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 27th day of March, two thousand twenty-three.

Robert A. Griffin,

Petitioner - Appellant,

v.

Superintendent Robert A. Kirkpatrick,

Respondent - Appellee.

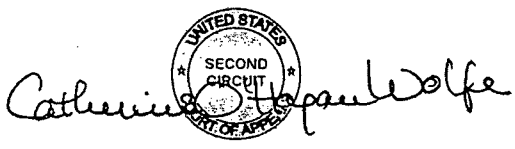
ORDER

Docket No: 22-1441

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

IT IS HEREBY ORDERED that the motion is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



W.D.N.Y.
08-cv-886
Vilardo, J.
Roemer, M.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 6th day of January, two thousand twenty-three.

Present:

Amalya L. Kearse,
Rosemary S. Pooler,
Steven J. Menashi,
Circuit Judges.

Robert A. Griffin,

Petitioner-Appellant,

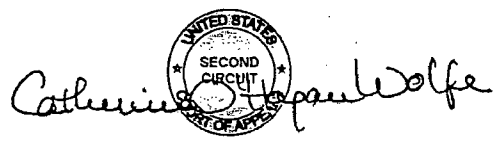
v. 22-1441

Superintendent Robert A. Kirkpatrick,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability, in forma pauperis status, and other relief. Upon due consideration, it is hereby ORDERED that motions are 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 DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBERT A. GRIFFIN,

Petitioner,

v.

08-CV-886-LJV-MJR
DECISION & ORDER

SUPERINTENDENT KIRKPATRICK,

Respondent.

On December 5, 2008, the pro se petitioner, Robert A. Griffin, submitted a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Docket Item 1. On December 14, 2010, United States District Judge Michael A. Telesca denied the writ and dismissed the petition. Docket Item 29. Griffin then appealed to the United States Court of Appeals for the Second Circuit and requested leave to file a successive petition under 28 U.S.C. § 2244(b), and the Second Circuit dismissed the appeal and denied the request. Docket Items 35, 36.

More than ten years after Judge Telesca denied his habeas petition in 2010, on May 3, 2021, Griffin moved under Federal Rule of Civil Procedure 60(b)(6) for relief from Judge Telesca's decision and order. Docket Item 40. He also asked this Court to appoint counsel and conduct an evidentiary hearing in connection with his Rule 60(b)(6) motion. Docket Items 45, 46. On May 17, 2021, the respondent, Superintendent Kirkpatrick, responded, Docket Item 42; two weeks later, Griffin replied, Docket Item 43.

On June 11, 2021, the case was referred to United States Magistrate Judge Michael J. Roemer for all proceedings under 28 U.S.C. § 636(b)(1)(A) and (B). Docket

Item 44. On March 25, 2022, Judge Roemer issued a Report, Recommendation, and Order ("RR&O") recommending that Griffin's Rule 60(b)(6) motion be denied because it is time barred and lacks merit. Docket Item 49. Judge Roemer also denied Griffin's motions for the appointment of counsel and an evidentiary hearing. *Id.*

On April 21, 2022, Griffin objected to the RR&O, largely repeating the arguments he made to Judge Roemer in his Rule 60(b)(6) motion and reply, *see* Docket Items 40 and 43. Docket Item 51. On May 18, 2022, Kirkpatrick responded to the objection,[1] Docket Item 53; on May 23, 2022, Griffin replied,[2] Docket Item 54.

A district court may accept, reject, or modify the findings or recommendations of a magistrate judge. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). The court must review *de novo* those portions of a magistrate judge's recommendation to which a party objects. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3).

This Court has carefully and thoroughly reviewed the RR&O; the objection, response, and replies; and the materials submitted to Judge Roemer. Based on that *de*

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[1] This Court ordered Kirkpatrick to respond to Griffin's objection by May 13, 2022. Docket Item 52. Griffin argues that Kirkpatrick's response should not be considered because Kirkpatrick filed it five days late. Docket Item 54. Federal Rule of Civil Procedure 6(b)(1)(B) provides that a "court may, for good cause, extend the time[to respond] . . . on motion made after the time has expired if the party failed to act because of excusable neglect." The Court construes Kirkpatrick's response as including a request to extend the time to file and grants that motion. The Court therefore considers Kirkpatrick's response. Moreover, even if the Court did not consider Kirkpatrick's response, it still would accept and adopt the RR&O on its merits.

[2] Griffin supplemented his reply on May 31, 2022. Docket Item 55. Although Griffin did not ask for leave of the Court to supplement his submission, the Court construes his submission as including a request to supplement, grants that request, and considers Griffin's additional submission.

novo review, the Court accepts and adopts Judge Roemer's recommendation to deny Griffin's motion for the reasons stated in the RR&O.

Griffin objects to Judge Roemer's conclusion that the Rule 60(b)(6) motion is untimely. More specifically, he argues that Judge Roemer erred by failing to consider that Griffin faced additional challenges as an incarcerated *pro se* petitioner and that he only recently became aware of Rule 60(b)(6). *See* Docket Item 51 at 2, 4-6. Both those arguments lack merit.

Although a court must "read [a *pro se* petitioner's] papers liberally" and "interpret them to raise the strongest arguments that they suggest," *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994), a petitioner's *pro se* status "does not exempt [him] from compliance with [the] relevant rules of procedural and substantive law," *Amnay v. Del Labs*, 117 F. Supp. 2d 283, 285 (E.D.N.Y. 2000); *see also Spurgeon v. Lee*, 2019 WL 569115, at *2 (E.D.N.Y. Feb. 11, 2019). So the fact that Griffin is proceeding *pro se* does not relieve him from complying with the requirement that a Rule 60(b)(6) motion "be made within a reasonable time" after judgment is entered. *See* Fed. R. Civ. P. 60(c)(1). And this Court agrees with Judge Roemer that Griffin's motion was not made within a reasonable time.

Likewise, the fact that Griffin was not aware of Rule 60(b) until another prisoner told him about the rule does not relieve him from Rule 60(c)(1)'s requirements. As Judge Roemer noted, "[e]ven if the Court did find this to be an excusable reason for the delay" in bringing the Rule 60(b) motion, Griffin "still waited another three years" after learning about Rule 60(b) "to file the [] motion." Docket Item 49 at 8 n.5. And as Judge

Roemer explained, even three years is not "a reasonable time" to wait before bringing a Rule 60(b) motion. *See id.* at 6 (collecting cases); 8 n.5.

Griffin also objects to Judge Roemer's conclusion that even if the motion were timely, it still would fail on the merits. Docket Item 51 at 7-15. In his objection and replies, Griffin repeatedly asserts that he is actually and factually innocent, and he seems to argue that Judge Roemer overlooked Griffin's actual-innocence claim. *See, e.g., id.* at 9-10; Docket Item 55 at 7-8. But Judge Roemer addressed Griffin's actual-innocence claim and found it to be without merit. *See* Docket Item 49 at 16 n.10 ("Petitioner has not offered any specific, newly discovered facts or evidence, nor has he pointed to any facts or evidence previously known but not put before the courts, which would in any way suggest . . . that petitioner is actually or factually innocent."). This Court agrees with that conclusion.[3]

Griffin offers several other objections to the RR&O, *see* Docket Item 51 at 7-15; 55 at 2-8, but most simply rehash the arguments made before Judge Roemer, *see* Docket Items 40 and 43. When a party "simply reiterates [his] original arguments," a district court need review the RR&O "only for clear error." *Singh v. New York State Dep't of Tax'n & Fin.*, 865 F. Supp. 2d 344, 348 (W.D.N.Y. 2011).

And Griffin's objections that do more than rehash the arguments do too much. Rather than raising an error in Judge Roemer's analysis, Griffin's other objections raise

[3] Moreover, to the extent Griffin argues that a jury would not have found him guilty if the trial court excluded his confession, Griffin conflates factual innocence with legal innocence. Actual innocence "references 'factual innocence, not mere legal insufficiency.'" *Hyman v. Brown*, 927 F.3d 639, 657 (2d Cir. 2019) (quoting *Bousley v. United States,* 523 U.S. 614, 624 (1998)).

entirely new arguments. Judge Roemer warned Griffin that the Court "ordinarily refuse[s] to consider *de novo* arguments, case law[,] and/or evidentiary material which could have been, but were not, presented to the Magistrate Judge in the first instance." Docket Item 49 at 17 (citing *Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co.*, 840 F.2d 985, 990-91 (1st Cir. 1988)).

Nonetheless, this Court has reviewed Griffin's arguments—both those that rehash the arguments made before Judge Roemer and those that are entirely new—*de novo*, finds them to be without merit, and agrees with Judge Roemer that Griffin has not met the high bar for relief from final judgment under Rule 60(b)(6).

CONCLUSION

For the reasons stated above and for the reasons in the RR&O, Griffin's motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(6), Docket Item 40, is DENIED.

The Court hereby certifies under 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith and therefore denies leave to appeal as a poor person. *Coppedge v. United States,* 369 U.S. 438 (1962). The Court also certifies under 28 U.S.C. § 2253(c)(2) that because the issues raised here are not the type of issues that a court could resolve in a different manner, and because these issues are not debatable among jurists of reason, the petitioner has failed to make a substantial showing of the denial of a constitutional right. Accordingly, the Court denies a certificate of appealability.

Griffin must file any notice of appeal with the Clerk's Office, United States District Court, Western District of New York, within 30 days of the date of this order. Requests to proceed on appeal as a poor person must be filed with the United States Court of Appeals for the Second Circuit in accordance with the requirements of Rule 24 of the Federal Rules of Appellate Procedure.

SO ORDERED.

Dated: June 21, 2022
Buffalo, New York

/s/ Lawrence J. Vilardo
LAWRENCE J. VILARDO
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBERT A. GRIFFIN,

Petitioner,

v.

SUPERINTENDENT KIRKPATRICK,
WENDE CORRECTIONAL FACILITY,

Respondent.

1:08-CV-00886 LJV (MJR)

REPORT,
RECOMMENDATION
AND ORDER

INTRODUCTION

This case has been referred to the undersigned by the Honorable Lawrence J. Vilardo, pursuant to Section 636(b)(1) of Title 28 of the United States Code, for all pretrial matters and for hearing and reporting on dispositive motions for consideration by the District Court. (Dkt. No. 44) Before the Court is petitioner Robert A. Griffin's motion for relief from a final judgment pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. (Dkt. No. 40) Petitioner has also moved for an evidentiary hearing and the appointment of counsel. (Dkt. Nos. 45, 46) For the following reasons, it is recommended that petitioner's Rule 60(b)(6) motion be denied; and it is ordered that petitioner's request for an evidentiary hearing and the appointment of counsel are denied.

PROCEDURAL BACKGROUND

In February of 2003, Robert A. Griffin ("petitioner") was tried, in New York State Court, Monroe County (the "trial court"), on an eighteen-count indictment arising from three separate burglaries or robberies occurring between July 31, 1997 and September

1, 1999. (Dkt. No. 42, pg. 5) Each incident also involved the sexual assault of a different female victim, two of whom were children. (*Id.*) Prior to the commencement of the jury trial, petitioner moved to suppress (1) incriminating statements he made to law enforcement on April 3, 2002, on grounds that they were taken in violation of his right to counsel; and (2) evidence from a DNA sample obtained from him on April 3, 2002, on grounds that it was the result of an improper statement by police. (Dkt. No. 42, Appendix E) After conducting a pretrial suppression hearing and making specific findings of fact, the trial court denied petitioner's motion to suppress evidence and statements. (*Id.*)[1]

On February 13, 2003, the jury convicted petitioner of burglary in the second degree; kidnapping in the second degree; two counts of sexual abuse in the first degree; three counts of rape in the first degree; four counts of sodomy in the first degree; burglary in the first degree; two counts of assault in the second degree; robbery in the first degree; and robbery in the second degree. (Dkt. No. 42, pg. 5, Appendix A) On March 7, 2003, petitioner was sentenced to the maximum allowable prison term on each court, with sentences for each separate count to run consecutively, for a total incarceration time of approximately fifty years. (*Id.*; Dkt. No. 42, Appendix C) Petitioner is currently incarcerated at Sing Sing Correctional Facility. (Dkt. No. 40, pg. 3)

[1] The statements at issue in the suppression hearing were taken at the Cayuga Correctional Facility on April 3, 2002, during an interview by police investigators, while petitioner was serving a sentence for an unrelated attempted burglary conviction. (Dkt. No. 42, Appendix D) At that time, petitioner admitted the following to law enforcement (1) that on July 31, 1997, he burglarized a home in Irondequoit, New York, kidnapped a four-year old child from the home, sexually assaulted her in a vehicle, and left her by the side of the road; (2) that on April 10, 1999, he burglarized a home in Brighton, New York, sexually assaulted a ten-year old girl who was present there, and hit her in the head with an exercise weight before leaving; and (3) that on August 31, 1999, he raped a sixty-seven year old woman in Irondequoit, New York, choked her until she was unconscious, and stole her purse. *Griffin v. Kirkpatrick*, 08-CV-0886, 2010 U.S. Dist. LEXIS 132113 (WDNY Dec. 14, 2010).

Following his trial and conviction, petitioner filed at least four motions with the trial court between April 2004 and August 2013, all seeking to vacate the criminal judgment against him pursuant to Section 440.10 of the New York Criminal Procedure Law (NYCPLR § 440.10).[2] (Dkt. No. 42, Appendix E) Petitioner raised various grounds in his NYCPLR § 440.10 motions, including: (1) that his consent to provide the DNA sample and confession to law enforcement on April 3, 2002 were involuntary; (2) ineffective assistance of trial counsel; and (3) that he was subjected to an illegal arrest on April 3, 2002. (Dkt. No. 42, Appendix E) The trial court declined to hold an evidentiary hearing as to any of the claims raised in petitioner's NYCPLR § 440.10 motions, and instead decided the motions based upon the parties' written submissions.[3] (*Id.*) All of petitioner's motions to vacate the criminal judgment pursuant to NYCPLR § 440.10 were ultimately denied by the trial court. (*Id.*)

Petitioner was assigned the Monroe County Public Defender to perfect his direct appeal to the Appellate Division, Fourth Department ("Fourth Department"). (Dkt. No. 42, pg. 5) Petitioner also submitted a supplemental, *pro se* brief to the Fourth Department arguing that his trial counsel was ineffective for failing to obtain suppression of his April 3, 2002 confession and DNA evidence. (Dkt. No. 42, Appendix B) On June 8, 2007, the Fourth Department unanimously affirmed petitioner's judgment of conviction, concluding that such contentions, among others, were without merit. *See People v. Griffin*, 41 A.D.3d

[2] NYCPLR § 440.10 permits the court in which judgment was entered to vacate the judgment upon motion of the defendant if certain statutory requirements are met.

[3] The trial court also relied on many of the findings of the fact from the pretrial suppression hearing and found, *inter alia*, that petitioner knowingly and voluntarily signed a consent form giving police permission to obtain his DNA sample, and that his April 3, 2002 confession was the product of a knowing and voluntary waiver of his *Miranda* rights, which had been provided to him by law enforcement. (Dkt. No. 42, Appendix E)

1285, 1287 (4th Dep't 2007). The New York State Court of Appeals denied petitioner leave to appeal. *People v. Griffin*, 9 N.Y.3d 923 (2007).[4]

On December 5, 2008, petitioner filed, in this Court, a *pro se* petition for a federal writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Dkt. No. 1) Petitioner argued (1) ineffective assistance of trial counsel; (2) deprivation of right to counsel; (3) insufficiency of the evidence; (4) denial of right to a fair trial; and (5) various Fourth Amendment violations, including that his confession was involuntary as well as the product of an arrest made without probable cause or jurisdiction, and that his DNA sample was improperly obtained. (*Id.*) On December 14, 2010, the Hon. Michael A. Telesca issued a detailed Decision and Order denying the writ of habeas corpus and dismissing the petition in its entirety. (Dkt. No. 29; *Griffin v. Kirkpatrick*, 08-CV-0886, 2010 U.S. Dist. LEXIS 132113 (W.D.N.Y. Dec. 14, 2010)) Petitioner then appealed to the United States Court of Appeals, Second Circuit, for leave to file a successive petition pursuant to 28 U.S.C. § 2244(b)(3)(C) arguing, *inter alia*, that his "appellate counsel was ineffective in failing to argue [that] trial counsel had been ineffective in failing to move to suppress statements & DNA evidence." (Dkt. No. 42, Appendix C) The Second Circuit denied petitioner's request to file a successive petition on these and other grounds. (*Id.*)

On May 3, 2021, petitioner filed the instant Rule 60(b)(6) motion seeking relief from Judge Telesca's December 14, 2010 Decision and Order denying the habeas petition. (Dkt. No. 40) Petitioner further requested that this Court appoint him counsel and conduct an evidentiary hearing in connection with his Rule 60(b)(6) motion. (Dkt. Nos. 45, 46)

[4] Petitioner has also challenged his conviction in the state courts by filing six petitions seeking a writ of error coram nobis, all of which have been rejected by the Fourth Department. (Dkt. No. 42, pg. 9)

Respondent filed a response in opposition on May 17, 2021 (Dkt. No. 43) and petitioner filed a reply on June 1, 2021 (Dkt. No. 43).

DISCUSSION

Rule 60(b) of the Federal Rules of Civil Procedure allows a party to seek relief from a final judgment for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, without reasonable diligence, could not have been discovered in time to move for a new trial; (3) fraud; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; or (6) any other reason that justifies relief. *See* Fed. R. Civ. P. 60(b). The Supreme Court has held that Rule 60(b) applies in the habeas context. *See Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005). Here, petitioner specifically states that he is moving for relief under subsection (6) of Rule 60(b). (Dkt. No. 40) He contends that "exceptional and extraordinary circumstances of trial court and trial counsel errors affecting the integrity of [the] habeas proceeding" warrant reopening the federal judgment. (*Id.*) As explained in turn below, petitioner's Rule 60(b)(6) motion should be denied because (1) it is time-barred; (2) petitioner is attempting to attack the merits of his underlying conviction; and (3) there are no exceptional or extraordinary circumstances which warrant reopening this Court's prior judgment.

Petitioner's claim is time-barred.

A motion for relief from a final judgment under Rule 60(b)(6) "must be made within a reasonable time" after the judgment is entered. *See* Fed. R. Civ. P. 60(c)(1). To determine whether a litigant has filed a Rule 60(b)(6) motion within a reasonable period, the Court "must scrutinize the particular circumstances of the case and balance the

interest in finality with the reasons for delay." *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 897 (2d Cir. 1983). Here, this Court entered a final judgment denying the petition for a writ of habeas corpus on December 15, 2010. *See Griffin*, 2010 U.S. Dist. LEXIS 132113; Dkt. No. 29. Petitioner filed the instant Rule 60(b)(6) motion seeking relief from that judgment over ten years later, on May 3, 2021. *See* Dkt. No. 40

The Court does not find ten years from the date judgment was entered to be a reasonable amount of time for petitioner to have waited before filing the instant Rule 60(b)(6) motion. *See Brown v. Rivera*, 6:06-CV-06274, 2019 U.S. Dist. LEXIS 149707 (W.D.N.Y. Sept. 3, 2019) ("Ten years from the date judgment was entered is clearly not a reasonable time" for filing a Rule 60(b)(6) motion.); *Williams v. Donnelly*, 99-CV-6051, 2011 U.S. Dist. LEXIS 21676 (W.D.N.Y. Mar. 2, 2011) (denying Rule 60(b) motion filed over seven years after denial of habeas petition because of significant delay); *Malik v. Mackey*, 03 Civ. 580, 2009 U.S. Dist. LEXIS 7729 (S.D.N.Y. Jan. 30, 2009) (motion for reconsideration under Rule 60(b)(6) filed two years after entry of judgment was untimely); *Spurgeon v. Lee*, 11-CV-600, 2019 U.S. Dist. LEXIS 21825 (E.D.N.Y. Feb. 11, 2019) (deeming 33-month delay sufficient to deny Rule 60(b) motion as untimely).

The Court rejects petitioner's claim that his time for filing the Rule 60(b)(6) motion should be subject to "equitable tolling" because the state court created an "impediment" when it wrongfully denied him an evidentiary hearing in connection with his numerous collateral motions to vacate his conviction, brought before the trial court pursuant to NYCPLR § 440.10. To be sure, the granting or denying of an evidentiary hearing by a state trial court on a collateral motion to vacate a conviction is not a prerequisite to the filing of a Rule 60(b)(6) motion to challenge a federal court judgment denying a habeas

petition. Further, the trial court first declined to conduct an evidentiary hearing with respect to petitioner's initial motion to vacate in April of 2004, four years before petitioner filed a writ of habeas corpus in this Court and six years before this Court issued a final judgment as to the habeas petition. Therefore, to the extent that petitioner is arguing that the trial court's denial of a hearing with respect to his collateral appeals is relevant to his Rule 60(b)(6) claim, petitioner was aware of the denial when this Court rejected his habeas petition in December of 2010 and could have raised any such arguments in a Rule 60(b)(6) motion filed promptly at that time. Indeed, petitioner continued to file unsuccessful collateral attacks on his criminal conviction with the trial court between 2010 and 2013, and the trial court continued to decline to hold an evidentiary hearing as to petitioner's claims. However, these proceedings had no effect on petitioner's ability to timely or promptly challenge, under Rule 60(b), this Court's denial of his habeas petition and certainly do not reasonably explain why he waited so long to do so. In fact, the trial court last denied petitioner's request for an evidentiary hearing as to a collateral appeal motion on August 22, 2013, and petitioner still waited another seven years to file the instant Rule 60(b)(6) motion. Indeed, the Second Circuit has found much shorter delays to be patently unreasonable. *Rodriguez v. Mitchell*, 252 F.3d 191 (2d Cir. 1999) ("We do not think that three and one-half years from the date judgment was entered [dismissing the habeas petition] is a reasonable time [for purposes of Rule 60(b)(6)]."); *Kellogg v. Strack*, 269 F.3d 100, 104 (2d Cir. 2001) (twenty-six-month delay in submitting Rule 60(b) motion is "patently unreasonable" absent mitigating circumstances); *Truskoski v. ESPN, Inc.*, 60 F.3d 74, 77 (2d Cir. 1995) (Rule 60(b)(6) motion submitted eighteen months after entry of judgment found "plainly" untimely); *Fowlkes v. Adamec*, 622 F. App'x 76, 77 (2d

Cir. 2015) (four-year delay unreasonable); *Grace v. Bank Leumi Tr. Co. of N.Y.*, 443 F.3d 180, 191 (2d Cir. 2006) ("In a typical case, five years from the judgment to a Rule 60(b) motion would be considered too long by many courts."). For these reasons, petitioner's Rule 60(b)(6) motion is untimely and should be dismissed in its entirety.[5]

The Petition Lacks Merit

Even if petitioner's motion were not time-barred, and it is, it should still be dismissed. The Second Circuit has made clear that Rule 60(b) motions for relief from a final judgment may not circumvent the statutory restraints on a state prisoner's ability to file second or successive habeas applications under 28 U.S.C. § 2254. *See Harris v. United States*, 367 F.3d 74, 80 (2d Cir. 2004); 28 U.S.C. § 2244(b). Specifically, a claim that "seeks to add new grounds for [habeas] relief" or that "attacks the federal court's previous resolution of a [habeas] claim on the merits" can only be raised in successive habeas petition and may not be asserted on a Rule 60(b) motion. *Gonzalez*, 545 U.S. at 532. Conversely, a motion is properly brought under Rule 60(b) when it "merely asserts that a previous ruling [on a habeas petition] 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.* Stated another way, a motion to reopen a habeas proceeding under Rule 60(b) is permissible when it "relates to the integrity of the federal habeas proceeding, not to the integrity of the state criminal trial." *Rodriguez*, 252 F.3d at 199.

[5] The Court also rejects petitioner's argument that his Rule 60(b)(6) motion should be deemed timely because he was unaware of the grounds for challenging this Court's final judgment through Rule 60(b) until "he met with inmate Tony Harrison, at Sing Sing Correctional Facility, on or about June 2018." Even if the Court did find this to be an excusable reason for the delay, which it does not, petitioner still waited another three years, until May 3, 2021, to file the Rule 60(b) motion. As noted in the cases cited herein, three years constitutes an unreasonable delay.

In evaluating a Rule 60(b) motion, the reviewing court "has the obligation to characterize the request for relief properly, regardless of the label that the petitioner applies." *Dent v. United States*, 09 Civ. 1938, 2013 U.S. Dist. LEXIS 73803 (E.D.N.Y. May 24, 2013). When a Rule 60(b) motion improperly attacks the underlying conviction, the court has two options: "(1) treat the Rule 60(b) motion as a second or successive habeas petition and transfer it to [the Second Circuit] for possible certification; or (2) simply deny the portion of the motion attacking the underlying conviction as beyond the scope of Rule 60(b)." *Harris*, 367 F.3d at 74.

Petitioner's Rule 60(b)(6) motion seems to rest primarily on two arguments: (1) that the trial court erred by failing to suppress evidence and statements; and (2) that petitioner was denied effective assistance of both trial and appellate counsel. The Court addresses each argument in turn below, including whether they relate to the integrity of the habeas proceeding or the integrity of the state criminal trial and why both claims should be rejected.

Fourth Amendment Violations

Petitioner argues that the trial court erred by failing to suppress evidence that was obtained through improper police conduct in violation of his Fourth Amendment rights. The evidence petitioner believes should have been suppressed includes his incriminating statements to law enforcement on April 3, 2002, while he was incarcerated for an unrelated charge at Cayuga Correctional Facility, as well as his DNA sample. Petitioner's Fourth Amendment arguments plainly attack the integrity of his criminal trial and underlying conviction and have nothing to do with the integrity of the federal habeas proceeding. Moreover, petitioner raised these very same arguments in his habeas

petition, and this Court rejected those claims on their merits.[6] Thus, petitioner's claim that the trial court erred in failing to suppress evidence is clearly outside the proper scope of a Rule 60(b) motion. *See United States v. Morales*, 03 CV 4676, 2008 U.S. Dist. LEXIS 95724 (S.D.N.Y. Nov. 10, 2008) (Rule 60(b) motion denied where petitioner was attempting to "resurrect issues he raised in his [h]abeas [p]etition, which [the] Court [had] already considered and rejected."); *Dodakian v. United States*, 14-CV-01188, 2015 U.S. Dist. LEXIS 179409 (S.D.N.Y. Aug. 14, 2015) (defendant's argument that fruit of the email search should have been suppressed involves her underlying conviction and is beyond the scope of Rule 60(b)"); *Williams v. Artus*, 06-CV-0356, 2008 U.S. Dist. LEXIS 77302 (W.D.N.Y. Oct. 2, 2008) ("[N]one of the arguments [defendant] raises in support of the motion for relief from judgment can be construed...as within...any of the subsections of Rule 60(b), because they merely argue that [the] [c]ourt wrongly dismissed [defendant's] Fourth Amendment claims attacking his underlying conviction and sentence.").

Because petitioner's request for relief on Fourth Amendment grounds "attacks the conviction itself, rather than an infirmity in the process that led to the Court's ruling on the habeas corpus petition...the request for relief is properly characterized as a second or successive habeas corpus petition." *Dent*, 2013 U.S. Dist. LEXIS 73803. As noted above,

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[6] Specifically, Judge Telesca ruled that petitioner's Fourth Amendment claims were both procedurally barred and preluded pursuant to the doctrine of *Stone v. Powell*, 428 U.S. 465 (1976). *See Griffin*, 2010 U.S. Dist. LEXIS at 14. In *Stone*, the Supreme Court held that "[w]here the state has provided an opportunity for a full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." 428 U.S. at 494. Indeed, the record reflects that petitioner had a full and fair opportunity to litigate his Fourth Amendment claims when the state court held a pretrial evidentiary hearing to address his motions to suppress statements and evidence. Moreover, the Second Circuit has held that a denial of a petitioner's claim under *Stone* constitutes a decision "on the merits" for purposes of the gatekeeping function of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *Graham v. Costello*, 299 F.3d 129 (2d Cir. 2002).