

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-51004

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

RAYMOND ALFRED GAGNON,

Defendant - Appellant

Appeal from the United States District Court
for the Western District of Texas

ON MOTION FOR RECONSIDERATION AND REHEARING EN BANC

Before DAVIS, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:

() The Motion for Reconsideration is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

() The Motion for Reconsideration is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

() A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Priscilla A. Deuer

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-51004



A True Copy
Certified order issued Dec 20, 2017

Tyke W. Cayer

Clerk, U.S. Court of Appeals, Fifth Circuit

Plaintiff-Appellee

v.

RAYMOND ALFRED GAGNON,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas

O R D E R:

Raymond Alfred Gagnon, seeks a certificate of appealability (COA) to appeal the district court's denial of his Federal Rule of Civil Procedure 60(b)(3), (4) motion challenging the district court's initial dismissal of his 28 U.S.C. § 2255 as time barred. Gagnon's § 2255 motion challenged his conviction for transportation of child pornography. He contends that he is entitled to relief because the Government perpetuated fraud against the court during his initial § 2255 motion proceedings. He argues that the fraud resulted in a defect in the integrity of the § 2255 proceedings, and, therefore, the district court erred in denying his motion for the same reasons that it denied his earlier Rule 60(b) motion.

The issuance of a COA requires "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Gagnon must show that "a jurist

No. 16-51004

of reason could conclude that the district court's denial of [the Rule 60(b)] motion was an abuse of discretion." *Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011).

Insofar as Gagnon is challenging the district court's ruling on his § 2255 motion on the merits, he has failed to make a debatable showing that his claims are not successive. Nor has he made a debatable showing that his claims raised a defect in the integrity of the § 2255 proceedings that may be addressed under Rule 60(b). His motion for a COA is DENIED. His motion to proceed in forma pauperis on appeal is also DENIED.

Gagnon has now filed three unsuccessful and largely repetitive postconviction motions challenging the dismissal of his § 2255 motion as untimely and has unsuccessfully sought COAs to appeal each of those rulings.

See *United States v. Gagnon*, No. 14-50136 (5th Cir. Sept. 16, 2014); *United States v. Gagnon*, No. 15-50140 (5th Cir. May 2, 2016). Gagnon is WARNED that filing frivolous, repetitive, or otherwise abusive pleadings in this court could result in the imposition of sanctions. See *Coghlan v. Starkey*, 852 F.2d 806, 817 n.21 (5th Cir. 1988). These sanctions may include dismissal, monetary sanctions, and restrictions on his ability to file pleadings in this court and any court subject to this court's jurisdiction.

/s/ Priscilla R. Owen

PRISCILLA R. OWEN

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT of TEXAS
SAN ANTONIO DIVISION

UNITED STATES of AMERICA,

Plaintiff-Respondent

v.

RAYMOND ALFRED GAGNON,
BoP # 6249-082,

Defendant-Movant

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Civil Action
No. SA-12-CA-1188-XR

Criminal Case
No. SA-8-CR-471-XR

O R D E R

Defendant Raymond Alfred Gagnon's Notice of Appeal (Docket Entry # 83) construed as a motion for certificate of appealability to appeal this Court's denial of his Fed. R. Civ. P. 60(b) Motion seeking relief from this Court's denial of his 28 U.S.C. § 2255 Motion to Vacate, *see* Fed. R. App. P. 22(b)(1), is **DENIED** for the reasons stated in this Court's Order denying the Rule 60(b) Motion (Entry # 81). Defendant's Rule 60(b) Motion and appeal fail to present "a substantial showing of the denial of a federal right" or a substantial showing this Court's procedural rulings are incorrect as required by Fed. R. App. P. 22 for a certificate of appealability. *See Slack v. McDaniel*, 529 U.S. 473, 483, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). Defendant's appeal fails to present a "good faith" non-frivolous issue as required by 28 U.S.C. § 1915(a)(3), and therefore Defendant is **DENIED** leave to proceed in forma pauperis on appeal. *See Coppedge v. U.S.*, 369 U.S. 438, 445, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962).

DATED: June 28, 2017


XAVIER RODRIGUEZ
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT of TEXAS
SAN ANTONIO DIVISION

FILED
JUL 21 2016
CLERK, U.S. DISTRICT COURT
BY DEPUTY CLERK
WESTERN DISTRICT OF TEXAS

UNITED STATES of AMERICA,

Plaintiff

v.

RAYMOND ALFRED GAGNON,
BoP Reg. # 06249-082,

Defendant

Civil Action
No. SA-12-CA-1188-XR

Criminal Case
No. SA-8-CR-471-XR

O R D E R

Defendant Raymond Alfred Gagnon's Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b) (Docket Entry # 79), seeking reconsideration of this Court's Order denying his 28 U.S.C. § 2255 Motion to Vacate his federal conviction, is **DENIED** for the reasons stated in this Court's Order denying his previous motion for relief from judgment (Entry # 72) and the Fifth Circuit Court of Appeals' decision affirming the denial of such relief (Entry # 78).

DATED: July 21, 2016


XAVIER RODRIGUEZ
United States District Judge

RECEIVED

FEB 17 2015

CLERK, U.S. DISTRICT CLERK
WESTERN DISTRICT OF TEXAS
BY _____ DEPUTY

UNITED STATES of AMERICA,

Plaintiff

v.

RAYMOND ALFRED GAGNON,

Defendant

UNITED STATES DISTRICT COURT
WESTERN DISTRICT of TEXAS
SAN ANTONIO DIVISION**FILED**

FEB 02 2015

CLERK, U.S. DISTRICT CLERK
WESTERN DISTRICT OF TEXAS
BY _____ DEPUTY CLERKCivil Action
No. SA-12-CA-1188-XRCriminal Case
No. SA-8-CR-471-XR**ORDER**

Before the Court is Defendant Raymond Alfred Gagnon's Motion for Relief Pursuant to Fed. R. Civ. P. 60. (Docket Entry # 69.)

Defendant Gagnon pleaded guilty in 2009 to transportation of child pornography in violation of 18 U.S.C. § 2252(a)(1), and was sentenced to 200 months and lifetime supervised release.

Gagnon filed a 28 U.S.C. § 2255 Motion to Vacate Federal Sentence in 2013 contending his guilty plea was unknowing and involuntary and his counsel was ineffective. This Court dismissed the § 2255 Motion as barred by the one-year statute of limitations. On January 30, 2014, this Court denied Gagnon's Motion to Alter or Amend Judgment Pursuant to Fed. Rs. Civ. P. 52(b) and 59(e). On appeal the Fifth Circuit concluded the record supported this district court's ruling that the § 2255 Motion was time-barred, and denied Gagnon's motion for a certificate of appealability. *U.S. v. Gagnon*, No. 15-50136 (5th Cir., Sept. 22, 2014).

Gagnon's current Motion for Relief Pursuant to Fed. R. Civ. P. 60 seeks relief from this Court's January 30, 2014 Order denying his Motion to Alter or Amend Judgment. Gagnon's current Motion states that he intends to show his conviction was the result of prosecutorial misconduct, including fraud, misrepresentations, evidence tampering, and withholding of exculpatory evidence.

Defendant Gagnon's Motion for Relief (Docket Entry # 69) is **DENIED**. Rule 60(b) applies to relief from a "final judgment, order, or proceeding," however, Defendant Gagnon specifically seeks relief from this Court's *Order* denying his Fed. Rs. Civ. P. 52(b) and 59(e) Motion to Alter or Amend Judgment. Rule 60(b) does not apply to relief from previous post-judgment orders denying

reconsideration because such orders are not final judgments or orders. In any event, Gagnon failed to show an error of law or fact or other grounds for relief from this Court's Order denying his Motion to Alter or Amend Judgment.

If Defendant seeks to challenge this Court's dismissal of his § 2255 Motion as untimely, his current filing can be construed as a Rule 60(b) motion for relief from judgment, and the Motion is **DENIED** for the reasons stated in this Court's Memorandum Decision (Entry # 58) and previous Order denying reconsideration (Entry # 62). Defendant failed to identify an error of law or fact or other grounds warranting relief from judgment. Furthermore construed as a Rule 60(b) Motion, the Motion is untimely. *See Fed. R. Civ. P. 60(c)(1)* (providing such a motion "must be made within a reasonable time").

In *U.S. v. Hernandes*, 708 F. 3d 680, 681-82 (5th Cir. 2013) (citing *Gonzalez v. Crosby*, 545 U.S. 524, 531-32, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005)), the Fifth Circuit held a motion for reconsideration re-asserting a § 2255 claim on the merits or presenting a new claim is in effect a successive § 2255 motion. To the extent Defendant re-asserts his claims on the merits or asserts new claims, Defendant's current Motion is construed as a successive § 2255 motion to vacate, which is **DISMISSED WITHOUT PREJUDICE** for lack of jurisdiction because the Court of Appeals has not authorized Defendant to file a successive § 2255 motion. *See 28 U.S.C. § 2244(a)*.

Furthermore, Gagnon cannot proceed pursuant to Fed. R. Civ. P. 60(d) to set aside this Court's judgment denying his § 2255 Motion through an independent action for alleged "fraud on the court," because such a claim is in effect a successive § 2255 claim that may not proceed without authorization of the Court of Appeals. *See U.S. v Baker*, 718 F.3d 1204, 1207-08 (10th Cir. 2013).

DATED: *February 2, 2015*


XAVIER RODRIGUEZ
United States District Judge