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

KYLE RAINEY	:	
	:	CIVIL ACTION
v.	:	
	:	NO. 05-4272
JAMES WYDNER, et al.,	:	
	:	

Memorandum and Order

YOHN, J. October _____, 2006

Presently before the court is petitioner Kyle Rainey's motion to vacate his judgment of sentence in state court pursuant to Federal Rule of Civil Procedure 60(b). Rainey's first two claims were presented and rejected in his prior federal habeas action and they will now be dismissed pursuant to 28 U.S.C. § 2244(b)(1). Rainey's claim based on alleged new evidence will be denied as untimely under Rule 60(b)(2), but to the extent that it can be considered a second or successive habeas corpus petition will be referred to the Third Circuit for possible certification.

I. FACTS

On March 26, 1994, Rainey and his co-conspirators, Nathan Riley and Darrell Wallace, robbed Bright Jewelers in the City of Philadelphia. On June 1, 1994, the trio robbed Sun Jewelers, also in Philadelphia. Petitioner was charged with both robberies and convicted in separate trials.

Before the trial on the Bright Jewelers robbery which is the case at issue here, the trial court denied Rainey's motion to suppress a photo array identification made by the jewelry store owner. In addition, the trial court granted a motion in limine, which allowed the Commonwealth to present evidence of the Sun Jewelers robbery, at the Bright Jewelers trial. A jury found Rainey guilty of the Bright Jewelers robbery and possessing an instrument of crime on November 1, 1995.

Rainey's counsel, Kalvin Kahn, filed a direct appeal to the Pennsylvania Superior Court, contesting the trial court's evidentiary rulings. On June 25, 1997, that court found that the trial court did not err in allowing admission of the Sun Jewelers robbery and that the claim of error regarding the admission of the allegedly suggestive photo array was waived because counsel failed to supply the court with a copy of the photo array. Petitioner's subsequent pro se PCRA petitions in the Pennsylvania courts were ultimately denied.

Rainey then filed a petition under 28 U.S.C. § 2254 with this court on April 21, 2000, concerning his conviction in the Bright Jewelers robbery case. *See* Docket No. 00-2086, Petition for Writ of Habeas Corpus, dated Apr. 21, 2000. Petitioner claimed that the trial court violated his due process rights by: 1) allowing the introduction of evidence related to the Sun Jewelers robbery and 2) failing to suppress the pre-trial photo array identification. This court denied Rainey's § 2254 petition on December 13, 2000. I agreed with United States Magistrate Judge Peter B. Scuderi's Report and Recommendation that petitioner's claims were procedurally defaulted and that even if the claims were not procedurally defaulted, they were meritless. The Third Circuit denied petitioner's request for a Certificate of Appealability ("COA") on September 13, 2001.

While Rainey's application for the COA was pending with the Third Circuit, he filed a separate petition under 28 U.S.C. § 2254, concerning his conviction for the Sun Jewelers robbery. *See* Docket No. 01-623, Petition for Writ of Habeas Corpus, dated Feb. 7, 2001. This case was assigned to the Honorable Timothy J. Savage.

On January 14, 2005, Rainey filed a "Motion to Vacate Judgment of Sentence" pursuant to Fed. R. Civ. Pro. 60(b). *See* Docket No. 05-182, entry Jan. 14, 2005. Though this motion related to Rainey's Bright Jewelers conviction and the § 2254 petition at Docket No. 00-2086, it was erroneously assigned to Judge Savage. On April 19, 2005, Judge Savage found that Rainey's motion, though styled as being under Rule 60(b), was actually a successive habeas petition and

entered an order transferring the petition to the Third Circuit to determine whether the court could consider Rainey's successive petition. *See* Docket No. 05-182, Order dated Apr. 19, 2005. The Third Circuit denied petitioner's request to filed a successive habeas petition regarding the Bright Jeweler's robbery on June 2, 2005.

On August 11, 2005, Rainey filed this motion, a second Rule 60(b) motion in relation to his Bright Jewelers conviction and this court's decision with regard to his § 2254 petition. *See* Docket No. 05-4272, Petition Pursuant to 60(b), dated Aug. 11, 2005. Because this filing relates to my decision in his original habeas petition (Docket No. 00-2086), Rainey's current motion is correctly before this court.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 60(b) provides for relief from a final judgment. Relief may be requested where "fraud, misrepresentation, or other misconduct of an adverse party" has occurred or when "the judgment is void." Fed. R. Civ. P. 60(b)(3), (4). Further, Rule 60(b) also allows relief for "any other reason justifying relief from the operation of judgment." Fed. R. Civ. P. 60(b)(6).

Petitioner asks the court to adopt the standard stated by the Second Circuit in *Rodriguez v. Mitchell*, 252 F.3d 191, 198 (2d. Cir. 2001), that a Rule 60(b) motion "to vacate a judgment denying habeas is not a second or successive habeas petition." However, *Rodriguez* is not the law of this circuit. In *Pridgen v. Shannon*,380 F.3d 721, 727 (3d Cir. 2004), the Third Circuit specifically disagreed with the decision in *Rodriguez*, holding that a Rule 60(b) motion may be considered, but not if it conflicts with the rules of the Antiterrorism and Effective Death Penalty Act ("AEDPA") or if its purpose is to attack the underlying conviction.[1] The court stated that:

[1]AEDPA specifically prohibits state prisoners from filing second or successive habeas petitions, subject to very specific exceptions and procedures articulated in the statute. *See* 28 U.S.C. § 2244(b). None of these procedures has been met here.

> In instances in which the factual predicate of a petitioner's Rule 60(b) motion attacks the manner in which the earlier habeas judgment was procured and not the underlying conviction, the Rule 60(b) motion may be adjudicated on the merits. However, when the Rule 60(b) motion seeks to collaterally attack the petitioner's underlying conviction, the motion should be treated as a successive habeas petition.

Id. at 727. The Third Circuit was persuaded by the First Circuit's explanation in *Rodwell v. Pepe*, 324 F.3d 66, 67 (1st Cir. 2003), that "AEDPA's restrictions on the filing of second or successive habeas petitions make it implausible to believe that Congress wanted Rule 60(b) to operate under full throttle in the habeas context."

More recently, the Supreme Court considered the extent to which AEDPA limited the application of Rule 60(b). *Gonzalez v. Crosby*, 125 S. Ct. 2641, 2647-48 (2005). The Court ruled that where a motion for relief under Rule 60(b) sets forth what would constitute a "claim" for habeas relief under 28 U.S.C. § 2254 by either attempting to "add a new ground for relief," or by attacking "the federal court's previous resolution of a claim on the merits," such a motion must be considered to be a successive petition for relief, which would require authorization from the circuit court of appeals. *Id.* On the other hand, a Rule 60(b) motion attacking "not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings" would be decided under Rule 60(b) and not be construed as a second application for relief. *Id.*

In sum, if the petitioner seeks to relitigate issues already decided by the district court on habeas, or pose new claims that would have been cognizable on federal habeas review, the Rule 60(b) motion constitutes a successive habeas petition. *Pridgen*,380 F.3d at 726. Under 28 U.S.C. § 2244(b)(3)(A), a district court may not entertain these successive petitions unless the habeas petitioner obtains "an order from the appropriate court of appeals authorizing the district court to consider the motion." *See Christy v. Horn*, 115 F.3d 201, 208 (3d Cir. 1997).

III. DISCUSSION

Rather than attacking the manner in which the earlier habeas judgment was procured, Rainey seeks to reargue the exact same claims litigated in his first habeas petition**.** He requests relief pursuant to Rule 60(b)(3), (4), and (6), based upon due process violations, stemming from the trial court's failure to suppress the photo array and evidence from the second robbery. These are the same issues this court already decided when I denied his initial habeas petition. In his Report and Recommendation, Judge Scuderi found that both claims were procedurally defaulted and that Rainey failed to show cause and prejudice to excuse the procedural default.[2] Docket No. 00-2086, Report and Recommendation, Nov. 1, 2000. Additionally, Judge Scuderi found that even if the claims were not procedurally defaulted, they were meritless. *Id.*

Entirely absent from Rainey's motion, ostensibly filed under Rule 60(b), is any allegation that the earlier habeas judgment was somehow improperly procured. Rainey does not explain how the

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[2]A petitioner may show cause to excuse a procedural default by providing proof that his counsel on direct appeal was constitutionally ineffective. Coleman v. Thompson, 501 U.S. 722, 754 (1991). As evidence of his attorney's ineffectiveness, Rainey now provides the affidavit of his direct appeal attorney, Kalvin Kahn, in which he admits that he mistakenly forgot to attach the photo array to petitioner's direct appeal. *See* Docket No. 05-4272, Petition filed Aug. 11, 2005, Exh. A. Though Rainey did not provide this affidavit as part of his original habeas petition, Judge Scuderi addressed the argument Rainey's evidence supports: that his attorney's ineffectiveness in failing to attach the required photo array is sufficient cause to excuse his procedural default.

> To the extent that Rainey would argue that his default is due to appellate counsel's ineffectiveness in failing to attach the required photo array, such a claim must fail. A claim of ineffective assistance of counsel constitutes "cause" for procedural default only if the claim was presented to the state courts independently prior to its use to establish cause. Rainey never presented this claim of ineffective assistance of counsel to the Pennsylvania courts; therefore, the claim can not constitute cause for Rainey's procedural default.

See Docket No. 00-2086, Report and Recommendation, Nov. 1, 2000, at 19, n. 5, (citations omitted). Kahn's affidavit, though proof that he failed to supply the photo array on direct appeal, does not change the fact that Rainey's never presented the ineffective assistance claim was to the Pennsylvania courts. Additionally, when a "Rule 60(b)(2) motion present[s] new evidence in support of a claim already litigated," it is considered a second successive habeas petition. *Gonzalez v. Crosby*, 125 S. Ct. 2641, 2647 (2005).

original habeas decision was fraudulent, due to the misconduct of an adverse party, was void, or provide "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. Pro. 60 (b)(3), (4), and (6). Because Rainey is attempting to relitigate claims decided in his habeas petition rather than questioning this court's manner of finding those claims defaulted, the court concludes that the alleged Rule 60(b) motion is really a successive habeas petition. *See Pridgen,*380 F.3d at 726. If Rainey were to succeed on these claims, the result would be the reversal of the state court judgment rejecting his PCRA petition. The proper forum to raise these claims is in a habeas proceeding. Because they were, in fact, presented in his prior federal habeas action, and rejected, they now must be dismissed pursuant to 28 U.S.C. § 2244(b)(1).[3]

Rainey also seeks to have this court review newly discovered evidence as part of his Rule 60(b) motion. Petitioner provides the court with the affidavit of Nathan Riley, who plead guilty to both the Bright Jewelers and Sun Jewelers robberies. Riley testified that, with regard to the robbery of Bright Jewelers, "Kyle Rainey was not a participant in the commission of this crime." *See* Exh. C. to Pl. Rule 60(b) Pet. In light of the new evidence, Rainey claims that he is "actually innocent." Docket No. 05-4272, Pl. Rule 60(b) Pet. dated Jan 26, 2006, at 20.

Though Rainey facially relies upon Rules 60(b) (3), (4), and (6), claims of newly discovered evidence are properly evaluated under Rule 60(b)(2). *See* Fed. R. Civ. Pro. 60(b)(2) ("[T]he court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have

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[3]Even if Rainey could show that his claims should be considered as a Rule 60(b) motion, such relief is available only in cases evidencing extraordinary circumstances. *Stradley v. Cortez,* 518 F.2d 488, 493 (3d Cir. 1975), *citing Ackermann v. United States,* 340 U.S. 193, (1950). Assuming the court believed there were legal errors in the first habeas petition, Rainey's motion would not be granted. "[L]egal error does not by itself warrant the application of Rule 60(b). Since legal error can usually be corrected on appeal, that factor without more does not justify the granting of relief under Rule 60(b)." *Pridgen,* 380 F.3d at 728, *quoting Martinez-McBean v. Government of Virgin Islands,* 562 F.2d 908, 912 (3d Cir. 1977).

been discovered in time to move for a new trial under Rule 59(b)"). Because Rainey's 60(b) motion is based on new evidence, it must have been brought within one year of the decision on his original habeas petition. *See* Fed. R. Civ. P. 60(b) (providing that motions brought on the basis of newly discovered evidence shall be brought "not more than one year after the judgment"). The motion was brought on September 10, 2005, over four years after this court's judgment denying Rainey's habeas petition on December 13, 2000 and almost four years after the Third Circuit denied a certificate of appealability on September 13, 2001. Though Rainey also asks the court to review his claim under Rule 60(b)(6), a catchall provision that provides relief from judgment for "any other reason justifying relief," Rule 60(b)(6) cannot be used to evade the time limits of Rule 60(b)(2). *See Catasauqua Area School Dist. v. Eagle-Picher Industries, Inc.,* 118 F.R.D. 566, 569-570 (E.D. Pa. 1988) (finding that a plaintiff can not use Rule 60(b)(6) as a means of avoiding the time bar associated with 60(b)(2) where the reason for the relief sought under 60(b)(6), newly discovered evidence, is actually encompassed by Rule 60(b)(2)). Thus, Rainey's motion is untimely under Rule 60(b).

To the extent that this portion of his motion could be considered a second or successive petition, I will refer the matter to the Third Circuit for possible certification.

IV. CONCLUSION

Rainey does not make any allegation that the earlier habeas judgment was somehow improperly procured or fraudulent. Instead he restates the two identical claims raised in his original habeas petition which were rejected and includes a new claim for relief based on Rule 60(b)(2). His new claim based upon newly discovered evidence is untimely because it was not filed until four years after this court and the Third Circuit rendered judgment on his habeas petition. Additionally all of the arguments Rainey asserts are classic successive petition claims because the factual predicates of his claims attack the underlying state court conviction. *Pridgen*, 380 F.3d at 727. The two renewed claims will be dismissed pursuant to 28 U.S.C. § 2244(b)(1). The newly discovered

evidence claim is denied under Rule 60(b) as untimely but to the extent it could be considered a successive petition is subject to the restrictions of § 2244(b)(3)(A). As Rainey has not obtained an order from the Third Circuit authorizing this court to consider this claim as a successive petition, I will refer the claim to the Third Circuit for consideration as a second or successive petition.

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Order

And now, this _____ day of October, 2006, upon consideration of Kyle Rainey's petition filed pursuant to Federal Rule of Civil Procedure 60(b)(3)(4) and (6) under motion to vacate judgment of sentence (Document No. 1), Rainey's amended petition (Document No. 4), Rainey's petition pursuant to Federal Rule of Civil Procedure 60(b)(3)(4) and (6) (Document No. 7), and the Commonwealth's response, **IT IS HEREBY ORDERED** that:

1. Rainey's due process claims stemming from the trial court's failure to suppress the photo array and provision to admit evidence from the second robbery are **DISMISSED** pursuant to 28 U.S.C. § 2244(b)(1).

2. Rainey's claim of newly discovered evidence based on Rule 60(b)(2) is **DENIED** as untimely. To the extent that this claim could possibly be considered a second or successive petition, it is referred for consideration to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 2244(b)(3)(A).

3. Rainey's motion for appointment of counsel is **DISMISSED** as moot.

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William H. Yohn Jr., Judge