

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PATRICK MCALLISTER,

 Petitioner,

 v.

UNITED STATES OF AMERICA,

 Respondent.

CASE NO. C16-6032 RBL

ORDER ON MOTION TO DISMISS
CONVICTION AND MOTION TO
STAY PROBATION

THIS MATTER is before the Court on *pro se* Petitioner Patrick McAllister’s Motion to Dismiss Conviction Pursuant to Rule 60(b) [Dkt. 39]¹ and his Motion to Stay Probation [Dkt. 46]. In 2012, McAllister was convicted by a jury in Jefferson County Superior Court of 31 counts of rape and assault against his non-citizen fiancée and sentenced to 250 months imprisonment. In 2013, McAllister pled guilty to a single count of immigration fraud (18 U.S.C. § 1546(a)) for making a false declaration on a Petition for Alien Fiancé(e) (I-129F) form that he submitted to federal immigration authorities. This Court sentenced McAllister to time served and one year of supervised release to commence after the completion of his state sentence. The Court

¹ McAllister filed an identical Motion to Dismiss Conviction in his related criminal case. See *United States v. Patrick McAllister*, 3:13-cr-5464-RBL, Dkt. 86.

1 also ordered several special conditions of supervision, including the requirement that McAllister
2 undergo a sexual deviancy evaluation and participate in a certified sexual deviancy treatment
3 program designated by the U.S. Probation and Pretrial Services Office. *See United States v.*
4 *McAllister*, 3:13-cr-5464-RBL, Dkt. 62 at 4. McAllister appealed but the Ninth Circuit affirmed
5 his conviction. McAllister’s subsequent petition to vacate his conviction pursuant to 28 U.S.C. §
6 2255 was also denied. *See* Dkt. 1; Dkt. 29.

7 In July 2017, the Washington Court of Appeals (Division II) reversed McAllister’s rape
8 and assault convictions on ineffective assistance of counsel grounds. *In re McAllister*, 199 Wash.
9 App. 1068 (Wash. Ct. App. 2017). McAllister now asserts that the reversal of his state
10 convictions for rape and assault justify vacating his federal immigration fraud conviction.
11 McAllister also seeks to delay the imposition of his supervised release pending the Court’s ruling
12 on his Rule 60 motion. The Government opposes McAllister’s motions, arguing that the vacated
13 state convictions are immaterial to McAllister’s federal conviction, and that there is no grounds
14 to delay the imposition of supervised release.

15 I. LEGAL STANDARD

16 Courts have an obligation to construe a *pro se* petitioner’s pleadings liberally. *See*
17 *Balistreri v. Pacifica Police Dept.* 901 F.2d 696, 699 (9th Cir. 1990); *Bretz v. Kelman*, 773 F.2d
18 1026, 1027 n.1 (9th Cir. 1985). Fed. R. Civ. P. 60(b) “allows a party to seek relief from a final
19 judgment, and request reopening of his case, under a limited set of circumstances including
20 fraud, mistake, and newly discovered evidence.” *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005).
21 This rule, however, is not intended to provide relief from a criminal judgment. *See United States*
22 *v. Andrade-Larrios*, 39 F.3d 986, 988 (9th Cir. 1994). A § 2255 petition for habeas relief is the
23 proper avenue for a prisoner in federal custody to petition the court that sentenced him to vacate,
24

1 set aside, or correct his sentence if it imposed his sentence “in violation of the Constitution or
2 laws of the United States” or lacked “jurisdiction to impose such sentence,” or if his sentence
3 exceeded “the maximum authorized by law” or “is otherwise subject to collateral attack.” 28
4 U.S.C. § 2255(a). To obtain relief, the movant must prove, by a preponderance of the evidence,
5 the existence of an error rendering his conviction unlawful. *See Simmons v. Blodgett*, 110 F.3d
6 39, 42 (9th Cir. 1997). The petitioner bears the burden of establishing any factual predicates
7 necessary to establish his claims. *See Grady v. United States*, 929 F.2d 468, 471 (9th Cir. 1991).
8 A second or successive habeas petition must be preauthorized by the Court of Appeals before it
9 can be considered by the district court. *See* 28 U.S.C. § 2255(h)(1); 28 U.S.C. § 2244(b); *Crosby*,
10 545 U.S. at 531–32.

11 II. ANALYSIS

12 A. Rule 60(b) Motion to Vacate Criminal Conviction

13 McAllister already filed a § 2255 petition challenging his immigration fraud conviction,
14 arguing that his plea was involuntary, that the Government withheld exculpatory evidence, and
15 that his lawyer failed to competently represent him. Dkt. 1. The Court denied the petition,
16 determining McAllister’s knowing and voluntary waiver of his appellate rights procedurally
17 barred his collateral attack on his conviction. Dkt. 29. The Court also rejected McAllister’s
18 ineffective assistance of counsel claim as meritless. *Id.* Both this Court and the Ninth Circuit
19 declined to issue a certificate of appealability. *Id.* at 5; Dkt. 38.

20 McAllister now purports to challenge his immigration fraud conviction under Fed. R.
21 Civ. P. 60(b). Dkt. 39; Dkt. 48 at 2. But, as the U.S. Supreme Court observed, “[v]irtually every
22 Court of Appeals to consider the question has held that such a pleading, although labeled a Rule
23 60(b) motion, is in substance a successive habeas petition and should be treated accordingly.”
24 *Crosby*, 545 U.S. at 531. The Court must treat McAllister’s Rule 60(b) motion to vacate his

1 immigration fraud conviction as a successive § 2255 petition. The Court may not adjudicate
2 McAllister’s second § 2255 petition absent prior authorization from the Ninth Circuit Court of
3 Appeals. 28 U.S.C. § 2255(h)(1); 28 U.S.C. § 2244(b). Because McAllister has not received
4 authorization to file a subsequent § 2255 petition, his motion [Dkt. 39] is **DENIED**.

5 Even if McAllister’s second § 2255 petition were properly before the Court, the reversal
6 of his state convictions has no bearing on his federal conviction for immigration fraud.
7 McAllister repeatedly conflates his state rape and assault convictions, which were reversed by
8 the Washington Court of Appeals, with his federal conviction for making a false declaration on
9 the I-129F form, which has been affirmed by the Ninth Circuit. *See United States v. McAllister*,
10 634 F. App’x 202 (9th Cir. 2015) (holding McAllister’s waiver of his appellate rights in his plea
11 agreement was knowing and voluntary, and that the government did not breach the plea
12 agreement by recommending special conditions of supervised release). McAllister’s assertion
13 that the state case and the federal case “were 100% integrated, where the Federal case is
14 predicated on the state conviction” is simply incorrect. Dkt. 39 at 1. McAllister was charged with
15 different crimes, by different sovereigns, adjudicated in separate proceedings before different
16 courts. Although the state charges against McAllister may have ultimately brought the attention
17 of federal immigration authorities to McAllister’s immigration fraud, the state rape and assault
18 charges are otherwise unrelated to the federal immigration fraud conviction.

19 **B. Motion to Stay Probation**

20 McAllister “moves this Court for a stay of his probation until petitioner’s motion to
21 dismiss and or the Supreme Court decides to issue a (COA) or not.” Dkt. 46 at 1. The Court has
22 denied McAllister’s Rule 60(b) motion above, and there is no indication from the docket that
23 McAllister has filed a petition for certiorari with the U.S. Supreme Court. The Court determines
24 that there are no grounds which justify staying McAllister’s term of supervised release, which

1 began when McAllister was released from state custody on October 20, 2017. Accordingly,
2 McAllister's motion to stay supervised release is **DENIED**.

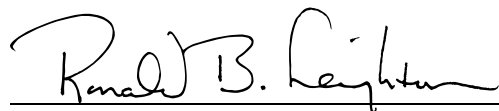
3 Construing McAllister's motion liberally, the Court also interprets it as a request to
4 modify the special conditions of supervision requiring McAllister to undergo sexual-deviancy
5 evaluation and treatment. The Government requests the opportunity to confer with the Probation
6 Office and respond separately regarding modifications to McAllister's supervised release.
7 Accordingly, the Court **STAYS** Special Conditions of Supervision Nos. 3 and 4. The
8 Government shall file a response stating its position as to whether a modification removing these
9 special conditions of supervision is appropriate in light of the reversal of McAllister's state rape
10 convictions by December 13, 2017.

11 **III. CONCLUSION**

- 12 • McAllister's identical Motions to Dismiss Conviction Pursuant to Rule 60(b) [Dkt.
13 39, 3:16-cv-6032 (civil case); Dkt. 86, 3:13-cr-5464 (criminal case)] are **DENIED**.
14 • McAllister's Motion to Stay Probation [Dkt. 46] is **DENIED**.
15 • Special Conditions of Supervision Nos. 3 and 4 [Dkt. 62, 3:13-cr-5464-RBL] are
16 **STAYED**. The Government shall file a response by December 13, 2017 addressing
17 whether special conditions mandating sexual deviancy evaluation and treatment
18 designated by the U.S. Probation Office are warranted.

19 **IT IS SO ORDERED.**

20 Dated this 28th day of November, 2017.

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22 Ronald B. Leighton
23 United States District Judge
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