

Medina to 235 months imprisonment, followed by five years of supervised release, and imposed a fine of \$2,000 and a special assessment of \$100. Adopting the factual findings and the guideline application in the Presentence Investigation Report (“PSI”), the court determined specifically that the total offense level was 33 and the criminal history category was VI, yielding an imprisonment range of 235 to 293 months, a supervised release range of three to five years, and a fine of \$17,500 to \$175,000. (Sentencing Hr’g 3.) At the time of sentencing, all parties involved agreed that Medina was subject to a mandatory minimum sentence of fifteen years, pursuant to the Armed Career Criminal Act, 18 U.S.C. § 924 (e)(1) (“ACCA”)² (Sentencing Hr’g

²18 U.S.C. § 924(e) reads, in pertinent part:

(1) In the case of a person who violates section 922(g) of this title [18 USCS § 922(g)] and has three previous convictions by any court referred to in section 922(g)(1) of this title [18 USCS § 922(g)(1)] for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g) [18 USCS § 922(g)].

(2) As used in this subsection--

(A) the term “serious drug offense” means--

(i) an offense under the Controlled Substances Act (21 U.S.C. § 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. § 951 *et seq.*), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. § 1901 *et seq.*), for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year . . . , that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

6, 12, 15, 21, 22), based on his previous felony drug-related offenses.³

Medina timely appealed his conviction. He argued that the district court wrongfully denied his pretrial motion to bifurcate the evidence relating to prior felony convictions from the evidence relating to possession of a firearm, thereby requesting the Third Circuit to overrule its decision in *United States v. Jacobs*, 44 F.3d 1219 (3d Cir. 1995). The Third Circuit affirmed, declining to overrule *Jacobs*, and held that the district court did not improperly exercise its discretion by refusing to grant bifurcation. *United States v. Medina*, No. 00-1043 (3d Cir. Sept. 14, 2000).

On May 9, 2001, Medina filed a *pro se* motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255. In that motion, Medina argued that his counsel was ineffective based on numerous acts or omissions relating to the suppression hearing, trial, sentencing, and direct appeal. He specifically asserted, among other things, that counsel was ineffective for failing to call a key exculpatory witness at trial and for not contesting the failure to consolidate prior convictions for sentencing purposes. In discussing the failure to consolidate his prior convictions, Medina noted that “counsel failed to demonstrate that each drug arrest and prior conviction evinced a close factual relationship.” (Def.’s § 2255 Mot. 16.) He then continued in a discussion of evidence counsel should have presented, including the government’s interest in a person known as “Paid,” which demonstrated the matters were related. (*Id.* at 17.) Medina then

³The PSI listed six different offenses (PSI ¶¶ 24-29), but concluded specifically that Medina was classified as an armed career criminal “[b]ecause he has been convicted of drug trafficking on at least three occasions” (*Id.* at ¶ 20). In its Notice of Defendant’s Prior Convictions for Enhanced Sentencing under 18 U.S.C. § 924(e), the government listed four of Medina’s prior convictions, (Doc. No. 13), corresponding to paragraphs 24 through 27 of the PSI (PSI ¶¶ 24-27).

appeared to argue that had counsel made this known, the court would not have had to look at each offense individually. (*Id.* at 17.) Medina then discussed and cited several cases related to the consolidation of sentences for sentencing purposes.⁴ (*Id.* at 17-18.)

The government filed a response to Medina's *pro se* § 2255 motion arguing, *inter alia*, that Medina's counsel was not ineffective for failing to call the aforementioned witness, and that his sentence was not miscalculated because his prior convictions were ineligible for consolidation based on the intervening arrests. The court appointed the Defender Association of Philadelphia, Federal Court Division, as counsel because Medina's *pro se* motion was "set forth in a confusing and unorganized manner, and advanc[ed] several clearly frivolous claims and

⁴Medina stated the following:

Herein the instant case, the Honorable Court, thereby admission of counsel would not have been exposed to the onerous task of scrutinizing the record related to each of these cases. To which, the Government's discovery material was inclusive of all pertinent documents related to the prior offenses due to the interest of the person known as "Paid." "*If the legislature's definition provides an inexact construct, however, the court commonly bases its characterization of the previous conviction on what is readily apparent from the formal documents in the case without delving more deeply into the action circumstances of the offense [emphasis added] (permitting a sentencing court, when a categorical approach fails, to consider the charging papers and jury instructions to ascertain the contours of the particular prior offense.)*" *United States v. Correa*, 114 F. 3d 314, 317-318 (1st Cir. 1997) "These statements are in accord with out observation that "'scheme' and 'plan' are words of intention, implying that [the separate crimes] have been jointly planned, or at least that it has been evident that the commission of one would entail the commission of the other as well." *United States v. Woods*, 976 F. 2d 1096, 1099 (7th Cir. 1992) It is here, in furtherance of Petitioner's claim, that counsel failed to present evidence of the nexus of the drug offenses thereof the prior convictions. "As the district court in the present case noted, it is a common practice for defense counsel to endeavor to bring all pending sentencing involving a single defendant before one judge in the hope of receiving a more lenient cumulative sentence . . ." *United States v. Lopez*, 961 F. 2d 384, 387 (2nd Cir. 1992).

(Def. § 2255 Mot. 17-18 (errors in original) (emphasis added).)

other claims that [were] so unclear that it [was] impossible to discern what issues the defendant [was] attempting to raise and still others with no articulated facts in support thereof.” (Order, Dec. 14, 2001.) The court directed newly-appointed counsel to file an amended motion on or before January 31, 2002, and directed the government to file a response to that amended motion on or before February 28, 2002. In the interim, Medina, having secured the assistance of a prison paralegal, filed a *pro se* affidavit on January 22, 2002, in order to clarify the issues he had previously presented in his *pro se* §2255 motion. In this affidavit, Medina’s principal argument was that his counsel was ineffective for failing to call several witnesses at trial; he did not raise any issues related to his sentencing. Medina’s appointed counsel then filed an amended motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255, on March 1, 2002.⁵ This motion narrowed the issues significantly, leaving only the issue of trial counsel’s failure to investigate and present potential defense witnesses. Similar to Medina’s *pro se* affidavit, the amended motion did not raise any issues related to sentencing. This court held an evidentiary hearing on Medina’s § 2255 motion on May 22, 2002, and denied the motion on May 23, 2002. The Third Circuit denied a certificate of appealability on March 3, 2003; Medina did not make any sentencing-related arguments in this application to the Third Circuit.

⁵Medina points out that he did not sign the amended § 2255 motion, in violation of the Rules Governing Section 2255 Proceedings. However, Rule 2(b)(5) allows for the motion to be signed “by the movant or by a person authorized to sign it for the movant,” in this case, Medina’s attorney. Rules Governing § 2255 Proceedings 2(b)(5); *see also* Rules Governing § 2255 Proceedings 2(b) advisory committee’s notes (2004) (explaining that “Rule 2(b)(5) has been amended by removing the requirement that the motion be signed personally by the moving party. Thus, under the amended rule the motion may be signed by movant personally or by someone acting on behalf of the movant, assuming that the person is authorized to do so, for example, an attorney for the movant”). Furthermore, improper compliance with Rule 2(b) “does not preclude the district court, in its discretion, from exercising jurisdiction over the petitioner’s claims.” *Ferrara v. United States*, 456 F.3d 278, 295 (1st Cir. 2006) (citations omitted).

On August 29, 2003, five months after the Third Circuit denied his request for a certificate of appealability, Medina filed a petition to reopen his § 2255 motion. Medina argued that his sentence was, in reality, beyond the statutory maximum because he was not eligible for enhanced punishment as an armed career criminal, pursuant to the ACCA, 18 U.S.C. § 924(e). Medina appeared to argue two constitutional bases for attacking the sentence: 1) the improper imposition of the enhanced sentence constituted a deprivation of due process, and 2) the ineffective assistance of counsel at his sentencing for not raising this issue. (Def.'s Pet. to Reopen § 2255 Mot. 9.) Medina further argued that the petition to reopen was not a second or successive § 2255 motion because, read liberally, Medina's original *pro se* § 2255 motion raised ineffective assistance of counsel at sentencing. (*Id.* at 11.) In its response filed on October 14, 2003, the government countered that Medina's petition to reopen was, in reality, a second or successive § 2255 motion. Medina filed a reply to the government's answer on October 30, 2003. On December 4, 2003, this court denied Medina's petition to reopen without prejudice to the right of Medina to seek a certification from the Third Circuit to allow a second or successive motion under 18 U.S.C. § 2255. This court held that there was no error in the collateral review process because Medina had waived any claims of ineffective assistance of sentencing counsel that might have been in his original § 2255 motion by filing an amended motion and an affidavit in support of his § 2255 motion, both of which did not raise any sentencing issues, and by failing to pursue any claim related to sentencing at the hearings on May 22 and 23, 2002. (Order Dec. 4, 2003.) Thus, what remained of Medina's petition to reopen was actually a second motion under § 2255, which the court was not entitled to hear absent a certification from the Third Circuit. (*Id.*) Medina appealed to the Third Circuit and, in this appeal, raised sentencing issues related to

the use of his underlying drug offenses as predicates for purposes of the ACCA. The Third Circuit denied a certificate of appealability on July 23, 2004, stating that “[j]urists of reason would not debate the conclusion that Appellant has failed to show that he is entitled to reopen his motion to vacate, set aside or correct sentence.” *United States v. Medina*, docket no. 99-00141, (Order 3d Cir. July 23, 2004).

On December 22, 2005, Medina filed the instant motion for relief from judgment or order pursuant to rule 60(b)(6).⁶ Medina’s principal argument is that the court failed to apply a liberal construction to his original *pro se* § 2255 motion and rule on all of the issues arguably presented therein. (Def.’s Rule 60(b) Mot. 1.) Medina alleges that he did not understand that appointed counsel had the authority to waive any of the issues in his *pro se* motion or that the amended motion would supercede his *pro se* motion. (*Id.* 2, 7.) Thus, he argues, the court had “an obligation to decipher and rule on all the issues presented in the [*pro se* § 2255 motion] absent an

⁶Medina made clear at the hearing, which I held on the motion on October 26, 2006, that he brings in the instant petition pursuant to section (6) of Rule 60(b). Rule 60(b), in relevant part, states:

On motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

explicit on the record waiver of those issues.” (*Id.* 3.)

Medina argues that this means the court should have considered and ruled on a sentencing issue involving the improper enhancement of his sentence based on the ACCA. He asserts that under *Taylor v. United States*, 495 U.S. 575, 602 (1990), *Shepard v. United States*, 544 U.S. 13, 15 (2005), and *United States v. Richardson*, 313 F.3d 121, 122 (3d Cir. 2002), the district court is required to take a “categorical” approach when determining whether a prior offense is a qualifying predicate for purposes of applying enhanced penalties under the ACCA. (Def.’s Rule 60(b) Mot. 9.) In other words, the district court may look “only at the fact of conviction and the statutory definition of the prior offense as defined by state law and not . . . the conduct and circumstances underlying the conviction.” (*Id.* at 10.) Medina points out that his prior drug offenses may not be considered ACCA predicates because the judgments in those criminal cases do not state the identity or quantity of the controlled substances involved, thus making it impossible to ascertain whether those drug offenses carried a maximum sentence of ten years or more because those offenses carried variable penalties. (*Id.* at 11.) Consequently, in the absence of qualifying predicates, the maximum sentence authorized for a violation of § 922(g) is ten years. (*Id.* at 11.) Medina argues that his counsel was ineffective for failing to direct the district court’s attention to these issues, but that the instant motion is not a successive or second § 2255 motion because read very liberally, Medina raised ineffective assistance at sentencing, even though he did not pinpoint the issue. (*Id.* at 15-16.) Medina also argues that the defect in sentencing cannot be waived or defaulted because it is a jurisdictional defect. (*Id.*) Additionally, Medina asserts that the defect makes the sentence invalid, pointing to case law stating that due process is violated where a sentencing court imposes a sentence based on false information or

assumptions. (*Id.* 13-14.)

The government has filed a limited response, arguing that Medina's motion should be summarily denied, but reserving the right to argue the merits should the motion not be summarily denied. The government contends Medina is in reality attempting to request relief from the judgment in his criminal case and that Rule 60(b) only provides for relief in civil cases. (Gov't's Resp. 4.) Next, the government argues that Medina's motion is an attempt to raise claims that were previously raised and litigated in his § 2255 motions and his petition to reopen. (*Id.*) Thus, Medina's motion is a second and successive petition, identical to his petition to reopen, and should be dismissed. (*Id.*) The government notes that Medina never raised the issue of ineffective assistance of sentencing counsel with respect to the ACCA qualifying predicates, but only issues relating to the consolidation of sentences. (*Id.* at 4.) Moreover, the government contends that Medina waived any claim regarding sentencing when he filed an affidavit, *pro se*, and amended motion, through counsel, both of which did not raise any sentencing issues. (*Id.* at 6.) Medina filed a reply to the government's response, setting forth essentially the same arguments as his original motion.

The court held a hearing on October 26, 2006 in order to clarify and hear argument on the issues brought up in Medina's 60(b) motion. After a discussion of both the procedural issues and the merits underlying Medina's sentencing claims, the court asked the parties to obtain the documents that a sentencing court would be permitted to utilize under the *Taylor* rule in order to determine whether those documents supplied sufficient information permitting the court to use those convictions as predicate offenses under the ACCA. After various submissions from the parties, the court obtained the various documents relating to Medina's underlying offenses,

including the charging documents and plea agreements, that the sentencing court would have been permitted to examine in making its enquiry into predicate offenses for purposes of ACCA enhancement.⁷ As explained further below, I will deny Medina’s Rule 60(b) motion because Medina’s *pro se* petition, read appropriately liberally, cannot be said to have put the court on notice of any of his current sentencing claims and, in any event, it was superseded by his amended petition. In addition, Medina’s substantive argument that his previous criminal convictions cannot serve as ACCA qualifying predicates is without merit because the documents the court is entitled to examine as per *Taylor* and its progeny sufficiently indicate the charges to which he pled guilty.

II. Discussion

Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, newly discovered evidence, or under 60(b)(6), the “the catch-all provision,” which provides that a “court may relieve a party or a party’s legal representative from a final judgment, order or proceeding . . . for any . . . reason justifying relief from operation of a judgment.” Fed. R. Civ. P. 60(b); *See Gonzalez v. Crosby*, 125 S.Ct. 2641, 2645-46 (2005). Only extraordinary, and special circumstances justify relief under Rule 60(b)(6). *Pridgen v. Shannon*, 380 F.3d 721, 728 (3d Cir. 2004) (internal quotation omitted). “Rule 60(b) does not confer upon the district courts a

⁷The court did not have before it the transcript of Medina’s sentencing hearing. Pursuant to the defendant’s inquiry, the Philadelphia Court of Common Pleas has advised that it does not routinely transcribe guilty plea colloquys and cannot now do so as the court reporter in this case has left that court and her location is unknown.

standardless residual of discretionary power to set aside judgments.” *Moolenaar v. Gov’t of Virgin Islands*, 822 F.2d 1342, 1346-1347 (3d Cir. 1987) (quotation omitted) (detailing case law from the Supreme Court and Third Circuit where extraordinarily circumstances have not been found: change in the law not extraordinary; legal error, inconsistencies with legal precedent, and impatience with pro se plaintiff’s lack of legal skill not extraordinary; changed circumstances not extraordinary; Commonwealth’s unwillingness to return money or entertain court proceedings not extraordinary; allegation that jury did other than what it intended not extraordinary; and denaturalization judgment erroneous and failure to appeal on advice of counsel and Alien Control Officer not extraordinary; and noting that extraordinary circumstance found where United States obtained a default judgment while holding the plaintiff in jail). In other words, “[r]elief under Rule 60(b)(6) may only be granted under extraordinary circumstances where, without such relief, an extreme and unexpected hardship would occur. *Sawka v. Healtheast, Inc.*, 989 F.2d 138, 140 (3d Cir. 1993) (citations omitted).

Both the Supreme Court and the Third Circuit have held that a prisoner may not circumvent the Antiterrorism and Effective Death Penalty Act (“AEDPA”) by styling an unauthorized successive habeas petition as a motion under Rule 60(b).⁸ *Gonzalez* 125 S.Ct. at 2647; *Pridgen*, 380 F.3d at 727. The Third Circuit has stated:

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

⁸AEDPA specifically prohibits prisoners from filing second or successive habeas petitions, subject to very specific exceptions and procedures articulated in the statute. *See* 28 U.S.C. § 2255.

the petitioner's underlying conviction, the motion should be treated as a successive habeas petition.

Pridgen, 380 F.3d at 727. The Supreme Court similarly 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. § 2254⁹ 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. *Gonzalez*, 125 S.Ct. at 2648. On the other hand, the Court stated that 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 defendant 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. § 2255 (referring to 28 U.S.C. § 2244(b)(3)(A)), a district court may not entertain these

⁹Although *Gonzalez* limited its holding to 28 U.S.C. § 2254 proceedings, courts that have addressed the issue have concluded that *Gonzalez* applies to § 2255 motions as well. See *United States v. Colon*, 2006 U.S. Dist. LEXIS 37221, at *7 n.2 (E.D. Pa. June 7, 2006) (citing *United State v. Whyte*, 172 Fed. Appx. 428, 429 (3d Cir. 2006) (nonprecedential); *United States v. Scott*, 414 F.3d 815 (7th Cir. 2005); *United States v. Terrell*, 141 Fed. Appx 849, 851 (11th Cir. 2005) (nonprecedential)); see also *United States v. Swint*, 2005 U.S. Dist. LEXIS 25318, at **12-13 (E.D. Pa. Oct. 27, 2005) (finding that "every court to address whether *Gonzalez* applies to habeas proceedings under 28 U.S.C. § 2255 has reached the same conclusion").

successive petitions unless the defendant obtains an order from the appropriate court of appeals authorizing the district court to consider the motion. *See Gonzalez*, 125 S.Ct. at 2645.

A. Medina's Procedural Claims

Medina does attack the manner in which the original habeas judgment was procured, arguing that the district court was obligated to decipher and rule on all claims brought by Medina in his original *pro se* motion. (Def.'s Rule 60(b) Mot. 1, 2, 4, 16.) However, there was not error or other extraordinary and special circumstances that warrant relief from judgment denying his § 2255 motion. Taking seriously the mandate "to give a liberal construction to *pro se* habeas petitions," *United States ex rel. Montgomery v. Brierley*, 414 F.2d 552, 555 (3d Cir. 1969) (citation omitted), it cannot be said that Medina's petition put the court on notice that he wished to pursue a sentencing claim that his prior offenses were improperly counted as qualifying predicates under the ACCA. Although Medina quotes language that invokes themes from *Taylor* and its progeny, *see supra* Part.I n.4, it is couched in his argument relating to the failure of sentencing counsel to consolidate his prior sentences. Moreover, the case from which he quotes, *United States v. Correa*, 114 F.3d 314 (1st Cir. 1997), concerns how a court is to determine whether prior offenses are related for sentence enhancement purposes; the language in that case from *Taylor* is used to support the First Circuit's holding that with respect to offenses that are temporally and factually distinct, charges based thereon should not be regarded as having been consolidated unless the original sentencing court entered an actual order of consolidation or there is some other persuasive indicium of formal consolidation apparent on the face of the record. *Correa*, 114 F.3d at 317. The court in *Correa* cites to *Taylor* to justify its direction to sentencing

courts to rely only on certain reliable documents. *Id.* (stating “insistence on a formal indicium of consolidation . . . is in keeping with the way in which we have treated analogous matters. After all, when a federal court looks to a prior state conviction in formulating its sentencing calculus, the court most often characterizes the previous conviction by means of a formal categorical approach”) (citing *Taylor*, 495 U.S. at 600-02). Thus, this language from Medina’s *pro se* motion was not sufficient to alert the court to his claims.

As this court already decided when it denied Medina’s petition to reopen his § 2255 motion, Medina’s subsequent amended motion superseded his *pro se* motion. The court found that any potential claim regarding ineffective assistance of sentencing counsel was waived as soon as the amended motion was filed without such a claim and, although he did not sign the amended motion, Medina signed the affidavit in support of his motion, which also did not mention ineffective assistance of sentencing counsel. (Order, Dec. 4, 2003.) Additionally, Medina was present at the hearing on his § 2255 motion and made no effort to pursue the claim of ineffective assistance of sentencing counsel. (*Id.*) The remaining arguments in Medina’s petition to reopen his § 2255 motion were claims attacking the constitutionality of the underlying conviction; therefore, the court denied the remainder of the petition with leave to seek a certificate of appealability from the Third Circuit, as it constituted a second or successive petition. *Id.*

In the instant motion, Medina argues that the court is permitted to revisit that holding because it was before the Supreme Court had decided in *Gonzalez* that a motion for reconsideration under Rule 60(b) is not necessarily a second or successive petition. (Def.’s Answer to Gov’t’s Resp. 9.) However, the court’s earlier decision remains valid. As I stated in

that order:

The Third Circuit, as well as courts in the Eastern District, have recognized that “[a]n amended complaint supercedes the original version” *Snyder v. Pascack Valley Hosp.*, 303 F.3d 271, 276 (3d Cir 2002); *see also Hemispherx Biopharma, Inc. v. Asensio*, 2000 WL 1052045, at *2 (E.D. Pa. 2000) (“An amended complaint supersedes an original complaint, and renders the original complaint of no legal effect.”). Defendant’s claim regarding ineffective assistance of sentencing counsel was waived as soon as the amended complaint was filed without such claim. Although defendant did not sign the amended complaint, he did file and sign an affidavit in support of his § 2255 motion, which did not mention the claim for ineffective assistance of sentencing counsel, signaling his awareness of the waiver of this claim.

(Order, Dec. 4, 2003.) Accordingly, the only way for this court to entertain Medina’s substantive claims that there was a defect in his sentencing is if Medina receives a certificate of appealability from the Third Circuit to file another § 2255 motion. *See* 28 U.S.C. § 2255. The mandates of AEDPA are clear: “A second or successive motion must be certified.” *Id.* However, the Third Circuit denied a certificate allowing Medina to file a successive petition on the same claims presented in the instant motion. While it may be that Medina is left without a forum in which to assert his new sentencing claims, in enacting AEDPA Congress was aware of “the practical realities of habeas filings, [and] the spectrum of federal interests that those realities implicate, as evidenced by the profound societal costs that attend the exercise of habeas jurisdiction,” *United States v. Bendolph*, 409 F.3d 155, 162 (3d Cir. 2005), and sought to “incorporate[] reforms to curb the abuse of the statutory writ of habeas corpus.” H.R. Rep. No. 104-5187, at 111 (1996). Rule 60(b) is simply not the appropriate vehicle for bringing claims related to the constitutionality of his sentencing; such claims are properly brought in a § 2255 motion.

Medina also appears to assert that based on the alleged sentencing defects, this court was without jurisdiction to impose the sentence. (Def.’s Rule 60(b) Mot. 13.) To the extent that

Medina contends that this court was without jurisdiction to impose his sentence, he is incorrect, and to the extent that he attempts to argue that the sentence was invalid or unconstitutional, his claims are barred by AEDPA. In *United States v. Colon*, 2006 U.S. Dist LEXIS 37221 (M.D. Pa. June 7, 2006), the defendant, in a Rule 60(b) motion, asserted that the district court lacked jurisdiction in the original criminal proceedings to impose a sentence. *Colon*, 2006 U.S. Dist. LEXIS 37221, at *8. The defendant argued that in Count I, the court had used the new version of the relevant criminal statute and that no quantity of drugs was specified, and in Count II, that the count did not include the element of intent, an essential element of the offense. *Id.* at **5-6, 9. The court rejected the defendant's arguments for reasons that apply to Medina's instant motion: "First, a lack of jurisdiction in the original criminal proceedings would not have destroyed the integrity of the 2255 proceedings. Second, and more importantly, none of these reasons is a ground for concluding that [the court] lacked jurisdiction in the criminal proceedings themselves." *Id.* at **9-10 (quoting *United States v. Cross*, 208 F.3d 308, 314 n.10 (3d Cir. 2002) (noting that 18 U.S.C. § 3231 confers jurisdiction on district court to try federal criminal cases and that 28 U.S.C. § 2255 confers jurisdiction to entertain § 2255 motions)); *see also United States v. Tucker*, 2005 U.S. Dist. LEXIS 37619, at *4 (M.D. Pa. Dec. 7, 2005) (stating that defendant's attempt to use Rule 60(b) must fail because the determination of drug quantity was not made in § 2255 proceedings, but at defendant's sentencing, and the drug-quantity issue is not a jurisdictional issue).

To support his claim that the sentencing defect is an "unwaivable jurisdictional defect," Medina cites several cases from various United States Courts of Appeal, (Def.'s Rule 60(b) Mot. 13), but those cases are inapplicable. All of the cases cited by Medina deal with waivers in the

context of guilty pleas and were brought in different procedural postures. For example, Medina cites *United States v. Spinner*, 180 F.3d 514 (3d Cir. 1999), where the defendant, on appeal, raised the fact that the indictment had failed to allege an effect on interstate commerce and thus was defective. *Spinner*, 180 F.3d at 516. The court held that by entering a guilty plea, the defendant had not waived this jurisdictional defect. *Id.* Another case that Medina cites, *United States v. Peter*, 310 F.3d 709 (11th Cir. 2002), discusses the defendant's appeal from a denial of a petition for a writ of error *coram nobis* where the defendant had pled guilty to a charge of conspiracy in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO") based on predicate acts of mail fraud. *Peter*, 310 F.3d at 711. The Supreme Court subsequently held that the acts the defendant had performed could not serve as predicates to the RICO violation, *id.* (citing *Cleveland v. United States*, 531 U.S. 12 (2000)), thus the district court was without jurisdiction to enter a guilty plea for a non-offense. *Peter*, 310 F.3d at 713. The *Peter* court also recognized collateral attack as the proper manner in which to challenge jurisdictional errors. *Id.* at 712. In *United States v. Michelsen*, 141 F.3d 867 (8th Cir. 1998), the court held that in his guilty plea the defendant had waived his right to appeal, but that did not alter his right to bring a "challenge under 28 U.S.C. § 2255 to an 'illegal sentence,' such as a sentence imposed in excess of the maximum penalty provided by statute or based upon a constitutionally impermissible factor such as race." *Michelsen*, 141 F.3d at 872 n.3; *see also United States v. Teeter*, 257 F.3d 14, 25 n.10 (1st Cir. 2001) (stating that a waiver should not be construed to bar an appeal if the trial court imposes a sentence exceeding the maximum penalty permitted by law). Thus, the cases cited by Medina would stand for the proposition that sentencing defects, such as that alleged here, are not waived but are properly brought on collateral attack, an avenue

currently foreclosed to Medina. *Cf. Pridgen*, 380 F.3d at 728 (3d Cir. 2004) (“Since legal error can usually be corrected on appeal, that factor without more does not justify the granting of relief under Rule 60(b)(6).”)

B. Medina’s Substantive Claims Under *Taylor*

In *Taylor*, the Supreme Court held that a court sentencing under the ACCA can look to statutory elements, charging documents, and jury instructions to determine whether an earlier conviction after trial was for a qualifying predicate offense. *Taylor*, 495 U.S. at 602; *see also Shepard*, 544 U.S. at 15 (articulating the holding of *Taylor*). The Court concluded that this categorical approach was mandated by an interpretation of § 924(e). *Taylor*, 495 U.S. at 600, 602. In *Shepard*, the Court held that in determining whether an earlier guilty plea necessarily admitted and supported a conviction for a predicate offense, the sentencing court was not permitted to look to police reports or complaint applications, but “is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.” 544 U.S. at 15. Thus, *Shepard* articulated what evidence the court is permitted to consider when making a finding that a prior conviction qualifies a defendant for a sentence enhancement under the ACCA.

In the instant case, the documents make clear that the offense conduct at issue actually constituted at least three qualifying offenses for purposes of ACCA enhancement. *See Shepard*, 544 U.S. at 16. Although the Probation Office relied on police reports, which is explicitly prohibited by *Shepard*, when producing the PSI (Gov’t Letter, Nov. 1, 2006), the materials upon

which the court may properly rely are sufficient to determine qualifying predicates. Medina's first qualifying predicate is burglary. (PSI ¶ 27.) The information¹⁰ and the plea agreement signed by Medina make clear that the offense to which Medina was pleading guilty was burglary. (Def. Letter, Nov. 1, 2006, Attach. 6.)¹¹ The information charges that Medina entered a building or occupied structure, or separately secured or occupied portion thereof, with intent to commit a crime therein, the actor not being licensed or privileged to enter, in violation of 18 Pa. Cons. Stat. § 3502. (*Id.*) The plea agreement states the charge as burglary and references § 3502. (*Id.*) Thus, based on these documents, the court finds that Medina committed the offense of burglary, which qualifies as a predicate "violent felony" under the ACCA. *See Taylor*, 495 U.S. at 599 (concluding that "a person has been convicted of burglary for purposes of a § 924(e) enhancement if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime").

Two of Medina's other convictions are also appropriately usable for purposes of ACCA enhancement as they each qualify as a "serious drug offense." (PSI ¶¶ 25, 26.) One of the two drug convictions, for an arrest on June 3, 1994, is described at paragraph 25 of the PSI and, based on the contents of the information and plea agreement, was for manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance—cocaine—in violation of

¹⁰The information used in the Pennsylvania criminal system is the equivalent of the indictment in the federal system.

¹¹The criminal complaint similarly states that Medina was charged with burglary. (Def. Letter, Nov. 1, 2006, Attach 6; Gov't Letter, Nov. 3, 2006.)

35 Pa. Stat. Ann. § 780-113(A)(30). (See Def. Letter, Nov. 1, 2006, Attach. 4.)¹² Because cocaine is a Schedule II narcotic drug, see Pa. Stat. Ann. § 780-104(2)(i)(4), Medina was subject to the penalty described at 35 Pa. Stat. Ann. § 780-113(f)(1.1), which consists of, *inter alia*, imprisonment not exceeding ten years. Thus, that offense counts as a “serious drug offense.” Medina’s last necessary qualifying predicate is for an arrest on December 14, 1994, described at paragraph 26 of the PSI. Based on the contents of the information and the guilty plea agreement, Medina was charged with and pled guilty to a violation of 35 Pa. Stat. Ann. § 780-113(A)(30) for manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance, in this instance, heroin. (See Def. Letter, Nov. 1, 2006, Attach. 5.)¹³ Because heroin is a Schedule I narcotic drug, see Pa. Stat. Ann. § 780-104(1)(ii)(10), Medina was subject to the penalty described at 35 Pa. Stat. Ann. § 780-113(f)(1), which consists of, *inter alia*, imprisonment not exceeding fifteen years. Thus, this offense is also a qualifying predicate.¹⁴

¹²The criminal complaint also states that Medina unlawfully possessed cocaine, of sufficient weight and/or under sufficient circumstances as to indicate an intent to deliver. (Def. Letter, Nov. 1, 2006, Attach. 4; Gov’t Letter, Nov. 3, 2006.)

¹³The criminal complaint similarly charges that Medina unlawfully possessed heroin of sufficient weight and/or under sufficient circumstances as to indicate an intent to deliver. (Def. Letter, Nov. 1, 2006, Attach. 5; Gov’t Letter, Nov. 3, 2006.)

¹⁴The government argues that the offense described at paragraph 24 may also be considered a qualifying predicate for purposes of ACCA enhancement. (Gov’t Letter, Nov. 15, 2006.) However, because in that instance Medina was charged with several drug offenses in the information, even though the criminal complaint only charged cocaine, it is not entirely clear to which drug offense he actually pled guilty. (Def. Letter, Nov. 1, 2006, Attach. 3.) The government asserts that reading the information, guilty plea agreement and written plea colloquy together, and computing the total maximum sentence stated in the guilty plea agreement for all the crimes charged, it is apparent that the crime to which Medina pled guilty was for a drug offense carrying a maximum penalty punishable by a period of imprisonment of ten years or more. (Gov’t Letter, Nov. 15, 2006.) Because use of this conviction would require an additional inferential step and because I already found Medina to have three qualifying

Medina argues that the two serious drug offenses at paragraphs 25 and 26 of the PSI may not be counted as predicates because *Shepard* requires an admission by Medina to the charge and as to the specific controlled substance and its quantity. (Def. Letter, Nov. 1, 2006.) Specifically, he argues that *Shepard* “lists the type of documents the judge may consult to find an admission by the defendant to the factual basis for the plea but it does not say that any of those documents is a substitute for a recorded admission by the defendant to all of the elements of the offense that would make the drug conviction one that can be counted to enhance Mr. Medina under the ACCA.” (Def. Resp. to Gov’t Letter, Nov. 21, 2006.) Further, had Medina pled guilty to the heroin offense that would be countable for an enhancement under the ACCA, a mandatory minimum sentence of two years would have been imposed, the absence of which creates a sufficient ambiguity for the question to be decided in Medina’s favor. (*Id.*) Medina argues that if he “was given some kind of break, it most likely was being allowed to plead to some offense that would not be countable as a serious drug offense under the ACCA.” (*Id.*)

Medina somewhat misstates the thrust of *Shepard*. The holding of *Shepard* did not alter the Supreme Court’s holding in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), confirmed by *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), that a sentencing judge can make a finding by a preponderance of the evidence that a prior conviction qualifies a defendant for a sentencing enhancement. *United States v. Coleman*, 451 F.3d 154, 159 (3d Cir. 2006). Rather, it specified what evidence the sentencing judge can consider when make such a finding.

predicates, I will not address the use of the conviction at paragraph 24 of the PSI. Although the PSI stated that due to Medina’s three drug trafficking offenses he would be classified as an armed career criminal, the government’s notice of prior convictions filed under 18 U.S.C. § 924(e) included the above-mentioned burglary charge. (Doc. No. 13.)

It is entirely possible for a defendant to plead guilty to an offense other than that originally charged, as Medina contends. *See, e.g., Taylor*, 495 U.S. at 601-602 (noting that “if a guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary”); *United States v. Day*, 465 F.3d 1262, 1267 (11th Cir. 2006) (concluding that the district court erred by basing its finding that the conviction was for generic burglary on the information, as the document charged a crime for which the defendant was not ultimately convicted). However, there is no evidence that that is what occurred in this instance and it is pure speculation to contend that Medina pled guilty to an entirely different offense.¹⁵ Rather, I find by preponderance of the evidence that the charging document and the plea agreement, appropriately read together, show that Medina pled guilty to offenses that qualify as “serious drug offenses” for purposes of ACCA enhancement. As a consequence, even if Medina were not procedurally barred from relief from the denial of his § 2255 petition, his substantive arguments are unavailing. Thus, Medina cannot show extraordinary, and special circumstances justify relief under Rule 60(b)(6) because no “extreme and unexpected hardship would occur” if his prior judgment were not set aside. *See Sawka* 989 F.2d at 140.

¹⁵The fact that Medina received only a one-to-two year sentence and that a mandatory minimum sentence on the heroin charge was not imposed is not determinative for several reasons. First, the mandatory minimum sentence provision for heroin, 18 Pa. Cons. Stat. Ann. § 7508(a)(7), was added by the legislature in 2000. 2000 Pa. Laws. 41. Thus, subsection (a)(7) and paragraphs (i) through (ii) were not in force when Medina was sentenced in 1995. (*Id.*) Moreover, even if the provision existed in 1995, paragraph (i) states that the two-year sentence must be imposed for one gram of heroin, 18 Pa. Cons. Stat. Ann. § 7508(a)(7)(i), but the exact quantity of heroin, in grams, involved in Medina’s case, is not specified in any of the documents permitted under *Shepard*. And lastly, there could merely have been an oversight by the attorney or judge involved or an intentional grant of leniency by the sentencing judge.

For the aforementioned reasons, Medina's motion for relief from judgment or order pursuant to Rule 60(b) of the Federal Rules of Civil Procedure is denied. An appropriate order follows.

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

UNITED STATES OF AMERICA

v.

STEVE MEDINA
a/k/a Steven Medina

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CRIMINAL ACTION
NO. 99-141

CIVIL ACTION
NO. 01-2771

Order

And now, this _____ day of December 2006, upon consideration of defendant Steve Medina's motion for relief from judgment or order pursuant to Rule 60(b) (Doc. No. 98), the government's response thereto (Doc. No. 100), defendant's reply to that response (Doc. No. 101), oral arguments, and the parties' post-hearing submissions, it is hereby ORDERED that the motion is DENIED.

William H. Yohn, Jr., Judge