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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 02-40098-01-JAR
)	
CORDELL NICHOLS,)	
)	
Defendant.)	
)	
_____)	

ORDER DENYING DEFENDANT’S MOTION FOR RELIEF

This matter is before the Court on the defendant’s “Motion for Relief from Judgment Pursuant to Rule 60(b)(2), Newly Discovered Evidence.”(Doc. 250). After consideration of defendant’s arguments and applicable law, the Court is prepared to rule.

The defendant filed this motion for relief *pro se* on June 7, 2004, while his conviction was on direct appeal to the Tenth Circuit Court of Appeals. While this motion was pending, on July 6, 2004, the Tenth Circuit filed its order affirming the conviction on appeal. This motion seeks relief, on the basis of newly discovered evidence, pursuant to Rule 60(b)(2) of the Federal Rules of Civil Procedure. The defendant primarily argues that new evidence shows that prosecution witness Trooper Weigel did not investigate other accidents on the day of the traffic stop that initiated charges in this case. This, defendant argues, calls Trooper Weigel’s veracity into serious question. The defendant also argues that the Missouri Highway Patrol does not train its officers to use a stopwatch to evaluate whether someone

is following another vehicle too closely. Defendant apparently contends that this is also new evidence that challenges the testimony of Kansas Highway Patrol Trooper Weigel.

Rule 60(b) provides relief from civil judgments, not criminal judgments.¹ Rule 60 simply provides no relief to defendant from his criminal conviction and judgment. Thus, the Court will deny this motion. In light of the nature of the defendant's challenges to his conviction, this motion could be construed as a collateral attack pursuant to 28 U.S.C. § 2255. However, the Court declines to treat this as a § 2255 motion. Were the Court to characterize this as a § 2255 motion, it would effectively bar the defendant from bringing other claims, if any, under a motion for relief through § 2255. This defendant is *pro se* and may not understand that he gets but one opportunity to bring all claims of collateral attack under § 2255. The Court cannot find that the defendant intended to include all his claims in this motion for relief. As the Tenth Circuit held in *United States v. Kelly*,² if the court chooses to characterize a motion as one for relief under § 2255, the court must first notify the defendant, giving him an opportunity to cure, either by converting his motion to a § 2255 action including all claims, or allowing him to re-file the motion in a manner that could not be characterized as a habeas. The Court finds that although this motion could be characterized as a § 2255 action, it is not necessarily characterized as a § 2255.

IT IS THEREFORE BY THE COURT ORDERED that the Motion for Relief (Doc. 250) is **DENIED**.

¹*United States v. Josenberger*, No. 95-20081, 1999 WL 450958 (June 17, 1999 D. Kan.) (unpublished opinion).

²235 F.3d 1238 (10th Cir. 2000); *See also Josenberger*, No. 95-20081, 1999 WL 450958 (construing a 60(b) motion as a § 2255).

IT IS FURTHER ORDERED that this motion is not construed as a motion for relief under 28 U.S.C. § 2255.

SO ORDERED.

Dated this 10th day of August 2004.

S/ Julie A. Robinson
Julie A. Robinson
United States District Judge