

1 All of petitioner's Rule 60(b) motions are barely more than variations, if at all, on the
2 same theme. The latest Rule 60(b) motion is barred by the principles of res judicata..

3 Procedural History¹

4 The initial petition in this case was filed April 18, 1996, ECF No. 1. That petition was
5 dismissed for failure to exhaust state remedies, judgment was entered on November 27, 1996,
6 ECF No. 13, and petitioner appealed on December 20, 1996. On June 12, 1998 the Ninth Circuit
7 Court of Appeal, recognizing by that time that state court exhaustion had transpired, vacated the
8 judgment and remanded the matter to this district court, ECF No. 21.

9 On June 15, 1998 petitioner filed an amended habeas petition, ECF No. 22. On February
10 28, 2001 the district court again dismissed the case and judgment was entered. ECF Nos. 63, 65,
11 66. On May 31, 2002 the Ninth Circuit Court of appeals affirmed the judgment. ECF No. 71.
12 Petitioner's first Motion for Relief from Judgment (filed October 23, 2006) was dismissed to the
13 extent that it was a successive petition, and denied to the extent it is a Rule 60(b) motion. ECF
14 Nos. 74, 77. Part of the motion involved the vindictive prosecution motion at issue in the latest
15 filing.

16 The second Rule 60(b) motion was filed on September 11, 2009. It too was denied. ECF
17 Nos. 80, 82. This court declined to issue a certificate of appealability on March 5, 2010, ECF No.
18 84, as did the Ninth Circuit on October 20, 2011. ECF No. 90.

19 The third Rule 60(b) motion was filed on September 15, 2015. ECF No. 91. It was again
20 denied as a successive petition in the guise of a Rule 60(b) motion. ECF Nos. 98, 101.

21 The fourth Rule 60 (b) motion, the one at bar, was filed on June 19, 2017. ECF No. 106.
22 In this motion petitioner posits purportedly new information on a claim which has been argued in
23 one way or another since the initial petition—that of vindictive prosecution. However, this claim
24 has been adjudicated on several occasions and it is now time to say enough for this petition first
25 filed in 1996 involving a conviction adjudged in 1989.

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28 ¹ This procedural history is truncated to avoid listing all 108 docket entries in this case and
limiting it to the petitioner's repeated efforts to overturn his conviction.

1 *Discussion*

2 The undersigned is well aware that the doctrine of res judicata² generally does not apply to
3 Rule 60 motions in that such a motion is regarded as simply a continuation of the case, not a new
4 action. Watts v. Pinckney, 752 F.2d 406, 410 (9th Cir. 1985). As is clear from the previous
5 Findings and Recommendations regarding the previous Rule 60 motions, the issue in habeas
6 corpus actions with respect to Rule 60 motions is usually whether they are simply successive
7 petitions in the guise of a Rule 60 motion.

8 However, the situation here does not involve a first Rule 60 motion; it involves seriatim
9 motions which show no signs of abating. In such a case, res judicata is a viable doctrine. See
10 Brown v. Bureau of Reclamation, 2008 WL 4239006 *2 (D. Idaho 2008) and cases cited therein.
11 Accordingly, petitioner's fourth Rule 60 motion is barred by res judicata.

12 Moreover, it is also time to enter an order to the Clerk prohibiting the filing of any further
13 Rule 60 motions in this case. If petitioner has any further claims to make concerning his 1989
14 conviction, he should petition the Ninth Circuit pursuant to 28 U.S.C. section 2244(a)(3)(A).

15 *Conclusion*

16 IT IS HEREBY ORDERED that petitioner's motion for appointed counsel, ECF 107, is
17 denied.

18 Accordingly, IT IS HEREBY RECOMMENDED:

- 19 1. Petitioner's Rule 60 motion filed at ECF No. 106 should be dismissed as barred by res
20 judicata;
- 21 2. The Clerk should be ordered to not accept any further filings in this action by
22 petitioner.

23 These findings and recommendations are submitted to the United States District Judge
24 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
25 after being served with these findings and recommendations, any party may file written
26 objections with the court and serve a copy on all parties. Such a document should be captioned

27 ² *Res judicata* prevents a party from bringing a new action for claims which were, or could have
28 been, raised in the initial action. Federated Dept. Stores v. Moitie, 452 U.S. 394, 398 (1981).

1 “Objections to Magistrate Judge’s Findings and Recommendations.” The petitioner is advised
2 that failure to file objections within the specified time may waive the right to appeal the District
3 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

4 Dated: October 10, 2017

5 /s/ Gregory G. Hollows
6 UNITED STATES MAGISTRATE JUDGE
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