

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-12328-H.

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

NESTOR LEON,

Defendant - Appellant.

Appeal from the United States District Court
for the Middle District of Florida

ORDER: Pursuant to the 11th Cir. R. 42-1(b), this appeal is DISMISSED for want of prosecution because the appellant Nestor Leon failed to pay the filing and docketing fees to the district court, or alternatively, file a motion to proceed in forma pauperis in district court and file a Transcript Order Form within the time fixed by the rules.

Effective August 29, 2023.

DAVID J. SMITH
Clerk of Court of the United States Court
of Appeals for the Eleventh Circuit

FOR THE COURT - BY DIRECTION

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

VS.

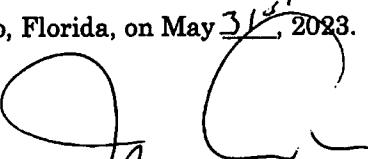
CASE NO. 6:14-cr-238-JA-DCI

NESTER LEON

ORDER

Having considered Defendant Nester Leon's Motion for Return of Personal Property (Doc. 231, filed May 19, 2023) and the Government's Response to Defendant's Motion for Return of Property (Doc. No. 233, filed May 26, 2023), the Defendant's Motion (Doc. 231) is DENIED.

DONE and ORDERED in Orlando, Florida, on May 31st, 2023.


JOHN ANTOON II
United States District Judge

Copies furnished to:
United States Attorney
Nester Leon

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

NESTOR LEON,

Petitioner,

v.

Case No. 6:19-cv-1882-JA-DCI
(6:14-cr-238-JA-DCI)

UNITED STATES OF AMERICA,

Respondent.

ORDER

THIS CAUSE is before the Court on Petitioner's Motion for Reconsideration Pursuant to Federal Rules of Civil Procedure 59(e) and 60(b) ("Motion," Doc. 82). To support the Motion, Petitioner argues that the Court erred in denying without a hearing the six grounds contained in his Second Amended Motion to Vacate, Set Aside, or Correct Sentence ("Second Amended Motion to Vacate"), and he raises a new claim for relief, that he is actually innocent of his 18 U.S.C. § 924(c) conviction because carjacking is not categorically a crime of violence. (Doc. 82 at 1-7.) For the following reasons, the Motion is denied in part and dismissed in part, and Petitioner is denied a certificate of appealability.

I. Legal Standards

Federal Rule of Civil Procedure 59 permits courts to alter or amend a

judgment based on “newly-discovered evidence or manifest errors of law or fact.” *Anderson v. Fla. Dep’t of Envtl. Prot.*, 567 F. App’x 679, 680 (11th Cir. 2014) (quoting *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007)). “A movant ‘cannot use a Rule 59(e) motion to relitigate old matters’ or ‘raise argument[s] or present evidence that could have been raised prior to the entry of judgment.’ *Levinson v. Landsafe Appraisal Services, Inc.*, 558 F. App’x 942, 946 (11th Cir. 2014) (quoting *Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005)).

Rule 60(b) of the Federal Rules of Civil Procedure provides:

[T]he court may relieve a party or its legal representative 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 (whether previously called intrinsic or extrinsic), 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)(1)-(6). Rule 60(b), however, “cannot be used to circumvent

the prohibition on filing unauthorized successive post-conviction challenges.” *United States v. Bueno-Sierra*, 723 F. App’x 850, 853 (11th Cir. 2018) (citing *Gonzalez v. Crosby*, 545 U.S. 524, 530-32 (2005) and *Franqui v. Florida*, 638 F.3d 1368, 1371-73 (11th Cir. 2011)). “A Rule 60(b) motion from a denial of a § 2255 motion is considered a successive motion if it ‘seeks to add a new ground for relief’ or ‘attacks the federal court’s previous resolution of a claim on the merits.’” *Id.* (quoting *Gonzalez*, 545 U.S. at 532).

II. Analysis

Petitioner does not specify the provision of Rule 60(b) on which he relies. To the extent Petitioner argues that the Court erred by denying his six grounds for relief without an evidentiary hearing, he arguably alleges a “defect in the integrity” of the habeas proceedings, *see Gonzalez*, 545 U.S. at 532, which may be raised in a Rule 60 motion. Nevertheless, this argument is meritless.

The facts relevant to Petitioner’s grounds were adequately developed in the record. The Court, therefore, was able to conclusively determine from the record—without a hearing—that Petitioner was not entitled to relief. *See Lynn v. United States*, 365 F.3d 1225, 1238-39 (11th Cir. 2004); *Holmes v. United States*, 876 F.2d 1545, 1553 (11th Cir. 1989). Courts may dismiss a 28 U.S.C. § 2255 motion without an evidentiary hearing “if (1) the petitioner’s allegations, accepted as true, would not entitle the petitioner to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record,

inherently incredible, or conclusions rather than statements of fact." *Engelen v. United States*, 68 F.3d 238, 240 (8th Cir. 1995); *see also Holmes v. United States*, 876 F.2d 1545, 1552-53 (11th Cir. 1989). Here, the Court accepted Petitioner's allegations in the Second Amended Motion to Vacate as true and concluded they did not entitle him to relief, or the Court otherwise determined his allegations were refuted by the record. *See* Doc. 80. Consequently, an evidentiary hearing was not necessary to resolve Petitioner's grounds.

Further, Petitioner has not demonstrated that the denial of the grounds in the Second Amended Motion to Vacate constitutes a manifest error of law or fact. Nor has Petitioner established the applicability of any provision of Rule 60(b). Thus, to the extent Petitioner challenges the Court's denial of the Second Amended Motion to Vacate, the Motion is denied.

With respect to Petitioner's new claim(s) challenging his § 924(c) conviction, *see* Doc. 82 at 5-6, these claim(s) could have been presented before the disposition of the Second Amended Motion to Vacate. Thus, no basis exists under Rule 59 to consider the new claim(s).

Likewise, Petitioner is precluded from raising new claims in a Rule 60(b) motion but instead must seek permission from the Eleventh Circuit Court of Appeals to file a successive § 2255 if he wants to do so. *See* 28 U.S.C. §§ 2244 and 2255. Consequently, the Motion is dismissed without prejudice as to Petitioner's new claim(s) to allow Petitioner the opportunity to seek

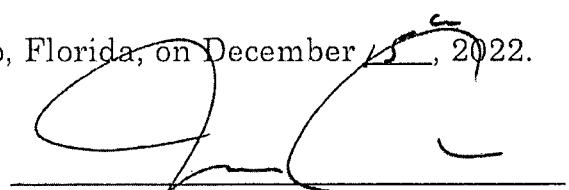
authorization from the Eleventh Circuit Court of Appeals. Petitioner should be aware that § 2255 limits the circumstances under which the Court of Appeals will authorize the filing of a second or successive § 2255 motion.

III. Conclusion

Accordingly, it is **ORDERED** and **ADJUDGED** as follows:

1. Petitioner's Motion for Reconsideration Pursuant to Federal Rules of Civil Procedure 59(e) and 60(b)(Doc. 82) is **DENIED IN PART** and **DISMISSED IN PART**.
2. This Court should grant an application for certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner has failed to make a substantial showing of the denial of a constitutional right. Accordingly, a Certificate of Appealability is **DENIED** in this case.
3. The Clerk of the Court is directed to send Petitioner an "Application for Leave to File a Second or Successive Motion to Vacate, Set Aside, or Correct Sentence 28 U.S.C. § 2255 By a Prisoner in Federal Custody" form.

DONE and ORDERED in Orlando, Florida, on December 13, 2022.



JOHN ANTOON II
United States District Judge

Copies furnished to:
Counsel of Record
Unrepresented Party