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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

EDWARD V. SHELL,  
  
Petitioner,  
  
v.  
  
RICK M. HILL, Warden,  
  
Respondent.

Civil No. 00-1065 BTM<sup>1</sup> (RBB)

**ORDER:**

- (1) DENYING RULE 60(b) MOTION (Doc. No. 37); and**
- (2) DISMISSING CASE**

On May 24, 2000, Petitioner, a state prisoner proceeding pro se, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, challenging his June 3, 1997 conviction in San Diego County Superior Court case number SCD126559. (See Doc. No. 1.) The Court denied the petition on the merits on March 9, 2001. (See Doc. No. 16.) Petitioner appealed the judgment, and on September 19, 2002, the Ninth Circuit Court of Appeals affirmed the denial. (See Doc. No. 30.)

A Notice of Spreading the Mandate was filed in this Court on October 25, 2002, and a Mandate Hearing was held on November 12, 2002. (See Doc. Nos. 28, 29.) On November 12, 2002, a certified copy of the judgment from the Ninth Circuit was filed in this Court, and a second Notice of Spreading the Mandate was filed on February 12, 2003. A second Mandate Hearing was held on March 4, 2003. (See Doc. Nos. 31-33.) In an Order dated January 31,

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<sup>1</sup> Due to the death of Judge Judith M. Keep, Judge Barry Ted Moskowitz has been randomly reassigned to this case.

1 2003, the Ninth Circuit granted Petitioner’s motion to file a late petition and recall the mandate  
2 and denied Petitioner’s petition for panel rehearing and rehearing en banc. (*See* Doc. No. 34.)  
3 The mandate was reissued and the appeal was closed. (*Id.*) Almost eight years later, Petitioner  
4 has filed a document entitled “Motion for Relief From Judgment Based on an Illegal Sentence  
5 Pursuant to Fed.R.Civ.Pro. Rule 60(b)(6)” in this Court. (*See* Doc. No. 37.)

6 “Rule 60(b)(6) . . . permits reopening when the movant shows ‘any . . . reason justifying  
7 relief from the operation of the judgement’ other than the more specific circumstances set out  
8 in Rules 60(b)(1)-(5).” *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005). A rule 60(b) motion may  
9 not, however, be used to circumvent AEDPA’s rules for filing successive petitions. *Id.* at 531.  
10 Thus, the Supreme Court has held that a rule 60(b) motion filed after the denial of a habeas  
11 corpus petition on the merits that seeks to add new grounds for relief is a successive petition  
12 under 28 U.S.C. § 2254(b)(3). *Id.*

13 Petitioner’s motion alleges that the state court sentence he received in San Diego County  
14 Superior Court case number SCD126559 is illegal because the court breached his plea agreement  
15 and did not have jurisdiction to impose a sentence under California’s Three Strikes law. (Mem.  
16 of P. & A. Supp. Motion at 3-7.) These are new grounds for relief, and thus the motion must be  
17 treated as a successive petition under 28 U.S.C. § 2244(b)(3). *Gonzalez*, 545 U.S. at 529.  
18 Unless a petitioner shows he or she has obtained an Order from the appropriate court of appeals  
19 authorizing the district court to consider a successive petition, the petition may not be filed in  
20 the district court. *See* 28 U.S.C. § 2244(b)(3)(A). Here, there is no indication the Ninth Circuit  
21 Court of Appeals has granted Petitioner leave to file a successive petition.

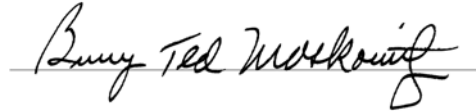
### 22 CONCLUSION

23 Because Petitioner’s Rule 60(b)(6) motion must be treated as a successive petition, and  
24 because there is no indication Petitioner has obtained permission from the Ninth Circuit Court  
25 of Appeals to file a successive petition, this Court lacks jurisdiction to consider the instant  
26 motion. Accordingly, the Court **DENIES** Petitioner’s Rule 60(b)(6) motion (doc. no. 37), and  
27 **DISMISSES** this action without prejudice to Petitioner filing a petition in this court if he obtains  
28 the necessary order from the Ninth Circuit Court of Appeals. **THE CLERK OF COURT IS**

1 **DIRECTED TO MAIL PETITIONER A BLANK APPLICATION FOR LEAVE TO FILE**  
2 **SECOND OR SUCCESSIVE PETITION UNDER 28 U.S.C. § 2254.**

3 **IT IS SO ORDERED.**

4 DATED: December 16, 2010

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6 Honorable Barry Ted Moskowitz  
7 United States District Judge

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