

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
★ SEP 09 2011 ★
#*
BROOKLYN OFFICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
JOSE D. FLOREZ,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

-----X
DEARIE, United States District Judge:

ORDER

04-CR-0080 (RJD)
07-CV-4965 (CPS)

Jose D. Florez, a federal prisoner appearing *pro se*, moves for relief pursuant to Fed. R. Civ. P. 60(b)(6). By order dated July 23, 2009, the Court denied petitioner's motion to vacate his federal sentence under 28 U.S.C. § 2255. See Florez v. United States, No. 07-CV-4965 (CPS), 2009 WL 2228121 (E.D.N.Y. Jul. 24, 2009), appeal dismissed, Mandate, No. 09-3924-pr (2d Cir. Jan. 28, 2010).

"[R]elief under Rule 60(b) is available for a previous habeas proceeding only when the Rule 60(b) motion attacks the integrity of the previous habeas proceeding rather than the underlying criminal conviction." Harris v. United States, 367 F.3d 74, 77 (2d Cir. 2004); Rodriguez v. Mitchell, 252 F.3d 191 (2d Cir. 2001). Here, despite petitioner's argument to the contrary, he does challenge the underlying criminal conviction in this Rule 60(b) motion and not the integrity of the § 2255 proceeding. In fact, he seeks to "correct" his sentence to remove "the three point offense level enhancement," Motion at 2, thereby challenging his underlying sentence. The same ground was presented and rejected in his § 2255 motion. See Florez, 2009 WL 2228121 at *21.

Accordingly, this motion is denied as beyond the scope of Rule 60(b). Gitten v. United States, 311 F.3d 529, 534 (2d Cir. 2002). Florez may move in the United States Court of Appeals for the Second Circuit for an order authorizing the district court to consider a second or successive § 2255 motion. See 28 U.S.C. § 2255; 28 U.S.C. § 2244(b)(3)(A).

SO ORDERED.

Dated: 9/7, 2011
Brooklyn, New York

s/Raymond J. Dearie

Raymond J. Dearie
United States District Judge