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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Lezmond Charles Mitchell,
10 Defendant/Movant,
11 v.
12 United States of America,
13 Plaintiff/Respondent.

No. CV-09-08089-PCT-DGC

ORDER

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15 Before the Court is Petitioner Lezmond Mitchell's motion for relief from
16 judgment, filed pursuant to Federal Rule of Civil Procedure 60(b)(6). (Doc. 71.) The
17 motion has been fully briefed. (Docs. 76, 79.) For the reasons set forth below, the
18 motion is denied.

19 **I. Background**

20 In 2003, Petitioner was sentenced to death under the Federal Death Penalty Act;
21 his conviction and sentences were affirmed on appeal. *United States v. Mitchell*, 502
22 F.3d 931, 942 (9th Cir. 2007), *cert. denied* 553 U.S. 1094 (2009). On May 22, 2009,
23 Petitioner filed a motion for authorization to interview jurors in which he asserted that his
24 counsels' responsibility to conduct a thorough post-conviction investigation required that
25 they be allowed to contact and interview all jurors in his case. (Doc. 1.) Specifically,
26 Petitioner asked "to interview the jurors about racial and religious prejudice . . . to see
27 whether Mitchell's Navajo beliefs," which the prosecutor briefly invoked during closing
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1 arguments, “played any part in his death sentence.” (*Id.* at 10.) Respondent opposed the
2 motion. (Doc. 18.)

3 Petitioner’s request was governed by Local Rule of Civil Procedure 39.2(b), which
4 requires that the requesting party “file with the Court written interrogatories proposed to
5 be submitted to the juror(s), together with an affidavit setting forth the reasons for such
6 proposed interrogatories, within the time granted for a motion for a new trial.” *Id.*; *see*
7 *also* LRCrim. 23.1. In addition to these procedural requirements, the requesting party
8 must establish good cause for the request. LRCiv. 39.2(b). On September 4, 2009, the
9 Court denied Petitioner’s request to interview jurors because it was untimely and failed to
10 establish good cause. (Doc. 21.)

11 Petitioner moved to vacate, set aside or correct his sentence under 28 U.S.C.
12 § 2255. (Doc. 9.) The Court denied his motion on September 30, 2010 (Doc. 56), and
13 the Ninth Circuit affirmed. *Mitchell v. United States*, 790 F.3d 881, 883 (9th Cir. 2015),
14 *cert. denied* 137 S. Ct. 38 (2016).

15 The United States Supreme Court then decided *Peña-Rodriguez v. Colorado*, 137
16 S. Ct. 855 (2017), which Petitioner now cites as the basis for his request to reopen his
17 § 2255 motion and revisit his motion to contact the jurors from his trial. (Doc. 71 at 3.)

18 **II. Discussion**

19 Citing *Peña-Rodriguez*, Petitioner alleges that this Court’s prior denial of his
20 request to interview jurors “prevented a full and fair merits determination, which
21 warrants re-opening the proceedings under Rule 60(b),” at which point he intends to
22 again “move the Court for an order granting . . . access to the jurors from his trial.”
23 (Doc. 71 at 9.) “Rule 60(b)(6) . . . permits reopening when the movant shows ‘any . . .
24 reason justifying relief from the operation of the judgment’ other than the more specific
25 circumstances set out in Rules 60(b)(1)–(5).” *Gonzalez v. Crosby*, 545 U.S. 524, 528–29
26 (2005). Relief under Rule 60(b)(6) requires a showing of “extraordinary circumstances.”
27 *Id.* at 536. “Such circumstances ‘rarely occur in the habeas context.’” *Jones v. Ryan*,
28 733 F.3d 825, 833 (9th Cir. 2013).

1 Respondent urges that (1) the court lacks jurisdiction to decide Petitioner’s Rule
2 60 motion because it is in reality an improper second or successive § 2255 petition,
3 (2) Petitioner’s motion is barred by this Court’s prior rulings, and (3) the other safeguards
4 against racial bias in this case were sufficient to ensure Petitioner’s right to a fair trial was
5 realized.¹ (Doc. 76.) Because *Peña-Rodriguez* does not grant Petitioner the right to
6 investigate potential juror bias in the absence of a reason to believe his jurors may have
7 been biased against him, there are no extraordinary circumstances warranting relief from
8 the judgment.

9 **A. The Court Has Jurisdiction to Consider Petitioner’s Motion.**

10 After a petitioner files an initial § 2255 petition, any subsequent § 2255 petition is
11 barred unless the petitioner complies with the requirements of § 2255(h). *See United*
12 *States v. Washington*, 653 F.3d 1057, 1059 (9th Cir. 2011) (noting that § 2255(h) requires
13 that a petitioner seeking to file a second or successive petition must first have the circuit
14 court certify that the petition relies on either substantial new evidence or a new,
15 retroactive rule of constitutional law). To avoid these requirements, petitioners
16 sometimes “characterize their pleading as being a motion under rule 60(b).” *Id.*

17 The Ninth Circuit has issued guidance for determining when a Rule 60(b) motion
18 is an attempt to circumvent the requirements of § 2255(h). “[A] Rule 60(b) motion that
19 attacks ‘some defect in the integrity of the federal habeas proceedings’ is not a disguised
20 § 2255 motion” *Washington*, 653 F.3d at 1060 (quoting *Gonzalez*, 545 U.S. at 534).
21 Motions that “seek vindication” of a claim, on the other hand, are “in substance []
22 successive habeas petition[s] and should be treated accordingly.” *See Gonzalez*, 545 U.S.

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24 ¹ Respondent also argues that to the extent *Peña-Rodriguez* has any substantive
25 bearing on Petitioner’s case, its holding is not retroactive and thus does not apply to
26 Petitioner. (Doc. 76 at 8–9.) Because the Court agrees with Respondent that *Peña-*
27 *Rodriguez* does not entitle Petitioner to relief under Rule 60(b)(6), the Court need not
28 address whether *Peña-Rodriguez* applies retroactively. *See Greenawalt v. Ricketts*, 943
F.2d 1020, 1029 (9th Cir. 1991) (declining to opine on retroactivity of *Enmund v.*
Florida, 458 U.S. 782, 801 (1982), where the holding in *Enmund* “would not change the
outcome of this case”).

1 at 531. Improperly disguised motions may include those that add new grounds for relief,
2 attack the court’s previous resolution of a claim on the merits, or supplement evidence in
3 support of a previously litigated claim. *Id.* at 532.

4 In this motion, Petitioner does not seek to vindicate a substantive claim. He
5 consistently argues that he is seeking only to investigate, as a preliminary matter, whether
6 a substantive claim exists. (Doc. 1 at 4–8; Doc. 71 at 6–9.) Only if he discovered
7 evidence of juror bias would he then file a substantive claim. (Doc. 79 at 3–4.) His
8 motion does not raise substantive claims he previously litigated, and is validly before this
9 Court.

10 **B. Petitioner Is Not Entitled to Relief Under Rule 60(b)(6).**

11 Petitioner alleges that the holding in *Peña-Rodriguez* establishes that this Court’s
12 order denying his request to contact jurors violated his Sixth Amendment rights, giving
13 rise to an “extraordinary circumstance” entitling him to relief under Rule 60(b)(6).
14 Respondent, relying primarily on the law-of-the-case doctrine, counters that Petitioner
15 remains bound by this Court’s prior rulings and may not re-litigate whether he is entitled
16 to interview jurors.

17 The law-of-the-case doctrine generally precludes courts “from reconsidering an
18 issue that has already been decided by the same court in the identical case.” *Sechrest v.*
19 *Ignacio*, 549 F.3d 789, 802 (9th Cir. 2008). Although the doctrine generally is
20 discretionary, *United States v. Lewis*, 611 F.3d 1172, 1179 (9th Cir. 2010), it mandates
21 that courts follow a prior decision “unless (1) the decision is clearly erroneous and its
22 enforcement would work a manifest injustice; (2) intervening controlling authority makes
23 reconsideration appropriate; or (3) substantially different evidence was adduced at a
24 subsequent trial.” *Alaimalo v. United States*, 645 F.3d 1042, 1049 (9th Cir. 2011).

25 Petitioner argues, first, that the law of the case doctrine does not apply when a
26 party seeks relief under Rule 60(b). (Doc. 79 at 2.) Petitioner fails to cite authority
27 supporting this proposition, and the Court has found none. *Cf., e.g., Agostini v. Felton*,
28 521 U.S. 203, 236 (1997) (analyzing the law of the case doctrine when presented with a

1 Rule 60(b)(5) request for relief and concluding that following the Court’s prior judgment
2 would meet the “manifest injustice” exception to the doctrine). In the alternative,
3 Petitioner argues that *Peña-Rodriguez* is “an intervening change in the law’ that justifies
4 departing from the law-of-the-case doctrine.” (*Id.*) As explained below, however,
5 because Petitioner is no more entitled to interview jurors now than he was prior to *Peña-*
6 *Rodriguez*, that case does not entitle him to relief.

7 Petitioner describes *Peña-Rodriguez* as a broad decision recognizing a right under
8 the Sixth Amendment to conduct investigations into juror bias in criminal cases. (*See*
9 Doc. 71 at 9.) He argues that *Peña-Rodriguez* supersedes this Court’s Local Rule 39.2,
10 which places specific limits on juror contacts. (*Id.* at 8.) But Petitioner’s interpretation is
11 overbroad. *Peña-Rodriguez* does not override Local Rule 39.2.

12 Local Rule 39.2 provides:

13 Interviews with jurors after trial by or on behalf of parties
14 involved in the trial are prohibited except on condition that
15 the attorney or party involved desiring such an interview file
16 with the Court written interrogatories proposed to be
17 submitted to the juror(s), together with an affidavit setting
18 forth the reasons for such proposed interrogatories, within the
19 time granted for a motion for a new trial. ***Approval for the***
20 ***interview of jurors in accordance with the interrogatories***
21 ***and affidavit so filed will be granted only upon the showing***
22 ***of good cause.*** See Federal Rules of Evidence, Rule 606(b).
Following the interview, a second affidavit must be filed
indicating the scope and results of the interviews with jurors
and setting out the answers given to the interrogatories.

23 *Id.* (emphasis added); *see also* Fed. R. Evid. 606(b).

24 Local Rule 39.2 and Federal Rule of Evidence 606(b) implement what is known as
25 the federal “no-impeachment” rule. That rule bars litigants from using jurors’ statements
26 to attack the validity of a verdict. *See Smith v. City & Cty. of Honolulu*, 887 F.3d 944,
27 954 (9th Cir. 2018) (citing Fed. R. Evid. 606(b)). The rule “evolved to give substantial
28 protection to verdict finality and to assure jurors that, once their verdict has been entered,

1 it will not later be called into question based on the comments or conclusions they
2 expressed during deliberations.” *Peña-Rodriguez*, 137 S. Ct. at 860.

3 In *Peña-Rodriguez*, the Supreme Court created a narrow exception to the no-
4 impeachment rule. The Court held that “where a juror makes a clear statement that
5 indicates he or she relied on racial stereotypes or animus to convict a criminal defendant,
6 the Sixth Amendment requires . . . the trial court to consider the evidence of the juror’s
7 statement and any resulting denial of the jury trial guarantee.” *Id.* at 869. The Court’s
8 decision addresses only what a court must do when presented with evidence of racial
9 bias; it does not address how or when a criminal defendant may seek to obtain evidence
10 of racial bias. Indeed, the Court specifically noted that the methods of investigating
11 potential racial animus remain governed by local rules. *See Peña-Rodriguez*, 137 S. Ct.
12 at 869 (“The practical mechanics of acquiring and presenting such evidence will no doubt
13 be shaped and guided by state rules of professional ethics and local court rules, both of
14 which often limit counsel’s post-trial contact with jurors.”).

15 Petitioner acknowledges that *Peña-Rodriguez* allows courts to limit access to
16 jurors through local rules, but argues that Local Rule 39.2 effectively *prohibits* access to
17 jurors after trial. (Doc. 79 at 6.) Not so. Rule 32.9 imposes a “good cause” threshold,
18 which requires only a “preliminary showing” of juror misconduct. *See Wilkerson v.*
19 *Amco Corp.*, 703 F.2d 184, 185–86 (5th Cir. 1983) (“We continue to decline to ‘denigrate
20 jury trials by afterwards ransacking the jurors in search of some ground . . . for a new
21 trial’ unless a preliminary showing is made.”); *Sullivan v. Fogg*, 613 F.2d 465, 467 (2d
22 Cir. 1980) (“Once a preliminary showing of incompetence or juror misconduct has been
23 made there is a corresponding right to an inquiry into the relevant surrounding
24 circumstances.”). The good cause threshold does not prohibit all inquiries into potential
25 racial bias—it prohibits all baseless or speculative inquiries into potential racial bias.

26 Rule 39.2 reflects the fact that courts do not presume racial bias. *See United*
27 *States v. Anekwu*, 695 F.3d 967, 978 (9th Cir. 2012) (“[T]here is no constitutional
28 presumption of juror bias for or against members of any particular racial or ethnic

1 groups.” (quoting *Rosales–Lopez v. United States*, 451 U.S. 182, 190 (1981))). Instead,
2 courts evaluate the need to investigate juror bias on a case by case basis. Trial courts
3 may determine whether a hearing on potential juror bias is necessary by first considering
4 “the content of the allegations, the seriousness of the alleged misconduct or bias, and the
5 credibility of the source.” See *Tracey v. Palmateer*, 341 F.3d 1037, 1044 (9th Cir.), *cert.*
6 *denied*, 543 U.S. 864 (2003).

7 Petitioner has not alleged any reason to believe that any of the jurors in his case
8 were biased against him due to his race. Absent a preliminary showing of bias, Rule 39.2
9 prohibits the fishing expedition Petitioner requests, and the Court’s holding in *Peña-*
10 *Rodriguez* does not alter that result. Petitioner is no more entitled to interview jurors now
11 than he was when he made his initial request. (Doc. 1.) Thus, he was not deprived of an
12 adequate investigation prior to filing his § 2255 motion in this Court, and he has not
13 established that “extraordinary circumstances” warrant relief from this Court’s judgment
14 under Rule 60(b)(6).

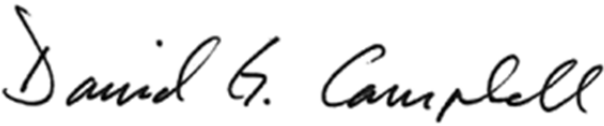
15 Finally, to the extent the parties dispute whether other safeguards, such as voir dire
16 and the in-court observation of jurors during trial, adequately protected Petitioner’s
17 conviction from the influence of racial bias (Docs. 76 at 12–14; 79 at 4–5), the Court
18 agrees with Respondent that those safeguards weigh against finding the “extraordinary
19 circumstances” that warrant reopening Petitioner’s case.

20 Finally, Petitioner is not entitled to a certificate of appealability because he has not
21 demonstrated that jurists of reason would find it debatable whether the Court abused its
22 discretion in denying Petitioner’s motion or that jurists of reason would find it debatable
23 whether Petitioner’s underlying § 2255 motion states a valid claim for denial of a
24 constitutional right. See *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015).

1 **IT IS ORDERED** denying Petitioner's Notice of Motion and Motion of Relief from
2 Judgment Pursuant to Federal Rule of Civil Procedure Rule 60(b)(6) (Doc. 71).

3 **IT IS FURTHER ORDERED** that no certificate of appealability shall be issued.

4 Dated this 17th day of September, 2018.

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9 David G. Campbell
10 Senior United States District Judge
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