

ORDER DENYING COA APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 6 2017

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BOBBY THOMPSON,

Defendant-Appellant.

No. 17-56170

D.C. No.

2:03-cr-00847-ABC-2

Central District of California,  
Los Angeles

ORDER

Before: CALLAHAN and M. SMITH, Circuit Judges.

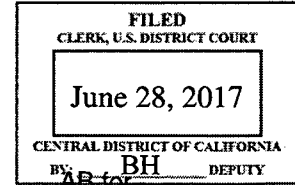
The request for a certificate of appealability is denied because appellant has not shown that “jurists of reason would find it debatable whether the [disguised section 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether 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.**

APPENDIX B

Order denying relief from judgment.



United States District Court  
Central District of California

United States of America,

Plaintiff,

v.

Bobby Thompson,

Defendant.

2:03-CR-00847-ABC

**Order Denying Without Prejudice  
Motion for Relief From Judgment**

On May 8, 2017, Defendant Bobby Thompson (“Defendant”) filed a “Motion for Relief from Judgment Due to Fraud Upon the Court” (“Motion”). Having considered the papers filed in support of, and in opposition to, the Motion, the Court finds this matter appropriate for resolution without oral argument. See Fed. R. Civ. P. 78; L.R. 7-15. For the following reasons, the Court DENIES the Motion without prejudice.

**I. Background**

On May 17, 2005, the United States filed an eight-count Third Superseding Indictment against Defendant, charging him with the following: one count of conspiracy to manufacture, aid and abet the manufacture, and possess with intent to distribute PCP in violation of 21 U.S.C. § 846; one count of possession of equipment for manufacturing a controlled substance in violation of 21 U.S.C. § 843(c)(6); three counts of illegal possession of a listed chemical in violation of 21

1 U.S.C. § 841(c)(2); one count of possession with intent to distribute PCP in  
2 violation of 21 U.S.C. § 841(a)(1); one count of maintaining a drug-involved  
3 premises in violation of 21 U.S.C. § 856(a)(2); and one count of being a felon in  
4 possession of a firearm in violation of 18 U.S.C. § 922(g)(1). (See Dkt. No. 147.)  
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6 After a four-day trial, on February 16, 2007, the jury found Defendant guilty  
7 of all eight counts. (See Dkt. Nos. 382, 386.) On August 6, 2007, the Honorable  
8 Audrey B. Collins sentenced Defendant to 360 months in prison, consisting of 360  
9 months on counts one and three, 240 months on counts two, four, and eight, 120  
10 months on counts five and seven, and 48 months on count six, all to be served  
11 concurrently, plus a five-year term of supervised release. (See Dkt. Nos. 432, 433.)  
12 The Court also ordered Defendant to pay a special assessment of \$100 for each  
13 count, totaling \$800, which was due immediately. (Id.)  
14

15 Defendant unsuccessfully challenged his conviction on direct appeal. The  
16 Ninth Circuit issued two opinions denying Defendant's claims. In the first order,  
17 the Ninth Circuit affirmed the Court's order allowing Defendant to invoke his Sixth  
18 Amendment right to represent himself and the Court's order denying Defendant's  
19 last request for a continuance. United States v. Thompson, 587 F.3d 1165, 1173-74  
20 (9th Cir. 2009). In the second order, the Ninth Circuit affirmed the Court's denial  
21 of Defendant's motion to suppress a wiretap and the Court's denial of Defendant's  
22 request to hold a hearing regarding purported omissions from a wiretap affidavit.  
23 United States v. Thompson, 359 Fed. App'x 900, 901 (9th Cir. Dec. 22, 2009).  
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1 Defendant then challenged his conviction collaterally by filing a habeas  
2 petition pursuant to 28 U.S.C. § 2255 (“Section 2255”) on June 24, 2011. (See Dkt.  
3 No. 584.) Defendant filed four briefs in support of his petition and claimed his  
4 Sixth Amendment right to counsel and his right to a speedy trial were violated. He  
5 also identified several purported omissions and misrepresentations in an affidavit  
6 and application for a wiretap that he contended supported his motion to suppress.  
7 The Court denied the Section 2255 petition on the merits on February 29, 2012.  
8 (See Dkt. No. 602.) Defendant filed multiple motions for reconsideration, which  
9 the Court denied. (See Dkt. Nos. 603, 609, 610, 612.)  
10

11 On March 13, 2015, Defendant filed a motion to correct a clerical error in the  
12 judgment pursuant to Federal Rule of Criminal Procedure 36. (See Dkt. No. 640.)  
13 The Court denied that motion on May 6, 2015. (See Dkt. No. 648.) Defendant  
14 appealed that ruling and the Ninth Circuit affirmed the order summarily on January  
15 25, 2016.  
16

17 Defendant filed the instant Motion on May 8, 2017 pursuant to Federal Rule  
18 of Civil Procedure 60(d)(3). On May 15, 2017, the Court ordered the United States  
19 to file a response to the Motion by no later than June 12, 2017. On June 12, 2017,  
20 the United States filed a timely “Motion to Dismiss Defendant’s Motion for Relief  
21 from Judgment Due to Fraud Upon the Court, Pursuant to Rule 60(d)(3)”  
22 (hereinafter referred to as “Opposition”). The Court then took the Motion under  
23 submission. Defendant filed a Reply to the Opposition on June 21, 2017.  
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## II. Legal Standard

A federal prisoner who is “claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States,” may file a motion pursuant to Section 2255 with the district court that imposed the sentence. 28 U.S.C. § 2255(a). “As a general rule, [Section] 2255 provides the exclusive procedural mechanism by which a federal prisoner may test the legality of detention.” Harrison v. Ollison, 519 F.3d 952, 955 (9th Cir. 2008) (quoting Lorentsen v. Hood, 223 F.3d 950, 953 (9th Cir. 2000)) (internal quotation marks omitted). A petitioner is generally limited to one motion under Section 2255. A “second or successive” Section 2255 motion may not be considered unless it has first been certified by the court of appeals to contain either “(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense,” or “(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” 28 U.S.C. § 2255(h).

“Because of the difficulty of meeting this standard, petitioners often attempt to characterize their [second or successive] motions in a way that will avoid the strictures of 28 U.S.C. § 2255(h)[.]” United States v. Wash., 653 F.3d 1057, 1059 (9th Cir. 2011). Petitioners often “characterize their pleading as being a motion under Rule 60(b) of the Federal Rules of Civil Procedure [(“Rule 60(b)”)], which allows a party to seek relief from a final judgment, and request reopening of his

case, under a limited set of circumstances.”<sup>1</sup> Id. (internal quotation marks and citations omitted). “When a Rule 60(b) motion is actually a disguised second or successive [Section] 2255 motion, it must meet the criteria set forth in § 2255(h).” Id. at 1059-60 (citing Gonzalez v. Crosby, 545 U.S. 524, 528 (2005)).

“[T]he Supreme Court has not adopted a bright-line rule for distinguishing between a bona fide Rule 60(b) motion and a disguised second or successive [Section] 2255 motion, instead holding that a Rule 60(b) motion that attacks ‘some defect in the integrity of the federal habeas proceedings’ is not a disguised [Section] 2255 motion but rather ‘has an unquestionably valid role to play

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<sup>1</sup> Here, Defendant brings his Motion pursuant to Federal Rule of Civil Procedure 60(d)(3) (“Rule 60(d)(3)”), not Rule 60(b). Rule 60(b) provides a court may relieve a party from a final judgment for certain enumerated reasons. See Fed. R. Civ. P. 60(b). Rule 60(d) provides other powers to grant relief from a judgment, and states in pertinent part: “This rule does not limit a court’s power to . . . (3) set aside a judgment for fraud on the court.” Fed. R. Civ. P. 60(d)(3). “A fraud-on-the-court claim may be brought either as an independent action preserved by the savings clause in Rule 60(d)(3), or as a claim under Rule 60(b)(3), which provides for relief from judgment” based on fraud, misrepresentation, or misconduct. United States v. Baker, 718 F.3d 1204, 1207 (10th Cir. 2013).

Although the Motion is brought pursuant to Rule 60(d) rather than Rule 60(b), a number of courts have held a Rule 60(d) motion that does not challenge the integrity of the habeas proceeding itself constitutes a second or successive claim for relief under Section 2255. See, e.g., Todd v. United States, No. C 11-0470 JLR, 2012 WL 5351845, at \*2 n.3 (W.D. Wash. Oct. 29, 2012) (collecting cases). Accordingly, the Court applies the Ninth Circuit’s reasoning in United States v. Washington, 653 F.3d 1057, (9th Cir. 2011) and its progeny to the Motion. See Baker, 718 F.3d at 1207 (although the petition is styled as brought under Rule 60(d)(3), that “does not change the analysis we use to determine if [the] pleading is an unauthorized second-or-successive [Section] 2255 motion.”).

1 in habeas cases.” Id. at 1060 (quoting Gonzalez, 545 U.S. at 532, 534); see  
2 also United States v. Buenrostro, 638 F.3d 720, 722-23 (9th Cir.2 011) (per curiam).

3 A Rule 60 motion should be treated as a successive habeas petition where the  
4 motion “advances one or more ‘claims,’” such as where a motion “seeks to add a  
5 new ground for relief,” or where the motion “attacks the federal court’s previous  
6 resolution of a claim on the merits.” Gonzalez, 545 U.S. at 532 (emphasis in  
7 original).

### 8 9 **III. Discussion**

10 In the Motion, Defendant claims the United States committed a fraud upon  
11 the Court and moves the Court “for an evidentiary hearing or in the alternative . . .  
12 [to] vacate [his] conviction and dismiss the charges . . . .” (Mot. at 15-16.) In  
13 particular, Defendant claims the United States violated his Fourth, Fifth, Sixth, and  
14 Fourteenth Amendment rights by withholding materials that were required to be  
15 disclosed pursuant to Brady v. Maryland, 373 U.S. 83 (1963) (hereinafter “Brady  
16 material”), and omitting information from wiretap affidavits and an affidavit in  
17 support of a search warrant. (Id. at 14-15.) In its Opposition, the United States  
18 argues the Motion is a disguised Section 2255 motion that must be denied because  
19 Defendant has not yet obtained a certification from the Ninth Circuit to authorize  
20 him filing a second Section 2255 motion pursuant to 28 U.S.C. § 2255(h). (See  
21 Opp’n.)

22  
23 Preliminarily, the Court must determine whether to construe the Motion as  
24 brought pursuant to Rule 60 or as a “disguised second or successive [Section] 2255  
25 motion.” Wash., 653 F.3d at 1059-60. Although Defendant styles the Motion as  
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1 brought pursuant to Rule 60(d)(3), which states Rule 60 “does not limit a court’s  
2 power to set aside a judgment for fraud on the court,” the Court must consider the  
3 nature of the claims asserted in the Motion to determine if they challenge the  
4 “integrity of the proceedings.” Fed. R. Civ. P. 60(d)(3); Gonzalez, 545 U.S. at 532,  
5 534.

6  
7 In the Motion, Defendant repeats several arguments the Court has already  
8 addressed, including his contention that he has newly discovered Brady material he  
9 believes was withheld wrongfully by the United States and the United States  
10 withheld specific information from a wiretap affidavit. (See Dkt. Nos. 602, 603,  
11 612.) As stated above, a Rule 60 motion constitutes a second or successive habeas  
12 petition where it, inter alia, seeks to present new evidence in support of a claim  
13 already litigated, seeks to add a new ground for relief, or attacks the court’s  
14 “previous resolution of a claim on the merits.” Wash., 653 F.3d at 1063 (citing  
15 and quoting Gonzales, 545 U.S. at 531-34). Defendant does not identify any  
16 defects in the integrity of the federal habeas proceedings. Instead, he seeks to attack  
17 his underlying conviction and sentence through the presentation of purported new  
18 evidence in support of claims already litigated and rejected by the Court. See  
19 United States v. Matthews, 833 F.2d 161, 164 (9th Cir. 1987) (“Where a defendant  
20 seeks to attack the basis for his conviction, the district court may properly construe  
21 the defendant’s [] motion as a motion under [Section 2255].”), abrogated on other  
22 grounds by Young v. Holder, 697 F.3d 976, 986 (9th Cir. 2012) (en banc).  
23 Accordingly, the Court construes the Motion as seeking relief pursuant to Section  
24 2255, rather than Rule 60.

As stated supra, Defendant filed a prior Section 2255 habeas petition, which the Court denied on February 29, 2012. A second or successive Section 2255 motion must be certified “by a panel of the appropriate court of appeals” before it may be filed with the District Court. 28 U.S.C. § 2255(h). Defendant has not demonstrated that he sought and obtained the requisite certification from the Ninth Circuit to pursue his successive Section 2255 claims. Accordingly, the Court is without jurisdiction to consider the Motion. See Wash., 653 F.3d at 1065 (holding “the district court was without jurisdiction to entertain [the petitioner’s] successive . . . [Section] 2255 motion” where the petitioner had failed to obtain a certificate from the Ninth Circuit). Defendant must first direct his arguments to the Ninth Circuit to obtain a certificate authorizing the Court to entertain his successive Section 2255 claims, pursuant to 28 U.S.C. § 2255(h).

#### IV. Conclusion

For the foregoing reasons, Defendant’s Motion is DENIED WITHOUT PREJUDICE to Defendant obtaining a certificate from the Ninth Circuit authorizing him to file a successive Section 2255 motion.

To the extent Defendant seeks a certificate of appealability, such request is denied. A certificate of appealability shall not issue.

**IT IS SO ORDERED.**

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Dated: 6/28/17

*Virginia A. Phillips*

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Virginia A. Phillips  
Chief United States District Judge

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