

1 1992. Petitioner's August 31, 1993, petition to the California
2 Supreme Court was denied on November 23, 1993.

3 Petitioner initially filed a pro se federal petition on May 12,
4 1994, in Lyons v. White, No. CIV S-94-0731 GEB GGH P. The
5 Federal Defender was appointed to represent petitioner on June 14,
6 1994. That petition was later dismissed without prejudice for
7 exhaustion purposes on November 14, 1995, by stipulation.

8 On April 18, 1996, in an apparently preemptive response to
9 the new standards of the Antiterrorism and Effective Death Penalty
10 Act ("AEDPA"), the Federal Defender filed a new federal habeas
11 petition for petitioner in this action, but was not appointed to
12 represent petitioner. This petition was signed only by the Federal
13 Defender who was not yet appointed to the case. The signature line
14 for petitioner was left blank. On July 8, 1996, a petition was finally
15 filed which contained petitioner's signature. Also on July 8, 1996,
16 the Federal Defender filed a request for appointment of counsel
17 nunc pro tunc, to date back to the April 18th petition. That request
18 was denied by order on August 22, 1996, at the same time the court
19 recommended that the petition be dismissed as a mixed petition, for
20 lack of exhaustion. That recommendation was affirmed by district
21 court order on November 27, 1996.

22 The Federal Defender continued to act on petitioner's behalf
23 without having been appointed, pursuing an appeal in the Ninth
24 Circuit. He was ultimately appointed as counsel in the Ninth
25 Circuit on April 11, 1997. The appeal was limited to the issue of
26 whether the district court appropriately dismissed the petition sua
27 sponte. Mr. Broderick then advised petitioner to exhaust the claims
28 which had been exhausted in the April, 1996, petition, assuming
that this second federal petition contained all of the possible claims.
Those claims were exhausted on May 28, 1997, when the California
Supreme Court denied the petition filed on March 14, 1997. On
April 27, 1998, the Ninth Circuit vacated the district court's order
of dismissal and remanded the case for further proceedings, finding
that the exhaustion requirement is met if state remedies are
exhausted while an appeal is pending.

On June 15, 1998, petitioner filed a first amended petition,
through the Federal Defender. On December 4, 1998, respondent
filed an answer to the first amended (federal) petition. On
December 21, 1998, petitioner filed a traverse, as well as a
document entitled "supplemental traverse."

Unbeknownst to respondent, petitioner's counsel
(Broderick) discovered when preparing the first amended petition
that no Assistant Federal Defender previously assigned to represent
petitioner had up to this point read the entire state court file.
Attorney Broderick's reading of the file discovered new claims that
assertedly "jumped out" at him, so patent were they. As a result, a
new state habeas petition was filed on July 30, 1998, identifying the
new claims. Thereafter, petitioner sought to have this court stay the
operative first amended petition in order to allow the new
exhaustion process to terminate. Due to the fact that the state court

1 acted expeditiously in denying the new state petition mooted the
2 stay issue, the undersigned vacated his recommendation to the
3 district court not to stay the case. Petitioner lodged a second
4 amended petition on April 28, 1999, containing 15 claims, all of
5 which were exhausted. After objection by respondent, petitioner
6 filed a motion for leave to file this second amended petition on May
7 11, 1999, which on August 11, 1999, the court granted in part and
8 denied in part, eliminating five of the fifteen claims alleged in the
9 second amended petition, claims 1, 2, 5, 6, and 7. Respondent was
10 directed to file a supplemental answer with regard to claims 3 and 4
11 in the second amended petition. Petitioner filed the second
12 amended petition on August 11, 1999. . . .

13 Respondent filed the supplemental answer on September 8,
14 1999. On September 10, 1999, petitioner filed a motion before the
15 district judge for reconsideration of the magistrate judge's order of
16 August 11, 1999. On December 2, 1999, the district judge denied
17 petitioner's motion. Petitioner filed his traverse on January 18,
18 2000, and a change of address on January 27, 2000.

19 ECF No. 63 at 3–5. On January 26, 2001, the undersigned recommended that the second
20 amended petition be denied. ECF No. 63. The court adopted the undersigned's recommendation
21 on February 28, 2001. ECF No. 65. On March 28, 2001, petitioner filed a notice of appeal. ECF
22 No. 68. On May 31, 2002, the Ninth Circuit issued an order affirming this court's dismissal.
23 ECF No. 71.

24 On August 10, 2006, petitioner filed a motion for relief from judgment under Rule 60(b).
25 ECF No. 72. On March 14, 2007, the undersigned recommended that petitioner's motion be
26 dismissed to the extent that it was a successive petition, and denied to the extent that it was a Rule
27 60(b) motion. ECF No. 74. The presiding district judge adopted the undersigned's
28 recommendation on May 1, 2007. ECF No. 77. On September 11, 2009, petitioner filed a second
Rule 60 motion. ECF No. 79. On December 16, 2009, the undersigned again recommended that
petitioner's motion be dismissed as successive petition. ECF No. 80. On January 21, 2010, the
presiding district judge again adopted the undersigned's findings and recommendations. ECF No.
82. On January 28, 2010, petitioner filed a notice of appeal and request for certificate of
appealability. ECF No. 83. The court declined to issue a certificate of appealability on March 5,
2010. ECF No. 84. On October 20, 2011, the Ninth Circuit also denied petitioner's request for a
certificate of appealability. ECF No. 90.

1 On September 15, 2015, petitioner filed a self-styled motion for relief from judgment
2 pursuant to Rule 60(b)(3). ECF No. 91. Respondent filed an opposition on October 1, 2015, ECF
3 No. 93, and petitioner filed a reply on October 15, 2015, ECF No. 94. Respondent then filed an
4 unauthorized sur-reply on October 20, 2015, ECF No. 95, which was followed by objections from
5 petitioner on November 4, 2015, ECF No. 96, and December 7, 2015, ECF No. 97.

6 LEGAL BACKGROUND

7 While the habeas restrictions established by the Antiterrorism and Effective Death Penalty
8 Act of 1996 (AEDPA) “did not expressly circumscribe the operation of Rule 60(b),” they “are
9 made indirectly relevant . . . by the fact that Rule 60(b), like the rest of the Rules of Civil
10 Procedure, applies in habeas corpus proceedings . . . only to the extent that [it is] not inconsistent
11 with applicable federal statutory provisions and rules.” Gonzalez v. Crosby, 545 U.S. 524, 529
12 (2005) (alteration in original) (footnote omitted) (internal quotation marks omitted). Accordingly,
13 habeas corpus petitioners cannot “utilize a Rule 60(b) motion to make an end-run around the
14 requirements of AEDPA” or to otherwise circumvent that statute’s restrictions on second or
15 successive habeas corpus petitions. Calderon v. Thompson, 523 U.S. 538, 547 (1998) (internal
16 quotation marks omitted); see also United States v. Buenrostro, 638 F.3d 720, 722 (9th Cir. 2011)
17 (per curiam) (“[A] state prisoner may not rely on Rule 60(b) to raise a new claim in federal
18 habeas proceedings that would otherwise be barred as second or successive under § 2254.”).

19 AEDPA generally limits a petitioner to one federal habeas corpus motion and precludes
20 “second or successive” habeas corpus petitions unless the petitioner meets certain narrow
21 requirements. See 28 U.S.C. § 2244(b). The statute provides that “[a] claim presented in a
22 second or successive habeas corpus application under section 2254 that was not presented in a
23 prior application shall be dismissed unless” it “relies on a new rule of constitutional law, made
24 retroactive to cases on collateral review by the Supreme Court, that was previously unavailable”
25 or on newly discovered facts that show a high probability of actual innocence. Id. §
26 2244(b)(2)(A)–(B); see also Gonzalez, 545 U.S. at 529–30.

27 Because of the difficulty of meeting this standard, habeas corpus petitioners at times have
28 characterized their second or successive habeas corpus petitions as Rule 60(b) motions. But

1 “[w]hen a Rule 60(b) motion is actually a disguised second or successive § 225[4] motion, it must
2 meet the criteria set forth in” § 2244(b)(2). See United States v. Washington, 653 F.3d 1057,
3 1059-60 (9th Cir. 2011) (discussing a second or successive 28 U.S.C. § 2255 petition); see also
4 Gonzalez, 545 U.S. at 528.

5 A legitimate Rule 60(b) motion “attacks . . . some defect in the integrity of the federal
6 habeas proceedings,” while a second or successive habeas corpus petition “is a filing that contains
7 one or more ‘claims,’” defined as “asserted federal bas[e]s for relief from a state court’s judgment
8 of conviction.” Gonzalez, 545 U.S. at 532. Put another way, a motion that does not attack “the
9 integrity of the proceedings, but in effect asks for a second chance to have the merits determined
10 favorably” raises a claim that takes it outside the bounds of Rule 60(b) and within the scope of
11 AEDPA’s limitations on second or successive habeas corpus petitions. Id. at 532 n.5.

12 ANALYSIS

13 The court should dismiss petitioner’s motion to the extent it is a successive petition and
14 deny it to the extent it is a Rule 60(b) motion. To show a defect in the integrity of his federal
15 habeas proceeding, petitioner must point to something that happened during that proceeding that
16 rendered its outcome suspect. As the court explains in more detail below, all of plaintiff’s
17 allegations relate to his state court proceedings. What’s more, even if petitioner’s allegations
18 could be construed as relating to his federal habeas proceedings, the motion would have to be
19 denied because those allegations would plainly be insufficient to show fraud upon the court.

20 Plaintiff requests that the court set aside its February 28, 2001, order denying plaintiff’s
21 writ of habeas corpus. ECF No. 91 at 28. That petition claimed that “the prosecution engaged in
22 vindictive prosecution by charging more serious offenses when petitioner refused a two-year offer
23 and demanded his constitutional right to a preliminary hearing.” ECF No. 63 at 2. According to
24 petitioner, on August 4, 1988, the prosecution filed a complaint in his underlying criminal case
25 charging him with one count of assault with a deadly weapon pursuant to California Penal Code §
26 245(a)(1), and one count of assault with a deadly weapon pursuant to California Penal Code §
27 245(a)(2). Id. at 22–23. At some point, perhaps before petitioner was charged, perhaps after,
28 petitioner spoke with the prosecutor regarding a potential plea deal. Id. The prosecutor told

1 petitioner that if he did not accept a plea deal he would receive an additional charge of mayhem,
2 along with great bodily injury enhancements. Id. Petitioner refused, however, to accept the plea
3 deal. Id.

4 At some point after the negotiations between the prosecutor and petitioner took place, a
5 second prosecutor not involved in the case spoke to an incarcerated informant who claimed that
6 petitioner was intimidating a rape victim via phone from the county jail. Id. In light of that
7 information the second prosecutor decided to review petitioner's case file, which is when he
8 discovered that petitioner had never been charged with raping the victim he was intimidating. Id.
9 The second prosecutor determined that petitioner had been "grossly undercharged" and
10 accordingly, decided to prosecute the case himself. Id. Petitioner alleged that on November 8,
11 1988, a first amended complaint was then filed charging him with twenty-three sex offense counts
12 and one count of attempted premeditated murder. Id. On December 12, 1988, the information
13 filed against petitioner charged him with thirty-two sex offense counts and one count of attempted
14 premeditated murder. Id. The petition alleged that the complaints charging petitioner with sex
15 offenses were filed vindictively because he had refused the plea deal offered by the first
16 prosecutor, insisting instead on testing the government's evidence. Id.

17 Although petitioner's motion is difficult to decipher at times, it seems that he is alleging
18 respondent committed several instances of fraud upon the court. All of these allegations revolve
19 around respondent's explanation for why additional sex offense charges were brought against
20 petitioner in the amended complaints. Specifically, petitioner attacks respondent's statements that
21 the second prosecutor received word from an informant that petitioner had been threatening a
22 rape victim not to come forward from prison. First, petitioner alleges that by failing to reveal this
23 information in state court, respondent prevented petitioner from "fully and fairly presenting his
24 case." ECF No. 91 at 20. Second, petitioner alleges that respondent used the aforementioned
25 information in this court, even though it should have been revealed earlier. Id. at 24. In addition,
26 petitioner claims that the information presented was false. Id. at 25. Finally, petitioner alleges
27 that his own attorney committed fraud upon the court by failing to challenge respondent's use of
28 the aforementioned information in this court. Id. at 27. All in all, these allegations boil down to

1 the claim that by not revealing this information earlier, in the underlying state court case,
2 respondent has committed fraud upon the court.

3 There are a number of problems with petitioner's claims. First, even though petitioner
4 frames some of his fraud upon the court claims as occurring in this court they are, in fact, directed
5 at the state court that presided over his underlying conviction. This is because his claims,
6 regardless of how they are phrased, effectively boil down to the assertion that the state should
7 have revealed the information it received from the informant during his state court proceedings.
8 Motions that include claims attacking petitioner's underlying state court conviction are second
9 and successive petitions, not legitimate Rule 60 motions. Jones v. Ryan, 733 F.3d 825, 834 (9th
10 Cir. 2013). What's more, even if petitioner's motion could be construed as alleging fraud upon
11 this court during the court of his habeas proceedings, the allegations are nowhere close to
12 sufficient. The Ninth Circuit has explained that "[f]raud on the court must involve an
13 unconscionable plan or scheme which is designed to improperly influence the court in its
14 decision." Abatti v. Comm'r, 859 F.2d 115, 118 (9th Cir. 1988) (internal quotation marks
15 omitted). Petitioner's allegation respondent failed to reveal information that, far from
16 exculpatory, actually *implicates petitioner further* in the crimes he was convicted of cannot
17 possibly constitute such a scheme against the court.

18 Accordingly, the court finds that petitioner has not properly alleged the existence of any
19 fraudulent plan or scheme that could warrant relief under Rule 60(b) and it will recommend his
20 motion be dismissed to the extent it is a successive petition and denied to the extent it is a Rule
21 60(b) motion.

22 CONCLUSION

23 In light of the foregoing, THE COURT HEREBY RECOMMENDS that petitioner's
24 motion for relief from judgment pursuant to Rule 60(b), ECF No. 91, be DISMISSED to the
25 extent that it is a successive petition, and DENIED to the extent that it is a Rule 60(b) motion.

26 These findings and recommendations are submitted to the United States District Judge
27 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
28 after being served with these findings and recommendations, any party may file written

1 objections with the court and serve a copy on all parties. Such a document should be captioned
2 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
3 shall be served and filed within ten days after service of the objections. The parties are advised
4 that failure to file objections within the specified time may waive the right to appeal the District
5 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

6 Dated: February 2, 2016

7 /s/ Gregory G. Hollows

8 UNITED STATES MAGISTRATE JUDGE

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