No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BRANDON BERNARD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

ROBERT C. OWEN
Counsel of Record
53 W. Jackson Blvd., Ste. 1056
Chicago, Illinois 60604
512.577.8329 voice
robowenlaw@gmail.com

JOHN R. CARPENTER
Assistant Federal Public Defender
Federal Public Defender for the
Western District of Washington
1331 Broadway, Suite 400
Tacoma, Washington 98402
253.593.6710 voice
john_carpenter@fd.org

Counsel for Petitioner

THIS IS A CAPITAL CASE
PETITIONER IS SCHEDULED TO BE EXECUTED
DECEMBER 10, 2020, AT 6:00 P.M. EASTERN TIME

INDEX TO APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-70021

United States Court of Appeals
Fifth Circuit
FILED
September 9, 2020
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

BRANDON BERNARD,

Defendant - Appellant

Appeal from the United States District Court
for the Western District of Texas
USDC Nos. 6:99-CR-70-2; 6:04-CV-164

Before HIGGINBOTHAM, JONES, and DENNIS, Circuit Judges.

PER CURIAM:*

Federal prisoner Brandon Bernard appeals the district court's order construing his motion for relief from judgment as an unauthorized successive habeas petition and transferring it to this court pursuant to 28 U.S.C. § 1631. We affirm.

The underlying facts have been spelled out in several prior opinions and do not bear repeating in full. Suffice it to say that twenty years ago, Bernard was convicted of capital murder and sentenced to death under federal law after

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

a woman died on Army property when Bernard set fire to a car while she was locked in its trunk. *See United States v. Bernard*, 299 F.3d 467, 471–73 (5th Cir. 2002). After his conviction and sentence were affirmed on direct appeal, Bernard filed his first 28 U.S.C. § 2255 habeas petition. The district court denied the petition and we denied a certificate of appealability. *See United States v. Bernard*, 762 F.3d 467 (5th Cir. 2014). Bernard then moved for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b). The district court construed the motion as an unauthorized successive habeas petition and dismissed it. We again denied a COA. *See United States v. Vialva*, 904 F.3d 356 (5th Cir. 2018).

Bernard has filed another motion for relief from judgment pursuant to Section 2255, and alternatively, Rule 60(b), asserting for the first time claims that the government (1) failed to disclose favorable evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963); and (2) presented false testimony at trial in violation of *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173 (1959). The district court again construed the motion as a successive petition but transferred it to this court pursuant to Section 1631.[1] Bernard now appeals the district court's transfer order, arguing his motion is not successive.[2]

We determine *de novo* whether a motion for relief from judgment should be construed as an unauthorized successive habeas petition. *United States v.*

[1] The court originally dismissed the motion for lack of jurisdiction but later amended its judgment and transferred the motion to this court. Bernard separately moves for authorization to file a successive habeas petition. We do not address that motion at this time.

[2] Because a Section 1631 transfer order to cure jurisdiction is not a "final order" under 28 U.S.C. § 2253(c)(1)(B), Bernard need not obtain a certificate of appealability. *See United States v. Fulton*, 780 F.3d 683, 688 (5th Cir. 2015).

Orozco-Ramirez, 211 F.3d 862, 865 (5th Cir. 2000); *In re Coleman*, 768 F.3d 367, 371 (5th Cir. 2014).

Bernard first contends the district court erred in construing his Section 2255 motion as a successive petition because the facts underlying his *Brady* and *Napue* claims could not have been discovered at the time Bernard filed his initial petition. While it is true that a habeas petition is not "successive simply because it follows an earlier federal petition," *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998), we have made clear that "claims based on a *factual* predicate not previously discoverable are successive." *Leal Garcia v. Quarterman*, 573 F.3d 214, 221 (5th Cir. 2009). In other words, if a prisoner's later-in-time petition raises a new claim based on evidence that the prisoner alleges was undiscoverable at the time of his earlier petition, the petition is successive. Bernard's motion does just that and is therefore successive.

Still, Bernard argues *Panetti v. Quarterman*, 551 U.S. 930, 127 S. Ct. 2842 (2007) requires a different result. But *Panetti* only reinforces our holding. There, the Supreme Court held that a capital prisoner's second-in-time habeas petition challenging his competency to be executed was not successive because his claim had not ripened until after the disposition of his first petition. *Id.* at 944–45. The Court emphasized that the second petition was not successive because the factual predicate for the prisoner's claim (his mental state at the time of execution) could not have existed when the prisoner filed his first petition, years before his scheduled execution. *Id.* at 945; *see also Tompkins v. Sec'y, Dep't of Corr.*, 557 F.3d 1257, 1260 (11th Cir. 2009) (recognizing that the *Panetti* petition was not successive since no claim of incompetency for execution "is ever ripe at the time of the first petition because the facts to be measured or proven—the mental state of the petitioner at the time of execution—do not and cannot exist when the execution is years away").

Here, the factual predicate for Bernard's claims (the government's alleged withholding of evidence and false testimony regarding Bernard's role in a gang) existed long before Bernard filed his first habeas petition. Whether or not Bernard could have discovered those facts goes to whether he meets the requirements for filing a successive petition, not whether his motion is successive to begin with. *See Blackman v. Davis*, 909 F.3d 772, 572–73 (5th Cir. 2018) (holding that a second-in-time petition raising *Brady* and *Napue* claims was successive because the claims relied on previously undiscovered facts); *In re Wogenstahl*, 902 F.3d 621, 627–28 (6th Cir. 2018); *United States v. Buenrostro*, 638 F.3d 720, 725–26 (9th Cir. 2011); *Tompkins*, 557 F.3d at 1260. The district court did not therefore err in construing Bernard's Section 2255 motion as an unauthorized successive habeas petition.

Bernard also contends the district court erred in construing his alternative Rule 60(b) motion as a successive petition. If a Rule 60(b) motion seeks merely to present a new habeas claim, "it should be treated as a second-or-successive habeas petition and subjected to AEDPA's limitation on such petitions." *In re Edwards*, 865 F.3d 197, 203–04 (5th Cir. 2018). Bernard's Rule 60(b) motion sought to reopen the proceedings to allow him to litigate his new *Brady* and *Napue* claims. "This is the definition of a successive claim." *Id.* at 204–05; *see also Segundo v. Davis*, 757 F. App'x 333, 336 (5th Cir. 2018) (Rule 60(b) motion was a successive habeas petition where a claim of ineffective assistance of counsel "was the focus of the motion, and reopening the proceedings to relitigate it is the clear objective of the filing"). The district court did not therefore err in construing Bernard's alternative Rule 60(b) motion as an unauthorized successive habeas petition.

For the foregoing reasons, the district court's transfer order is **AFFIRMED**. We **REMAND** to the district court with instructions to dismiss Bernard's Section 2255 petition for want of jurisdiction.

United States Court of Appeals
for the Fifth Circuit

No. 19-70021

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

BRANDON BERNARD,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:04-CV-164
USDC No. 6:99-CR-70-2

ON PETITION FOR REHEARING EN BANC

(Opinion 9/9/20, 5 CIR., _____, _____ F.3D _____)

Before HIGGINBOTHAM, JONES, and DENNIS, *Circuit Judges*.

PER CURIAM:

(**X**) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc

(FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

EDITH H. JONES
United States Circuit Judge

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 153. Habeas Corpus (Refs & Annos)

28 U.S.C.A. § 2255

§ 2255. Federal custody; remedies on motion attacking sentence

Effective: January 7, 2008
Currentness

(a) A prisoner in custody under sentence of a court established by Act of Congress 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, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(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.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 114, 63 Stat. 105; Pub.L. 104-132, Title I, § 105, Apr. 24, 1996, 110 Stat. 1220; Pub.L. 110-177, Title V, § 511, Jan. 7, 2008, 121 Stat. 2545.)

Notes of Decisions (5613)

28 U.S.C.A. § 2255, 28 USCA § 2255
Current through P.L. 116-193.

End of Document

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

UNITED STATES OF AMERICA	§	
	§	**CIVIL NO. W-04-CV-164**
V.	§	**CRIMINAL NO. W-99-CR-070 (2)-ADA**
	§	
BRANDON BERNARD	§	*** CAPITAL CASE ***

ORDER ON MOTION FOR RELIEF FROM JUDGMENT

Movant Brandon Bernard was convicted under federal law of capital murder and sentenced to death. His conviction and sentence were affirmed on direct appeal and he unsuccessfully challenged his conviction and sentence pursuant to 28 U.S.C. § 2255. Bernard has now filed a Motion for Relief From Judgment (ECF No. 661) in this Court which he contends is either a non-successive, "second-in-time" motion under § 2255 or, in the alternative, a motion filed pursuant to Federal Rule of Civil Procedure 60(b). In either scenario, Bernard seeks to set aside his death sentence based on the allegation that his sentence was secured, in part, by the Government's failure to disclose favorable evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The Government has not responded to Bernard's motion. Nevertheless, after carefully considering the motion and the governing legal authorities, the Court concludes Bernard's motion should be construed as a successive § 2255 motion which this Court is prohibited from considering. The motion is therefore dismissed for lack of jurisdiction.

Background

In June 2000, Bernard and his co-defendant Christopher Vialva were jointly tried and convicted in the Western District of Texas for their part in the carjacking and murder of Todd and Stacie Bagley while on federal government property. Both were sentenced to death. As

stated previously, their convictions were affirmed on direct appeal and certiorari was denied by the United States Supreme Court. *United States v. Bernard*, 299 F.3d 467 (5th Cir. 2002), *cert. denied*, 539 U.S. 928 (2003). Bernard and Vialva then challenged their convictions and sentences by filing motions to vacate, set aside, or correct under 28 U.S.C. § 2255 alleging a myriad of constitutional violations. After careful consideration, the district court—the Honorable Judge Walter S. Smith, Jr. presiding[1]—denied an evidentiary hearing, denied the § 2255 motions and the claims raised therein, and denied a certificate of appealability (COA). (ECF No. 449). On appeal, the Fifth Circuit also denied Bernard and Vialva a COA and their petitions for certiorari review were again denied by the Supreme Court in early 2016. *United States v. Bernard*, 762 F.3d 467 (5th Cir. 2014), *cert. denied*, 136 S. Ct. 892 (2016).

In January 2017, Tony Sparks—one of Bernard and Vialva's juvenile co-conspirators who was sentenced to life imprisonment after pleading guilty to carjacking—was granted a new sentencing hearing on the basis of the Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460 (2012). *See Sparks v. United States*, 2019 WL 1415775 at *1 (W.D. Tex. 2017). This resentencing hearing was held in February 2018, during which the Government called former Killeen Police Department (KPD) Sergeant Sandra Hunt as an expert witness. Sergeant Hunt, who previously headed the KPD's gang unit, testified about her investigation into the organizational hierarchy of the 212 PIRU Bloods, a Killeen gang to which Bernard, Vialva, Sparks, and the other co-conspirators belonged. According to Sergeant Hunt, both Vialva and Sparks occupied a relatively high position in the gang's hierarchy while Bernard "was at the very bottom of the chart." (ECF No. 661, Exhibit 1 at 9). Although she had conveyed this information to federal prosecutors during their investigation of the Bagley murders, the

[1] Judge Smith also presided over Bernard and Vialva's original trial.

Government did not present Sergeant Hunt's opinions concerning the gang's hierarchy during Bernard and Vialva's trial.

Bernard filed the instant motion nearly one year after Sergeant Hunt testified at the Sparks resentencing hearing. In the motion, Bernard contends that not only did the Government fail to present Sergeant's Hunt's conclusions at his trial, it failed to disclose this information to Bernard's trial counsel while actively misleading the jury into believing the 212 PIRU Bloods lacked any organizational structure. As a result, Bernard argues, the Government violated his constitutional rights under *Brady* by withholding favorable evidence and intentionally misleading the jury in violation of *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Bernard asks this Court to vacate his sentence of death pursuant to § 2255 and order a new sentencing hearing. In the alternative, should the Court find that the § 2255 motion is successive, Bernard seeks to reopen his original § 2255 proceedings under Rule 60(b) so the Court can address the new allegations on the merits.

Analysis

A. Bernard's § 2255 Motion is Successive.

Under 28 U.S.C. § 2244(b)(3), an applicant must first move in the appropriate court of appeals for an order authorizing the district court to consider a "second or successive" application for writ of habeas corpus before the application is filed in the district court. Because the statute does not define what constitutes a "second or successive" motion, however, the phrase takes meaning from case law, some of which predates the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Panetti v. Quarterman*, 551 U.S. 930, 944 (2007); *Slack v. McDaniel*, 529 U.S. 473, 486 (2000) (suggesting that the definition of "second or successive" would be the same under AEDPA as under pre-AEDPA law). Under this case

law, a motion that is literally second or successive in time is not necessarily "second or successive" for purposes of AEDPA. See *Panetti*, 551 U.S. at 943-44 (declining "to interpret 'second or successive' as referring to all § 2254 applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior § 2254 application."); *Stewart v. Martinez–Villareal*, 523 U.S. 637, 643-46 (1998). Rather, a numerically second petition or motion is "second or successive" only if it (1) raises a claim challenging the conviction or sentence "that was or could have been raised" in a prior action or (2) otherwise constitutes an abuse of the collateral challenge. *United States v. Orozco–Ramirez*, 211 F.3d 862, 867 (5th Cir. 2000) (quoting *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998) (per curiam)).

Bernard argues the instant § 2255 motion should not be considered "second or successive," and he should not be required to seek preauthorization, because his motion is based on material evidence that was concealed by the Government until the Sparks resentencing hearing in February 2018. Citing *Panetti*, Bernard contends AEDPA's gatekeeping provisions do not apply to second-in-time *Brady* claims where the Government prevented the claim from being raised in the original § 2255 motion because such a requirement would have a "far reaching and seemingly perverse" implication for habeas practice and is contrary to AEDPA's stated principles of comity, finality, and federalism. Bernard's argument, while compelling, is ultimately unpersuasive because it is not supported by a single relevant authority.

Indeed, Bernard's assertion that his *Brady/Napue* claims are not "second or successive" or that the claims are in tension with AEDPA's requirements for successive petitions has been rejected conclusively by the Fifth Circuit. *See Blackman v. Davis*, 909 F.3d 772, 778-79 (5th Cir. 2018), *as revised* (Dec. 26, 2018) (applying § 2244(b) to a petitioner's *Brady* claim based on

previously undiscovered facts); *In re Davila*, 888 F.3d 179, 184-87 (5th Cir. 2018) (applying § 2244(b) to a petitioner's *Brady* claim); *Leal Garcia v. Quarterman*, 573 F.3d 214, 221 (5th Cir. 2009) (emphasizing that "[s]ection 2244(b)(2)(B)(i) states that claims based on a *factual* predicate not previously discoverable are successive.") (emphasis in original); *Johnson v. Dretke*, 442 F.3d 901, 911 (5th Cir. 2006) (applying the AEDPA's gatekeeping provisions to a second-in-time *Brady* claim in the state habeas context); *see also In re Coleman*, 344 F. App'x 913, 2009 WL 2957743 (5th Cir. 2009) (unpublished) (same).

Several other circuit courts have also ruled that second-in-time *Brady* claims are not exempt from AEDPA's second or successive restrictions. *See Brown v. Muniz*, 889 F.3d 661 (9th Cir. 2018) (holding that petitioner's *Brady* claim was subject to AEDPA's second or successive gatekeeping requirements because the factual predicate supporting the *Brady* claim existed at the time of the first habeas petition); *In re Pickard*, 681 F.3d 1201, 1205 (10th Cir. 2012) (*Brady* claims were "certainly second-or-successive . . . because they assert[ed] a basis for relief from the underlying convictions"); *Quezada v. Smith*, 624 F.3d 514, 520-22 (2d Cir. 2010) (applying § 2244(b) to *Brady* claim); *In re Siggers*, 615 F.3d 477, 479 (6th Cir. 2010) (same); *Tompkins v. Secretary, Dept. of Corrections*, 557 F.3d 1257, 1259-60 (11th Cir. 2009) (per curiam) (holding that all second-in-time *Brady* claims are subject to AEDPA's gatekeeping provisions); *Evans v. Smith*, 220 F.3d 306, 323 (4th Cir. 2000) (same); *see also Crawford v. Minnesota*, 698 F.3d 1086, 1088–89 (8th Cir. 2012) (petitioner was required to obtain authorization to file a successive petition containing nonmaterial *Brady* claims).

To support his assertion, Bernard relies almost exclusively on the arguments made by the Eleventh Circuit in *Scott v. United States*, 890 F.3d 1239 (11th Cir. 2018). In *Scott*, the court examined whether AEDPA's gatekeeping provision should apply to a *Brady* allegation that could

not be discovered through the exercise of due diligence. After applying what it termed the "*Panetti* factors"—the implications for habeas practice, the purposes of AEDPA, and the abuse-of-the-writ doctrine—the court determined that a second-in-time collateral claim based on a newly-revealed *Brady* violation should not be considered "second or successive" for purposes of AEDPA. *Id*. at 1253. Nevertheless, the court was forced to conclude it was bound by prior precedent holding that, "in § 2255 cases, all second-in-time *Brady* claims are 'second or successive' under § 2255(h), even if the petitioner could not reasonably have been expected to discover the *Brady* violation[.]" *Id*. at 1259 (citing *Tompkins*, 557 F.3d at 1257).

Citing the *Scott* court, Bernard contends that *Tompkins*, as well as the previously-cited Fifth Circuit cases, were all wrongly decided because they did not involve an analysis of the "*Panetti* factors" in determining whether *Brady* claims are governed by AEDPA's gatekeeping provision. This Court takes no position on whether these cases were incorrectly decided in light of *Panetti*. But like the court in *Scott*, this Court is bound by clear circuit precedent indicating that Bernard's second-in-time *Brady/Napue* claims are "second or successive" within the meaning of § 2244(b) and § 2255(h).

Thus, until the Fifth Circuit says otherwise, Bernard must seek preauthorization to file the instant § 2255 motion before the Court can consider the merits of the *Brady/Napue* claims. Because he has not done so, Bernard's successive application for writ of habeas corpus will be dismissed. *See Burton v. Stewart*, 549 U.S. 147, 152 (2007) (holding the district court lacked jurisdiction to consider a successive § 2254 petition since petitioner did not obtain authorization from the court of appeals); *In re Campbell*, 750 F.3d 523, 529 (5th Cir. 2014) (petitioner must receive authorization before filing successive habeas petition).

B. Bernard's Alternative Motion Under Rule 60(b) is Also Successive.

Even if his § 2255 motion is deemed successive, Bernard argues he is entitled to relief under Federal Rule of Civil Procedure 60(b). A district court has jurisdiction to consider a Rule 60(b) motion in habeas proceedings so long as the motion "attacks, not the substance of the federal court's resolution of the claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005); *United States v. Williams*, 274 Fed. App'x 346, 347 (5th Cir. 2008) (applying *Gonzalez* to § 2255 motions). A motion that seeks to add a new ground for relief or attacks the previous resolution of a claim on the merits is, in fact, a successive petition subject to the standards of § 2244(b). *Gonzalez*, 545 U.S. at 531-32; *In re Sepulvado*, 707 F.3d 550, 552 (5th Cir. 2013). In other words, a motion that asserts or reasserts substantive claims of error attacking the validity of the movant's conviction may be treated as a successive § 2255 motion to vacate.

By contrast, a motion that shows "a non-merits-based defect in the district court's earlier decision on the federal habeas petition" falls within the jurisdiction of the district court to consider. *Balentine v. Thaler*, 626 F.3d 842, 847 (5th Cir. 2010). Thus, if the Rule 60 motion only attacks a "defect in the integrity" of the petitioner's federal habeas proceedings and does not seek to advance any new substantive claims, the motion shall not be treated as a second-or-successive petition. *Gonzalez*, 545 U.S. at 532. However, it is extraordinarily difficult to establish a claim of procedural defect:

> Procedural defects are narrowly construed. They include fraud on the habeas court, as well as erroneous previous rulings which precluded a merits determination—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar. They generally do not include an attack based on the movant's own conduct, or his habeas counsel's omissions, which do not go to the integrity of the proceedings, but in effect ask for a second chance to have the merits determined favorably.
>
> *In re Coleman*, 768 F.3d 367, 371-72 (5th Cir. 2014) (alterations omitted).

Bernard argues his request for Rule 60 relief is not a successive habeas petition because it is solely an attack on a defect in his prior habeas proceedings—namely, the Government's continued withholding of the *Brady* material during Bernard's original § 2255 proceeding coupled with its representation to the Court that it had provided open-file discovery. Although Bernard argues that it is only this second violation—the Government's representation of an open-file policy, and not the underlying *Brady/Napue* allegations—that entitle him to reopen the § 2255 proceeding, even a cursory examination of the motion reveals the true intent is to bring the new allegations before the Court. Bernard all but admits this by stating that the appropriate remedy for the alleged defect is to allow him to file an amended motion that incorporates the new allegations he wishes to litigate. (ECF No. 661 at 63). That is the very definition of a successive petition. *See In re Edwards*, 865 F.3d 197, 204-05 (5th Cir. 2017) (finding attempt to bring new claims under the guise of "defects in the integrity of the original habeas proceedings" to be successive). Because the alleged procedural defects are simply an attempt to circumvent § 2244, Bernard's motion must be dismissed as successive.

Conclusion

The Court concludes Bernard's motion should be construed as successive under § 2255. However, Bernard has not obtained leave from the Fifth Circuit Court of Appeals to file a successive motion as dictated by § 2244(b)(3)(A) and § 2255(h). Therefore, this Court lacks jurisdiction to consider the motion. *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000) (Section 2244(b)(3)(A) "acts as a jurisdictional bar to the district court's asserting jurisdiction over any successive habeas petition" until the appellate court has granted petitioner permission to file one).

Accordingly, **IT IS HEREBY ORDERED** that:

1. Movant Brandon Bernard's Motion for Relief From Judgment (ECF No. 661), construed as a successive § 2255 motion, is **DISMISSED WITHOUT PREJUDICE** for want of jurisdiction;

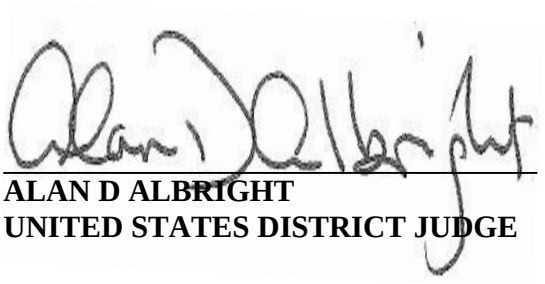
2. To the extent Bernard's motion is considered a Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6), this motion is also **DISMISSED WITHOUT PREJUDICE** for want of jurisdiction;

3. Bernard failed to make "a substantial showing of the denial of a federal right" and cannot make a substantial showing that this Court's procedural rulings are incorrect as required by Fed. R. App. P. 22 for a certificate of appealability. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Therefore, this Court **DENIES** Bernard a certificate of appealability. *See* Rule 11(a) of the Rules Governing § 2254 Proceedings; and

4. All other remaining motions, if any, are **DENIED**, and this case is now **CLOSED**.

It is so **ORDERED**.

SIGNED this 8th day of August, 2019.



ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. BRANDON BERNARD, Defendant.	CIVIL NO. W-04-CV-164 CRIM. NO. W-99-CR-070(2)-ADA ***CAPITAL CASE*** ORDER AMENDING JUDGMENT

The court hereby amends the Judgment entered in the above-styled and numbered cause as follows.

Pursuant to this Court's Order of August 8, 2019 (ECF No. 664), **IT IS HEREBY ORDERED, ADJUDGED** and **DECREED** that Movant Brandon Bernard's Motion for Relief from Judgment (ECF No. 661) is **TRANSFERRED** to the United States Court of Appeals for the Fifth Circuit pursuant to the authority of 18 U.S.C. § 1631. This case is now **CLOSED**.

It is so **ORDERED**.

SIGNED this 10 **day of** September, **2019.**

ALAN D. ALBRIGHT
UNITED STATES DISTRICT JUDGE

FEDERAL PUBLIC DEFENDER
1331 Broadway, Suite 400
Tacoma, WA 98402
(253) 593-6710

Presented by:

Robert C. Owen
Law Office of Robert C. Owen
1333 W. Devon Ave., #316
Chicago, IL 60660
(512) 577-8329
robowenlaw@gmail.com

John R. Carpenter
Asst. Federal Public Defender
1331 Broadway, Suite 400
Tacoma, Washington 98402
(253) 593.6710
john_carpenter@fd.org