

The Court must now decide whether the pending Rule 60(b)(3)(4) & (6) Motion, as supplemented by the Rule 60(b)(3)(4) & (6) Request, constitutes a second or successive habeas motion. If it is a successive habeas motion, petitioner must obtain an order from the Court of Appeals authorizing this Court to consider the motion.

For the reasons set forth below, the Court concludes that petitioner's Rule 60(b)(3)(4) & (6) Motion, as supplemented by the Rule 60(b)(3)(4) & (6) Request, must be construed as a successive habeas motion. Because petitioner has not obtained an order from the Court of Appeals authorizing this Court to consider the Rule 60(b)(3)(4) & (6) Motion, as supplemented by the Rule 60(b)(3)(4) & (6) Request, this action is transferred to the Court of Appeals pursuant to 28 U.S.C. § 1631 for a decision on the question whether to authorize this Court to consider the claims as a successive habeas petition.

II. BACKGROUND

The Court sets forth only an abbreviated procedural history as pertinent to the pending Rule 60(b)(3)(4) & (6) Motion, as supplemented by the Rule 60(b)(3)(4) & (6) Request. A detailed factual and procedural history is included in a previously reported opinion in this case. See Commonwealth v. Thompson, 674 A.2d 217 (Pa. 1996).

The Rule 60(b)(3)(4) & (6) Motion, as supplemented by the Rule 60(b)(3)(4) & (6) Request, arises out of petitioner's conviction by a jury of first-degree murder, aggravated assault, possession of an instrument of crime, and two counts of criminal conspiracy in 1991. The facts relevant to those convictions establish that on the night of December 19, 1990, petitioner, Junior Thompson, and a co-conspirator, "Danny," drove in a black Camaro to a parking lot on North 46th Street in Philadelphia, Pennsylvania. Petitioner and Danny exited from the car and

approached a group of people walking on the sidewalk of North 46th Street. Petitioner handed Danny a gun. Danny pointed the weapon at one member of the group, ordered him to lay down on the sidewalk, and shot him twice in the back. The three other people in the group fled the scene.

Police officers heard the gunfire as they patrolled nearby. They immediately drove to the scene and saw the black Camaro speed out of the parking lot on North 46th Street. At that time, the officers observed petitioner, who was in the passenger seat, retract his hand, which was holding a gun, through the car window. The officers then pursued the Camaro. After a high-speed chase, the Camaro pulled over, and the petitioner and his co-conspirator fled in opposite directions. The officers chased them on foot and succeeded in apprehending petitioner. A .30 caliber carbine was discovered on the passenger side seat of the Camaro. Ballistics tests linked the .30 caliber carbine with the shots fired at the crime scene.

Following the jury verdict, the state trial court sentenced petitioner to life imprisonment on the first-degree murder charge, with concurrent terms of five to ten years on the remaining charges. Petitioner filed several post-verdict motions. All motions were denied.

III. DISCUSSION

A. Petitioner's Rule 60(b)(3)(4) & (6) Motion and Rule 60(b)(3)(4) & (6) Request

Petitioner seeks relief under Federal Rule of Civil Procedure 60(b), sections (3), (4), and (6). Petitioner's Rule 60(b)(3)(4) & (6) Motion raises the following four related claims: (1) his case should be reconsidered in light of changes in the law of accomplice liability; (2) there is insufficient evidence to sustain a first-degree murder conviction; (3) he is actually innocent; and (4) his rights under the federal and state constitutions have been violated. The first of these

claims is the most developed in petitioner's submissions, and the Court will focus on it in this memorandum.

Petitioner argues that the jury instruction on accomplice liability at his trial denied him due process of law because it relieved the prosecution of its burden of proving each element of first-degree murder beyond a reasonable doubt. In advancing this argument, petitioner points to the fact that, following his trial, the Pennsylvania Supreme Court invalidated an accomplice liability instruction similar to the one given to the jury in his case. See Commonwealth v. Chester, 733 A.2d 1242, 1253 n.12 (Pa. 1999); Commonwealth v. Huffman, 638 A.2d 9961, 962 (Pa. 1994). In his Rule 60(b)(3)(4) & (6) Request, petitioner supplements the Rule 60(b)(3)(4) & (6) Motion by arguing that, after the Chester and Huffman decisions, the Third Circuit determined that jury instructions on accomplice liability, analogous to those given in his own trial, were erroneous in Laird v. Horn, 414 F.3d 419 (3d Cir. July 19, 2005). Based on this authority, petitioner asks the Court to reconsider his case in light of the intervening changes in the law on accomplice liability.

B. Standard for Bringing Motions Under Rule 60(b)(3)(4) & (6)

Rule 60(b) allows a party to seek relief from a final judgment under a limited set of circumstances, including fraud, mistake, and newly discovered evidence. See Fed. R. Civ. P. Rule 60(b).¹ The general purpose of the Rule is “to strike a proper balance between the

¹ Rule 60(b) provides that 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

conflicting principles that litigation must be brought to an end and that justice must be done.”

Boughner v. Secretary of Health, Education and Welfare, 572 F.2d 976, 977 (3d Cir. 1978).

“The decision to grant or deny relief pursuant to Rule 60(b) lies in the ‘sound discretion of the trial court guided by accepted legal principles applied in light of all the relevant circumstances.’”

United States v. Hernandez, 158 F. Supp. 2d 388, 392 (D. Del. 2001) (quoting Ross v. Meagan, 638 F.2d 646, 648 (3d Cir. 1981)).

To reopen a judgment under Rule 60(b)(3), a plaintiff must show “(1) that the adverse party engaged in fraud or other misconduct, and (2) that this conduct prevented the moving party from fully and fairly presenting his case.” Stridiron v. Stridiron, 698 F.2d 204, 207 (3d Cir. 1983). Such fraud must be demonstrated by “clear and convincing” evidence.” Brown v. Pennsylvania R.R. Co., 282 F.2d 522, 527 (3d Cir. 1960). A motion under Rule 60(b)(3) must be made within one year after the judgment, order, or proceeding was entered. Fed. R. Civ. P. 60(b).

To prevail on a Rule 60(b)(4) motion, a plaintiff must show that “the judgment is void.” Fed. R. Civ. P. 60(b)(4). A judgment is void and subject to relief under Rule 60(b)(4) only if the court that rendered it lacked jurisdiction to do so, or entered a decree that was beyond the court’s power to render. Marshall v. Board of Educ., 575 F.2d 417, 422 (3d Cir. 1978). A judgment is not void and not within the purview of Rule 60(b)(4) simply because it is erroneous or based upon precedent later deemed incorrect or unconstitutional. Id. A motion under Rule 60(b)(4) must be made within a “reasonable time” after the judgment, order, or proceeding was entered. Fed. R. Civ. P. 60(b).

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.

Rule 60(b)(6) “vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.” Klapport v. United States, 335 U.S. 601, 614-615 (1949); see also Coltec Industries, Inc. v. Hobgood, 280 F.3d 262, 273 (3d Cir. 2002) (describing Rule 60(b)(6) as a “catch-all”). Changes in decisional law generally do not support relief under Rule 60(b)(6). See Agostini v. Felton, 521 U.S. 203, 239 (1997) (observing that “intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)”). However, Rule 60(b)(6) relief may be, but is not necessarily, appropriate where there is a “a supervening change in governing law that calls into serious question the correctness of the court’s judgment.” United States v. Enigwe, 320 F. Supp. 2d 301, 308 (E.D. Pa. 2004) (citation omitted). This motion must be made within a “reasonable time” after the judgment, order, or proceeding was entered. Fed. R. Civ. P. 60(b).

Petitioner filed his Rule 60(b)(3)(4) & (6) Motion approximately fourteen years after his conviction by a jury, and approximately eight years after the denial of his habeas corpus motion under 28 U.S.C. § 2254. Because of the Court’s disposition of the action, it need not address the timeliness issue.

C. Applicability of the AEDPA Limitation on Second or Successive Habeas Petitions to a Motion Filed Under Federal Rule of Civil Procedure 60(b)

Before reaching the merits of petitioner’s Rule 60(b)(3)(4) & (6) Motion, as supplemented by the Rule 60(b)(3)(4) & (6) Request, the Court must determine whether petitioner’s Rule 60(b)(3)(4) & (6) Motion is, in essence, a second or successive 28 U.S.C. § 2254 habeas motion. Such a ruling is necessary because the Anti-Terrorism and Effective Death Penalty Act (AEDPA) limits a petitioner’s ability to bring a second or successive habeas motion.

Before filing a second or successive § 2254 habeas motion, a petitioner must obtain an order from the appropriate court of appeals authorizing the district court to consider the motion. See 28 U.S.C. § 2244(b)(3)(A).²

The Supreme Court and the Court of Appeals for the Third Circuit have ruled that a Rule 60(b) motion to vacate a judgment denying a habeas corpus motion under 28 U.S.C. § 2254 is construed as a second or successive habeas petition where the 60(b) motion seeks to challenge the underlying state conviction. See Gonzalez v. Crosby, 125 S.Ct. 2641 (June 23, 2005); Pridgen v. Shannon, 380 F.3d 721 (3d Cir. 2004). This Court examines these recent cases to determine their applicability to the instant motion.

At issue in Gonzalez v. Crosby was whether the petitioner could challenge the district court's prior ruling on the AEDPA statute of limitations through a Rule 60(b) motion after the federal courts had denied the petitioner habeas corpus relief from his state conviction under 28 U.S.C. § 2254. 125 S.Ct. at 2644-45. The Supreme Court concluded that the petitioner's Rule 60(b) motion was not the equivalent of a successive habeas petition because the motion attacked a defect in the integrity of the federal habeas proceedings, not the underlying state conviction. Id. at 2648. As a result, the Court held that the district court could rule on the Rule 60(b) motion without prior authorization by the court of appeals. Id. at 2651. However, the Court cautioned that "[u]sing Rule 60(b) to present new claims for relief from a state court's judgment of

²Section 2244(b)(3)(A) of the AEDPA provides in pertinent part: "Before a second or successive application . . . is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."

conviction – even claims couched in the language of a true Rule 60(b) motion – circumvents AEDPA’s requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts.” Id. at 2647 (citing § 2244(b)(2)).

The Gonzalez decision is consistent with the Third Circuit decision in Pridgen v. Shannon, 380 F.3d 721 (3d Cir. 2004). In Pridgen, the Court noted that, by enacting AEDPA, Congress intended to limit the ability of a prisoner to file “an endless stream of habeas petition,” and held that “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 Court concludes that, under Gonzalez and Pridgen, petitioner’s Rule 60(b)(3)(4) & (6) Motion, as supplemented by the Rule 60(b)(3)(4) & (6) Request, must be construed as a second or successive habeas corpus motion. By alleging constitutional violations and arguing that he should benefit from changes in the law of accomplice liability, petitioner collaterally attacks his underlying state conviction. Although petitioner styled his motion as a Rule 60(b)(3)(4) & (6) Motion to avoid the substantive gatekeeping provisions governing second or successive § 2254 habeas petitions, the petitioner’s collateral attack is precisely what the AEDPA sought to limit. As such, petitioner is required to file an application with the Court of Appeals seeking authorization for this Court to consider the Rule 60(b)(3)(4) & (6) Motion, as supplemented by the Rule 60(b)(3)(4) & (6) Request. See 28 U.S.C. § 2244(b)(3). Because the petitioner has failed to do so, this Court is precluded from reaching the merits of the Rule 60(b)(3)(4) & (6) Motion, as supplemented by the Rule 60(b)(3)(4) & (6) Request.

C. Transfer to the Third Circuit Court of Appeals

Under the circumstances presented, this Court must either dismiss petitioner’s Rule

60(b)(3)(4) & (6) Motion, as supplemented by the Rule 60(b)(3)(4) & (6) Request, as an unauthorized successive habeas petition, see Nunez v. United States, 96 F.3d 990, 991 (7th Cir. 1996); Peterson v. Brennan, 2004 U.S. Dist. Lexis 11860, *36 (E.D.Pa. 2004), or transfer the claim to the appropriate court of appeals pursuant to 28 U.S.C. § 1631 (2005),³ see Coleman v. United States, 106 F.3d 339, 341 (10th Cir. 1997); Peterson, 2004 U.S. Dist. Lexis at *36. To avoid further delay, the Court chooses the latter approach and orders petitioner's Rule 60(b)(3)(4) & (6) Motion, as supplemented by the Rule 60(b)(3)(4) & (6) Request, transferred to the United States Court of Appeals for the Third Circuit. The Court of Appeals must decide whether to authorize this Court to consider the Rule 60(b)(3)(4) & (6) Motion, as supplemented by the Rule 60(b)(3)(4) & (6) Request, as a successive habeas petition.

IV. CONCLUSION

For the foregoing reasons, the Court does not reach the merits of petitioner's Rule 60(b)(3)(4) & (6) Motion and Rule 60(b)(3)(4) & (6) Request.

The Court transfers petitioner's Rule 60(b)(3)(4) & (6) Motion, as supplemented by the Rule 60(b)(3)(4) & (6) Request, to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1631 for a decision on the question whether to authorize this Court to consider the Rule 60(b)(3)(4) & (6) Motion, as supplemented by the Rule 60(b)(3)(4) & (6)

³28 U.S.C. § 1631 (2005) provides in pertinent part:

Whenever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

Request, as a successive habeas petition.

An appropriate Order follows.

Apply The Same Standard Of Review Announced In Laird v. Horn To Support 60(b) Motion Claim Submitted By Petitioner Pursuant To Federal Rules Of Civil Procedure 60(b)(3)(4) & (6) And Claim Of Actual Innocence, is **TRANSFERRED** to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1631 for a decision on the question whether to authorize this Court to consider as a successive habeas motion petitioner's Motion To Vacate Judgment Of Sentence Pursuant To Federal Rules Of Civil Procedure 60(b)(3)(4) & (6) And An Claim of Actual Innocence, as supplemented by the Request by Junior Thompson to the Court To Apply The Same Standard Of Review Announced In Laird v. Horn To Support 60(b) Motion Claim Submitted By Petitioner Pursuant To Federal Rules Of Civil Procedure 60(b)(3)(4) & (6) And Claim Of Actual Innocence.

BY THE COURT:

JAN E. DuBOIS, J.