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

BENNY WILLIAMS,

Petitioner,

vs.

JEFF MACOMBER, Warden, et al.,

Respondents.

Civil No. 07cv0959-BTM (AJB)

ORDER:

**(1) DENYING RULE 60(b)
MOTION FOR RELIEF FROM
JUDGMENT, and**

**(2) DECLINING TO ISSUE A
CERTIFICATE OF
APPEALABILITY**

On November 19, 2009, this Court entered judgment denying Petitioner's First Amended Petition for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254, and issuing a Certificate of Appealability. (ECF Nos. 70-71.) The First Amended Petition contained eight claims, six of which challenged the use of Petitioner's two prior felony convictions (a 1978 California conviction for assault with a deadly weapon and a 1974 Oregon conviction for robbery), to enhance his sentence under California's Three Strikes law. (ECF No. 37 at 15-26, 29-34.) Petitioner appealed, and on December 8, 2011, the Ninth Circuit Court of Appeals affirmed this Court's judgment. (ECF No. 90.) On August 27, 2013, the Ninth Circuit Court of Appeals denied Petitioner's request for authorization to file a second or successive habeas petition, noting that all claims presented in his application had been presented in his prior habeas petition filed in this

1 Court. (ECF No. 91.) On February 1, 2016, Petitioner filed the instant Motion for relief
2 from judgment pursuant to Fed.R.Civ.P. 60(b), arguing that the prosecutor in his state
3 criminal case “committed intrinsic and extrinsic fraud” by filing sentence enhancement
4 allegations which erroneously alleged that his prior felony convictions constituted
5 “strikes” under California’s Three Strikes law, and that the sentencing court abused its
6 discretion and violated state law by using the prior convictions to enhance his sentence.
7 (ECF No. 93.)

8 **I. Discussion**

9 Federal Rule of Civil Procedure 60(b) entitles the moving party to relief from
10 judgment based on:

- 11 (1) mistake, inadvertence, surprise, or excusable neglect;
- 12 (2) newly discovered evidence that, with reasonable diligence, could not
13 have been discovered in time to move for a new trial under Rule 59(b);
- 14 (3) fraud (whether previously called intrinsic or extrinsic),
15 misrepresentation, or misconduct by an opposing party;
- 16 (4) the judgment is void;
- 17 (5) the judgment has been satisfied, released or discharged; it is based on
18 an earlier judgment that has been reversed or vacated; or applying it
19 prospectively is no longer equitable; or
- 20 (6) any other reason that justifies relief.

21 Petitioner has requested relief only under Rule 60(b)(3) and 60(b)(6) (see ECF No.
22 93 at 2), and there appears to be no basis for relief from judgment under any other
23 provision of Rule 60(b). Petitioner contends that relief is justified under Rule 60(b)(3)
24 because the prosecutor in his state criminal proceedings “in representation of the state
25 committed intrinsic or extrinsic [fraud], misrepresentation, and other misconduct when
26 she used her prosecutorial powers to file sentence enhancement allegations alleging
27 Petitioner’s prior felony conviction[s] were serious and violent felonies within the
28 meaning of” California’s Three Strikes law, because they are not serious or violent
felonies. (Id. at 4-5.) He argues that his prior California felony conviction for assault
with a deadly weapon is not a serious or violent felony under California law, and should

1 not have been alleged as such by the prosecutor or used to enhance his sentence. (Id. at
2 7-9.) Petitioner also contends relief is justified under Rule 60(b)(6) because his prior
3 Oregon felony conviction for robbery is not a serious or violent felony conviction within
4 the meaning of California’s Three Strikes law, and it was an abuse of discretion for the
5 trial court to use it to enhance his sentence. (Id. at 9-16.)

6 This Court must first determine whether Petitioner’s Rule 60(b) motion is in effect
7 a second or successive habeas petition. Gonzalez v. Crosby, 545 U.S. 524, 530-32
8 (2005). A Rule 60(b) motion constitutes a second or successive habeas petition when
9 it advances a new ground for relief or “attacks the federal court’s previous resolution of
10 a claim *on the merits*.” Gonzalez, 545 U.S. at 532 (italics in original); id. at 532 n.4
11 (explaining that “on the merits” in that context refers to an assertion that the court’s
12 resolution of a previous claim was in error, as opposed to an argument, for example, that
13 the court erred in ruling that a merits determination was not possible due to a procedural
14 ground).

15 If Petitioner’s Rule 60(b) motion is the equivalent of a second or successive
16 petition, this Court lacks jurisdiction to consider the motion absent a certificate from the
17 Ninth Circuit authorizing the filing of the petition. United States v. Washington, 653
18 F.3d 1057, 1065 (9th Cir. 2011); 28 U.S.C. § 2244(b)(1). The Court must treat a Rule
19 60(b) motion as a second or successive petition if it merely attempts to relitigate this
20 Court’s determination on the merits of the claims. See Washington, 653 F.3d at 1063
21 (providing as examples of a Rule 60(b) motion which must be treated as a successive
22 petition a motion asserting that owing to “excusable neglect” the movant’s habeas
23 petition had omitted a claim of constitutional error, a motion seeking to add a new
24 ground for relief, and a motion attacking the court’s prior resolution of a claim on the
25 merits), citing Gonzalez, 545 U.S. at 530-32.

26 In this Court’s Order denying the First Amended Petition, the Court denied on the
27 merits Petitioner’s claims that his federal Constitutional rights were violated by the
28 enhancement of his current sentence with his prior California felony conviction for

1 assault with a deadly weapon and his prior Oregon felony conviction for robbery. (ECF
2 No. 70 at 11-14.) In affirming this Court's judgment, the Ninth Circuit Court of Appeals
3 also addressed and rejected those claims on their merits. (ECF No. 90 at 4-7.) In his
4 instant Rule 60(b) Motion, Petitioner once again attempts to challenge the use of his
5 prior convictions to enhance his sentence.

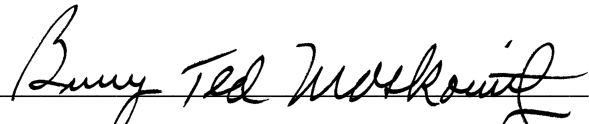
6 It is clear that Petitioner's Rule 60(b) Motion merely seeks to relitigate claims
7 presented in the First Amended Petition which were denied on the merits by this Court
8 and affirmed on appeal. This Court lacks jurisdiction to consider the Rule 60(b) motion
9 because Petitioner has not received permission from the Ninth Circuit to file a second or
10 successive petition in this Court. Gonzalez, 545 U.S. at 530-32; Washington, 653 F.3d
11 at 1063.

12 **II. Conclusion and Order**

13 The Court **DENIES** Petitioner's Rule 60(b) motion for relief from judgment for
14 the reasons set forth above. The denial is without prejudice to Petitioner to file a second
15 or successive petition in this Court if he obtains permission from the Ninth Circuit Court
16 of Appeals. The Court **DECLINES** to issue a certificate of appealability with respect
17 to the denial of Petitioner's Rule 60(b) Motion.

18 **IT IS SO ORDERED.**

19 DATED: April 5, 2016

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22 **HON. BARRY TED MOSKOWITZ**
23 United States District Judge
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