

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 25 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JOSE PASSALACQUA,

Petitioner-Appellant,

v.

MIKE MCDONALD, Warden,

Respondent-Appellee.

No. 19-55327

D.C. No. 2:12-cv-02430-AG-FFM
Central District of California,
Los Angeles

ORDER

Before: O'SCANLAIN and RAWLINSON, Circuit Judges.

The request for a certificate of appealability is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.”

Slack v. McDaniel, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Gonzalez v. Crosby*, 545 U.S. 524, 530-31 (2005); *Ortiz v. Stewart*, 195 F.3d 520, 520-21 (9th Cir. 1999).

Any pending motions are denied as moot.

DENIED.

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7 UNITED STATES DISTRICT COURT
8 CENTRAL DISTRICT OF CALIFORNIA
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10 JOSE PASSALACQUA, } No. CV 12-2430 AG (FFM)
11 v. Petitioner, } ORDER SUMMARILY DISMISSING
12 MIKE McDONALD, Warden, } PETITION FOR WRIT OF HABEAS
13 Respondent. } CORPUS FOR LACK OF SUBJECT
14 } MATTER JURISDICTION;
15 } REFERRING THE PETITION TO THE
16 } U.S. COURT OF APPEALS PURSUANT
17 } TO NINTH CIRCUIT RULE 22-3(A);
18 } AND
19 } DENYING A CERTIFICATE OF
20 } APPEALABILITY

21 **I. BACKGROUND**

22 Petitioner Jose Passalacqua, a state prisoner in the custody of the California
23 Department of Corrections (the “CDCR”), filed a Petition for Writ of Habeas Corpus by a
24 Person in State Custody (the “Petition”) pursuant to 28 U.S.C. § 2254 on September 7,
25 2011. (Docket No. 1). On June 6, 2014, the Honorable Oswald Parada, United States
26 Magistrate Judge, issued a report and recommendation (the “Report”) recommending
27 dismissal of the Petition on the merits. (Docket No. 65). On June 24, 2014, upon the
28 retirement of Magistrate Judge Oswald Parada, the case was transferred to the calendar of
Magistrate Judge Frederick F. Mumm. (Docket No. 66). On September 30, 2014, the
Court accepted the Report, entered judgment dismissing the Petition on the merits with
prejudice, and granted a certificate of appealability on the issue whether defense counsel
provided ineffective assistance of counsel. (Docket Nos. 69, 70, 71).

1 On October 20, 2014, petitioner filed a notice of appeal to the United States Court
2 of Appeals for the Ninth Circuit. (Docket No. 72). On May 17, 2016, the Ninth Circuit
3 issued a Memorandum Judgment affirming the decision of this Court. (Docket No. 80).
4 On July 11, 2016, the Ninth Circuit issued its Mandate instituting the May 17, 2016,
5 Memorandum Judgment. (Docket No. 82).

6 On July 30, 2018, petitioner filed "Petitioner's Motion to Reopen His Original
7 Habeas Corpus Petition Under Federal Rules of Civil Procedure 60(b), subd. 6"
8 ("Motion"). (Docket No. 83). The Court finds that reopening this action is not
9 warranted.

10 **II. ANALYSIS**

11 The Court finds that petitioner's motion is not a valid Rule 60(b) motion and that it
12 is instead a disguised second or successive 28 U.S.C. § 2254 habeas corpus petition.

13 Rule 60(b) provides:

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

29 Petitioner makes no showing under subsections (1) through (5). Accordingly, the
30 Court must determine whether relief under subsection (6) is warranted. In that regard, a
31 party merits relief under Rule 60(b)(6) if he demonstrates "extraordinary circumstances
32 which prevented or rendered him unable to prosecute [his case]." *Community Dental*

1 *Servs. v. Tani*, 282 F.3d 1164, 1168 (9th Cir. 2002), as amended on denial of reh'g and
2 reh'g en banc (Apr. 24, 2002) (internal quotation marks omitted; alteration in original).
3 “The party must demonstrate both injury and circumstances beyond his control that
4 prevented him from proceeding with the prosecution or defense of the action in a proper
5 fashion.” *Id.*

6 Section 106 of The Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L.
7 104-132, 110 Stat. 1214) (“the Act”) which became effective April 24, 1996, amended 28
8 U.S.C. § 2244(b) to read, in pertinent part, as follows:

9 (1) A claim presented in a second or successive habeas corpus application
10 under section 2254 that was presented in a prior application shall be
11 dismissed.

12 (2) A claim presented in a second or successive habeas corpus application
13 under section 2254 that was not presented in a prior application shall be
14 dismissed unless --

15 (A) the applicant shows that the claim relies on a new rule of
16 constitutional law, made retroactive to cases on collateral
17 review by the Supreme Court, that was previously unavailable;
18 or

19 (B)(I) the factual predicate for the claim could not have been
20 discovered previously through the exercise of due diligence;
21 and

22 (ii) the facts underlying the claim, if proven and viewed in
23 light of the evidence as a whole, would be sufficient to establish
24 by clear and convincing evidence that, but for constitutional
25 error, no reasonable factfinder would have found the applicant
26 guilty of the underlying offense.

1 (3)(A) Before a second or successive application permitted by this section is
2 filed in the district court, the applicant shall move in the appropriate court of
3 appeals for an order authorizing the district court to consider the application.

4 28 U.S.C. § 2244(b).

5 Where a second or successive § 2254 petition is disguised as a Rule 60(b) motion,
6 it must meet the criteria set forth in 28 U.S.C. § 2244(b)(2). *See Gonzalez v. Crosby*,
7 545 U.S. 524, 528, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005); *see also Jones v. Ryan*, 733
8 F.3d 825 (9th Cir. 2013); *United States v. Washington*, 653 F.3d 1057, 1059-60 (9th Cir.
9 2011). In *Jones*, the Ninth Circuit noted:

10 Our analysis of whether Jones's motion is a valid Rule 60(b) motion or
11 a disguised 28 U.S.C. § 2254 habeas corpus petition is informed by the
12 Supreme Court's decision in *Gonzalez v. Crosby*. *See Washington*, 653 F.3d
13 at 1062. Neither *Gonzalez* nor any other Supreme Court case has “adopted a
14 bright-line rule for distinguishing between a bona fide Rule 60(b) motion
15 and a disguised second or successive [§ 2254] motion.” *Id.* at 1060. Rather,
16 *Gonzalez* held that a legitimate Rule 60(b) motion “attacks . . . some defect
17 in the integrity of the federal habeas proceedings,” while a second or
18 successive habeas corpus petition “is a filing that contains one or more
19 ‘claims,’” defined as “asserted federal bas[e]s for relief from a state court’s
20 judgment of conviction.” 545 U.S. at 530, 532. Put another way, a motion
21 that does not attack “the integrity of the proceedings, but in effect asks for a
22 second chance to have the merits determined favorably” raises a claim that
23 takes it outside the bounds of Rule 60(b) and within the scope of AEDPA’s
24 limitations on second or successive habeas corpus petitions. *Id.* at 532 n.5.

25 Proper Rule 60(b) motions include those alleging fraud on the federal
26 habeas corpus court, as well as those in which the movant “asserts that a
27 previous ruling which precluded a merits determination was in error—for
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1 example, a denial for such reasons as failure to exhaust, procedural default,
2 or statute-of-limitations bar.” *Id.* at 532 nn.4 & 5.

3 By contrast, Rule 60(b) motions presenting “claims” such that they
4 constitute, in effect, new requests for relief on the merits include motions to
5 present “newly discovered evidence . . . in support of a claim previously
6 denied,” as well as motions contending that “a subsequent change in
7 substantive law is a reason justifying relief . . . from the previous denial of a
8 claim.” *Id.* at 531 (citations omitted) (internal quotation marks omitted).
9 Further, “*an attack based on . . . habeas counsel’s omissions*” generally
10 *does not go to the integrity of the proceedings; rather, it is a disguised*
11 *second or successive 28 U.S.C. § 2254 habeas corpus petition masquerading*
12 *as a Rule 60(b) motion.* *Id.* at 532 n.5. Such a motion, “although labeled a
13 Rule 60(b) motion, is in substance a successive habeas petition and should
14 be treated accordingly.” *Id.* at 531.

15 *Jones*, 733 F.3d 825, 834-835 (emphasis added).

16 In light of these principles, the Court must determine whether petitioner’s motion
17 alleges “a defect in the integrity of the federal habeas proceedings” and thus presents a
18 legitimate Rule 60(b) motion, or whether it raises “claims” and, “although labeled a Rule
19 60(b) motion, is in substance a successive habeas petition [that] should be treated
20 accordingly.” *Gonzalez*, 545 U.S. at 531, 532, 125 S.Ct. 2641. Petitioner’s motion
21 asserts that his federal habeas corpus counsel was ineffective for failing to present
22 evidence in the habeas proceeding that four additional potential jurors were present
23 during an improper conversation between potential jurors regarding petitioner’s guilt. As
24 the Supreme Court noted in *Gonzalez*, habeas counsel’s omissions generally do not go to
25 the integrity of the proceedings. *Gonzalez*, 545 U.S. at 531, 125 S.Ct. 2641. Petitioner
26 asserted the same allegations of juror misconduct in his habeas proceeding. The Rule
27 60(b) motion merely seeks to relitigate that claim in light of additional evidence not
28 presented by habeas counsel. The Court finds that the allegations of petitioner’s Rule

1 60(b) motion do not amount to an allegation of a defect in the integrity of the habeas
2 corpus proceedings. Rather, petitioner is essentially arguing that he deserves a “second
3 chance to have the merits determined favorably” in the context of a second or successive
4 28 U.S.C. § 2254 habeas corpus petition. *Gonzalez*, 545 U.S. at 532 n. 5, 125 S.Ct. 2641.
5 However, the new claims asserted by petitioner here are “precisely the sort of attack on
6 the ‘federal court’s previous resolution of a claim on the merits’ . . . that *Gonzalez*
7 characterized as a ‘claim’ which is outside the scope of Rule 60(b).” *Washington*, 653
8 F.3d at 1064 (citation omitted) (quoting *Gonzalez*, 545 U.S. at 532, 125 S.Ct. 2641).

9 Because petitioner did not seek authorization to file a successive petition, the
10 petition labeled as a Rule 60(b) motion must be dismissed under 28 U.S.C. § 2244(b).
11 Accordingly, this successive petition is DISMISSED.

12 **“REFERRAL” OF HABEAS CORPUS PETITION TO NINTH CIRCUIT**

13 Ninth Circuit Rule 22-3(a) states, in pertinent part, that “[i]f a second or successive
14 petition or motion, or an application for authorization to file such a petition or motion, is
15 mistakenly submitted to the district court, the district court shall refer it to the court of
16 appeals.”

17 Therefore, to the extent the Petition was “mistakenly submitted” to this Court, the
18 Petition must be referred to the court of appeals. However, it is unclear whether the
19 district court may both “refer” the Petition to the Ninth Circuit and, at the same time,
20 dismiss the Petition. After reviewing numerous district court cases in this circuit, this
21 Court concludes that simultaneous referral and dismissal is appropriate. *See Cielo v.*
22 *Hedgpeth*, 2014 WL 1801110 (C.D. Cal. Apr. 23, 2014).

23 **DENIAL OF CERTIFICATE OF APPEALABILITY**

24 A petitioner must obtain a certificate of appealability (“COA”) in order to appeal
25 the dismissal of a habeas petition. 28 U.S.C. § 2253(c)(1). The COA requirement
26 extends to successive habeas petitions that are disguised as Rule 60(b) motions. *Jones v.*
27 *Ryan*, 733 F.3d 830, 832 n.3 (9th Cir. 2013) (citations omitted) (finding that 28 U.S.C.
28 2244 governs the appeals of successive habeas petitions brought as Rule 60(b) motions).

1 As a result, petitioner is required to obtain a COA in order to appeal the Court's finding
2 that his Rule 60(b) motion is actually an unauthorized successive § 2254 habeas petition.

3 In practice, “[i]t is a ‘rare step’ for a district court to issue a COA.” *Murden v.*
4 *Artuz*, 497 F.3d 178, 199 (2d Cir. 2007) (Hall, J., concurring in judgment). If a court
5 does not reach the merits of a petitioner's claims, a COA may issue only if the petitioner
6 shows “that jurists of reason would find it debatable whether the petition states a valid
7 claim of the denial of a constitutional right and that jurists of reason would find it
8 debatable whether the district court was correct in its procedural ruling.” *Slack v.*
9 *McDaniel*, 529 U.S. 473, 484 (2000). The Court is mindful that it “must resolve doubts
10 about the propriety of a COA in the petitioner's favor.” *Jennings v. Woodford*, 290 F.3d
11 1006, 1010 (9th Cir. 2002) (*citing Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir.
12 2000) (en banc)). No such doubt exists here. Reasonable jurists would not find it
13 debatable that petitioner's 60(b) motion is a successive habeas petition. Consequently,
14 this matter is not “adequate to deserve encouragement to proceed further.” *Barefoot v.*
15 *Estelle*, 463 U.S. 880, 893 n.4, 103 S. Ct. 3383, 3385 n.4 (1983).

16 **III. ORDER**

17 Pursuant to Ninth Circuit Rule 22-3(a), the Court refers the Rule 60(b) motion to
18 reopen the action to the U.S. Court of Appeals for the Ninth Circuit for consideration as
19 an application for leave to file a second-or-successive habeas petition. The Clerk of
20 Court shall send a copy of the Rule 60(b) motion to reopen the action and a copy of this
21 Order to the Clerk of the U.S. Court of Appeals for the Ninth Circuit.

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1 The Clerk of Court shall provide petitioner with a form recommended by the Ninth
2 Circuit for filing an Application for Leave to File Second or Successive Petition Under 28
3 U.S.C. § 2254 or Motion Under 28 U.S.C. § 2255.

4 Petitioner's Rule 60(b)(6) motion to reopen the action is DENIED.

5 The Court DENIES a Certificate of Appealability.

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7 DATED: August 31, 2018



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9 ANDREW J. GUILFORD
10 United States District Judge
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Presented by:

11 /S/FREDERICK F. MUMM
12 FREDERICK F. MUMM
13 United States Magistrate Judge
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