APPENDIX A

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted April 12, 2019
Decided May 8, 2019

Before

WILLIAM J. BAUER, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

No. 18-3138

PHILIP HUGH WENTZEL,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 2:14-cv-01305-LA

Lynn Adelman,
Judge.

ORDER

Philip Wentzel has filed a notice of appeal from the denial of his motion under 28 U.S.C. § 2255 and an application for a certificate of appealability. We have reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED. All pending motions are DENIED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

PHILIP WENTZEL,
Petitioner-Defendant,

v.

Case No. 14-C-1305
(Criminal Case No. 12-CR-116)

UNITED STATES OF AMERICA
Respondent-Plaintiff.

ORDER

Petitioner Philip Wentzel has filed a motion to set aside the judgment against him as void, pursuant to Fed. R. Civ. P. 60(b)(4). Because the motion constitutes an unauthorized second collateral attack, I dismiss it for lack of subject matter jurisdiction.

I.

The government obtained an indictment charging petitioner with six counts of production of child pornography, one count of distribution of child pornography, one count of advertisement of child pornography, and one count of possession of child pornography. On September 20, 2012, he pleaded guilty to the six production counts. Prior to the sentencing hearing on December 21, 2012, based on the identification of an additional child-victim, the government filed an information charging another production count, and petitioner waived indictment and pleaded guilty to that charge as well. I then sentenced him to a total of 40 years in prison. He filed a notice of appeal but later moved to dismiss his direct appeal.

On October 17, 2014, petitioner filed a motion to vacate his sentence under 28 U.S.C. § 2255, raising a variety of claims. On October 30, 2014, I denied the motion on Rule 4 screening and dismissed the case. He took no appeal.

II.

On September 13, 2018, petitioner filed the instant Rule 60(b) motion. He argues that the court lacked subject matter jurisdiction to accept a second guilty plea on the information, as jeopardy attached on his plea to the original indictment.[1]

Federal prisoners are generally permitted just one collateral attack on their sentences. Second or successive motions must be certified by the court of appeals. 28 U.S.C. § 2255(h). Prisoners may not evade this limitation by inventive captioning; if the motion challenges the legality of a conviction or sentence it will be treated as a § 2255 motion, regardless of the label the prisoner plasters on the cover. Curry v. United States, 507 F.3d 603, 604 (7th Cir. 2007); Melton v. United States, 359 F.3d 855, 857 (7th Cir. 2004). If a Rule 60(b) motion is really a successive collateral attack, for which the prisoner has not obtained appellate permission, the district court must dismiss it for lack of jurisdiction. Curry, 507 F.3d at 604-05.

Petitioner's Rule 60(b) motion challenges the validity of his conviction and sentence, rather than some procedural irregularity in the handling of his first § 2255 action. See Gonzalez v. Crosby, 545 U.S. 524, 532-33 (2005). It accordingly constitutes a successive collateral attack. Petitioner does not indicate that he obtained authorization from the Seventh Circuit Court of Appeals.

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[1]His argument is difficult to follow. The conduct alleged in the information involved a different victim, and occurred on a different date, than the conduct alleged in the indictment to which he had previously pleaded guilty. The double jeopardy clause generally forbids multiple prosecutions for the same act; it does not prevent multiple punishments when the defendant commits the same type of crime against different victims at different times. Petitioner also alleges a breach of the plea agreement. The agreement required the government to dismiss counts 7-9 of the indictment, but petitioner points to nothing in the document forbidding the government from charging additional production counts based on the discovery of additional victims.

III.

THEREFORE, IT IS ORDERED that petitioner's motion (R. 7) is **DISMISSED**.

Pursuant to Rule 11(a) of the Rules Governing Section 2255 Proceedings, the district court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to a § 2255 petitioner. Because petitioner cannot make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), I decline to issue a COA.

Dated at Milwaukee, Wisconsin, this 24th day of September, 2018.

/s Lynn Adelman
LYNN ADELMAN
District Judge

APPENDIX C

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 28, 2019

Before

WILLIAM J. BAUER, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

No. 18-3138

PHILIP HUGH WENTZEL,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 2:14-cv-01305-LA

Lynn Adelman,
Judge.

ORDER

On consideration of petitioner-appellant's petition for panel rehearing with suggestion for rehearing *en banc* filed on May 21, 2019, in connection with the above-referenced case, both of the judges on the original panel have voted to deny the petition for panel rehearing, and no judge in active service has requested a vote on the petition for rehearing *en banc*. It is, therefore, ORDERED that the petition for panel rehearing and petition for rehearing *en banc* are DENIED.