

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

RAUL RODRIGUEZ	:	
	:	
Petitioner,	:	
	:	
v.	:	CRIMINAL ACTION
	:	
UNITED STATES OF AMERICA	:	NO. 09-614-2
	:	
Respondent.	:	

MEMORANDUM

Tucker, J.

October 10, 2017

Before the Court are Petitioner Raul Rodriguez’s Motion to Review Sentence Pursuant to F[ed]. R. Civ. P. Rule 60(b)(6) in Violation of [the] Laws of the United States (Doc. 256) (“Motion for Relief”), and Respondent United States of America’s Response Memorandum Opposing Petitioner’s Motion for Relief from Judgment Under F.R.C.P. 60(b) (Doc. 259). Upon consideration of the Parties’ submissions, Petitioner’s Motion for Relief is DENIED.

I. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner’s present Motion for Relief follows a number of Petitioner’s earlier submissions challenging his sentence and/or his underlying convictions. *See, e.g.*, Notice of Direct Appeal, Doc. 194;¹ Mot. Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, Doc. 216 (“Habeas Petition”);² Mot. to Review Sentence Imposed in Violation of the Law Pursuant to 18 U.S.C.S. § 3742(a)(1) and (2)

¹ On appeal, the Third Circuit affirmed the April 7, 2011 conviction and sentence by this Court. Third Circuit Judgment, Doc. 206.

² This Court denied Petitioner’s first Habeas Petition. Mem. and Order, Doc. 230. Although Petitioner sought to appeal this Court’s denial of his Habeas Petition, the Third Circuit declined to issue a certificate of appealability. Third Circuit Order, Doc. 261.

(“Motion to Review Sentence”).³ The facts of this case, therefore, should be well known to the Parties, and the Court will provide a factual and procedural background only to the extent necessary to address the Motion for Relief presently before the Court.⁴

A. The Underlying Case and Petitioner’s Guilty Plea

On April 21, 2010, a grand jury returned a superseding indictment against Petitioner Raul Rodriguez. Superseding Indictment, Doc. 90. The grand jury indicted Rodriguez on three counts: (1) conspiracy to distribute and possess with intent to distribute 100 grams or more of heroin, in violation of 21 U.S.C. § 846; (2) possession with intent to distribute heroin and aiding and abetting the distribution of heroin, in violation of 21 U.S.C. § 841(a)(1); and (3) reentry after deportation in violation of 8 U.S.C. § 1326(a) and (b)(2). *See generally* Superseding Indictment, Doc. 90. Petitioner initially pled not guilty.

However, on May 17, 2010, Petitioner notified the Court of his decision to change his plea from not guilty to guilty. That day, Petitioner entered a formal plea of guilty as to each of the three counts set forth in the Superseding Indictment. The Court conducted a thorough colloquy of Petitioner by, among other things, reviewing the charges against Petitioner, reminding the Petitioner of his right to stand trial and of the rights he would forfeit by pleading guilty, and reviewing with Petitioner the statutory maximum and mandatory minimum penalties that Petitioner might face as a result of pleading guilty. After the change of plea hearing, the

³ This Court denied Petitioner’s Motion to Review Sentence. Order, Doc. 249. The Third Circuit affirmed this Court’s denial of Petitioner’s Motion to Review Sentence. Third Circuit Order, Doc. 260.

⁴ This Court, as well as the Third Circuit, has previously provided lengthier recitations of the factual and procedural history in this case in prior opinions. *See, e.g., United States v. Rodriguez*, 486 F. App’x 283 (3d Cir. 2012) (affirming the judgment of sentence by this Court that is now the subject of Petitioner’s present Motion for Relief); *United States v. Rodriguez*, Crim. A. No. 09-CR-0614, 2014 WL 12703680 (E.D. Pa. Sept. 4, 2014) (denying Petitioner’s Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255).

parties were directed to submit their sentencing memoranda to the Court in advance of the sentencing hearing.

Accordingly, Petitioner's counsel submitted Petitioner's Sentencing Memorandum to the Court. Def.'s Sentencing Mem., Doc. 191. In the Sentencing Memorandum, Petitioner's counsel conceded that Petitioner had previously been convicted on a number of felony drug charges between August 1998 and May 2001. Def.'s Sentencing Mem. 3, Doc. 191. Indeed, even before Petitioner's May 2010 guilty plea, the Government notified Petitioner of the Government's intention to seek an enhanced sentence due to Petitioner's extensive criminal history by filing an Information Charging Prior Offenses pursuant to 21 U.S.C. § 851. Information Charging Prior Offenses, Doc. 71.

The Information Charging Prior Offenses described three of Petitioner's prior offenses: (1) a 2001 state felony drug conviction relating to an August 1998 drug incident; (2) a 2001 state felony drug conviction relating to a November 2000 drug incident; and (3) a 2002 state felony drug conviction relating to various drug offenses that took place between June 2000 and August 2001. Information Charging Prior Offenses, Doc. 71.

Later, on April 6, 2011, the Court held a sentencing hearing. At the conclusion of the hearing, the Court sentenced Petitioner to 292 months imprisonment (292 months on Counts I and IV and 240 months on Count VII, to run concurrently). J. in a Criminal Case, Doc. 193. The Court further imposed eight years of supervised release and a \$300 special assessment.⁵ J. in a Criminal Case, Doc. 193.

⁵ The Court later granted a Government request to amend the Court's Judgment and Commitment Order to reflect that as to Petitioner's conviction on Count VII for reentry after deportation, the term of supervised release would be three years. Order, Doc. 230.

B. Petitioner's Direct Appeal and Habeas Petition

Petitioner appealed his sentence to the Third Circuit. Petitioner's appeal challenged the substantive reasonableness of his 292-month term of imprisonment. *See Rodriguez*, 486 F. App'x at 284. On July 2, 2012, however, the Third Circuit affirmed this Court's judgment and ruled that Petitioner's sentence was substantively reasonable. *Id.*

On October 7, 2013, Petitioner filed his first Habeas Petition under 21 U.S.C. § 2255. Habeas Petition, Doc. 216. On September 4, 2014, the Court denied Petitioner's Habeas Petition. Mem. and Order, Doc. 230. Petitioner did not appeal the Court's denial of his Habeas Petition for approximately nine months, until June 3, 2015. Notice of Appeal, Doc. 238. On August 30, 2016, in view of the fact that Petitioner's Notice of Appeal was untimely, the Third Circuit issued an order denying Petitioner's application for a certificate of appealability. Third Circuit's Order, Doc. 261.

Despite the Third Circuit's decision to affirm the sentence imposed by this Court and the Third Circuit's lack of jurisdiction to review Petitioner's Habeas Petition, on April 13, 2016, Petitioner filed the present Motion for Relief. Mot. for Relief, Doc. 256. By this Motion for Relief, Petitioner again appears to challenge (1) the validity of his sentence relating to his conviction on Count IV—possession of heroin, and (2) the substance of his conviction on Count VII—reentry after removal. Mot. for Relief 5–6, Doc. 256.

II. STANDARD OF REVIEW

It is well-established that Federal Rule of Civil Procedure 60(b) is a rule of civil procedure and, therefore, has no applicability in matters of criminal law. For example, a "Rule 60(b) motion cannot be used to challenge the denial of a motion filed pursuant to

18 U.S.C. § 3582 [relating to the modification of an imposed term of imprisonment] because the Federal Rules of Civil Procedure do not apply to criminal proceedings.” *United States v. Birt*, 537 F. App’x 34, 35 (3d Cir. 2013) (citing *United States v. McCalister*, 601 F.3d 1086, 1087 (10th Cir. 2010)); *see also United States v. Martinez-Tull*, 226 F. App’x 239, 240 (3d Cir. 2007) (not precedential) (affirming the district court’s denial of a criminal defendant’s Rule 60(b) motion challenge to his criminal sentence because “Rule 60(b) of the Federal Rules of Civil Procedure . . . apply to civil cases, not criminal cases.”). Indeed, the Third Circuit has stated that “Rule 60(b) cannot be used as an independent means to relieve a defendant of a judgment in a criminal case, because the Federal Rules of Civil Procedure are not applicable to criminal cases . . . [Instead,] [t]he appropriate vehicle for a criminal defendant seeking to challenge his or her conviction or sentence is a motion under 28 U.S.C. § 2255.” *Gray v. United States*, 355 F. App’x 160, 162–63 (3d Cir. 2010).

If properly invoked in connection with a civil matter, however, Rule 60(b)(6) operates as “a catch-all provision that authorizes a court to grant relief from a final judgment for ‘any . . . reason’ other than those listed elsewhere in the Rule.” *Cox v. Horn*, 757 F.3d 113, 120 (3d Cir. 2014). The Third Circuit has cautioned, however, that “courts are to dispense their broad powers under 60(b)(6) only in ‘extraordinary circumstances where, without such relief, an extreme and unexpected hardship would occur.’” *Id.* (citing *Sawka v. Healtheast, Inc.*, 989 F.2d 138, 140 (3d Cir. 1993)). The United States Supreme Court has acknowledged that the threshold for entitlement to relief under Rule 60(b)(6) is remarkably high by explaining that the circumstances justifying relief under the rule “will rarely occur in the habeas context.” *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005).

III. DISCUSSION

In his Motion for Relief, Petitioner advances two grounds for relief. First, Petitioner asserts that his sentence of 292 months imprisonment for his conviction on Count IV (possession of heroin in violation of 21 U.S.C. § 841) violates the United States Supreme Court's decision in *Apprendi v. New Jersey* because the statutory maximum sentence for his crime was 240 months, fifty-two months fewer than the sentence he received. 530 U.S. 466 (2000). Second, Petitioner asserts that his conviction on Count VII (reentry after removal in violation of 8 U.S.C. § 1326(a) and (b)(2)) was substantively improper and legally defective because the Government failed to provide proof of his prior arrest upon a "warrant of deportation" such that the removal/deportation on which his conviction is based could not, as a matter of law, have supported his conviction. These grounds are unpersuasive.

The Court denies Petitioner's Motion for Relief for four reasons as set forth more fully below. First, the Petitioner may not use Fed. R. Civ. P. 60(b), which is a civil motion, to challenge his criminal conviction or sentence. Second, even if the Court were to consider Petitioner's Motion for Relief as a request for relief under 28 U.S.C. § 2255, the proper avenue for challenging a criminal conviction or sentence, Petitioner's Motion for Relief would violate the prohibition on successive habeas petitions. Third, as to Petitioner's specific assertion that his 292 month sentence for his conviction for Count IV (possession of heroin) constitutes an *Apprendi* violation, the sentence, in fact, does not violate *Apprendi* because the statutory maximum for the crime for which he was convicted was 360 months. Fourth, Petitioner has not established his entitlement to challenge the underlying removal order on which his conviction on Count VII is based.

1. Rule 60(b) Does Not Apply to Criminal Proceedings

In the present case, Petitioner has invoked Federal Rule of Civil Procedure 60(b) in an attempt to challenge his sentence relating to his conviction on one criminal count and in an attempt to challenge the substantive validity of his conviction on another. Such use of Rule 60(b), a rule of civil procedure, in connection with a criminal matter, such as Petitioner's sentence and conviction, violates the fundamental principle that civil rules apply only to civil matters. The Third Circuit has explicitly declared that "Rule 60(b) cannot be used as an independent means to relieve a defendant of a judgment in a criminal case, because the Federal Rules of Civil Procedure are not applicable to criminal cases [Instead,] [t]he appropriate vehicle for a criminal defendant seeking to challenge his or her conviction or sentence is a motion under 28 U.S.C. § 2255." *Gray*, 385 F. App'x at 162–63. Accordingly, Petitioner's Motion for Relief is, on its face, improper and, therefore, the Motion for Relief is denied. Even if the Court were to consider the Motion for Relief instead as a motion for relief under 28 U.S.C. § 2255, Petitioner's Motion for Relief still must be denied.

2. Petitioner's Motion For Relief Constitutes An Improper Successive Habeas Petition

As an initial matter, a Rule 60(b) motion may be treated as a habeas petition where the motion is "in substance[,] a habeas corpus application." *See Gonzalez*, 545 U.S. at 529 (treating a Rule 60(b) motion as a habeas petition under 28 U.S.C. § 2254); *United States v. Edwards*, 309 F.3d 110, 113 (3d Cir. 2002) (suggesting that even if the district court had deemed a Rule 60(b) motion as a habeas petition under 28 U.S.C. § 2255, that the motion would have been an unauthorized successive habeas petition). Whether a motion effectively constitutes a habeas corpus petition turns on whether the motion seeks "to collaterally attack the petitioner's underlying conviction." *Pridgen v. Shannon*, 380 F.3d 721, 727 (3d Cir. 2004).

After filing an initial habeas petition under 28 U.S.C. § 2255, subsequent habeas petitions are considered “successive.” 28 U.S.C. § 2255(h). Unless otherwise certified “by a panel of the appropriate court of appeals” as implicating one of two specific factual scenarios warranting review, a second or successive habeas petition is improper and will be denied. *Id.* A second or successive habeas petition can only be certified if a panel of the court of appeals finds that the petition relies upon:

- (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.

Id. Accordingly, the circumstances in which a petitioner might receive approval for the filing of a second or successive habeas petition are limited.

In the present case, Petitioner seeks to challenge his criminal sentence, which he already attempted to challenge as part of his initial Habeas Petition, and his underlying conviction on Count VII; therefore, Petitioner’s Motion for Relief is, in essence, a collateral attack on his underlying convictions and will be treated as a successive habeas petition. The Motion for Relief implicates neither of the narrow circumstances set forth under § 2255(h), thus, the Motion for Relief fails as an improper successive habeas petition. In addition to the fact that the Motion for Relief constitutes an improper successive habeas petition, the substantive arguments advanced by Petitioner are meritless.

3. Petitioner’s 292-Month Sentence Does Not Violate *Apprendi* Because The Statutory Maximum for Petitioner’s Crime Was 360 Months Incarceration

The penalties associated with a conviction under 21 U.S.C. § 841(a) are set forth under 21 U.S.C. § 841(b). Section 841(b)(1)(C) establishes a mandatory minimum sentence when a

defendant is convicted of a drug offense involving certain forms of controlled substances. Under § 841(b)(1)(C), a defendant “shall be sentenced to a term of imprisonment of not more than 20 years.” *Id.* If, however, a defendant commits a drug violation covered by the statute “after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years.” *Id.* Accordingly, the statutory maximum sentence under § 841(b)(1)(C) will shift upward if the defendant has previously been convicted of a felony drug offense.

For the higher mandatory minimum under § 841(b)(1)(C) to apply, the government must adhere to the provisions under 21 U.S.C. § 851, which sets forth the procedure for seeking a higher sentence based upon a defendant’s prior convictions. Section 851 provides that:

No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.

21 U.S.C. § 851(a)(1). While a defendant facing such information from the government may attack the validity of his prior convictions for purposes of a sentencing enhancement, where a defendant’s prior convictions occurred more than five years before the information, the defendant is barred from challenging the validity of those prior convictions. 21 U.S.C. § 851(e) (“No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.”).

In this case, the predicate convictions on which the Government relied in seeking an enhanced sentence were more than five years old by the time the Government filed its Information Charging Prior Offenses, therefore, Petitioner could not have challenged the validity

of the prior convictions. Accordingly, under § 841(b)(1)(C), in view of Petitioner’s prior felony drug convictions, the statutory maximum sentence that could have potentially been imposed upon Petitioner was 360 months, up from the baseline 240 months for a defendant without prior felony drug convictions. The Court’s imposition of a 292-month term of imprisonment for Petitioner’s conviction under 21 U.S.C. § 851 was, in fact, lower than the maximum potential sentence Petitioner could have received, and indeed, was the lowest sentence the Court could have imposed under the applicable guideline range.⁶

4. Petitioner Cannot Collaterally Attack The Underlying Removal Order On Which Count VII Is Based

The Third Circuit has stated that “[t]o collaterally attack [] a deportation order under 8 U.S.C. § 1326(d), (1) an alien must exhaust any administrative remedies that may have been available; (2) the deportation proceedings must have deprived the alien of the opportunity for judicial review; and (3) entry of the order must have been fundamentally unfair. ‘[A]ll three [requirements] must be met before an alien will be permitted to mount a collateral challenge to the underlying removal order.’” *United States v. Outram*, 199 F. App’x 138, 139 (3d Cir. 2006) (quoting *United States v. Torres*, 383 F.3d 92, 99 (3d Cir. 2004)). On the present facts, *Outram* is particularly instructive.

In *Outram*, the defendant pleaded guilty to an unlawful reentry after removal in violation of 8 U.S.C. § 1326(a) and (b)(2). *Id.* at 138. The district court sentenced the defendant to fifty-

⁶ Though Petitioner asserts that his 292-month term of imprisonment violates the United States Supreme Court’s rule in *Apprendi v. New Jersey*, as the Court has explained, Petitioner’s sentence was below the statutory maximum. 530 U.S. 466 (2000). Further, in asserting that his sentence violates the holding in *Apprendi*, Petitioner has overlooked the fact that the Supreme Court specifically carved out an exception to its rule by excluding from its holding any sentencing enhancements based upon prior convictions. *Id.* at 2362–63 (emphasis added) (providing that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond reasonable doubt.”).

seven months incarceration. *Id.* After first losing his appeal of his conviction, the defendant appealed his sentence and as part of his appeal attempted to challenge the validity of the underlying 1993 removal order on which his conviction for reentry after removal was based. *Id.* at 139.

The Third Circuit ultimately denied the defendant's appeal, not only because the defendant had failed to raise the issue of his 1993 removal order as part of his earlier appeal of his conviction, but also because the defendant failed to establish the three factors required to attack his underlying removal order collaterally. *Id.*

As in *Outram*, Petitioner's collateral challenge to his underlying removal is without merit. Notably, Petitioner has not previously raised any issue with respect to the underlying removal order on which his conviction for reentry after removal is based. Indeed, at the May 17, 2010 hearing on a Motion to Suppress Evidence, Petitioner specifically admitted his guilt for reentering the United States after removal. Tr. May, 17, 2010 Hr'g at 150:17–153:20. The absence of any challenge to Petitioner's underlying removal order, which became final on or about April 23, 2008, or approximately two years prior to the filing of the Superseding Indictment, belies Petitioner's lack of a basis on which to argue that his underlying removal was "fundamentally unfair." As to the other factors required to challenge an underlying removal order collaterally, Petitioner states no facts to support that he previously exhausted all administrative remedies that may have been available to him at the time of removal, nor has Petitioner stated facts to show that he was deprived of an opportunity for judicial review. In short, Petitioner has not established any one of the three required factors to challenge his removal order.

IV. CONCLUSION

For the foregoing reasons, Petitioner's Motion for Relief is DENIED. An appropriate Order follows.

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

RAUL RODRIGUEZ

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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CRIMINAL ACTION

NO. 09-614-2

ORDER

AND NOW, this __10th__ day of October, 2017, upon consideration of Petitioner Raul Rodriguez’s Motion to Review Sentence Pursuant to F[ed]. R. Civ. P. Rule 60(b)(6) in Violation of [the] Laws of the United States (Doc. 256) (“Motion for Relief”), and Respondent United States of America’s Response Memorandum Opposing Petitioner’s Motion for Relief from Judgment Under F.R.C.P. 60(b) (Doc. 259), **IT IS HEREBY ORDERED AND DECREED** that Plaintiff’s Motion for Relief is **DENIED**.¹

BY THE COURT:

/s/ Petrese B. Tucker

Hon. Petrese B. Tucker, U.S.D.J.

¹ This Order accompanies the Court’s Memorandum dated October 10, 2017.