APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JULY 24, 2019

United States Court of Appeals
Fifth Judicial Circuit
A True Copy
Certified order issued July 24, 2019
s/ Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50669

UNITED STATES OF AMERICA,
Plaintiff-Appellee
v.
PAUL ROSS EVANS,
Defendant-Appellant

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

O R D E R:

Paul Ross Evans, federal prisoner # 83230-180, pleaded guilty, pursuant to a written agreement under Federal Rule of Criminal Procedure 11(c)(1)(C), to a weapon-of-mass-destruction offense and was sentenced under the terms of his plea agreement. Evans now seeks a certificate of appealability (COA) from the denial of his motion for relief from the district court's judgment dismissing his amended 28

U.S.C. § 2255 petition. He also requests appointment of counsel. The district court construed Evans's pleading—which invoked Federal Rule of Civil Procedure 60(b)—as a successive and unauthorized § 2255 motion and dismissed it for lack of jurisdiction. *See* § 2255(h).

To obtain a COA, Evans must make "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). To satisfy this standard, Evans must demonstrate that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When, as here, the district court dismissed the motion on a procedural ground without reaching the merits, the movant must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Evans's amended § 2255 motion was voluntarily dismissed without prejudice prior to an adjudication on the merits. He now claims that his defense counsel fraudulently induced him to dismiss this motion. To the extent that Evans "attacks 'some defect in the integrity of the federal habeas proceedings,' rather than the resolution on the merits," reasonable jurists would debate the district court's dismissal of his Rule 60(b) motion as a second or successive petition. *In re Edwards*, 865 F.3d 197, 204 (5th Cir. 2017) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005)); *see also Slack*, 529 U.S. at 489 (holding that "a habeas

petition filed after an initial petition was dismissed" for failure to exhaust state remedies "without an adjudication on the merits is not a 'second or successive' petition").

Yet Evans has not made the required showing of a debatable constitutional claim. His amended § 2255 motion asserts that he was improperly sentenced as a career offender under the U.S. Sentencing Guidelines, citing to *Johnson v. United States*, 135 S. Ct. 2551 (2015). The record demonstrates, however, that Evans was not sentenced under the career offender provision of the Guidelines. Rather, Evans was sentenced in accordance with his Rule 11(c)(1)(C) plea agreement. Even if the district court had enhanced Evans's sentence based on his prior convictions, the definition of "crime of violence" in § 4B1.2(a) of the Guidelines is not unconstitutionally vague. *See Beckles v. United States*, 137 S. Ct. 886, 890 (2017).

In his COA motion, Evans also seeks to challenge his plea agreement. This claim was not raised in his amended § 2255 petition, and reasonable jurists would not debate the district court's dismissal of this new claim as second or successive. *See Edwards*, 865 F.3d at 203–04. Even if the district court's procedural ruling were debatable, Evans's underlying constitutional claim fails to meet the standard required for a COA. The statutory sentencing range for Evans's offense was not affected by his prior convictions and the sentence agreed to in his plea agreement does not exceed the statutory maximum. *See* 18 U.S.C. § 2332a(a); *cf. United States v. Peppers*, 899 F.3d 211, 225–26 (3d Cir. 2018) (holding that a Rule 11(c)(1)(C) plea agreement does not bar a collateral

attack under *Johnson*, 135 S. Ct. 2551, if the agreed-upon sentence exceeds the statutory maximum).

Accordingly, IT IS ORDERED that Evans's motion for a COA is DENIED. His request for the appointment of counsel is also DENIED.

s/ Stephen Higgonson
STEPHEN A. HIGGONSON
UNITED STATES CIRCUIT JUDGE

APPENDIX B — ORDER OF THE FIFTH CIRCUIT DENYING RECONSIDERATION, FILED SEPTEMBER 26, 2019

Date Filed: 09/26/2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50669

UNITED STATES OF AMERICA,
Plaintiff - Appellee
v.
PAUL ROSS EVANS,
Defendant - Appellant

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

Before JONES, HIGGINSON, and OLDHAM, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motion for a certificate of appealability and for appointment of counsel. The panel has considered appellant's' motion for reconsideration. IT IS ORDERED that the motion is DENIED.

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, FILED MAY 24, 2018

FILED
2018 MAY 24 AM 9:17

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Case No. A-07-CR-098-SS
No. A-16-CV-446-SS

PAUL ROSS EVANS,
Movant,
-vs-
UNITED STATES OF AMERICA,
Respondent.

ORDER

Before the Court is Movant Paul Ross Evans's Rule 60(b) Motion for Relief from Judgment. Evans previously challenged his conviction in a Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255. On May 25, 2017, the Court dismissed the motion as time-barred.

Evans's most recent motion is essentially a successive § 2255 motion. However, Evans has not obtained permission to file a successive motion to vacate, set aside or correct sentence. *See Gonzalez v. Crosby*, 545 U.S. 524, 530-32 & n. 4, 125 S. Ct. 2641 (2005). Because section 2244(b)(3)(A) "acts as a juris-

dictional bar to the district court's asserting jurisdiction over any successive habeas petition until [the Fifth Circuit] has granted the petitioner permission to file one," the district court is without jurisdiction to consider the action. *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000).

It is therefore **ORDERED** that the Rule 60(b) Motion for Relief from Judgment [#76], filed by Movant on May 21, 2018, is **DISMISSED WITHOUT PREJUDICE** for want of jurisdiction.

It is further **ORDERED** that a certificate of appealability is **DENIED**, as reasonable jurists could not debate the dismissal of the movant's motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

SIGNED this the 23rd day of May 2018.

s/ Sam Sparks
SAM SPARKS
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE DISTRICT COURT DENYING RECONSIDERATION, FILED JUNE 22, 2018

FILED
18 JUNE 22 AM 9:54

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Case No. A-07-CR-098-SS
No. A-16-CV-446-SS

PAUL ROSS EVANS,
Movant,
-vs-
UNITED STATES OF AMERICA,
Respondent.

ORDER

Before the Court is Movant Paul Ross Evans's "Motion to Alter or Amend a Judgment." Evans requests the Court to reconsider its May 23, 2018 Order, denying his "Rule 60(b) Motion for Relief from Judgment."

Evans previously challenged his conviction in a Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255. On May 25, 2017, the Court dismissed the motion as timebarred. The Federal Public Defender filed an additional § 2255 motion on behalf of Evans on June 23, 2016, raising a claim under *Johnson v. United States*, 135 S. Ct. 2551(2015). That motion was voluntarily dismissed

on May 23, 2017, after the Supreme Court issued its decision in *Beckles v. United States*, 137 S. Ct. 886 (2017), holding the Sentencing Guidelines are not subject to vagueness challenges under *Johnson*.

On May 21, 2018, Evans filed a "Rule 60(b) Motion for Relief from Judgment," attempting to assert a claim under *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). The Court held Evans's motion was essentially a successive § 2255 motion over which this Court has no jurisdiction.

In the instant motion Evans requests the Court to reconsider its order. He argues he is seeking reconsideration of the voluntary dismissal of the § 2255 motion filed by the Federal Public Defender. He argues the dismissal was obtained by fraud. He further argues his § 2255 motion was dismissed prematurely.

As explained previously, Evans has not obtained permission to file a successive motion to vacate, set aside or correct sentence. *See Gonzalez v. Crosby*, 545 U.S. 524, 530-32 & n. 4, 125 S. Ct. 2641 (2005). Because section 2244(b)(3)(A) "acts as a jurisdictional bar to the district court's asserting jurisdiction over any successive habeas petition until [the Fifth Circuit] has granted the petitioner permission to file one," the district court is without jurisdiction to consider the action. *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000). Accordingly, his motion is denied.

It is therefore **ORDERED** that the Motion to Alter or Amend Judgment [#78], filed by Movant on June 15, 2018, is **DENIED**.

It is further **ORDERED** that a certificate of appealability is **DENIED**, as reasonable jurists could not debate the dismissal or denial of the movant' s

motion on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

SIGNED this the 21st day of June 2018.

s/ Sam Sparks
SAM SPARKS
SENIOR UNITED STATES DISTRICT JUDGE