

Superior Court, and on March 9, 1990, the Superior Court affirmed the judgment of sentence. Discretionary review by the Pennsylvania Supreme Court was denied on March 22, 1991.

On May 24, 1991, Petitioner sought relief under the Post Conviction Relief Act (“PCRA”), 42 Pa. C.S.A. § 9541, et seq. Counsel was appointed and Petitioner’s argument was heard at a hearing. Petitioner’s PCRA petition was denied on November 22, 1991. Petitioner subsequently filed a timely appeal to the Superior Court. On November 24, 1993, the Superior Court affirmed the judgment of the PCRA court, finding Petitioner’s claim to be without merit. Petitioner then sought discretionary review by the Pennsylvania Supreme Court, which was denied on March 30, 1995.

On September 8, 1995, Petitioner filed in this court a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. As grounds for relief, Petitioner alleged violations of his Constitutional rights due to (1) illegally obtained testimony in violation of spousal immunity; (2) ineffective trial counsel; (3) improper admission of evidence of prior bad acts; and (4) prosecutorial misconduct in failing to present a witness for cross-examination. Amongst other specific allegations, Petitioner’s ineffective counsel claim alleged counsel’s failure to secure Petitioner’s presence during robing room conferences. The habeas petition was referred to Magistrate Judge Arnold C. Rapoport who subsequently recommended its dismissal, finding that certain grounds are procedurally defaulted and ineffective assistance of counsel in a state collateral proceeding is no basis for habeas relief. Despite Petitioner’s timely objections, on January 3, 1996, this court approved and adopted the Report and Recommendation of Magistrate Judge Arnold C. Rapoport and dismissed the petition. Petitioner subsequently appealed to the United States Court of Appeals for the Third Circuit, requesting an issuance of a Certificate of

Probable Cause for Appeal from the denial of his habeas petition. The Third Circuit denied Petitioner's request for a Certificate of Probable Cause on November 8, 1996, finding that Petitioner's claims were non-cognizable, procedurally defaulted, or failed to make a substantial showing of the denial of a federal right.

On December 18, 2000, Petitioner filed a second or successive petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, 00-cv-6388. On February 20, 2001, this court dismissed with prejudice four of Petitioner's five claims, finding that they were presented in the prior petition. Petitioner's fifth claim, relating to the demographics of the county in which he was tried, was dismissed without prejudice to Petitioner's right to seek an Order from the Third Circuit authorizing this court to consider this claim. On August 20, 2001, the Third Circuit denied Petitioner's request to file a second or successive habeas petition pursuant to 28 U.S.C. § 2244(b).

Presently before the Court is Petitioner's Motion Pursuant to Federal Rules of Civil Procedure 60(b). Petitioner claims that despite appearances, the instant motion is not effectively a successive habeas petition. Petitioner claims that he is entitled to relief because the transcript from his trial is incomplete. Specifically, Petitioner argues that his previously asserted "Batson" claim² would not have been determined procedurally defaulted had a transcription of the Prosecution's peremptory strikes been available.

2. See Batson v. Kentucky, 476 U.S. 79 (1986), where the United States Supreme Court held that the Equal Protection Clause of the Constitution forbids prosecutors from striking potential jurors based solely on the account of their race.

Petitioner states that the "nucleus of [his] Batson claim can be found in the original Habeas Corpus action ... filed September 8, 1995." (Petitioner's Mot. Pursuant to F.R.C.P. 60(b) at 5). Petitioner's Batson claim was first expressed in detail in his third pro se petition filed in the Court of Common Pleas of Delaware County under the Pennsylvania Post-Conviction Relief Act. (Respondents' Response Motion at 3).

II. DISCUSSION

Federal Rule of Civil Procedure 60(b) permits “a party to seek relief from a final judgment ... under a limited set of circumstances including fraud, mistake, and newly discovered evidence.”³ Gonzalez v. Crosby, 545 U.S. 524, 125 S.Ct. 2641, 2645 (2005). However, before proceeding with Petitioner’s Rule 60(b) motion, the Court must first determine whether or not the motion is, in essence, a second or successive habeas motion. This is because the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 28 U.S.C. §§2241-2266, addresses the right of all persons in state or federal custody to file a petition in a federal court seeking the issuance of a writ of habeas corpus. AEDPA contains a series of restrictions, one of which is AEDPA’s successive-petition provision, which imposes three requirements on second or successive habeas petitions:

First, any claim that has already been adjudicated in a previous petition must be dismissed. § 2244(b)(1). Second, any claim that has not already been adjudicated must be dismissed unless it relies on either a new and retroactive rule of constitutional law or new facts showing a high probability of actual innocence. § 2244(b)(2). Third, before the district court may accept a successive petition for filing, the court of appeals must determine that it presents a claim not previously raised that is sufficient to meet § 2244(b)(s)’s new-rule or actual-innocence provisions. § 2244(b)(3).

Gonzalez v. Crosby, 545 U.S. 524, 125 S.Ct. at 2646. In Gonzalez v. Crosby, the Supreme Court of the United States held that a Rule 60(b) motion challenging the underlying state conviction

3. F.R.C.P. 60(b) provides in relevant part:

“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 reasons justifying relief from the operation of the judgment”

qualifies as a second or successive habeas petition, thus subjecting the motion to AEDPA's successive-petition restrictions. Gonzalez, 545 U.S. 524, 125 S.Ct. at 2648; See, also, Pridgen v. Shannon, 380 F.3d 721, 727 (3d Cir. 2004).

In the instant case, Petitioner's motion pursuant to Rule 60(b) clearly challenges the underlying state conviction and can therefore only be construed as a second or successive habeas petition. Petitioner's Batson claim ultimately asserts a claim of error in his state conviction. Through this claim, Petitioner seeks relief of all prior judgments due to purported racial discrimination in the jury selection process. Likewise, Petitioner's specific arguments alleging fraud and violations of due process through the deliberate concealment of peremptory strikes from the trial transcript, while unfounded, nevertheless assert claims of error in Petitioner's underlying state conviction. As previously mentioned, a Rule 60(b) motion challenging the underlying state conviction is, in essence, a second or successive habeas and must be handled accordingly. Gonzalez, 545 U.S. 524, 125 S.Ct. at 2649; Pridgen, 380 F.3d at 727.

Under AEDPA, this Court may not consider a second or successive habeas corpus petition (or as in this case, a motion pursuant to Rule 60(b) determined to be, in essence, a second or successive habeas petition) prior to obtaining an order from the Court of Appeals for the Third Circuit. See AEDPA, 28 U.S.C. § 2244(b)(3). The Court must therefore dismiss Petitioner's motion pursuant to Rule 60(b) as an unauthorized habeas petition.

Petitioner has noted that Respondent's response was untimely (by 5 days). While Respondent should file in accordance with court orders, and untimely practice is not condoned,

the Court sees no prejudice caused by the untimely response found here. An appropriate order follows.

