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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 ROBERT G. PULLEY,

12 Petitioner,

13 v.

14 DANIEL PARAMO, Warden; and
15 KAMALA D. HARRIS, Attorney
16 General,

17 Respondents.

Case No.: 14-CV-2034 JLS (MDD)

**ORDER DENYING PETITIONER'S
MOTION**

(ECF No. 68)

18 This closed federal habeas corpus action was filed under 28 U.S.C. § 2254 by pro se
19 state prisoner Robert G. Pulley. Almost two years after the conclusion of Petitioner's most
20 recent appeal in this matter, Petitioner filed the present post-judgment motion ("Mot.,"
21 ECF No. 68). For the following reasons, Petitioner's Motion is **DENIED**.

22 **BACKGROUND**

23 In August 2014, Petitioner filed a Petition for Habeas Corpus pursuant to 28 U.S.C.
24 § 2254. The Court denied the Petition and entered judgment in favor of Respondents on
25 November 14, 2016. ECF Nos. 54, 55. Petitioner filed multiple notices of appeal. *See*
26 ECF Nos. 56, 57, 63. The Ninth Circuit denied Petitioner's request for a certificate of
27 appealability, finding that "appellant has not made a 'substantial showing of the denial of
28 a constitutional right.'" ECF No. 61 at 1 (quoting 28 U.S.C. § 2253(c)(2)). Petitioner's

1 subsequent appeal was dismissed as duplicative, and Petitioner’s motion for
2 reconsideration was denied on July 5, 2019. ECF Nos. 65, 66. Petitioner filed the present
3 motion almost two years after the conclusion of his third appeal from his initial Petition.

4 ANALYSIS

5 Petitioner now moves under Federal Rule of Civil Procedure 60(b)(6) to vacate the
6 judgment so that he can file an amended habeas petition. *See generally* Mot.

7 I. Rule 60(b) or Successive Petition

8 The Court must question first whether Petitioner’s filing is a Rule 60(b) motion or a
9 disguised 28 U.S.C. § 2254 petition. “Habeas corpus petitioners cannot ‘utilize a Rule
10 60(b) motion to make an end-run around the requirements of [Antiterrorism and Effective
11 Death Penalty Act of 1996 (“]AEDPA[”)]’ or to otherwise circumvent that statute’s
12 restrictions on second or successive habeas corpus petitions.” *Jones v. Ryan*, 733 F.3d 825,
13 833 (9th Cir. 2013) (quoting *Calderon v. Thompson*, 523 U.S. 538, 547 (1998)). A
14 legitimate Rule 60(b) motion “attacks . . . some defect in the integrity of the federal habeas
15 proceedings.” *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005). A second or successive
16 petition is a filing that contains one or more claims asserted as the basis for relief from a
17 state court’s judgment of conviction. *Id.* “[A] motion that does not attack ‘the integrity of
18 the proceedings, but in effect asks for a second chance to have the merits determined
19 favorably’ raises a claim that takes it outside the bounds of Rule 60(b) and within the scope
20 of AEDPA’s limitations on second or successive habeas corpus petitions.” *Jones*, 733 F.3d
21 at 834 (quoting *Gonzalez*, 545 U.S. at 532 n.5). Such a motion “although labeled a Rule
22 60(b) motion, is in substance a successive habeas petition and should be treated
23 accordingly.” *Gonzales*, 545 U.S. at 531.

24 Petitioner’s Rule 60(b) motion is in truth a disguised section 2254 petition. None of
25 his arguments amounts to an allegation of a “defect in the integrity of the federal habeas
26 proceedings” that constitutes legitimate grounds for a Rule 60(b) motion. *Gonzalez*, 545
27 U.S. at 530. Rather, Petitioner argues the Court “fail[ed] to properly address or properly
28 consider all the evidence Appellant put forth in his effort to amend his original, timely

1 federal petition for writ of habeas corpus[.]” Mot. at 2.¹ Petitioner asserts claims for
2 ineffective assistance of counsel as a basis for relief from the state court judgment.
3 Petitioner’s Motion “in effect asks for a second chance to have the merits determined
4 favorably[.]” *Jones*, 733 F.3d at 834 (quoting *Gonzalez*, 545 U.S. at 532 n.5). His filing,
5 then, must be treated as a second or successive petition under 28 U.S.C. § 2244(b)(3)(A).

6 **II. Successive Petition**

7 AEDPA “generally bars second or successive habeas petitions.” *Balbuena v.*
8 *Sullivan*, 980 F.3d 619, 634 (9th Cir. 2020), *cert. denied sub nom. Balbuena v. Cates*, 141
9 S. Ct. 2755 (2021). Section 2244(b)(1) states that “[a] claim presented in a second or
10 successive habeas corpus application under section 2254 that was presented in a prior
11 application shall be dismissed.” 28 U.S.C. § 2244(b)(1). In order to file a second or
12 successive petition, a federal habeas petitioner first must obtain an order from the Court of
13 Appeals authorizing the district court to consider the petition. *See* 28 U.S.C.
14 § 2244(b)(3)(A). This bar can be avoided if the petitioner “shows” that the “claim relies
15 on a new rule of constitutional law, made retroactive to cases on collateral review by the
16 Supreme Court, that was previously unavailable.” 28 U.S.C. § 2244(b)(2)(A).

17 First, Petitioner has not shown that he has obtained an order from the Court of
18 Appeals authorizing this Court to consider the petition. Second, Petitioner did not
19 announce a new rule of constitutional law that applies retroactively, *Jones*, 733 F.3d at 836,
20 840, and therefore it cannot underpin a second or successive petition, *id.* at 843; *Buenrostro*
21 *v. United States*, 697 F.3d 1137, 1140 (9th Cir. 2012). Instead, Petitioner argues that “had
22 the court properly considered all the evidence Appellant put forth to demonstrate his factual
23 innocence, it would have found the extraordinary circumstances of a Fundamental
24 Miscarriage of Justice.” Mot. at 14. The Court previously evaluated Petitioner’s
25 ineffective assistance of counsel claim and found the claim was untimely. *See* ECF No. 47
26 at 26 (finding neither delayed accrual pursuant to 28 U.S.C. § 2244(d)(1)(D) nor delayed
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28 ¹ Pin citations refer to the CM/ECF page numbers electronically stamped at the top of each page.

1 accrual for the ineffective assistance of counsel claims apply to Petitioner’s new claims).
2 As Petitioner has not met the requirements to file a successive petition, the Court declines
3 to revisit the merits of his Petition.

4 Accordingly, this second or successive petition is **DISMISSED**.

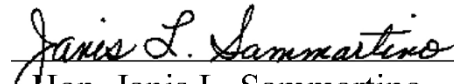
5 **CONCLUSION**

6 Insofar as Petitioner’s filing is a Rule 60(b) motion, it is **DENIED**. Insofar as
7 Petitioner’s filing is a second or successive petition, it is **DISMISSED**.

8 A certificate of appealability will not issue. Petitioner has not shown “that jurists of
9 reason would find it debatable whether the petition states a valid claim of the denial of a
10 constitutional right and that jurists of reason would find it debatable whether the district
11 court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).
12 The judgment and the order dismissing the Petition remain in effect. This case remains
13 closed.

14 **IT IS SO ORDERED.**

15 Dated: November 9, 2021

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17 Hon. Janis L. Sammartino
18 United States District Judge
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