S.D.N.Y. – W.P.
10-cv-1388
Briccetti, 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 13th day of September, two thousand twenty-three.

Present:

Reena Raggi,
Raymond J. Lohier, Jr.,
Susan L. Carney,
Circuit Judges.

Valery LaTouche,

Petitioner-Appellant,

v.

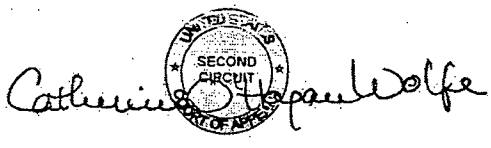
22-3017

Superintendent Harold D. Graham, Auburn Correctional Facility,

Respondent-Appellee.

Appellant, *pro se*, moves for a certificate of appealability and *in forma pauperis status*. 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).

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



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VALERY LA TOUCHE, Petitioner, v. HAROLD D. GRAHAM, Superintendent, Auburn Correctional Facility, Respondent.	:	**ORDER** 10 CV 1388 (VB)

Before the Court is petitioner's third motion to vacate the judgment in this case and re-open the proceeding pursuant to Fed. R. Civ. P. 60(b)(6). (Doc. #83).

For the following reasons, the motion is DENIED.

BACKGROUND

Petitioner was convicted on November 15, 2005, in Rockland County Court of second-degree murder, robbery, attempted robbery, and criminal possession of a weapon. His conviction was affirmed by the Appellate Division, Second Department, on April 7, 2009, People v. Latouche, 61 A.D.3d 702 (2d Dep't 2009), and leave to appeal to the Court of Appeals was denied on July 27, 2009.

The instant petition for a writ of habeas corpus was filed on February 22, 2010.

By order dated July 9, 2010, as amended by order dated July 26, 2010, Magistrate Judge Paul E. Davison granted petitioner's request for a stay to adjudicate a New York Criminal Procedure Law ("CPL") § 440.10 motion based on an otherwise unexhausted claim that his conviction was obtained in violation of his Sixth Amendment right to confront the witnesses against him (but not based on a claim of ineffective assistance of counsel). (Docs. ##12–13). On September 28, 2010, the state trial court denied petitioner's motion because the confrontation clause claim was procedurally barred under CPL § 440.10(2)(c). Leave to appeal to the Second

Department was denied on January 26, 2011. (See Doc. #44 (Report and Recommendation ("R&R")) at 13-14).

The stay of the habeas petition was subsequently lifted and, on March 8, 2013, the magistrate judge issued an R&R recommending that the Court deny the petition. On April 2, 2013, before filing objections to the R&R, petitioner again requested a stay, this time to present ineffective assistance of appellate counsel ("IAAC") claims to the state courts. (Doc. #47). This was the first time petitioner mentioned IAAC claims in the federal proceedings even though his habeas petition had been filed after his direct appeal had concluded.

This Court denied the request for a stay on April 18, 2013, reasoning that (i) petitioner "failed to demonstrate good cause for seeking a stay more than three years after his petition was filed and after the Court previously granted him such a stay to exhaust additional claims in state court," and (ii) even if it granted that stay, "any amended petition incorporating [additional claims] would be dismissed as untimely" because amended habeas petitions asserting new grounds for relief do not relate back for the purpose of the one-year statute of limitations under 28 U.S.C. § 2244(d). (Doc. #50).

On September 23, 2013, the Court adopted the R&R in its entirety and denied the habeas petition. In doing so, the Court stated that to the extent petitioner was attempting to assert an IAAC claim, that claim was untimely under Section 2244(d), and, in any event, such a claim was clearly without merit. (Doc. #55). The Second Circuit dismissed petitioner's appeal on March 13, 2014.

Thereafter, petitioner filed an application for a writ of error coram nobis to vacate the Second Department's decision affirming his conviction, citing IAAC. That application was

without merit." (Doc. #80). Petitioner's appeal from that Order was dismissed by the Second Circuit on December 3, 2020.

On June 7, 2022, petitioner filed the instant third Rule 60(b)(6) motion to vacate judgment and reopen the case, again arguing that his rights to effective representation and due process were violated because his trial and appellate attorneys failed to demonstrate petitioner's confession was coerced and involuntary. Petitioner brings one new argument, namely that a recent amendment to CPL § 440.10(2)(c) constitutes "extraordinary circumstances" justifying reopening under Rule 60(b)(6). (Doc. #83-1). Respondent opposes the motion, arguing it is untimely. (Doc. #87).

DISCUSSION

To the extent the instant motion reiterates arguments made in petitioner's two previous Rule 60(b) motions, such arguments must, again, be dismissed as untimely.

Petitioner's only new argument asserts that an intervening change in the law makes this case eligible for Rule 60(b)(6)'s catch-all provision, which allows a court to vacate a final judgment for any "reason that justifies relief." However, this provision only applies when "extraordinary circumstances must justify reopening." Kemp v. United States, 142 S. Ct. 1856, 1861 (2022).[1] And even in such a case, the court "may" vacate the judgment but is not required to do so. Fed. R. Civ. P. 60(b)(6) (emphasis added). Petitioner argues the change in Section 440.10(2)(c) is an extraordinary circumstance warranting the application of Rule 60(b)(6) and vacatur of the judgment denying his habeas petition.

Petitioner is incorrect.

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[1] Unless otherwise indicated, case quotations omit all internal citations, quotations, footnotes, and alterations.

The version of the statute in effect when petitioner's habeas petition was denied provided:

> [T]he court must deny a motion to vacate a judgment when . . . [a]lthough sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him.

CPL § 440.10(2)(c) (effective August 1, 2012, to January 18, 2016).

The current version, effective as of October 25, 2021, was amended, with relevant changes underlined, as follows:

> [T]he court must deny a motion to vacate a judgment when . . . [a]lthough sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his or her unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him or her unless the issue raised upon such motion is ineffective assistance of counsel.

Id.

Following the amendment, an ineffective assistance of counsel claim can no longer be dismissed (i) because it is based on the record but not raised on appeal, or (ii) because of the defendant's unjustifiable failure to perfect an appeal during the prescribed time. (See Donnino, Practice Commentary, McKinney's, Crim. Proc. L. § 440.10). In other words, now, ineffective assistance of counsel claims can be raised under Section 440.10 even if they could have been brought on direct appeal but were not.

In this case, the Second Department denied petitioner's IAAC claim not based on the earlier version of Section 440.10(2)(c), but rather based on the merits: Petitioner "has failed to establish that he was denied the effective assistance of appellate counsel." People v. LaTouche,

130 A.D.3d at 846. Perhaps petitioner confuses other claims that were dismissed based on Section 440.10(2)(c), like his confrontation clause claim (R&R at 23), and the argument that his confessions should have been suppressed (R&R at 27 n.26). Thus, because petitioner's IAAC claim was not dismissed based on either ground in the statute, the change in Section 440.10(2)(c) excluding ineffective assistance of counsel claims from being barred based on either ground is not relevant to this case and cannot constitute an extraordinary circumstance deserving of a Rule 60(b)(6) vacatur.

And, even if the change in the law were an extraordinary circumstance such that the IAAC claim would not be procedurally barred, it would nonetheless fail on the merits, as this Court has previously decided. (See Doc. #73 at 2 ("the Court previously found this claim was without merit"); and Doc. #55 at 2 ("plaintiff's ineffective assistance of counsel argument does not establish cause and prejudice or a fundamental miscarriage of justice that would excuse the procedural default of his sixth amendment claim, as the Court has carefully reviewed the record and finds plaintiff's sixth amendment claim is clearly without merit")).

Nevertheless, for the sake of a complete record, this Court will again review petitioner's IAAC claims on the merits. To establish ineffective assistance of counsel, petitioner must show: (i) counsel's performance was deficient and (ii) such deficiency actually prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687–88 (1984). Petitioner explains his IAAC claim in Motion #1: "Appellate counsel was ineffective for two reasons, (1) failing to argue that Mr. LaTouche's statement was coerce [sic] and rendered in violation of the Fifth Amendment right against self-incrimination, (2) failing to argue trial counsel's ineffective [sic] for failing to present and preserve an issue of coercion in respect to the leading detective's testimony." (Doc. 65 at 34).

The first reason is without merit because appellate counsel did argue petitioner's statement was coerced. Petitioner, himself, admits as much: "appellant [sic] counsel filed a brief on direct appeal regarding [petitioner's] convictions raising the following claims. . . . The lower court erred in denying the defendant's motion to suppress all of his statements, which were involuntarily rendered and violated his Fifth Amendment privilege against self-incrimination." (Doc. #65 at 7).

The second reason is also without merit because, even if it is true that appellate counsel did not bring up trial counsel's ineffectiveness for failing to present the issue of coercion at trial, appellate counsel's conduct was not deficient because petitioner admits the issue of coercion was brought up at trial: "At trial [petitioner] made it clear the effect of the detective [sic] oppressive conduct had on him when he testified that 'during the questioning, the three detectives . . . were in half circle with me in the center' and 'where [sic] ganging up on me like if I didn't want to answer their questions they would come and ask more questions, it was like intimidation.'" (Motion #2 at 20). Thus, an appellate claim regarding trial counsel's failure to bring up an issue that was, in fact, brought up at trial would have been futile. For these reasons, petitioner's IAAC claim fails on the merits.

Next, petitioner's IATC claim, which he raised for the first time in Motion #2, cannot be considered by this Court. Under 28 U.S.C. § 2254(b)(1)(A), "a state prisoner is required to exhaust all of his available state remedies before a federal court can consider his habeas application." Jackson v. Conway, 763 F.3d 115, 133 (2d Cir. 2014). A claim is exhausted when the petitioner has presented his "claim to the highest court of the state." Galdamez v. Keane, 394 F.3d 68, 73 (2d Cir. 2005). In New York, this means "a criminal defendant must first appeal his or her conviction to the Appellate Division, and then must seek further review of that conviction

by applying to the Court of Appeals for a certificate granting leave to appeal." Id. at 74. Thus, because petitioner has not exhausted his IATC claim in state court, this Court cannot review it.

Even if this Court were able to review the IATC claim, it would find it without merit. Petitioner claimed his trial counsel deficiently "failed to conduct any pre-trial investigation about the phenomenon and cause of false confession, while also failing to introduce expert testimony at the Huntley hearing and trial on the issues of . . . [petitioner]'s susceptibly [sic] to making a false confession" (Motion #2 at 18) due to his "mental limitations" (Id. at 21). To succeed on this claim, petitioner must have "demonstrate[d] that New York courts would have allowed false confession expert testimony at the time of [his] trial." Curry v. Burge, 2007 WL 3097165, at *18 n.25 (S.D.N.Y. Oct. 23, 2007).[2] He has not. At the time of petitioner's trial in 2005, New York courts did not allow false confession expert testimony, including testimony regarding a defendant's susceptibility to providing a false confession. Id. (collecting cases); accord, Hughes v. Sheahan, 312 F. Supp. 3d 306, 332 (N.D.N.Y. 2018) (collecting cases). Because such testimony would have been inadmissible, trial counsel's failure to investigate the issue and call an expert did not actually prejudice the result of the trial. Therefore, petitioner's IATC claim fails on the merits.

CONCLUSION

The motion to vacate judgment is DENIED.

Because petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. See 28 U.S.C. § 2253(c)(2); Love v. McCray, 413 F.3d 192, 195 (2d Cir. 2005).

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[2] Petitioner will be provided with a copy of this unpublished decision. See Lebron v. Sanders, 557 F.3d 76 (2d Cir. 2009).

The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this Order 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 is instructed to terminate the motion. (Doc. #83).

Chambers will mail a copy of this Order to petitioner at the address on the docket.

Dated: November 9, 2022
White Plains, NY

SO ORDERED:

Vincent L. Briccetti
United States District Judge

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