

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 18-11523

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

HOSAM MAHER HUSEIN SMADI,

Defendant-Appellant

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

O R D E R:

Hosam Maher Husein Smadi, federal prisoner # 39482-177, seeks a certificate of appealability (COA) from the denial of a post-judgment motion in a 28 U.S.C. § 2255 proceeding that challenged his guilty plea conviction for the attempted use of a weapon of mass destruction, for which he is serving a 288-month sentence. *See* 28 U.S.C. § 2253(c). The district court construed Smadi's pleading—which invoked Federal Rule of Civil Procedure 60(b)(6)—as a successive and unauthorized § 2255 motion and dismissed it for lack of jurisdiction.

Although Smadi attempted to portray his claims as asserting procedural defects in the § 2255 proceedings, the Rule 60(b) motion was in effect a successive and unauthorized § 2255 motion because it presented new claims of ineffective assistance of trial counsel and because it effectively asked for a

second chance to have the merits decided favorably. *See Gonzalez v. Crosby*, 545 U.S. 524, 530-32 & n.4 (2005); *United States v. Vialva*, 904 F.3d 356, 360-61 (5th Cir. 2018), *petition for cert. filed* (Dec. 7, 2018) (No. 18-6992) and (Mar. 19, 2019) (No. 18-1222). Accordingly, reasonable jurists would not debate the district court's dismissal of the motion. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Further, even if Smadi is correct that his challenge to the district court's purported failure to explicitly address some of his § 2255 claims attacked only a defect in the integrity of his § 2255 proceedings, he has not shown that reasonable jurists would conclude that his claims deserve encouragement to proceed further. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The motion for a COA is therefore DENIED.

Smadi has now made several unsuccessful attempts to obtain relief from the judgment denying his § 2255 motion. Smadi 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/Edith H. Jones

EDITH H. JONES

UNITED STATES CIRCUIT JUDGE

A True Copy
Certified order issued Jul 02, 2019

Tyke W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

Appendix -B- (4 Pages) .

**HOSAM MAHER HUSEIN Smadi, #39482-177, MOVANT, v. UNITED STATES OF AMERICA,
RESPONDENT.**

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS
DIVISION**

2018 U.S. Dist. LEXIS 189294

CIVIL CASE NO. 3:12-CV-4154-M-B, (CRIMINAL CASE NO. 3:09-CR-294-M-1)

October 15, 2018, Decided

October 15, 2018, Filed

Editorial Information: Subsequent History

Adopted by, Post-conviction relief dismissed at, Without prejudice, Certificate of appealability denied Smadi v. United States, 2018 U.S. Dist. LEXIS 188711 (N.D. Tex., Nov. 5, 2018)

Editorial Information: Prior History

Smadi v. United States, 2013 U.S. Dist. LEXIS 70408 (N.D. Tex., Apr. 24, 2013)

Counsel {2018 U.S. Dist. LEXIS 1}Hosam Maher Husein Smadi, Petitioner, Pro se, Marion, IL.

For USA, Respondent: Brian W McKay, LEAD ATTORNEY, Gary C Tromblay, US Attorney's Office, Dallas, TX.

Judges: RENEE HARRIS TOLIVER, UNITED STATES MAGISTRATE JUDGE.

Opinion

Opinion by: RENEE HARRIS TOLIVER

Opinion

Findings, Conclusions And Recommendation Of The United States Magistrate Judge

Pursuant to 28 U.S.C. § 636(b) and Chief Judge Lynn's order of referral, filed August 27, 2018, Doc. 30, Smadi's *Motion to Vacate Judgment Pursuant to Fed. R. Civ. P. 60(b)*, Doc. 29, was referred to the undersigned United States magistrate judge for a recommended disposition. Upon review of the relevant pleadings and applicable law, the Rule 60(b) motion should be **DISMISSED WITHOUT PREJUDICE** for want of jurisdiction.

I. BACKGROUND

Hosam Maher Husein Smadi pled guilty to the attempted use of a weapon of mass destruction and was sentenced to 24 years' imprisonment and a five-year term of supervised release. *United States v. Smadi*, 3:09-CR-294-M(01) (N.D. Tex., Dallas Div., Oct. 28, 2010), app. *dism.* as *frivolous*, 446 F. App'x 679 (5th Cir. Oct. 21, 2011) (per curiam). Smadi unsuccessfully sought post-conviction relief under 28 U.S.C. § 2255. *Hosam Maher Husein Smadi v. United States*, No. 3:12-CV-4154-M-BK, 2013 U.S. Dist. LEXIS 69819, 2013 WL 2145591, at *1 (N.D. Tex. May 16, 2013). He subsequently moved twice under FED. R. CIV. P. 60(b) to set aside the judgment on his Section 2255 petition. However, because in actuality{2018 U.S. Dist. LEXIS 2} his Rule 60(b) motions were successive

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Section 2255 motions, they were dismissed for want of jurisdiction. Doc. 25; Doc. 28. Smadi attempted to file another successive Section 2255 motion but, upon its transfer to the Court of Appeals for the Fifth Circuit, leave to file was denied. See Smadi v. United States, No. 3:17-CV-0221-M-BK, 2017 U.S. Dist. LEXIS 29531 (N.D. Tex. 2017) (transferring successive motion to the court of appeals), *leave to file denied*, No. 17-10252, 2017 U.S. App. LEXIS 28007 (5th Cir. May 31, 2017).

Undeterred, Smadi again brings a motion under Rule 60(b)(6), seeking vacation of the judgment on his first Section 2255 motion. Doc. 29 at 1. He avers that the *Findings, Conclusions and Recommendation of United States Magistrate Judge*, accepted by the Court over his objections, "is not sufficiently specific as to the claims considered by the Court as to notice Smadi as to what was adjudicated, and, this is preventing him from seeking further post-conviction relief." Doc. 29 at 1. He contends that "the Court's unclear order is acting as a bar [to his] further pursuit of justice in this matter." Doc. 29 at 7. He specifically asserts:

- 1) The Court ruled in its order of April 24, 2013, that Smadi raised "a litany of difficult to discern claims." Smadi v United States 2013 US Dist LEXIS 70408 (ND Tx 2013). The Court then went on to construe challenges{2018 U.S. Dist. LEXIS 3} to the voluntariness of Smadi's guilty plea, and, appeal waiver, preclusion of mental capacity, and, entrapment, defenses, and, refusal to dismiss the indictment. Smadi. It also construed Equal Protection, Due Process, and, Brady/Giglio violations. Smadi. It then "liberally construed" ineffective assistance of counsel claims. Smadi.
- 2) From the above, it is not clear how the Court construed substantive preclusion of mental capacity, and, entrapment defenses, and, refusal to dismiss the indictment, claims, separate from an ineffective assistance of counsel claim, without those issues ever having been raised, and, adjudicated.
- 3) The Court also found that "various claims related to entrapment/mental defect defenses, dismissal of indictment in light of coercion / entrapment, unlawful arrest, desire to proceed to trial, errors in sentencing, and, possibly, a *Brady/Giglio* claim" were waived. Smadi. However, it does not specify what the contours of these claims are, only the general basis of the claims.
- 4) The Court then separately ruled upon "ineffective assistance of counsel" claims. Smadi. It is not clear if these are the same claims that the Court found to be waived, and, that this section{2018 U.S. Dist. LEXIS 4} is mere dicta, or, if the Court made some adjudication on the merits and, if so, what the parameters of those claims so adjudicated are. Doc. 29 at 3.

Smadi also avers that he "reasonably believes that he had substantive claims for ineffective assistance of counsel":

- (a) Counsel's performance fell below the standard, and was unprofessionally deficient and prejudice [sic] when counsel misinformed, or lied to him about his true applicable guideline and the mandatory sentence he was facing, counsel statement that Smadi was facing a mandatory life sentence is belied by the advisory guidelines table itself because Smadi was not facing a mandatory of a life sentence, instead he was misled and misadvised about the applicable guideline and the mandatory minimum sentence he was facing as "Required by Rule 11" of the Pea [sic] agreement. This led to counsel's failure to object to the incorrect guideline which deprived the defendant of effective representation, and was prejudice when he received a higher sentence as a result of incorrect sentencing guideline.

Here, Smadi does not attempt to challenge any procedural ruling; he merely challenges the Court's interpretation of the claims raised in his first Section 2255 Motion. Because Smadi does not raise any procedural defects in the Court's judgment, his Rule 60(b) motion is prohibited. See *Vialva*, 904 F.3d 356, 2018 WL 4375562 at *4 (rejecting Rule 60(b) motion where movants' "invocation of defective procedure rest[ed] substantially on a merits-based challenge"); *Hernandes*, 708 F.3d at 682 (finding that "Rule 60(b) motion is, in fact, a § 2255 motion in disguise," where it "attacks the federal [2018 U.S. Dist. LEXIS 8] court's previous resolution of a claim *on the merits*" (internal quotation marks omitted)).¹

Moreover, Smadi not only implicitly challenges the Court's previous resolution of his claims on the merits, but also appears to raise new grounds of ineffective assistance of counsel. Smadi's new grounds are also improper under Rule 60(b). See *Gonzalez*, 545 U.S. at 530-532 (concluding a Rule 60(b) motion advances a "claim" when it "add[s] a new ground for relief" or "attacks the federal court's previous resolution of a claim on the merits").

III. CONCLUSION

Even when liberally construed, Smadi's current Rule 60(b) motion, like his previous ones, is "a § 2255 motion in disguise." *Hernandes*, 708 F.3d at 682. Consequently, it is the equivalent of a second or successive application, which this Court lacks jurisdiction to review without the authorization of the United States Court of Appeals for the Fifth Circuit. See 28 U.S.C. § 2244(b)(3)(A)&(B) (before a petitioner may file a second or successive application in the district court, a three-judge panel of the court of appeals must determine whether the application makes the requisite *prima facie* showing); 28 U.S.C. § 2255(h) (same). Accordingly, Smadi's *Motion to Vacate Judgment Pursuant to Fed. R. Civ. P. 60(b)*, Doc. 29, should be **DISMISSED WITHOUT PREJUDICE** for lack of jurisdiction.

SO{2018 U.S. Dist. LEXIS 9} RECOMMENDED on October 15, 2018.

/s/ Renee Harris Toliver

RENEE HARRIS TOLIVER

UNITED STATES MAGISTRATE JUDGE

Footnotes

1.

The instant motion was filed more than five years after Smadi's Section 2255 motion was denied in May 2013. Thus, it was not filed within a reasonable time after the entry of judgment, as required. *Gonzalez*, 545 U.S. at 528 n. 2; FED. R. CIV. P. 60(c)(1). A delay of over two years renders a Rule 60(b) motion untimely, particularly when the petitioner knew the substance of his claims or arguments and provides no plausible reason for delay. *Scheanette v. Quarterman*, 309 F. App'x 870, 872 n. 2 (5th Cir. 2009) (*per curiam*); see also *First Republic Bank Fort Worth v. Norglass, Inc.*, 958 F.2d 117, 120 (5th Cir. 1992) (same).

Appendix - C - (1 page).

In re: HOSAM MAHER HUSEIN SMADI, Movant
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
2017 U.S. App. LEXIS 28007
No. 17-10252
May 31, 2017, Decided

Editorial Information: Prior History

Motion for an order authorizing the United States District Court for the Northern District of Texas, Dallas to consider a successive 28 U.S.C. § 2255{2017 U.S. App. LEXIS 1} motion. Hosam Maher Husein Smadi v. United States, 2017 U.S. Dist. LEXIS 29014 (N.D. Tex., Mar. 1, 2017)

Counsel In re: HOSAM MAHER HUSEIN SMADI, Movant, Pro se, Marion, IL.
Judges: Before HIGGINBOTHAM, JONES, and PRADO, Circuit Judges.

Opinion

PER CURIAM:

Hosam Maher Husein Smadi, federal prisoner # 39482-177, seeks authorization to file a successive 28 U.S.C. § 2255 motion challenging the sentence imposed following his guilty-plea conviction of attempted use of a weapon of mass destruction. To obtain authorization to file a successive § 2255 motion, Smadi must make a *prima facie* showing that his claims are based upon "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 "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." § 2255(h)(1), (2); see 28 U.S.C. § 2244(b)(3)(C).

Smadi contends that his proposed claims are based on *Molina-Martinez v. United States*, 136 S. Ct. 1338, 194 L. Ed. 2d 444 (2016). However, he has not shown that *Molina-Martinez* sets forth a new rule of constitutional law or that the Supreme Court has made the decision retroactively{2017 U.S. App. LEXIS 2} applicable on collateral review. See *In re Tatum*, 233 F.3d 857, 859 (5th Cir. 2000). Moreover, his claims of guidelines miscalculations are not cognizable under § 2255. See *United States v. Cervantes*, 132 F.3d 1106, 1109 (5th Cir. 1998).

In addition, Smadi proposes to assert various claims of entrapment, inducement, misconduct, fraud, and withholding of evidence by the Government; the denial of the right to allocute; due process violations; and ineffective assistance of counsel. However, he fails to identify any newly discovered evidence that would establish by clear and convincing evidence that no reasonable factfinder would have convicted him. See § 2255(h)(1).

Accordingly, IT IS ORDERED that Smadi's motion for authorization to file a successive § 2255 motion is DENIED.