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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Joseph Nicholas Fuentes,

Petitioner,

v.

United States of America,

Respondent.

No. CV-08-00348-PHX-JAT

ORDER

Pending before the Court is Joseph Nicholas Fuentes' ("Petitioner") Rule 60(b)(6) Motion for Relief from Judgment (Doc. 21). Respondent has filed a response opposing the motion. (Doc. 36). Petitioner filed a reply. (Doc. 39). Having considered the Parties' briefs, the Court finds that Petitioner's Motion should be denied.

I. BACKGROUND

Petitioner was found guilty of first-degree murder and conspiracy to commit murder on January 26, 2005. (Doc. 36 at 10). He was sentenced to two concurrent life sentences. (*Id.*). He then unsuccessfully appealed his conviction. (*Id.*). The Ninth Circuit also denied his petition for rehearing. (*Id.*). Petitioner then filed a petition for a writ of certiorari, which was denied by the Supreme Court on May 4, 2007. (*Id.*). Shortly thereafter, on June 1, 2007, and August 10, 2007, Petitioner filed two short motions requesting appointment of counsel to "assist Movant in his habeas proceedings." (*Id.* at 10–11). He brought these Motions before he petitioned the Court for a writ of habeas corpus. (Doc. 13 at 3). These motions were denied because, at that point in time, no evidentiary hearing was required

and there was no additional discovery. (*See id.*). Further, this Court did not appoint counsel because it determined that declining to appoint counsel would not result in a denial of due process and that "Petitioner has articulated his claims well and the legal issues are not inherently complex." (*Id.*).[1]

Petitioner subsequently brought motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. (Doc. 1). Magistrate Judge Irwin submitted a Report and Recommendation on October 16, 2009 that recommended that Ground 2 of Petitioner's motion be dismissed and that the rest be denied. (Doc. 11 at 14). He found that Petitioner's second ground, prosecutorial misconduct, was procedurally defaulted because it had not been raised on appeal. (Doc. 11 at 3). He also found that the six alleged errors that Petitioner based his ineffective assistance of counsel claim on were meritless. (*See id.* at 4). Particularly with regard to Petitioner's "failure to investigate" claim, Magistrate Judge Irwin found that Petitioner did not provide any evidence about what that investigation would have produced. (*See id.* at 8). Thus, there was no basis for claiming ineffective assistance for failure to investigate potential witnesses. (*See id.*).

Overruling Petitioner's objection to the Report and Recommendation, this Court entered an order adopting the Report and Recommendation on December 7, 2009, and dismissing Petitioner's § 2255 petition. (Doc. 13). It did partially grant a certificate of appealability. (Doc. 13 at 10). Petitioner appealed this decision to the Ninth Circuit Court of Appeals on June 10, 2010. (Doc. 15). The Ninth Circuit affirmed this Court's decision on December 27, 2011. (Doc. 20).

A decade later, Petitioner filed a Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b). (Doc. 21). He claims that newly uncovered evidence proves his innocence and thus that it was an error for this Court to deny him counsel for his habeas petition. (*See id.* at 2–3). Respondents contend, mainly, that his Rule 60(b)(6) motion is actually a

[1] This Court noted that there are only three instances in which appointment of post-conviction counsel is necessary: when an evidentiary hearing is required, *United States v. Duarte-Higareda*, 68 F.3d 369 (9th Cir. 1995), when necessary for effective discovery, and when the case is so complex that lack of counsel would be a due process violation. *Brown v. United States*, 623 F.2d 54, 61 (9th Cir. 1980).

disguised "second or successive" habeas petition. (Doc. 36 at 1). And, thus, that this Court has no jurisdiction to rule on the merits of Petitioner's claim. (*See id.* at 2). Petitioner replies asserting that because he is challenging this Court's decision not to give him counsel, a procedural defect, this Court can hear his 60(b)(6) claim. (Doc. 39 at 1).

II. ANALYSIS

Rule 60(b) gives courts the power to relieve parties from final judgments, orders, or proceedings. *See* Fed. R. Civ. P. 60(b). But relief is only granted under a limited set of circumstances. *See id.*; *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). Petitioner brings his motion under 60(b)(6), a catchall provision that allows for reopening when a petitioner can show that there is "any ... reason that justifies relief." *See* Fed. R. Civ. P. 60(b)(6). These other reasons cannot include any of the reasons set out in Rules 60(b)(1)-(5). *See Gonzalez*, 545 U.S. at 529. The Rule itself serves as an exception to the judicial system's otherwise strong interest in finality. *See id.*

This tension between finality and Rule 60(b) is heightened in the context of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), which places significant barriers on attempts to bring second or successive habeas corpus petitions. *See id.* at 529–30; 28 U.S.C § 2255. Yet as the Supreme Court has noted, "Rule 60(b) has an unquestionably valid role to play in habeas cases." *See Gonzalez*, 545 U.S. at 534. In the habeas context a Rule 60(b)(6) motion is proper when a petitioner is attacking "some defect in the integrity of the federal habeas proceedings" such as a procedural error. *See id.* at 532 & n.4. The claim must be that the alleged error *precluded* a merits determination of his underlying habeas claim. *See id.* It is improper, and is considered a second or successive petition subject to AEDPA's guidelines, when it presents "new claims for relief from a ... court's judgment of conviction" or presents "new evidence in support of a claim already litigated ...." *See id.* at 531. A "claim" is defined as "an asserted federal basis for relief from a ... court's judgment of conviction." *See id.* at 530. Additionally, if the "federal judgment from which ... [a petitioner] seeks relief substantively addresses federal grounds for setting aside" his conviction, then his claims cannot be considered under Rule 60(b)(6). *See id.* at 533. They

must be brought through the mechanism set forth in 28 U.S.C. § 2255 (AEDPA).

A. Petitioner's motion is a disguised second or successive petition

Although Petitioner frames his motion as one based on the procedural error of denial of habeas counsel, in actuality he is bringing a disguised second or successive habeas corpus petition. First, Petitioner is in effect seeking leave to present newly discovered evidence in support of a claim previously denied. *See Gonzalez*, 545 U.S. at 531 (stating that such assertions constitute "claims" that can only be raised under AEDPA). He asserts that a newly uncovered motive for the murder shows that he is innocent and that his counsel was ineffective. His claim, thus, is "similar enough" to a habeas corpus application "that failing to subject it to the same requirements would be inconsistent with" § 2255. *See id.* (internal quotation marks omitted). Second, this motion attacks this Court's previous resolution of his ineffective assistance claim on the merits. In his first petition for a writ of habeas corpus, the federal judgment issued by this Court, and affirmed by the Ninth Circuit, substantively addressed Petitioner's asserted grounds for setting aside his conviction. *See id.* at 533. Again, this makes his motion a petition for the writ.

i. Petitioner is presenting new evidence in support of a previously denied claim.

As Petitioner notes numerous times throughout his motion, he is presenting evidence "that demonstrates his actual innocence and justifies reopening his original § 2255 proceeding." (Doc. 21 at 2). Whether the evidence provided does in fact prove his innocence this Court need not decide. Indeed, it cannot decide because it is clear that this is a second or successive petition. Thus, this Court does not have jurisdiction over the merits of his claim. Petitioner asserts that his "new evidence of actual innocence" is presented to the Court simply to "illustrate why the appointment of counsel was necessary ...." *id.* at 19. This Court finds that argument unavailing.

When assessing whether a Rule 60(b)(6) motion is advancing a "claim", and is thus a second or successive petition, courts must assess whether the petitioner is advancing an "asserted federal basis for relief from a ... judgment of conviction." *Mitchell v. United*

States, 958 F.3d 775, 784 (9th Cir. 2020) (quoting *Gonzalez*, 545 U.S. at 530). As both the United States Supreme Court and the Ninth Circuit have stated, this includes "a request to present newly discovered evidence in support of a claim previously denied ...." *Id.* at 785; *Gonzalez*, 545 U.S. at 531. Petitioner's newly discovered evidence purports to show that the person who helped orchestrate the murder had an ulterior motive for wanting the victim dead. (Doc. 21 at 14). Allegedly, the victim had previously assaulted a family member of the inmate who orchestrated the hit. (*See id.*). If he had been appointed counsel for his habeas proceedings, Petitioner argues, he would have been able to uncover this evidence and adequately present his ineffective assistance claim. (*See id.* at 22). Yet this is merely an attempt to couch a § 2255 claim "in the language of a true Rule 60(b) motion ...." *See Gonzalez*, 545 U.S. at 531. This circumvents § 2255's requirement that such claims be dismissed unless they rely "on either a new rule of constitutional law or newly discovered facts" that meet its heightened standard. *Id.*

The ultimate question that a court must ask when determining whether a Rule 60(b) motion is actually a second or successive petition is: what is the gravamen of petitioner's assertions? *See United States v. Washington*, 653 F.3d 1057, 1065 (9th Cir. 2011). It must be determined whether Petitioner's assertions actually go to the merits of his conviction, or rather go to a truly procedural error. *See id.* In *Washington*, the petitioner argued in his Rule 60(b) motion, among other things, that it was a procedural error for the court to refuse to conduct an evidentiary hearing on his actual innocence claims. *See id.* The court found that this was not the assertion of a procedural error, but rather a "claim," because his assertions really went to the merits of his conviction. *See id.* Here, Petitioner is presenting evidence that he claims demonstrates his actual innocence. The gravamen of his assertions shows, then, that he is really attacking the merits of his original conviction. What Petitioner is doing through this motion is "taking steps that lead inexorably to a merits-based attack on the prior dismissal of his habeas petition." *Post v. Bradshaw*, 422 F.3d 419, 424–25 (6th Cir. 2005); *See Wood v. Ryan*, 759 F.3d 1117, 1120 (9th Cir. 2014) (quoting *Post* approvingly).

ii. There was a proceeding on the merits.

This Court ruled on the merits of Petitioner's ineffective assistance claim. Therefore, he cannot assert that he is attacking a procedural error that precluded a merits determination. As noted above, Petitioner claims that his assertions concern procedural defects in the proceeding. (*See* Doc. 39 at 4). It was this Court's specific ruling on his three requests for counsel that he claims are being challenged. (*See id.*). Thus, he concludes, this is a valid Rule 60(b)(6) motion. Yet a true Rule 60(b) motion, in the habeas context, covers what could be considered true procedural defects. Those not based in the merits of a claim. As the Supreme Court explained in *Gonzalez*, procedural defects are those which involve determinations on procedural issues that ultimately precluded a merits determination. *See Gonzalez*, 545 U.S. at 532 n.4. Such errors include, and are akin to, denials for failure to exhaust, procedural default, or a statute-of-limitations bar. *Id.* The procedural rulings that can validly be challenged under Rule 60(b), then, must have fully precluded the court from considering any of the merits-based arguments of the petitioner. *See Mitchell*, 958 F.3d at 785 (noting that "an argument that a court's procedural error precluded a prisoner from obtaining a merits determination does not raise a habeas 'claim.'"). If the error prevents Petitioner from having a determination made, then such error can be raised under Rule 60(b). If a merits determination is made, however, even if there has not been a full factual development, then claims of error can only be raised through the procedures of § 2255. There clearly was a merits determination in Petitioner's original § 2255 claim. The claim of ineffective assistance was ruled upon by both this Court and the Ninth Circuit. Thus, there was no error that fully *precluded* a merits determination.

Further, even if a true procedural error is identified, that error must attack a defect in the *integrity* of the federal habeas proceedings. *Jones v. Ryan*, 733 F.3d 825, 834 (9th Cir. 2013). And "a proceeding is not without integrity when in accord with law." *Id.* Thus, the error must be such that it called the legality and integrity of the proceeding into question. As the Ninth Circuit noted, a procedural error that shows a defect in the integrity of a § 2255 proceeding is one that rendered the outcome of the proceeding suspect. *See*

United States v. Buenrostro, 638 F.3d 720, 721 (9th Cir. 2011). Such circumstances arise when "the judicial machinery did not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." *Id.* at 723 (internal quotations and alterations omitted). Here, there is no suggestion that this Court's decision to deny Petitioner counsel for his initial habeas proceeding was such a grave error that it cast serious doubt on the integrity of the proceeding. The ruling did not constitute a breakdown of the machinery of the judiciary. To the contrary that ruling was the product of the proper working of the judicial machinery. It did not lead to any impartiality. Rather, judged in light of the facts then available, it was entirely proper and well within this Court's discretion.

Given the fact that the Petitioner is effectively attempting to present new evidence to support a previously adjudicated claim, and one that was substantively adjudicated on the merits, this Court finds that Petitioner's nominal Rule 60(b)(6) motion is in fact a second or successive habeas corpus petition that must be brought through the mechanism of § 2255. Consequently, this Court does not have jurisdiction over the merits of this motion.

iii. Petitioner's other claims are also disguised § 2255 claims

In two short sentences Petitioner also raises the issues of trial counsel's deficient performance with regard to the conduct of a polygraph examination and his failure to retain an expert on gangs and prison life. (Doc. 21 at 27–28). Petitioner attaches expert testimony indicating that the way in which trial counsel allowed the polygraph examination to be conducted fell below usual standards. (Doc. 21-1). There is no valid legal reason why Petitioner could not have presented such testimony at his initial § 2255 proceeding. He was not barred from contacting expert witnesses. This is merely another attempt to introduce new testimony in support of a claim already decided on the merits. No new evidence is presented to support Petitioner's bare assertion that it was error for trial counsel not to call an expert on prison life. This Court previously ruled on that claim and found it meritless. (*See* Doc 13 at 8). Like his contention about the conduct of the polygraph exam, this

contention is also "an asserted federal basis for relief" from a previous conviction. *See Gonzalez*, 545 U.S. at 530. Thus, it is a "claim." *See id.* Both of these contentions, like Petitioner's contention based on the newly discovered evidence allegedly showing his innocence, must be raised, if at all, through the mechanism in § 2255.[2]

B. Petitioner does not meet the requirements for a certificate of appealability

As the Supreme Court has noted, "Many Courts of Appeals have construed ... [AEDPA] to impose an additional limitation on appellate review by requiring a habeas petitioner to obtain a [Certificate of Appealability] COA as a prerequisite to appealing the denial of a Rule 60(b) motion." *See Gonzalez*, 545 U.S. 524, 535 (2005). And that is how the Ninth Circuit has construed the Act. *See United States v. Winkles*, 795 F.3d 1134, 1142 (9th Cir. 2015) ("We conclude ... that a COA is required to appeal the denial of a Rule 60(b) motion for relief from judgment arising out of the denial of a section 2255 motion."). Thus, if Petitioner wishes to appeal the denial of his motion this Court must issue a COA.

The standards for COA issuance are governed by 28 U.S.C. § 2253. To receive a COA, the applicant must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). An applicant need not show that his appeal will succeed, however. *See Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Indeed, as the Supreme Court has said, there are some instances in which a COA will issue "where there is no certainty of ultimate relief." *Id.* Yet, the Supreme Court has also said that "issuance of a COA must not be *pro forma* or a matter of course." *Id.* At its most basic, "A prisoner seeking a COA must prove something more than the absence of frivolity or the existence of mere good faith on his ... part." *Id.* at 338 (internal quotations omitted). Consequently, a COA will only issue if "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right ...." *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). In the context of a Rule 60(b) motion, this means that jurists of reason

[2] As this Court has determined that it does not have jurisdiction to consider the substance of Petitioner's Rule 60(b) motion, the Court has not considered the Government's alternative arguments that even if this Court had jurisdiction, there are no extraordinary circumstances justifying relief and that the motion is untimely. (Doc. 36 at 2).

could disagree with this Court's resolution of Petitioner's constitutional claims or could conclude "that the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 137 S.Ct. 759, 773 (2017). Additionally, as the Ninth Circuit has stated, the test for a COA should incorporate the standard of review that the court of appeals will ultimately apply. *See Winkles*, 795 F.3d at 1143.

Petitioner's claims fall far short of meeting this standard. Whether applying de novo review, as would be used for review of a habeas claim, or abuse of discretion, as would be used for the denial of a Rule 60(b)(6) motion, no reasonable jurist would find it debatable that Petitioner's motion is actually a disguised second or successive habeas petition.[3] Turning to the question of debatability, although couched in the language of the claimed procedural error stemming from his denial of post-conviction counsel, as shown above, Petitioner's motion is clearly an attempt to present new evidence to substantiate a previously decided claim. It was not an abuse of discretion to dismiss a motion that obviously should be dismissed applying the Supreme Court's clear precedent under *Gonzalez*. And any de novo review would also reach the same conclusion. Therefore, this Court concludes that a COA is not warranted in this case.

III. CONCLUSION

Petitioner's motion for relief under Rule 60(b)(6) is in fact a disguised second or successive habeas corpus petition. Thus, this Court does not have jurisdiction to rule on its merits.

Accordingly,

IT IS ORDERED that Petitioner's Motion for Relief from Judgment (Doc. 21) is **DENIED**.

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[3] The "reasonable jurist" question in the COA test is directed at the district court's reasoning behind denying the Rule 60(b)(6) motion, *not* at its reasoning behind denying the initial § 2255 claims.

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED** as to this Rule 60(b)(6) motion.

Dated this 17th day of October, 2022.