

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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STEVEN JUDE HOFFENBERG,

Petitioner,

00 Civ. 1686

-against-

OPINION

UNITED STATES OF AMERICA,

Respondent.

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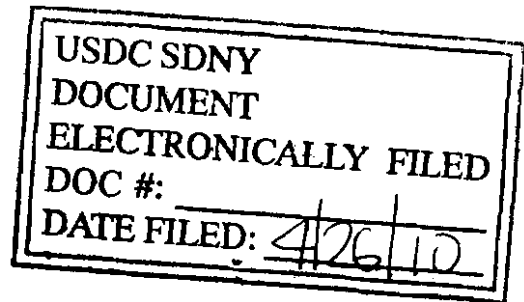
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Sweet, D.J.

Petitioner Steven Hoffenberg ("Hoffenberg" or the "Petitioner") has moved pro se under Rule 60(b)(3) and (6) of the Federal Rules of Civil Procedure (i) to reopen the judgment entered by this Court denying Petitioner's motion to vacate his sentence under 28 U.S.C. § 2255 and (ii) for "bail release," claiming that the Section 2255 proceedings were flawed because his lawyer allegedly concealed from the Court an alleged conflict of interest of a former Assistant United States Attorney ("AUSA") that allegedly arose and ended during the underlying criminal case. For the reasons set forth below, the motion to reopen the judgment is denied and the motion for "bail release" is denied.

Prior Proceedings

In April 1995, Hoffenberg pleaded guilty before this Court to conspiracy to commit securities fraud, mail fraud, conspiracy to obstruct an investigation by the United States Securities and Exchange Commission ("SEC"), and income tax evasion. See United States v. Hoffenberg, Nos. 94 Cr. 213 and 95 Cr. 321, 1997 WL 96563, at *1 (S.D.N.Y. Mar. 5, 1997). On March 7, 1997, the Court

sentenced Hoffenberg principally to a term of 20 years' imprisonment. See id. at *15. Hoffenberg is currently serving his sentence. The Second Circuit affirmed Hoffenberg's conviction and sentence in a summary order. United States v. Hoffenberg, Nos. 97-1159(L) and 97-1166, 1998 WL 695933, at *2 (2d Cir. Sept. 22, 1998).

After seeking and being denied a rehearing en banc, Hoffenberg filed a Section 2255 petition on or about June 21, 2000. See Hoffenberg v. United States, 436 F. Supp. 2d 609, 610 (S.D.N.Y. 2006). In an opinion, dated June 21, 2006, the Court granted a certificate of appealability on issues relating to an alleged conflict of interest concerning Hoffenberg's former counsel. On April 3, 2007, the Court denied a request by Hoffenberg's counsel to certify the appealability of the issue of the alleged conflict of a former AUSA. In a summary order, dated June 19, 2009, the Second Circuit upheld this Court's denial of the Section 2255 petition. Hoffenberg v. United States, 2009 WL 1740050, at *3 (2d Cir. June 19, 2009).

On December 28, 2009, Hoffenberg filed the instant Rule 60 motion, which was marked fully submitted on February 10, 2010.

The Facts

A. The Offense Conduct

The charges to which Hoffenberg pleaded guilty principally relate to his conduct as the chief executive officer, president and chairman of the board of Towers Financial Corporation ("Towers"). See Hoffenberg, 1997 WL 96563, at *1-*8. For example, Hoffenberg and his co-conspirators made fraudulent representations in connection with the sale of more than \$270 million in promissory notes for Towers and the sale of \$210 million in bonds for a related entity. See id. at *4-*5. In or about 1989, the SEC began an investigation of the fraudulent sale of Towers' securities. See id. at *6. Hoffenberg intentionally testified falsely in several SEC depositions and directed Towers employees and associates to testify falsely during the SEC investigation. See id.

Hoffenberg also participated in an entirely separate fraudulent scheme in Illinois whereby he misappropriated and misused more than \$3 million of funds and bonds belonging to two Illinois-based insurance

companies controlled by Towers. See id. at *1. Hoffenberg was indicted for this conduct in the Northern District of Illinois and the indictment was transferred to this Court pursuant to Rule 20 of the Federal Rules of Criminal Procedure. See id. at *7. Hoffenberg's guilty plea included a plea to one count of mail fraud in connection with the scheme he perpetrated in Illinois. See id. at *8; United States v. Hoffenberg, 859 F. Supp. 698, 699 (S.D.N.Y. 1994).

Hoffenberg also evaded personal income taxes for the years 1987 through 1991 by causing a number of his personal expenses to be paid by a corporation he owned. See Hoffenberg, 1997 WL 96563, at *6. As a result, he avoided paying approximately \$668,280 in income taxes. See id.

B. Cooperation Agreement and Guilty Plea

On or about September 23, 1993, Hoffenberg entered into an agreement with the Government (the "Cooperation Agreement"), pursuant to which he agreed, among other things, to plead guilty to certain charges and to cooperate with the Government's investigation. See

Hoffenberg, 859 F. Supp. at 699. The Government subsequently advised Hoffenberg that he had breached the Cooperation Agreement by concealing assets and his interest in two companies. Id. at 699-700. Hoffenberg sought to enforce specific performance of the Cooperation Agreement. From June 5 through June 14, 1995, this Court held a five-day hearing on Hoffenberg's motion for specific performance, during which former AUSA Daniel Nardello ("Nardello") and several other witnesses testified. In an opinion dated December 18, 1995, this Court denied Hoffenberg's motion. See United States v. Hoffenberg, 908 F. Supp. 1265, 1280 (S.D.N.Y. 1995).

C. The Section 2255 Proceedings

After submitting various letter motions to this Court starting in December 1999, Hoffenberg filed a Section 2255 petition on or about June 21, 2000, asserting several ineffective assistance of counsel claims against various counsel, each of which derived from his allegation that Hoffman & Pollok LLP, the law firm that represented him at the time of his guilty plea, had a conflict of interest. The Court denied the Section 2255 petition. See Hoffenberg v. United States, 436 F. Supp. 2d 609, 614 (S.D.N.Y. 2006).

On or about September 21, 2006, Robin Smith ("Smith"), counsel for Hoffenberg for part of the Section 2255 proceeding, submitted a supplemental declaration in support of Hoffenberg's motion for a certificate of appealability (the "Supplemental Declaration"). The Supplemental Declaration stated that Hoffenberg had "recently learned" that Nardello negotiated employment with Decision Strategies – an investigations firm employed by Towers' bankruptcy trustee during the prosecution of Hoffenberg's case – while he was employed by the United States Attorney's Office and prosecuting Hoffenberg, in violation of 18 U.S.C. § 208, a criminal conflict of interest statute.

On October 10, 2006, a certificate of appealability from the denial of the Section 2255 petition was granted without reference to the Supplemental Declaration. On or about April 30, 2007, the Court, by a Memo-Endorsement Order, treated the Supplemental Declaration as a motion to grant a certificate of appealability on an issue not determined by its June 2006 opinion, and denied the motion.

Hoffenberg appealed to the Second Circuit the denial of his Section 2255 petition. Before the Second Circuit, he argued for the first time that he received ineffective assistance of counsel because his trial counsel allegedly failed to cross-examine Nardello sufficiently. He also sought remand to add to his Section 2255 petition a claim relating to the cross-examination of Nardello concerning his alleged conflict of interest. The Government did not oppose the motion, but noted that the claim would fail because, among other reasons, it would be time-barred. On June 19, 2009, the Second Circuit issued a summary order holding that this Court did not err in denying Hoffenberg's 2255 petition. Hoffenberg, 2009 WL 1740050, at *3. The Second Circuit dismissed the portion of the appeal concerning the cross-examination of Nardello, noting that an appeal from a denial of a Section 2255 petition is limited to the issue certified for appeal and that the alleged failure to cross-examine Nardello sufficiently was "totally unrelated" to Hoffenberg's former counsel's purported conflict of interest. Id. at *2. The Second Circuit also declined to transfer to this Court Hoffenberg's attempt to file an additional petition raising new claims, holding that a transfer would be futile because the additional petition was untimely. Id. at *3.

D. Hoffenberg's Rule 60 Motion

Hoffenberg filed the instant Rule 60 motion pro se on December 29, 2009. His motion papers present the following three questions: (i) whether there were structural errors in the Section 2255 proceedings as a result of alleged fraud on the court by Smith for allegedly concealing "crimes" purportedly committed by Nardello "at the time of the grand jury indictment presentation"; (ii) whether Smith obstructed justice by allegedly preventing the Court from learning about the alleged bribery of Nardello; and (iii) whether it was "obstruction fraud" from Smith to have allegedly prevented the Court from learning how Hoffenberg's former partner allegedly paid bribes to Nardello from Towers funds to ensure that the former partner would avoid prosecution. Hoffenberg's purported basis for his bribery allegations is that Nardello allegedly violated 18 U.S.C. § 208, the same argument Smith presented to this Court in her Supplemental Declaration.

**The Rule 60(b) Motion Constitutes Relitigation
and is Denied as Beyond the Scope of Rule 60(b)**

Hoffenberg seeks relief under Fed. R. Civ. P. Rule 60(b)(3) and (6). Rule 60(b)(3) provides that a court may relieve a party from a final judgment entered as a result of fraud by an opposing party. Rule 60(b)(6) is a "catch-all" provision providing that a court may relieve a party from a final judgment for "any other reason that justifies relief." Since 28 U.S.C. § 2255 provides a vehicle for a prisoner to move the sentencing court to vacate or correct the sentence, "relief under Rule 60(b) is available for a previous habeas proceeding only when the Rule 60(b) motion attacks the integrity of the previous habeas proceeding rather than the underlying criminal conviction." Harris v. United States, 367 F.3d 74, 77 (2d Cir. 2004); see United States v. Morales, No. 03 CV 4676, 2008 WL 4921535, at *4 (S.D.N.Y. Nov. 10, 2008); Grullon v. United States, No. 99 Civ. 1877, 2004 WL 1900340, at *4 (S.D.N.Y. Aug. 24, 2004).

Hoffenberg has sought to frame his argument as an attack on the integrity of the habeas proceeding by claiming that during the habeas proceeding his post-

conviction counsel concealed fraud by the Government that occurred during the underlying criminal proceeding. However, the prior proceedings set forth above establish that he has repackaged as a Rule 60 motion a prior argument concerning the validity of his underlying conviction. Hoffenberg attempted to raise Nardello's alleged conflict with this Court, but a certificate of appealability concerning the alleged conflict was denied. Hoffenberg then argued before the Second Circuit that his counsel for his criminal case rendered ineffective assistance by inadequately cross-examining Nardello as to this alleged conflict during the hearing concerning specific performance of the Cooperation Agreement. Now, Hoffenberg makes a substantially similar argument, but claims this time that his post-conviction counsel failed to inform the Court about Nardello's alleged conflict. Rule 60(b) is not a vehicle to relitigate issues already raised during a prior Section 2255 proceeding. See White v. United States, No. 1:96-CV-1912, 2009 WL 1405212, at *2 (N.D.N.Y. May 18, 2009) ("Rule 60(b) is not properly used as a mechanism to relitigate issues already resolved in a prior § 2255 motion."); Davis v. United States, Nos. 08 Civ. 7515 and 05 CIV 0694, 2009 WL 222354, at *1 (S.D.N.Y. Jan. 27, 2009). This motion is an impermissible attempt to relitigate

issues already decided by the Court during the Section 2255 proceeding.

Given that Hoffenberg's motion seeks to attack his underlying conviction, the Court has two procedural options: (i) treat the motion as "a second or successive" habeas petition and refer it to the Second Circuit for possible certification; or (ii) deny the motion, or portion thereof, attacking the underlying conviction "as beyond the scope of Rule 60(b)." Harris, 367 F.3d at 82 (citing Gitten v. United States, 311 F.3d 529, 534 (2d Cir. 2002)).

The Second Circuit has cautioned against referring a Rule 60(b) motion to that Court without informing the movant of the District Court's intent to do so and allowing the movant to withdraw the motion so as to avoid the adverse consequences that may flow from such a referral. See Gitten, 311 F.3d at 532-34. The Second Circuit has noted not the potential adverse consequences include summary rejection of the motion and summary denial of any subsequent challenge as an abuse of the writ. Id. at 533. Here, it is likely that the Second Circuit would find an abuse of the writ given that it has already held that hearing a new Section 2255 petition would be futile.

Accordingly, Hoffenberg's motion is denied as beyond the scope of Rule 60(b). See Harris, 367 F.3d at 82.

The Rule 60(b) Motion is Denied on the Merits

Relief under Rule 60(b) is only warranted if the defendant presents "highly convincing" evidence that demonstrates "extraordinary circumstances" justifying relief. James v. United States, 603 F. Supp. 2d 472, 478 (E.D.N.Y. 2009); Morales, 2008 WL 4921535, at *3 (quoting Gonzalez v. Crosby, 545 U.S. 524, 535 (2005)).

First, Hoffenberg's motion under Rule 60(b)(3) fails because the allegations of Government fraud pertain to the underlying criminal proceedings, and are therefore beyond the scope of Rule 60(b). To the extent Hoffenberg intends to allege that the Government participated with his counsel in the alleged concealment of Nardello's alleged conflict of interest, and that this allegation constitutes an attack on the integrity of the prior habeas proceeding, Hoffenberg has failed to submit any evidence, let alone "highly convincing" evidence to support his allegation.

Second, Hoffenberg's motion under Rule 60(b)(6) also fails. The requisite "extraordinary circumstances" justifying Rule 60(b) relief are "particularly rare where the relief sought is predicated on the alleged failures of counsel in a prior habeas petition," given that "a habeas petitioner has no constitutional right to counsel in his habeas proceeding." Harris, 367 F.3d at 77. To prevail on such a theory under Rule 60(b)(6), Hoffenberg must show that his counsel abandoned the case or prevented him from being heard. Id. To the contrary, here, Hoffenberg's lawyer previously presented and the Court ruled upon Nardello's alleged conflict of interest.¹ See White, 2009 WL 1405212, at *2; Davis, 2009 WL 222354, at *1.

Furthermore, Hoffenberg's motion is time-barred under Rule 60(b)(3) and (6). Rule 60(b)(3) motions must be made within one year of the entry of judgment. Fed. R.

¹ Hoffenberg's motion papers are unclear about the period of time during which he asserts that Smith allegedly concealed Government misconduct from the Court. Even if Hoffenberg is claiming that Smith should have raised the alleged misconduct prior to the filing of the Supplemental Declaration, Hoffenberg has not made any evidentiary showing about Smith's knowledge of the allegations prior to that point.

In addition, Hoffenberg fails to demonstrate that any conflict of interest violation occurred. He relied solely on the facts that Nardello became employed by Decision Strategies, and that Towers' bankruptcy trustee contracted with Decision Strategies. Section 208 requires evidence that Nardello knew of a conflict and that Decision Strategies' financial interests were affected by the prosecution of Hoffenberg. 18 U.S.C. § 208.

Civ. P. 60(c)(1). Rule 60(b)(6) motions must be made with a "reasonable time." Id.; see Morales, 2008 WL 4921535, at *3. To determine whether a delay is reasonable, a court must consider "the particular circumstances of the case, and balance the interest in finality with reasons for delay." Id. (quoting PRC Harris, Inc. v. Boeing Co., 700 F.2d 894, 897 (2d Cir. 1983)). The Second Circuit has found delays of 18 months and 26 months unreasonable. Id. (citing Truskoski v. ESPN, Inc., 60 F.3d 74, 77 (2d Cir. 1995) and Kellogg v. Strack, 269 F.3d 100, 104 (2d Cir. 2001)). Here, judgment was entered on July 28, 2006, and Hoffenberg's motion was not filed until December 28, 2009, a delay of almost three and a half years. Even if the relevant judgment were the Court's denial of a certificate of appealability on the issues raised in the Supplemental Declaration, the delay amounts to more than two and half years. The motion is therefore time-barred.

The Motion for "Bail Release" is Denied

The motion for "bail release" is based upon the allegations underlying the Rule 60(b) motion. The denial of that motion mandates denial of the motion for "bail release."

Conclusion

For the reasons set forth above, Hoffenberg's motion pursuant to Federal Rule of Civil Procedure 60(b) is denied, and his motion for bail is denied.

It is so ordered.

New York, NY
April 20, 2010



ROBERT W. SWEET
U.S.D.J.