APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GEORGE RAHSAAN BROOKS,	)	
	)	
Petitioner,	)	Civil Action No. 88-1427
	)	Judge Arthur J. Schwab/
vs.	)	Chief Magistrate Judge Maureen P. Kelly
	)	
CHARLES H. ZIMMERMAN	)	
	)	Re: ECF No. 22
Respondents.	)	

REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that the "Rule 60(b)(6) and Rule 60(d) Motion for Extraordinary Relief and Change in the Law," ECF No. 22, be denied and, to the extent that one is needed, that a certificate of appealability likewise be denied.

II. REPORT

George Rahsaan Brooks, also known as George Rahsaan Brooks-Bey ("Petitioner"), initiated this Section 2254 habeas case in 1988. The habeas petition was denied in 1989. ECF No. 1. Thereafter, a certificate of probable cause was denied by the United States Court of Appeals for the Third Circuit in 1990 and a petition for writ of certiorari was denied by the United States Supreme Court in 1991. Id.

On February 27, 2018, Petitioner filed what he captioned as a "Rule 60(b)(6) and Rule 60(d) Motion for Extraordinary Relief and Change in the Law" (the "Purported Rule 60(b)

Appendix "A"

Motion").[1] ECF No. 22. The instant motion is simply the latest in Petitioner's repeated attacks here in federal court on his state court convictions for, *inter alia*, second degree murder. See ECF No. 22 at ¶¶ 21 - 26 (Petitioner's summarization of his federal court attacks).

On May 18, 1976, Petitioner was convicted of robbery and murder in the second degree by a jury in the Court of Common Pleas of Allegheny County in connection with the death of Michael Miller. Brooks v. Zimmerman, 712 F.Supp. 496 (W.D. Pa. 1989) (which is the reported case that denied Petitioner's habeas petition herein which is the object of the Purported Rule 60(b) Motion). More than 40 years after the conviction, and almost 30 years since this Court entered its final order denying his Section 2254 Petition in this case, Petitioner now brings this Purported Rule 60(b) Motion. Because we find the Purported Rule 60(b) Motion to constitute a second or successive Section 2254 petition, over which this Court lacks subject matter jurisdiction, the Court recommends denial of the Motion. In the alternative, even if treated as a true Rule 60(b) Motion, it should be denied because of the length of time that has passed between the time that the judgment in this case was entered and the time this Purported Rule 60(b) Motion was filed.

A. Discussion

1. True Rule 60(b) Motion versus Second Section 2254 Petition.

The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") bars state prisoners from bringing second or successive Section 2254 habeas petitions in the United States District Courts without first obtaining permission from the relevant United States Court of Appeals. 28 U.S.C. § 2244(b). Since AEDPA's enactment, federal courts had been facing the difficult task of determining whether a motion ostensibly filed pursuant to Fed. R. Civ. P. 60(b) was truly, in law

[1] Although Petitioner invokes Rule 60(d), he makes no arguments concerning the applicability of Rule 60(d) and so he fails to carry his burden to show entitlement to relief thereunder.

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and in fact, a Rule 60(b) motion or whether it was a second or successive Section 2254 habeas petition. The United States Supreme Court addressed this issue in the case of Gonzalez v. Crosby, 545 U.S. 524, 535 (2005).

For habeas petitioners, Rule 60(b) may not be used to avoid the prohibition set forth in 28 U.S.C. § 2244(b) against second or successive petitions. In Gonzalez, the Supreme Court explained that a Rule 60(b) motion constitutes a second or successive habeas petition when it advances a new ground for relief or "attacks the federal court's previous resolution of a claim on the merits." Id. at 532. "On the merits" refers "to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)." Id. at n.4. The Supreme Court further explained that a Rule 60(b) motion does not constitute a second or successive petition when the petitioner "merely asserts that a previous ruling which precluded a merits determination was in error – for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." Id. When "no 'claim' is presented, there is no basis for contending that the Rule 60(b) motion should be treated like a habeas corpus application." Id. at 533. However, when a "claim" attacks the validity of the state court conviction, as opposed to attacking the judgment of the federal habeas court's procedural ruling, then the Rule 60(b) motion constitutes a second or successive habeas petition over which the District Court lacks subject matter jurisdiction.

Accordingly, a threshold determination must be made as to whether the instant Purported Rule 60(b) Motion constitutes a true Rule 60(b) motion or a second or successive Section 2254 petition. See United States v. Dowell, 438 F. App'x 706, 708 (10th Cir. 2011) ("We must first decide whether Dowell's motion is properly characterized as a Rule 60(b) motion or whether it is

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actually a second or successive habeas petition under 28 U.S.C. § 2255(h)."). We find that the Purported Rule 60(b) Motion is a second or successive Section 2254 petition.

A review of the issues Petitioner raises in the Purported Rule 60(b) Motion clearly demonstrates that, with the exception of the Ground denominated as Issue I, Petitioner is raising new grounds for relief which attack the validity of his state court conviction within the contemplation of Gonzalez v. Crosby.[2] As such, his claims are not properly before this Court

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[2] The grounds raised in the Purported Rule 60(b) Motion are as follows:

> A. There was neither subject matter jurisdiction for the coroner's office to issue [a] subpoena for petitioner to be at a coroner's preliminary hearing or to issue an arrest warrant for petitioner. The coroner's solicitor lacked subject matter jurisdiction to have made legal determinations at petitioner[']s preliminary hearing and that office lacked both constitutional and statutory authorization to have done any of the above. Trial Counsel Gary Zimmerman was ineffective for not giving petitioner the representation he was entitled to under the Six [sic] Amendment to the United States Constitution and his incompetence caused the conviction of an innocent man.

ECF No. 22 at 27 – 28 (emphasis deleted throughout).

> B. Trial counsel was ineffective for failing to interview witnesses, do discovery to obtain a copy of probable cause affidavits, arrest warrants, indictment, the autopsy report, police reports, the coroner's subpoena for petitioner to be present at its preliminary hearing and a copy of Michael Miller's medical report and a copy of the coroner hearing transcript. He was also ineffective for not calling police officer[r] John Gizler who testified a[s] a witness at the Coroner's preliminary hearing.

Id at 34.

> C. Petitioner Was Deprived Of His Right To Effective Assistance Of Trial Counsel By Counsel's Failure To Ask For the jury Charge That Would Have Informed The Jury That It Had The Power And The Obligation To Disregard Petitioner's Alleged Statement Entirely If They Felt The Commonwealth Did Not Prove It It [sic] To Be Voluntary.

Id. at 48.

> D. Petitioner Was Deprived of His Right To Effective Assistance Of Post-Trial/Appellate Counsel For Counsel's Failure To Preserve And Litigate On Appeal The Issue of Pre-Trial/Trial Counsel's Ineffectiveness And Trial Court's Willful Falsehood In Court Opinion That Victim's Mother Gave A Complete And Actuate [sic] Description Of

(...footnote continued)

Petitioner And That The Victim Told Family Members Brooks Beat Him And Took His Money.

Id. at 50.

E. Pretial/Trial [sic], Post-Verdict/Appellate Counsels Were Ineffective For Failing To Raise Issues Presented In This Petition At Pre-Trial/Trial, Post-Verdict Motions And On Appeal.

Id. at 53.

F. Newly Presented Evidence Was Withheld Which Prevented Petitioner From Addressing The Instant Claims On PCRA and In Prior Habeas Corpus Petitions.

Id. at 54.

G. THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRES AN INDICTMENT BE RETURNED BY A LEGALLY AND UNBIAS [sic] GRAND JURY. THE PRESENTMENT CLAUSE GURANTEES [sic] THAT IN CRIMINAL PROSECUTIONS NO PERSON SHALL BE HELD TO ANSWER A CAPITAL OR OTHERWISE INFAMOUS CRIME, UNLESS ON PRESENTMENT OR INDICTMENT BY A GRAND JURY.

Id. at 57 -58.

[No letter.] BRADY AND DUE PROCESS VIOLATIONS BROUGHT ABOUT THE CONVICTION OF A MAN INNOCENT OF HIS CRIME.

Id. at 69.

H. PETITIONER IS SERVING AN ILLEGAL SENTENCE. HE WAS DENIED DUE PROCESS UNDER THE LAW. THE COMMONWEALTH VIOLATED THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION, ARTICLE 6, CLAUSE 2, THIS CAUSED AN INNOCENT MAN TO BE WRONGFULLY CONVICTED.

Id. at 73.

I. A CHANGE IN THE LAW WILL NOW PERMIT AN INNOCENT MAN TO ARGUE CONSTITUTIONAL AND SUBSTANTIVE CLAIMS THAT WAS [sic] PROCEDURALLY BARRED AND TIME BARRED THAT WILL PROVE HIS INNOCENCE, A CONSPIRACY TO CONVICT AN INNOCENT MAN BY DETESTIVES, [sic] PROSECUTORS AND THE CORONER'S OFFICE AND INEFFECTIVE ASSISSTANCE OF COUNSELAND THESE ARE SUBSTANTIAL

(...footnote continued)

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because it lacks subject matter jurisdiction over such claims, which, in effect, seek to directly attack his state court conviction and not the judgment of this Court which denied his 1988 habeas petition. See, e.g., In re Carrascosa, 616 F. App'x 475, 476 (3d Cir. 2015) ("The District Court denied this motion with prejudice for lack of subject matter jurisdiction, see *Carrascosa v. United States*, 2010 WL 4116990 (D.N.J. Oct. 19, 2010), and we denied Carrascosa's application for a certificate of appealability, see C.A. No. 10–4698, agreeing with the District Court that the Rule 60(b) motion was in reality an unauthorized second or successive habeas corpus petition.").

2. Even if Treated as a True Rule 60(b) Motion, It is Untimely Filed.

To the extent that the Purported Rule 60(b) Motion could be construed as a true Rule 60(b) motion, Petitioner fails to carry his required burden to show that the equities weigh in favor of granting relief under Federal Rule of Civil Procedure 60(b) given his delay in bringing this Motion and so the Motion should be denied.

Federal Rule of Civil Procedure 60(b) expressly provides that:

> **(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
> **(1)** mistake, inadvertence, surprise, or excusable neglect;
> **(2)** newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> **(3)** fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> **(4)** the judgment is void;
> **(5)** the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> **(6)** any other reason that justifies relief.

REASONS FOR RE-OPENING HIS CASE SO HE WILL BE ABLE TO DEMONSTRIATE A MANIFEST INJUSTICE.

Id. at 75.

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(c) Timing and Effect of the Motion.

(1) ***Timing.*** A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

Petitioner invoked Rule 60(b)(6). ECF No. 22 at 1. Petitioner must bring a Rule 60(b)(6) motion within a reasonable time after the habeas judgment has been entered. In this case, Petitioner has not carried his burden to establish the reasonableness of time between the time the habeas judgment was entered in this case and the filing of the Purported Rule 60(b) Motion. Azbuko v. Bunker Hill Cmty. Coll, 442 F. App'x 643, 644 (3d Cir. 2011) (per curiam) ("[B]ecause [plaintiff] has provided no explanation for his delay in filing, we agree with the District Court that he has not filed his motion within a reasonable time of the order that he seeks to challenge."). Thus, the Court concludes that the instant Purported Rule 60(b) Motion is time-barred.

3. McQuiggin does not merit Rule 60(b) relief.

Petitioner does claim that he is relying on a change in the law, namely McQuiggin v. Perkins, 569 U.S. 383 (2013), as an extraordinary circumstance to justify relief under Rule 60(b)(6). ECF No. 22 at 76. However, Petitioner fails to carry his burden to convince this Court that McQuiggin even applies to Petitioner's case. In McQuiggin, the United States Supreme Court recognized an actual innocence exception to the statute of limitations imposed by the AEDPA on the filing of Section 2254 habeas petitions. Petitioner fails to show how this change in the law applies to his particular case given that both the habeas petition filed in this case in 1988, and the judgment denying the habeas petition, occurred long before the enactment of AEDPA in 1996 and its statute of limitations. Hence, the AEDPA statute of limitations had no

application to Petitioner's Section 2254 habeas petition or its denial. Thus, Petitioner fails to show how the change in the law brought about by McQuiggin has any effect on his case.

Moreover, even if Petitioner could establish that the change in the law brought about by McQuiggin and its actual innocence exception applied to Petitioner's case, he would still not be entitled to relief under Rule 60(b). This is because of the inordinate amount of time that has passed between the filing of the Purported Rule 60(b) Motion and the time since his conviction became final on February 5, 1982, 90 days after the Pennsylvania Supreme Court affirmed Petitioner's conviction on direct appeal in a per curiam order,[3] and the time since the habeas judgment at issue was rendered herein on May 9, 1989, which this Purported Rule 60(b) Motion attacks. What the United States Court of Appeals for the Third Circuit has stated in Cox v. Horn, 757 F.3d 113, 125–26 (3d Cir. 2014) applies with great force here given that more than 20 years have passed between the date judgment in this habeas case was rendered and the date that McQuiggin was decided.

> Rule 60(b)(6) relief in the habeas context, especially based on a change in federal procedural law, will be rare. *Gonzalez,* 545 U.S. at 535–36 & n. 9, 125 S.Ct. 2641. Principles of finality and comity, as expressed through AEDPA and habeas jurisprudence, dictate that federal courts pay ample respect to states' criminal judgments and weigh against disturbing those judgments via 60(b) motions. In that vein, a district court reviewing a habeas petitioner's 60(b)(6) motion may consider whether the conviction and initial federal habeas proceeding were only recently completed or ended years ago. Considerations of repose and finality become stronger the longer a decision has been settled. *See id.* at 536–37, 125 S.Ct. 2641 (cautioning against 60(b)(6) relief in "cases long since final" and

[3] Com. v. Brooks, 445 A.2d 96 (Pa. 1981). See also Jimenez v. Quarterman, 555 U.S. 113, 119–20 (2009) ("As a result, direct review cannot conclude for purposes of § 2244(d)(1)(A) until the 'availability of direct appeal to the state courts,' *Caspari v. Bohlen*, 510 U.S. 383, 390, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994), and to this Court, *Lawrence, supra*, at 332–333, 127 S.Ct. 1079, has been exhausted. Until that time, the 'process of direct review' has not 'com[e] to an end' and 'a presumption of finality and legality' cannot yet have 'attache[d] to the conviction and sentence,' *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983).").

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> "long-ago dismissals"); *id.* at 542 n. 4, 125 S.Ct. 2641 (Stevens, J., dissenting) ("In cases where significant time has elapsed between a habeas judgment and the relevant change in procedural law, it would be within a district court's discretion to leave such a judgment in repose."). Here, Cox's direct appeal was decided in 1996 and his initial habeas petition, in which his claims were deemed defaulted, was dismissed in 2004, eight years before *Martinez*.

Id. at 125–26. Considering all of the equitable factors referenced in Satterfield v. District Atty. Philadelphia, 872 F.3d 152 (3d Cir. 2017), we recommend exercising the Court's discretion in this case to leave Petitioner's habeas judgment in repose and to deny the Purported Rule 60(b) Motion.[4]

III. CONCLUSION

For the reasons set forth herein, the Purported Rule 60(b) Motion should be denied. To the extent one would be required, a Certificate of Appealability should also be denied.

In accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Local Rule 72.D.2, the parties are permitted to file written objections in accordance with the schedule established in the docket entry reflecting the filing of this Report and Recommendation.

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[4] To the extent that Petitioner seeks to challenge herein the disposition of Petitioner's Section 2241 habeas petition filed in Brooks v. Johnson, Civ. A. No. 00-cv-872 (W.D. Pa.), the reasoning concerning the untimeliness of the Motion as it relates to Brooks v. Zimmerman herein applies as well to Brooks v. Johnson. ECF No. 22 at 82 (referencing Brooks v. Johnson). The judgment in Brooks v. Johnson was entered on or about April 5, 2002. The present Purported Rule 60(b) Motion filed herein was not filed until March 5, 2018, nearly 16 years after Brooks v. Johnson was decided. A copy of the Report and Recommendation and the Memorandum Order adopting same and the Order on Reconsideration filed in Brooks v. Johnson are attached hereto as Appendix 1.

To the extent that we properly measure the time for filing a true Rule 60(b) motion from the date that the decision was rendered in McQuiggin, (on which Petitioner relies) which was May 28, 2013, we find the nearly 5-year delay between the date McQuiggin was decided and the date Petitioner filed the instant Purported Rule 60(b) Motion to constitute an unreasonable delay. Evans v. Pierce, 148 F. Supp. 3d 333, 337–38 (D. Del. 2015) ("Although the Third Circuit did not define what constitutes a reasonable time for filing a Rule 60(b)(6) motion premised on *Martinez*, the court concludes that waiting almost three full years to file the instant motion does not satisfy the 'reasonable time' requirement."), *aff'd sub nom.*, Evans v. Vaughn, 2016 WL 9631579 (3d Cir. June 16, 2016).

9.2

Objections are to be submitted to the Clerk of Court, United States District Court, 700 Grant Street, Room 3110, Pittsburgh, PA 15219. Failure to timely file objections will waive the right to appeal. Brightwell v. Lehman, 637 F.3d 187, 193 n. 7 (3d Cir. 2011). Any party opposing objections may file their response to the objections within fourteen (14) days thereafter in accordance with Local Civil Rule 72.D.2.

Respectfully submitted,

MAUREEN P. KELLY
CHIEF UNITED STATES MAGISTRATE JUDGE

Date: April 18, 2018

cc: The Honorable Arthur J. Schwab
United States District Judge

All Counsel of Record via CM-ECF

GEORGE RAHSAAN BROOKS
AP-4884
SCI Coal Township
1 Kelley Drive
Coal Township, PA 17866

10.3

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GEORGE RAHSAAN BROOKS,	)	
	)	
Petitioner,	)	Civil Action No. 88-1427
	)	Judge Arthur J. Schwab
v.	)	Chief Magistrate Judge Maureen P. Kelly
	)	
CHARLES H. ZIMMERMAN,	)	
	)	
Respondent.	)	

ORDER OF COURT

After Petitioner George Rahsaan Brooks filed a Motion for Extraordinary Relief and Change in the Law in the above-captioned matter, Chief United States Magistrate Judge Maureen P. Kelly filed a Report and Recommendation giving the parties until May 7, 2018, to file written objections thereto. Upon review of the Objections filed by Petitioner on April 30, 2018, upon review of the record, and upon consideration of the Magistrate Judge's Report and Recommendation, which is ADOPTED as the opinion of this Court,

IT IS HEREBY ORDERED this 4th day of May, 2018 that the Motion for Extraordinary Relief and Change in the Law is DENIED. A certificate of appealability is DENIED.

IT IS FURTHER ORDERED that, pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, if any party wishes to appeal from this Order a notice of appeal, as

provided in Fed. R. App. P. 3, must be filed with the Clerk of Court, United States District Court, at 700 Grant Street, Room 3110, Pittsburgh, PA 15219, within thirty (30) days.

By the Court:

/s/ Arthur J. Schwab
United States District Judge

cc: Honorable Maureen P. Kelly
Chief United States Magistrate Judge

All Counsel of Record Via CM-ECF

12a

DLD-305 September 6, 2018

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **18-2275**

GEORGE RAHSAAN BROOKS

vs.

SUPERINTENDENT COAL TOWNSHIP SCI

(W.D. PA. CIV. NO. 88-cv-01427)

Present: JORDAN, SHWARTZ and KRAUSE, Circuit Judges

Submitted is appellant's application for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above captioned case.

Respectfully,

Clerk

ORDER

The foregoing application for a certificate of appealability is denied. Reasonable jurists would not find it debatable, Slack v. McDaniel, 529 U.S. 473, 484 (2000), that appellant's Rule 60 motion was, in reality, an unauthorized second or successive motion to vacate sentence over which the District Court lacked jurisdiction, 28 U.S.C. § 2244(b).

By the Court,

s/ Cheryl Ann Krause
Circuit Judge

Dated: September 13, 2018
PDB/cc: George Rahsaan Brooks
Ronald M. Wabby, Jr., Esq.

A True Copy:

Patricia A. Dodszuweit

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

Appendix "B"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2275

GEORGE RAHSAAN BROOKS,
Appellant

v.

SUPERINTENDENT COAL TOWNSHIP SCI

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 2-88-cv-01427)
District Judge: Arthur J. Schwab

SUR PETITION FOR REHEARING

Present: SMITH, *Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN, GREENAWAY, Jr., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, BIBAS and PORTER, *Circuit Judges*.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Cheryl Ann Krause
Circuit Judge

Dated: November 30, 2018
Lmr/cc: George Rahsaan Brooks
Ronald M. Wabby, Jr.

Appendix "C"

1.C

Additional material from this filing is available in the Clerk's Office.