

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JOSE GENAO,
Petitioner,

vs.

C.A. No. 03-461L

UNITED STATES OF AMERICA,
Respondent.

MEMORANDUM AND ORDER

Before the Court is a Motion for Relief from Judgment Pursuant to Rule 60(b)(4), (5), and (6) to Reopen §[] 2255 Case No 2:97cv430^[1] in Light of a New Rule of Constitutional Law Decided in the Supreme Court 10-1001, and Request for an Appointment of Counsel (Doc. No. 29) ("Motion") filed by Petitioner Jose Genao, proceeding *pro se*. For the reasons stated below, the Motion is DENIED.

BACKGROUND

The Court briefly recites the relevant background and refers the reader to this Court's Memorandum and Order dated June 1, 2004 (Doc. No. 9), and the Government's Memorandum Opposing Defendant's Motion for Relief from Judgment (Doc. No. 32) for a more complete narration.

Genao was convicted, after a jury trial, on three counts of a superceding indictment on May 26, 2000. On August 31, 2000, he was sentenced to 262 months imprisonment on each count, to run

¹ Genao's first motion to vacate, set aside, or correct sentence was filed under C.A. No. 03-461L. His first motion for review under Rule 60(b) was filed in his criminal case, C.R. No. 99-105L. It is unclear, then, to what the above number refers, as the Court's docket reflects no connection between that case and Genao.

concurrently, followed by supervised release. Thereafter, he filed an appeal with the Court of Appeals for the First Circuit, which was denied.² Genao then sought a writ of *certiorari* from the Supreme Court, which was also denied.³

Subsequently, Genao filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. That motion was denied, as were his motion for reconsideration and appeal of the denial of the motion to vacate. Genao next filed a motion under Rule 60(b) requesting review of his sentence. That motion, too was denied, on the ground that, despite being denominated a motion to review, the motion was really a second or successive § 2255 petition, which required permission from the First Circuit to file. Genao subsequently requested such permission from the First Circuit, along with the appointment of counsel, which requests were denied in a Judgment issued on June 6, 2012.

DISCUSSION

Genao now seeks relief pursuant to Federal Rule of Civil Procedure 60(b)(4), (5), and (6)⁴ as well as 28 U.S.C. § 2255. He seeks to reopen

² See United States v. Genao, 281 F.3d 305 (1st Cir. 2002).

³ See Genao v. United States, 537 U.S. 901 (2002).

⁴ The portions of Federal Rule of Civil Procedure 60(b) on which Petitioner relies state that:

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

...

his previous § 2255 motion in light of a "new rule of constitutional law,"⁵ specifically the U.S. Supreme Court's ruling in Martinez v. Ryan, 132 S.Ct. 1309 (2012).

The Judgment of the First Circuit noted above reads as follows:

Petitioner Jose Genao's motion for appointment of counsel is denied. The Supreme Court ruling on which Petitioner relies, Martinez v. Ryan, 132 S.Ct. 1309 (2012), does not

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- (4) the judgment is void;
 - (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
 - (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b).

⁵ Section 2255 of Title 28 of the United States Code states, in relevant part, that:

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of-

...

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme and made retroactively applicable to cases on collateral review₁.

28 U.S.C. § 2255(f). Moreover, § 2255 also requires that:

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain-

...

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Id. § (h) (bold added).

create a constitutional right to appointed counsel in collateral proceedings nor extend to claims of ineffective assistance of *federal* trial counsel. Petitioner already obtained §2255 habeas review of the ineffective assistance of counsel claims he advanced regarding his federal criminal case.

We further deny Petitioner's application for leave to file a second or successive petition. Petitioner does not premise his petition on newly discovered evidence or a new rule of constitutional law and so fails to fulfill the requirements for relief under 28 U.S.C. §2244 and §2255(h).

Genao v. United States, No. 12-1673, Judgment (1st Cir. June 6, 2012).

It is clear from reading Genao's Motion that it is, in reality, a second or subsequent § 2255 petition.⁶ See Munoz v. United States, 331 F.3d 151, 152-53 (1st Cir. 2003)(holding that a motion brought under Rule 60(b) for relief from a judgment previously entered in a § 2255 case should be treated as a second or successive habeas petition if it constitutes a direct challenge to the constitutionality of the underlying conviction). The Court so finds. Further, Genao is doing,

⁶ Although the Court has construed Genao's Motion liberally, as it must, Estelle v. Gamble, 429 U.S. 97, 106 (1976)(citing Haines v. Kerner, 404 U.S. 519, 520 (1972)), clearly he is seeking to "vacate, set aside or correct [his] sentence," 28 U.S.C. § 2255(a).

in essence, exactly what the First Circuit told him he could not do. Accordingly, the instant Motion is DENIED. Genao's request for counsel is also DENIED.

SO ORDERED:

/s/Ronald R. Laqueux
Ronald R. Laqueux
Senior U.S. District Judge
DATE: 4/2/14