

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APR 24 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOX JOSEPH SALERNO,

Petitioner-Appellant,

v.

DORA B. SCHIRO, Warden; ATTORNEY
GENERAL FOR THE STATE OF
ARIZONA,

Respondents-Appellees.

No. 23-15126

D.C. No. 2:05-cv-01277-ROS
District of Arizona,
Phoenix

ORDER

Before: SILVERMAN and H.A. THOMAS, Circuit Judges.

The court has considered all filings submitted by appellant in support of his request for a certificate of appealability. The request for a certificate of appealability (Docket Entry No. 4) is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015); *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (order).

Any pending motions are denied as moot.

DENIED.

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Fox Joseph Salerno,

No. CV-05-01277-PHX-ROS

10 Petitioner,

ORDER

11 v.

12 Dora B Schriro, et al.,

13 Respondents.

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15 On March 30, 2007, the Court issued an Order adopting a Report and
16 Recommendation and denied Petitioner Fox Salerno's petition for writ of habeas corpus.
17 (Doc. 64). As relevant here, that Order addressed and rejected Petitioner's arguments that
18 his sentences from state court convictions were unlawful under *Apprendi v. New Jersey*,
19 530 U.S. 466 (2000) or *Blakely v. Washington*, 542 U.S. 296 (2004). Less than a week
20 later, Petitioner filed a motion for reconsideration. (Doc. 66). That motion presented
21 additional arguments regarding what Petitioner viewed as "*Apprendi/Blakely*" errors in his
22 sentences. (Doc. 66). The Court denied that motion on April 13, 2007. (Doc. 71). On
23 November 7, 2007, the Ninth Circuit denied Petitioner's request for a certificate of
24 appealability. (Doc. 73).

25 On September 24, 2022, Petitioner filed a "Motion to Re-Open Case." (Doc. 74).
26 That motion argues Petitioner recently "came across [the] R&R and re-read it." (Doc. 74
27 at 2). In doing so, Petitioner realized his sentences violated the requirements of *Apprendi*,
28 apparently in some way he did not articulate in his original petition or motion for

1 reconsideration. (Doc. 74 at 3). In his motion filed this year, Petitioner claims his sentence
2 was “a miscarriage of justice, and a structural and fundamental error.” (Doc. 74 at 1).
3 Petitioner also claims the sentencing error meant the state trial court “did not have subject
4 matter jurisdiction” and jurisdiction “cannot be waived and cannot be time barred.” (Doc.
5 74 at 5). Respondents filed an opposition arguing Petitioner’s motion is untimely, fails on
6 its merits, and likely qualifies as a “second or successive” habeas petition that must be
7 authorized by the Court of Appeals. (Doc. 80).

8 While unclear, Petitioner’s “Motion to Re-Open Case” appears to be seeking relief
9 pursuant to Federal Rule of Civil Procedure 60. (Doc. 74 at 5-6). Because of the statutory
10 limitations on repetitive habeas litigation, the threshold issue is whether that motion should
11 be viewed as a Rule 60 motion that may be heard by this Court or if Petitioner’s motion
12 should be viewed as a “second or successive habeas corpus application” that can only be
13 heard by this Court after Petitioner obtains permission from the Court of Appeals. 28
14 U.S.C. § 2244(b)(1), (b)(3)(A).

15 A post-judgment filing purporting to be a Rule 60 motion actually is a “second or
16 successive habeas corpus application” if it “seeks to add a new ground for relief or attacks
17 the federal court’s previous resolution of a claim *on the merits.*” *Balbuena v. Sullivan*, 980
18 F.3d 619, 638 (9th Cir. 2020). Of special relevance here, a motion must be viewed as a
19 “second or successive habeas corpus application” if it “argues a change in substantive law
20 justifies relief from the previous denial of a claim.” *Id.* Under this standard, Petitioner’s
21 motion is a “second or successive habeas corpus application” that cannot be heard absent
22 permission from the Court of Appeals.

23 Petitioner’s “Motion to Re-Open Case” makes clear he is attacking on the merits the
24 denial of his habeas petition in 2007. According to Petitioner, the R&R issued in 2007,
25 and subsequently adopted by the Court, “incorrectly concluded” his state court sentences
26 were permissible. (Doc. 74 at 4). Petitioner’s motion also states, at the time Petitioner
27 filed his habeas petition in 2005, “*Apprendi* was still being hashed out and the defining
28 case laws came out in 2006 & 2007.” (Doc. 74 at 2). In effect, Petitioner argues there have

1 been changes in the governing law since 2007 such that he is now entitled to relief. Arguing
2 the merits of the previous denial, and claiming subsequent legal developments mean he is
3 now entitled to relief, establish Petitioner's "Motion to Re-Open Case" qualifies as a
4 second or successive habeas corpus application. That motion, therefore, cannot be heard
5 without permission from the Court of Appeals. 28 U.S.C. § 2244(b)(1).

6 Finally, a certificate of appealability "is required in order to appeal the denial of a
7 Rule 60(b) motion for relief from a district court's judgment denying federal habeas relief."
8 *Martinez v. Shinn*, 33 F.4th 1254, 1261 (9th Cir. 2022). Petitioner's motion is not, in fact,
9 a proper Rule 60 motion. But even if so construed, the motion does not present any
10 plausible basis for relief. Therefore, jurists of reason would not "find it debatable whether
11 the [Court] abused its discretion in denying" Petitioner's Rule 60 motion. *Id.* No certificate
12 of appealability will be issued.

13 Accordingly,

14 **IT IS ORDERED** the Motion to Reopen Case (Doc. 74) is **DENIED**.

15 **IT IS FURTHER ORDERED** a Certificate of Appealability is **DENIED**.

16 Dated this 15th day of November, 2022.

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Honorable Roslyn O. Silver
Senior United States District Judge