FILED

MAY 23 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MOSES SHEPARD, AKA Moses Antonio Shepard, Defendant-Appellant.	No. 19-15446 D.C. Nos. 4:15-cv-00504-CKJ 4:10-cr-01032-CKJ-1 District of Arizona, Tucson ORDER

Before: BYBEE and BEA, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 3) is denied because appellant has not shown "that (1) jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 60(b) motion and, (2) jurists of reason would find it debatable whether the underlying section 2255 motion states a valid claim of the denial of a constitutional right." *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015), *cert. denied* 136 S. Ct. 2462 (2016); *see also* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Any pending motions are denied as moot.

DENIED.

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, vs. Moses Shepard, Defendant/Movant.	No. CR 10-1032-TUC-CKJ CV 15-504-TUC-CKJ **ORDER**

Pending before the Court is the FRCvP 60(b) Motion for Relief from a Judgment or Order ("Motion") (CR 10-1032, Doc. 936) and the Final - Supplemental Motion for Relief from the Final Judgment, Order or Proceeding Under FRCvP 60(b)(4), citing to Gonzalez vs. Crosby, 545 US 524 (2005) ("Final Motion") (CR 10-1032, Doc. 937) (collectively, "the Motions") filed by Movant Moses Shepard ("Shepard"). The caption of the Motion provides CR 10-1032 as the filing case, with CV 15-504 in parentheses. This document was docketed in CR 10-1032. The caption of the Final Motion includes both case numbers, but was only docketed in CR 10-1032. The Court will address both the Motion and the Final Motion in both cases.

Shepard requests the Court reopen the final judgment, order or proceeding:

> due to the Court's failure to correct the Speedy Trial Act violation when it reset and renewed the 30/70 Day STA Clock, without having convened a new trial, thereby failing to provide Movant with his Constitutional [due process] rights, pertaining to the 18 USC § 3161(d)(1) hard-copy [subsequent indictment], thereby having created a [defect in the integrity of the habeas proceedings], namely, failure to correct a conviction where [the judgment is void], requiring relief, under [extraordinary circumstances justifying the reopening of the final judgment].

Final Motion (CR 10-1032, Doc. 937, pp. 1-2).

APPENDIX "B"

"On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding . . ." Fed.R.Civ.P. 60(b). Rule 60(b) "provides for reconsideration only upon a showing of[:] (1) mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) 'extraordinary circumstances' which would justify relief." *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1442 (9th Cir. 1991) (citing Fed. R. Civ. P. 60(b)). "Rule 60(b) has an unquestionably valid role to play in habeas cases." *Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005). However, "Rule 60(b), like the rest of the Rules of Civil Procedure, applies in habeas corpus proceedings under 28 U.S.C. § 2254 only "to the extent that [it is] not inconsistent with" applicable federal statutory provisions and rules. *Id.* at 529 (quoting Rule 11, Rules Governing Section 2254 Cases).

The Court has great discretion in considering motions under Rule 60(b). Only "a failure to correct clear error constitutes abuse of discretion." *McDowell v. Calderon*, 197 F.3d 1253, 1255 n.4 (9th Cir. 1999) (en banc) (per curiam) (emphasis in original). The Ninth Circuit Court of Appeals has expressly disavowed "any suggestion" in its prior cases "that a refusal to reconsider is an abuse of discretion merely because the underlying order is erroneous, rather than clearly erroneous." *Id.*; *see also Bakery Mach. & Fabrication, Inc. v. Traditional Baking, Inc.*, 570 F.3d 845, 848 (7th Cir. 2009) ("The district court has great latitude in making a Rule 60(b) decision because that decision is 'discretion piled on discretion.' "). Indeed, "[a] final judgment may be reopened only in narrow circumstances." *Henderson v. Shinseki*, 562 U.S. 428, 440 (2011).

It is not clear what Order Shepard is referring to in asserting the Court "reset and renewed the 30/70 Day STA Clock[.]" Final Motion (CR 10-1032, Doc. 937, p. 1). Rather, continuances in the criminal case were only granted when the Court found the ends of justice served by the granting of a continuance outweighed the interests of the public and Shepard in a speedy trial. *See e.g.* January 13, 2012 Order (CR 10-1032, Doc. 700). Rather, it appears Shepard is requesting the Court "rethink what the court ha[s] already thought through

– rightly or wrongly." *Above the Belt, Inc. v. Mel Bohanan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D.Va. 1983). This does not provide an appropriate basis to reconsider the Court's prior rulings. The Court declines to exercise its discretion to reconsider the judgments, Orders, or proceedings and will deny the Motions.

Additionally, the Court will also deny a certificate of appealability on the Motions for the same reason. *See United States v. Winkles*, 795 F.3d 1134, 1142 (9th Cir. 2015) (certificate of appealability is required to appeal the denial of a Rule 60(b) motion arising out of the denial of a section 2255 motion); *Johnson v. Montgomery*, No. LA CV 13-07189-VBF, 2014 WL 7338824, at *6 (C.D. Cal. Dec. 15, 2014) (citation omitted) ("The requirement to obtain a COA also applies to orders denying reconsideration of an order which denied or dismissed a habeas petition."). The Court finds that jurists of reason would not find it debatable whether the Motions stated a valid claim of the denial of a constitutional right and the Court finds that jurists of reason would not find it debatable whether the district court was correct in its procedural ruling.

Accordingly, IT IS ORDERED:

1. The FRCvP 60(b) Motion for Relief from a Judgment or Order (CR 10-1032, Doc. 936) and the Final - Supplemental Motion for Relief from the Final Judgment, Order or Proceeding Under FRCvP 60(b)(4), citing to Gonzalez vs. Crosby, 545 US 524 (2005) (CR 10-1032, Doc. 937) are DENIED.

2. A Certificate of Appealability shall not issue in this case.

3. The Clerk of Court shall docket this Order in both CR 10-1032 and CV 15-504.

DATED this 9th day of January, 2019.

Cindy K. Jorgenson
United States District Judge