

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF PUERTO RICO

3 ORLANDO MALPICA-GARCÍA,

4 Petitioner,

5 v.

6 UNITED STATES OF AMERICA,

7 Respondent.

Civil No. 08-2055 (JAF)

(Crim. No. 03-081)

8 **OPINION AND ORDER**

9 Pending before this court is Petitioner's motion under Federal Rule of Civil Procedure
10 60(b)(6) for relief from our denial of his petition for relief from a federal court conviction
11 pursuant to 28 U.S.C. § 2255. (Docket No. 50.) Respondent, the United States of America,
12 does not oppose.

13 **I.**

14 **Factual and Procedural History**

15 On July 1, 2005, following a six-day trial, a jury found Petitioner guilty of conspiracy to
16 possess controlled substances with intent to distribute and conspiracy to use, carry, or possess
17 a firearm. (Crim. No. 03-081, Docket No. 954.) On October 14, 2005, this court sentenced
18 Petitioner to concurrent terms of imprisonment of 385 months and 240 months, and five years
19 of supervised release. (Crim. No. 03-081, Docket No. 1017.) Petitioner appealed, and on
20 June 6, 2007, the First Circuit affirmed his sentence. United States v. Malpica-García, 489 F.3d
21 393 (1st Cir. 2007). The Supreme Court denied certiorari on October 1, 2007. United States v.
22 Malpica-García, 128 S. Ct. 316 (2007).

1 However, the Supreme Court has noted that “an attack based on the movant’s own
2 conduct, or his habeas counsel’s omissions . . . ordinarily does not go to the integrity of the
3 proceedings, but in effect asks for a second chance to have the merits determined favorably.”
4 Id. at 532 n.5. A Rule 60(b) motion seeking “relief from a judgment previously entered in a
5 section 2255 case should be treated as a second or successive habeas petition if—and only
6 if—the factual predicate set forth in support of the motion constitutes a direct challenge to the
7 constitutionality of the underlying conviction.” Munoz v. United States, 331 F.3d 151, 153 (1st
8 Cir. 2003) (internal quotation marks and citations omitted). Once a court has determined that
9 the Rule 60(b) motion is not a second § 2255 motion in disguise, “the motion may be
10 adjudicated under the jurisprudence of Rule 60(b).” Id.

11 The first five clauses of Rule 60(b) enumerate specific reasons for grants of relief, such
12 as the clause (1), which lists reasons of “mistake, inadvertence, surprise, or excusable neglect.”
13 F. R. Civ. P. 60(b). By contrast, Rule 60(b)(6) broadly covers “any other reason that justifies
14 relief.” Id. A party must bring a motion seeking relief “for reasons (1), (2), and (3) no more
15 than a year after the entry of the judgment,” in contrast to Rule 60(b)(6) motions, which must
16 be made “within a reasonable time.” F. R. Civ. P. 60(c). Rule 60(b)(6) “is a catch-all provision.
17 In terms, it authorizes the district court to grant relief from judgment for ‘any other reason that
18 justifies relief.’” Ungar v. PLO, 599 F.3d 79, 83 (1st Cir. 2010) (quoting Fed. R. Civ.
19 P. 60(b)(6)). To prevail on a Rule 60(b)(6) motion, movants “must show extraordinary
20 circumstances suggesting that the party is faultless in the delay” in seeking relief. Blanchard
21 v. Cortes-Molina, 453 F.3d 40, 44 (1st Cir. 2006) (citing Pioneer Inc. v. Brunswick Assocs.
22 Ltd., 507 U.S. 380, 393 (1993)). Additionally, the Supreme Court has noted that “clause (6) and

1 clauses (1) through (5) are mutually exclusive;” thus, a party may not seek relief in a 60(b)(6)
2 motion for any of the reasons enumerated in clauses one through five, such as excusable neglect
3 or surprise. Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 864 n.11 (1988).

4 III.

5 Analysis

6 We first determine whether Petitioner’s Rule 60(b) motion constitutes an impermissible
7 second § 2255 petition. Deciding that we may reach the merits of the motion, we next
8 determine whether Petitioner has established the “extraordinary circumstances” required to grant
9 relief under Rule 60(b)(6). We frame our analysis using the precept that pleadings filed pro se
10 are to be construed liberally. Erickson v. Pardus, 551 U.S. 89, 94 (2007) (quoting Estelle v.
11 Gamble, 429 U.S. 97, 106 (1976)).

12 Petitioner alleges that his habeas counsel committed “gross negligence” by: (1) failing
13 to call Edwin Malpica Garcia¹—who Petitioner claims would have corroborated his
14 testimony—as a witness during the § 2255 evidentiary hearing; and (2) deciding not to file a
15 Rule 60(b)(1) motion based on said failure to put the additional witness on the stand.² Petitioner
16 argues that had habeas counsel taken either of these actions, this court would have reassessed

¹ Specifically, Petitioner alleges counsel “failed to satisfy minimal professional standards of care” by neglecting “to move this Honorable Court for a writ to allow Edwin Malpica Garcia—a federal prisoner—to appear and give testimony on [Petitioner’s] behalf.” (Docket No. 50 at 13.) We highly doubt that this testimony—which would have echoed the statement in his affidavit, which was part of the § 2255 record—would have made such a thunderous difference in our credibility assessment of Petitioner at the hearing.

² To the extent Petitioner couches his arguments regarding habeas counsel’s decisions in the language of an ineffective assistance of counsel claim, we note that he has no right to counsel for collateral appeal and cannot bring such a claim against habeas counsel. Ellis v. United States, 313 F.3d 636, 652 (1st Cir. 2002) (citing Penn. v. Finley, 481 U.S. 551, 555 (1987)) (“A convicted criminal has no constitutional right to counsel with respect to habeas proceedings.”). The Supreme Court’s recent decision in Martinez v. Ryan, 2012 U.S. LEXIS 2317 (Mar. 20, 2012), does nothing to change his situation.

1 its findings of credibility and found in his favor and, thus, we should grant Rule 60(b)(6) relief
2 by vacating our denial of his petition and granting him a new second evidentiary hearing with
3 the additional witness testimony. (Docket No. 50 at 14.) We find that the challenges to
4 procedural aspects of this habeas proceeding—as opposed to the constitutionality of the
5 underlying conviction—make up the bulk of his motion, and, thus, we decide the motion under
6 Rule 60(b)(6) jurisprudence.

7 However, we find that Plaintiff has failed to establish the “exceptional circumstances”
8 required to grant Rule 60(b)(6) relief. Cotto v. United States, 993 F.2d 274, 279 (1st Cir. 1993).
9 “Rule 60(b) relief is extraordinary in nature and, thus, motions invoking that rule should be
10 granted sparingly.” Fisher v. Kadant, Inc., 589 F.3d 505, 512 (1st Cir. 2009) (quoting Karak
11 v. Bursaw Oil Corp., 288 F.3d 15, 19 (1st Cir. 2002)) (internal quotation marks omitted). We
12 reject Petitioner’s threadbare assertions that counsel’s strategic choices constituted gross
13 negligence. We find nothing meriting such extraordinary relief in habeas counsel’s strategic
14 decision not to put a witness on the stand or decision not to file a Rule 60(b)(1) motion
15 regarding this choice.³ Regarding its decision in Chang v. Smith, the First Circuit has explained
16 that “although a claim for inexcusable neglect [might] lie under the catch-all provision, the
17 plaintiff had failed to make out a claim on the basis of his attorney’s failure to file a Rule
18 60(b)(1) motion in the district court because the underlying neglect—counsel’s acquiescence
19 to a voluntary dismissal—was undertaken with plaintiff’s knowledge” and Rule 60(b) does not

³ Petitioner’s motion states that the proposed testimony would have echoed that of an affidavit already in the record and, thus, would have added little. Moreover, the hypothetical Rule 60(b)(1) motion would have almost assuredly failed: Rule 60(b)(1) is not an appropriate vehicle for a challenge to “a deliberate strategic choice that did not work out.” Ungar v. PLO, 599 F.3d 79, 85–86 (1st Cir. 2010). Even though we appointed Petitioner’s habeas counsel, we cannot ignore “the general proposition that all parties are bound by the acts of their attorneys.” Link v. Wabash R.R. Co., 370 U.S. 626 (1962).

1 offer relief from improvident strategic choices. Ojeda-Toro v. Rivera-Mendez, 853 F.2d 25,
2 31 (1st Cir. 1988) (citing Chang v. Smith, 778 F.2d 83, 85 (1st Cir. 1985)).

3 Nevertheless, it is well-settled that an attorney’s neglect of a case
4 will not provide the basis for a Rule 60(b)(6) motion. Even an
5 attorney’s gross negligence is not a basis for relief under Rule
6 60(b)(6) unless the gross negligence is explained by exceptional
7 circumstances and the movant makes a showing of client diligence
8 in the face of the attorney’s negligence.

9 Cruz v. Mun. of Dorado, 780 F. Supp. 2d 157, 159 (D.P.R. 2011) (quoting Cobos v. Adelphi
10 Univ., 179 F.R.D. 381, 388 (E.D.N.Y. 1998) (internal quotation marks omitted).

11 Even if we were to construe counsel’s (eminently reasonable) actions as negligent,
12 Petitioner has waited thirteen months to file this motion and failed to offer any explanations of
13 exceptional circumstances—much less extraordinary circumstances, that illustrate that he is
14 faultless in the delay. Pioneer Inv. Servs., 507 U.S. at 393; see also Lincoln Sav. Bank v.
15 Carmelita Dev. Corp., 88 F.R.D. 648, 651 (D.P.R. 1980) (describing “classic” example of a
16 party who “comes in more than a year after judgment with new legal representation to assert that
17 it is a victim of some blunder of his prior counsel,” and noting that courts “have repeatedly held
18 that such a circumstance is not so extraordinary as to bring Rule 60(b)(6) into play”).

19 Here, the circumstances are “all the less extraordinary in petitioner’s case, because of his
20 lack of diligence in pursuing review of the . . . issue”—well aware of counsel’s decision not to
21 put the additional witness on the stand and of her withdrawal as counsel, he nevertheless waited
22 over a year before bringing a Rule 60(b) challenge. Gonzalez, 545 U.S. at 537. Based on the
23 plentiful reasons discussed above, we find that Petitioner has failed to show that circumstances
24 exist in this case to merit relief under Rule 60(b)(6).

1 **IV.**

2 **Conclusion**

3 For the foregoing reasons, we hereby **DENY** Petitioner's Rule 60(b) motion. (Docket
4 No. 50.)

5 **IT IS SO ORDERED.**

6 San Juan, Puerto Rico, this 3rd day of April, 2012.

7 s/José Antonio Fusté
8 JOSE ANTONIO FUSTE
9 U.S. District Judge