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IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

|                           |   |                              |
|---------------------------|---|------------------------------|
| JOHN ALLEN NEWTON,        | ) | No. CV-F-96-6366 OWW         |
|                           | ) | (No. CR-F-94-5036 OWW)       |
|                           | ) |                              |
| Petitioner,               | ) | MEMORANDUM DECISION AND      |
|                           | ) | ORDER DENYING PETITIONER'S   |
| vs.                       | ) | SECOND MOTION TO RE-OPEN     |
|                           | ) | SECTION 2255 MOTION PURSUANT |
|                           | ) | TO RULE 60(b), FEDERAL RULES |
| UNITED STATES OF AMERICA, | ) | OF CIVIL PROCEDURE           |
|                           | ) |                              |
| Respondent.               | ) |                              |
|                           | ) |                              |
|                           | ) |                              |

On December 20, 2010, Petitioner John Allen Newton, proceeding *in pro per*, filed a motion pursuant to Rule 60(b), Federal Rules of Civil Procedure, to re-open his motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255.

A. Background.

Petitioner was convicted by jury trial of two counts of carjacking in violation of 18 U.S.C. § 2119, two counts of use of a firearm during a crime of violence in violation of 18 U.S.C. § 924, and one count of being a felon in possession of a firearm in

1 violation of 18 U.S.C. § 922. Petitioner was sentenced on  
2 September 26, 1994 to a total of 465 months incarceration.  
3 Petitioner filed an appeal to the Ninth Circuit. In *United*  
4 *States v. Newton*, 65 F.3d 810 (9<sup>th</sup> Cir.1995), cert. denied, 516  
5 U.S. 1137 (1996), the Ninth Circuit affirmed Petitioner's  
6 convictions.

7 Petitioner filed a motion to vacate, set aside or correct  
8 sentence pursuant to 28 U.S.C. § 2255 on December 17, 1996,  
9 asserting newly discovered evidence and ineffective assistance of  
10 counsel based on counsel's failure to call certain family  
11 witnesses at trial and failure to file a motion to suppress.  
12 Petitioner's Section 2255 motion was denied by Order filed on  
13 January 30, 1996. A certificate of appealability was denied by  
14 the District Court on July 22, 1997 and by the Ninth Circuit on  
15 November 11, 1997.

16 On February 7, 2008, Petitioner filed a "Motion to Reopen a  
17 28 United States Code § 2255 Via Federal Rule Civil Procedure  
18 60(b)(4) For the sole purpose ... To obtain a vactur [sic] of a  
19 judgment enter [sic] without 'Subject-Matter jurisdiction.' By  
20 Memorandum Decision and Order filed on May 26, 2008, Petitioner's  
21 motion to re-open his Section 2255 motion was denied.  
22 Petitioner's motion to re-open contended that the car identified  
23 in Counts 3 and 4 of the Indictment were never transported,  
24 shipped, or received by anyone in interstate commerce; that  
25 affidavits executed in October 1996 establish Petitioner's actual  
26 innocence of carjacking; and that Counts 2 and 4 charging him

1 with use of a firearm during a crime of violence specify simple  
2 possession of the weapon, which does not fit the elements of 18  
3 U.S.C. § 924(c). Petitioner's motion to re-open was denied on  
4 the merits by Order filed on May 26, 2010.

5 On November 26, 2008, Petitioner filed a motion to  
6 reconsider the May 26, 2008 Order pursuant to Rule 60(b)(4) and  
7 (6). Petitioner's motion to reconsider was denied on the grounds  
8 that Petitioner was using the vehicle of Rule 60(b) to re-argue  
9 issues decided against him and to raise new claims not previously  
10 asserted on appeal or for Section 2255 relief. Petitioner's  
11 motion was construed as a second or successive Section 2255  
12 motion over which the District Court lacks jurisdiction to  
13 consider the merits absent prior authorization from the Ninth  
14 Circuit. To the extent Petitioner's motion to reconsider  
15 asserted Petitioner was entitled to relief pursuant to Amendment  
16 599 to the Sentencing Guidelines, Petitioner's motion was  
17 considered on the merits and denied. No appeal was taken by  
18 Petitioner from the denial of his motion to re-open or his motion  
19 to reconsider.

20 B. Current Motion to Re-Open.

21 Petitioner again moves to re-open his Section 2255 motion on  
22 the ground that "counts 2 and 4, charging him with use of a  
23 firearm during a crime of violence clearly specify simple  
24 possession of a Norinco 9mm semi-automatic handgun, and that  
25 these specified acts of simple possession do not fit the criteria  
26 under Title 18 U.S.C. 924(c)." Petitioner cites *Castillo v.*

1 *United States*, 530 U.S. 120 (2000), and contends that the  
2 "intervene [sic] change of the laws establish that mandatory  
3 minimum sentences implicates the Sixth Amendment right to a jury  
4 trial."

5 In *Castillo*, the Supreme Court examined Section 924(c)(1)  
6 before it was amended in November 1998. The Supreme Court ruled:

7 The statute in question, 18 U.S.C. § 924(c),  
8 prohibits the use or carrying of a 'firearm'  
9 in relation to a crime of violence, and  
10 increases the penalty dramatically when the  
11 weapon used or carried is, for example, a  
12 'machinegun.' We conclude that the statute  
13 uses the word 'machinegun' (and similar  
14 words) to state an element of a separate  
15 offense' the result of which is 'the  
16 indictment must identify the firearm type and  
17 a jury must find that element proved beyond a  
18 reasonable doubt.'

19 530 U.S. at 121, 123.<sup>1</sup>

20 In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), the Supreme  
21 Court discussed the interaction between Rule 60(b), Federal Rules  
22 of Civil Procedure, and the AEDPA. After noting that the AEDPA  
23 and its decisions make clear that a "claim" "is an asserted  
24 federal basis for relief from a ... judgment of conviction", *id.*  
25 at 530, the Supreme Court stated:

26 In some instances, a Rule 60(b) motion will  
contain one or more 'claims.' For example,  
it might straightforwardly assert that owing  
to 'excusable neglect.' Fed. Rule Civ. Proc.

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<sup>1</sup>There is a split of authority whether *Castillo* is retroactive to cases on collateral review. See *United States v. Wiseman*, 297 F.3d 975 (10<sup>th</sup> Cir.2002); compare *United States v. Gonzales*, 327 F.3d 416 (5<sup>th</sup> Cir.2003). Neither the Supreme Court nor the Ninth Circuit appear to have ruled on the issue of *Castillo's* retroactivity.

1 60(b)(1), the movant's habeas petition had  
2 omitted a claim of constitutional error, and  
3 seek leave to present that claim ...  
4 Similarly, a motion might seek leave to  
5 present 'newly discovered evidence,' Fed.  
6 Rule Civ. Proc. 60(b)(2), in support of a  
7 claim previously denied ... Or a motion might  
8 contend that a subsequent change in  
9 substantive law is a 'reason justifying  
10 relief,' Fed. Rule Civ. Proc. 60(b)(6), from  
11 the previous denial of a claim ... Virtually  
12 every Court of Appeals to consider the  
13 question has held that such a pleading,  
14 although labeled a Rule 60(b) motion, is in  
15 substance a successive habeas petition and  
16 should be treated accordingly ....

17 We think those holdings are correct. A  
18 habeas petitioner's filing that seeks  
19 vindication of such a claim is, if not in  
20 substance a 'habeas corpus application,' at  
21 least similar enough that failing to subject  
22 it to the same requirements would be  
23 'inconsistent with' the statute. 28 U.S.C. §  
24 2254 Rule 11. Using Rule 60(b) to present  
25 new claims for relief from a state court's  
26 judgment of conviction - even claims couched  
in the language of a true Rule 60(b) motion -  
circumvents AEDPA's requirement that a new  
claim be dismissed unless it relies on either  
a new rule of constitutional law or newly  
discovered facts. § 2244(b)(2). The same is  
true of a Rule 60(b)(2) motion presenting new  
evidence in support of a claim already  
litigated: even assuming that reliance on a  
new factual predicate causes that motion to  
escape § 2244(b)(1)'s prohibition of claims  
'presented in a prior application,' §  
2244(b)(2)(B) requires a more convincing  
factual showing than does Rule 60(b).  
Likewise, a Rule 60(b) motion based on a  
purported change in the substantive law  
governing the claim could be used to  
circumvent § 2244(b)(2)(A)'s dictate that the  
only new law on which a successive petition  
may rely is 'a new rule of constitutional  
law, made retroactive to cases on collateral  
review by the Supreme Court, that was  
previously unavailable.' In addition to the  
substantive conflict with AEDPA standards, in  
each of these three examples use of Rule

1 60(b) would impermissibly circumvent the  
2 requirement that a successive habeas petition  
3 be precertified by the court of appeals as  
falling within an exception to the  
successive-petition bar. § 2244(b)(3).

4 In most cases, determining whether a Rule  
5 60(b) motion advances one or more 'claims'  
6 will be relatively simple. A motion that  
7 seeks to add a new ground for relief ... will  
8 of course qualify. A motion can also be said  
9 to bring a 'claim' if it attacks the federal  
10 court's previous resolution of a claim *on the*  
*merits*, since alleging that the court erred  
by denying habeas relief on the merits is  
effectively indistinguishable from alleging  
that the movant is, under the substantive  
provisions of the statutes, entitled to  
habeas relief.

11 *Id.* at 531-532. However, the Supreme Court ruled:

12 That is not the case ... when a Rule 60(b)  
13 motion attacks, not the substance of the  
14 federal court's resolution of a claim on the  
merits, but some defect in the integrity of  
the federal habeas proceedings.

15 *Id.* at 532. The Supreme Court noted:

16 Fraud on the federal habeas court is one  
17 example of such a defect. See generally  
18 *Rodriguez v. Mitchell*, 252 F.3d 191, 199 (CA2  
2001) (a witness's allegedly fraudulent basis  
19 for refusing to appear at a federal habeas  
20 hearing 'relate[d] to the integrity of the  
21 federal habeas proceeding, not to the  
22 integrity of the state criminal trial'). We  
23 note that an attack based on the movant's own  
conduct, or his habeas counsel's omissions,  
see, e.g., *supra*, at 530-531, ordinarily does  
not go to the integrity of the proceedings,  
but in effect asks for a second chance to  
have the merits determined favorably.

24 Here, Petitioner's motion to re-open seeks to raise a new  
25 claim for Section 2255 relief. Petitioner essentially uses the  
26 vehicle of Rule 60(b) to raise a new claim not previously

1 asserted on appeal or for Section 2255 relief. Petitioner's  
2 motion to re-open must be construed as a second or successive  
3 motion pursuant to Section 2255 governed by 28 U.S.C. § 2244 with  
4 respect to all claims. *Thompson v. Calderon*, 151 F.3d 918, 921  
5 (9<sup>th</sup> Cir.), cert. denied, 524 U.S. 965. Consequently, the  
6 District Court lacks jurisdiction to consider the merits of this  
7 motion absent authorization from the Ninth Circuit Court of  
8 Appeals. *United States v. Allen*, 157 F.3d 661, 664 (9<sup>th</sup>  
9 Cir.1998).

10 Conclusion

11 For the reasons stated, Petitioner's motion pursuant to  
12 Rule 60(b), Federal Rules of Civil Procedure, to re-open his  
13 motion to vacate, set aside or correct sentence pursuant to 28  
14 U.S.C. § 2255 is DENIED FOR LACK OF JURISDICTION.

15 IT IS SO ORDERED.

16 Dated: December 28, 2010

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE