merits." *Hamilton*, 188 F. Supp. 3d at 239 (citing 28 U.S.C. § 2244(b)). Specifically, before a district court may even entertain a successive habeas petition, the Second Circuit must certify that the petition (1) does not raise a "claim that has already been adjudicated in a previous petition" and (2) that it "relies on either a new and retroactive rule of constitutional law or new facts showing a high probability of actual innocence." *Gonzalez*, 545 U.S. at 529-30 (citing 28 U.S.C. §§ 2244(b)(1)-(2)). "Absent authorization from the Second Circuit," district courts "lack[] jurisdiction to consider a successive habeas petition." *Sterling v. Kuhlman*, No. 97-CV-2825, 2006 WL 177404, at *2 (S.D.N.Y. Jan. 25, 2006) (citing *Torres v. Senkowski*, 316 F.3d 147, 149 (2d Cir. 2003)).

DISCUSSION

First, the petitioner asks the Court to reconsider Judge Weinstein's 2018 denial of reconsideration, claiming the court did not adequately consider his "actual innocence" defense or "newly discovered facts." (ECF No. 131 at 10, 17.) As the Second Circuit noted when the

petitioner appealed Judge Weinstein's decision, the petitioner's motion for reconsideration was more properly construed as "a successive § 2254 petition, not a proper Rule 60(b) motion;" thus, Judge Weinstein "lacked jurisdiction to consider the Rule 60(b) motion." (ECF No. 128.) Nevertheless, the Second Circuit dismissed the petitioner's claim on the grounds that "a reasonable jury still could have convicted him." (*Id.*) Accordingly, vacatur of Judge Weinstein's reconsideration decision is inappropriate, and any claims related to the petitioner's "actual innocence" or "newly discovered facts" must be brought as a motion for a successive habeas petition before the Second Circuit.

The petitioner also asks the Court to reassess his habeas petition in light of his most recent coram nobis motion to the state court. He argues that his appellate counsel in state court "failed him in the appellate stages through a writ of error coram nobis which both New York Appellate Courts denied without a written opinion." (ECF No. 131 at 5.) Because his claim is related to his state appeal, however, his attack is on his state court appellate process, not the integrity of the habeas proceeding. *See, e.g.*, *United States v. Al-Khabbaz*, No. 04-CR-1379, 2017 WL 7693368, at *2 (S.D.N.Y. Dec. 18, 2017) ("Defendant raised four different reasons why his attorneys were ineffective [in his initial petition]. Thus, Defendant is not challenging the integrity of his first habeas proceeding because his present ground for relief—counsel's supposed failure to advise him of the risks of deportation—was never raised in that first proceeding."); *James v. United States*, 603 F. Supp. 2d 472, 482 (E.D.N.Y. 2009) ("[A]llegations of ineffective assistance of . . . counsel attack the underlying conviction rather than the integrity of the habeas proceedings." (citation omitted)); *Barnes v. Burge*, No. 03-CV-1475, 2009 WL 612323, at *2 (E.D.N.Y. Mar. 9, 2009) (converting Rule 60(b) motion into successive habeas petition where petitioner previously claimed ineffective assistance of counsel on one ground but

later filed a Rule 60(b) motion alleging two other grounds); *Abu Mezer v. United States*, No. 01-CV-2525, 2005 WL 1861173, at *2 (E.D.N.Y. July 27, 2005) (Rule 60(b) motion improper because "it seeks to attack the underlying criminal conviction (based on . . . ineffective . . . counsel) rather than the integrity of the original habeas proceeding"). Accordingly, the petitioner's ineffective assistance claim is also a successive habeas petition and must be denied as outside the scope of Rule 60(b).

When presented with a successive habeas petition styled as a Rule 60(b) motion, the district court has "two procedural options: (i) the court may treat the Rule 60(b) motion as 'a second or successive' habeas petition, in which case it should be transferred to [the Second Circuit] for possible certification, or (ii) the court may simply deny the portion of the motion attacking the underlying conviction 'as beyond the scope of Rule 60(b).'" *Harris v. United States*, 367 F.3d 74, 82 (2d Cir. 2004) (citation omitted). In order to provide the petitioner with notice and to conserve judicial resources, I deny the motion as beyond the scope of Rule 60(b). *See Davis v. New York*, No. 07-CV-9265, 2017 WL 5157458, at *3 (S.D.N.Y. Nov. 6, 2017) ("The Second Circuit suggests that a district court should give a prisoner notice before transferring a Rule 60(b) motion to the Court of Appeals as a second or successive habeas petition in order that the prisoner be given an opportunity to withdraw or restyle the motion. Accordingly, in order to give [the petitioner] notice and conserve judicial resources, this Court denies [the petitioner's] motion as beyond the scope of Rule 60(b)." (citations omitted)).

CONCLUSION

The petitioner's Rule 60(b) motion is denied. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this opinion would not be taken in good faith. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962). The Clerk of Court is respectfully directed to mail a copy of this Order to the petitioner.

SO ORDERED.

s/Ann M. Donnelly

ANN M. DONNELLY
United States District Judge

Dated: Brooklyn, NY
May 21, 2021

Orders on Motions

1:97-cv-06868-AMD LiFrieri v. Stinson **CASE CLOSED on 08/29/2003**

CLOSED,MJSELECT

U.S. District Court

Eastern District of New York

Notice of Electronic Filing

The following transaction was entered on 9/10/2021 at 9:45 AM EDT and filed on 9/10/2021

Case Name: LiFrieri v. Stinson

Case Number: 1:97-cv-06868-AMD

Filer:

WARNING: CASE CLOSED on 08/29/2003

Document Number: No document attached

Docket Text:

ORDER denying [135] Motion for Extension of Time to File Response/Reply. The Court lacks jurisdiction to consider the petitioner's motion for extension of time with respect to filing a notice of appeal. *See* Fed. R. App. P. 4(a)(5). Pursuant to Federal Rule of Appellate Procedure 4(a)(6), the Court may reopen the time to file a notice of appeal if "(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry; (B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and (C) the court finds that no party would be prejudiced." The petitioner has shown that he did not receive notice of the entry of the Court's order [133] until on or around July 26, 2021, more than 21 days after the order's entry. (ECF No. 135 at 3.) Moreover, it appears that the petitioner deposited the motion with prison authorities for forwarding to the Court within 14 days after receiving notice of the order's entry. (*Id.* at 4.) Last, reopening the time would only provide some of the time the petitioner would have had to file a notice of appeal had he received notice of the order's entry within 21 days. Therefore, the Court finds that the parties would not be prejudiced. Pursuant to Federal Rule of Appellate Procedure 4(a)(6), the Court reopens the time to file a notice of appeal for 14 days from the entry of this order. If the petitioner wishes to file a notice of appeal, the notice of appeal is due by September 24, 2021. The Court cannot grant any extensions. The Clerk of Court is respectfully directed to mail a copy of this order along with a Notice of Appeal form to the *pro se* plaintiff. Ordered by Judge Ann M. Donnelly on 9/10/2021. (Mathew, Joshua)

1:97-cv-06868-AMD Notice has been electronically mailed to:

Victor Barall barallv@brooklynda.org

Martin G. Goldberg MGoldbergEsq@Juno.com

Solomon Neubort neuborts@brooklynda.org

Martin Goldberg mgoldbergesq@juno.com

KINGS COUNTY DISTRICT ATTORNEYS OFFICE - GENERIC appealsefile@brooklynda.org

1:97-cv-06868-AMD Notice will not be electronically mailed to:

Donna R. Newman
Law Office of Donna R. Newman
20 Vesey Street
Suite 400
New York, NY 10007

Thomas S. Burka
Kings County District Attorney's Office
350 Jay Street
Brooklyn, NY 11201

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DEMETRIO LIFRIERI,

Petitioner,

– against –

JAMES STINSON,

Respondent.

ORDER

97-CV-6868

Jack B. Weinstein, Senior United States District Judge:

Petitioner, Demetrio LiFrieri, seeks an order setting aside his conviction in State court. This court has repeatedly considered this remedy and denied it, and related applications. *See, e.g.*, Mot. Reconsideration, Sept. 5, 2017, ECF No. 104; Mot. Vacate Conviction, Feb. 9, 2018, ECF No. 114; Order, Mar. 20, 2018, ECF No. 120 (denying motion for reconsideration, ECF No. 104, and motion to vacate conviction, ECF No. 114); Mot. Reargument/Reconsideration, Apr. 16, 2018, ECF No. 122; Order, June 1, 2018, ECF No. 123 (denying certificate of appealability for order, ECF No. 120); Order, June 6, 2018 (denying motion for reargument/reconsideration, ECF No. 122); Mandate of the United States Court of Appeals, Jan. 3, 2019, ECF No. 128 (holding that district court lacked jurisdiction to consider motion for reconsideration).

The petition is dismissed.

SO ORDERED.

Jack B. Weinstein
Senior United States District Judge

Dated: March 11, 2019
Brooklyn, New York

APPENDIX D

E.D.N.Y. - Bklyn
97-cv-6868
Weinstein, 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 11th day of October, two thousand eighteen.

Present:

John M. Walker, Jr.,
Guido Calabresi,
Debra Ann Livingston,
Circuit Judges.

Demetrio LiFrieri, AKA, Demtrio Lifrieri,

Petitioner-Appellant,

v. 18-1101

James Stinson,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability, in forma pauperis status, and appointment of counsel to appeal the denial of his second Fed. R. Civ. P. 60(b) motion in which he had sought reconsideration of the denial of his 28 U.S.C. § 2254 petition. Upon due consideration, we have determined that the district court lacked jurisdiction to consider the Rule 60(b) motion because it was in substance a successive § 2254 petition, not a proper Rule 60(b) motion. *See Gonzalez v. Crosby*, 545 U.S. 524, 531–32 (2005) (holding that even if a pleading is "labeled a Rule 60(b) motion," it is subject to the requirements for successive applications in 28 U.S.C. § 2244(b) if it presents only "claims for relief from a state court's judgment of conviction"); *Torres v. Senkowski*, 316 F.3d 147, 151 (2d Cir. 2003) (holding that a district court lacked jurisdiction to reach the merits of an uncertified second or successive § 2254 petition). However, treating the reconsideration motion as a successive application would be futile because, even in light of Appellant's allegedly new evidence, a reasonable jury still could have convicted him. *See* 28 U.S.C. § 2244(b)(2)(B)(ii). Therefore, it is hereby ORDERED that the motions are DENIED and the appeal is DISMISSED.

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

UNITED STATES SECOND CIRCUIT COURT OF APPEALS

Catherine O'Hagan Wolfe

APPENDIX E(1)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DEMETRIO LIFRIERI,

Petitioner,

– against –

JAMES STINSON,

Respondent.

ORDER

97-CV-6868

JACK B. WEINSTEIN, Senior United States District Judge:

The attorney for the moving party has made a strong case that the issue of breaking and entering into the trunk of petitioner's vehicle that resulted in the finding of two bodies, and subsequent finding of guilt, was based on a Fourth Amendment violation. *See* Motion to Vacate Conviction, ECF No. 114, Feb. 10, 2018.

This case has been thoroughly examined in this court and there is no further basis for review. *See Stone v. Powell*, 428 U.S. 465, 494–95 (1976) ("[W]e conclude that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."); *see also Lifrieri v. Stinson*, No. 97-CV-6868, 2009 WL 2413400, at *1 (E.D.N.Y. July 31, 2009).

The motion is denied.

SO ORDERED.

Jack B. Weinstein
Senior United States District Judge

APPENDIX F

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