

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

KEITH CATO HAMMIE,	:	
	:	
Petitioner,	:	
	:	
v.	:	CASE NO. 3:01CV960 (RNC)
	:	NO. 3:98CR130 (RNC)
UNITED STATES OF AMERICA,	:	
	:	
Respondent.	:	

RULING AND ORDER

Petitioner is serving two concurrent terms of imprisonment of 235 months for armed bank robbery, in violation of 18 U.S.C. §§ 2113(a) and (d), and criminal possession of a firearm, in violation of 18 U.S.C. §§ 921(g)(1) and 924(e). Having tried unsuccessfully to obtain relief from his sentence under 18 U.S.C. § 2255, he has filed a motion pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure asking the court to reopen the 2255 proceeding to consider an argument concerning the validity of his sentence that was not raised before. Because the relief he seeks is beyond the scope of Rule 60(b)(6), the motion is denied.

Petitioner's new argument challenges the court's reliance on a juvenile adjudication to increase his mandatory minimum sentence on the firearms violation from ten years to fifteen years, as provided by the Armed Career Criminal Act of 1984 for persons who have three prior convictions for violent felonies.

18 U.S.C. § 924(e).<sup>1</sup> Petitioner contends that relying on the juvenile adjudication to sentence him as an armed career criminal violated the constitutional rule, subsequently announced by the Supreme Court in Apprendi, 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 a reasonable doubt.” Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). He contends that his juvenile adjudication does not fall within the “prior conviction” exception to Apprendi because he had no right to a jury trial.<sup>2</sup>

The government argues in opposition that Rule 60(b)(6) cannot be used to reopen petitioner’s 2255 proceeding to enable the court to consider this new challenge to the validity of his

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<sup>1</sup> Petitioner stipulated that he was subject to sentencing as an armed career criminal based on two prior adult convictions for armed robbery, and one prior juvenile adjudication for armed robbery. In addition to increasing the mandatory minimum sentence for the firearms violation under 18 U.S.C. § 924(e), petitioner’s status as an armed career criminal required that he be sentenced in accordance with U.S.S.G. § 4B1.4, which served to increase his total offense level from 25 to 31, his criminal history category from IV to VI, and ultimately his guideline range from 84-105 months to 188-235 months. See Presentence Report ¶¶ 20, 29.

<sup>2</sup> Whether a non-jury juvenile adjudication falls within the “prior conviction” exception is an issue the Second Circuit has yet to consider. The Third, Eighth and Eleventh Circuits have held that such adjudications do fall within the exception. See United States v. Burge, 407 F.3d 1183, 1187-91 (11<sup>th</sup> Cir. 2005); United States v. Jones, 332 F.3d 688, 694-96 (3d Cir. 2003); United States v. Smalley, 294 F.3d 1030, 1031-33 (8<sup>th</sup> Cir. 2002). The Ninth Circuit has held that they do not. See United States v. Tighe, 266 F.3d 1187, 1192-95 (9<sup>th</sup> Cir. 2001).

sentence because doing so would circumvent the strict gate-keeping requirements applicable to second or successive habeas applications.<sup>3</sup> This argument is correct. As the Supreme Court recently clarified, Rule 60(b) may be invoked to reopen a habeas proceeding only to challenge the integrity of the habeas proceeding itself; when the motion raises a new ground for attacking the underlying sentence or conviction, it must be treated as a second or successive habeas application. See Gonzales v. Crosby, 125 S. Ct. 2641 (June 23, 2005).<sup>4</sup> See also Harris v. United States, 367 F.3d 74, 77 (2d Cir. 2004); Gitten v. United States, 311 F.3d 529, 534 (2d Cir. 2002).

When, as in this case, a Rule 60(b)(6) motion to reopen a habeas proceeding presents a new ground for attacking the underlying conviction or sentence, the Second Circuit allows a district court to (1) treat the motion as a second or successive habeas petition and transfer it to the Court of Appeals for possible certification, or (2) deny the motion as beyond the

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<sup>3</sup> A second or successive habeas application cannot be filed unless a court of appeals first certifies that it contains either "(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." 28 U.S.C. § 2255.

<sup>4</sup> Though Gonzales decided the issue only for cases under 28 U.S.C. § 2254, its holding and rationale appear to apply equally to cases under § 2255. See United States v. Terrell, 2005 WL 1672122,\*2 (11<sup>th</sup> Cir. July 19, 2005).

scope of Rule 60(b). Harris, 367 F.3d at 82; Gitten, 311 F.3d at 534 (2d Cir. 2002). Forwarding petitioner's motion to the Court of Appeals would risk summary denial of his new challenge to his sentence based on Apprendi.<sup>5</sup> More importantly, it would risk summary denial of any subsequent (i.e. third) challenge he might make as an abuse of the writ. See Gitten, 311 F.3d at 533. In light of this, the motion is denied as beyond the scope of Rule 60(b).

#### Conclusion

Accordingly, petitioner's motion is hereby denied.

So ordered this 20<sup>th</sup> day of December 2005.

\s\  
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Robert N. Chatigny  
United States District Judge

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<sup>5</sup> See Bottone v. United States, 350 F.3d 59, 63 (2d Cir. 2003) (holding that "even if [petitioner] were able to bring a § 2255 petition that was not successive, this court's decision in Coleman v. United States, 329 F.3d 77 (2d Cir. 2003), [holding that Apprendi does not retroactively apply to § 2255 petitions filed after the Apprendi ruling], would foreclose his claims.").



