

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

January 31, 2020

**Christopher M. Wolpert
Clerk of Court**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL JACOBY,

Defendant - Appellant.

No. 19-1438
(D.C. Nos. 1:19-CV-02467-KHV &
1:10-CR-00502-KHV-1)
(D. Colo.)

ORDER*

Before **HOLMES, PHILLIPS**, and **EID**, Circuit Judges.

Michael Jacoby, proceeding pro se, seeks a certificate of appealability (COA) to appeal from the district court's order dismissing for lack of jurisdiction his motion for relief under 28 U.S.C. § 2255. He also requests in the alternative that this court grant him authorization to file a second or successive § 2255 motion. We deny both a COA and authorization.

I. Background

Jacoby was convicted in 2012 of eleven counts of wire fraud, three counts of money laundering, and two counts of bank fraud, and was sentenced to 108 months'

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

imprisonment and five years of supervised release. This court affirmed his convictions and sentence on direct appeal. *United States v. Zar*, 790 F.3d 1036, 1059 (10th Cir. 2015). He filed his first § 2255 motion in 2016, challenging his conviction on four different grounds. The district court denied relief and we denied a COA. *United States v. Jacoby*, 750 F. App'x 689 (10th Cir. 2018).

Jacoby filed the § 2255 motion at issue here in 2019. He claimed he had newly discovered evidence that, if presented to the jury, would have established his actual innocence. Because Jacoby filed this successive § 2255 motion without authorization from this court, the district court dismissed it for lack of jurisdiction. In the same order, the district court denied a COA and declined to transfer the motion to this court, noting that Jacoby's claims were not meritorious because his new evidence was not newly discovered.

II. COA

To appeal the district court's dismissal of his motion, Jacoby must obtain a COA. *See* 28 U.S.C. § 2253(c)(1)(B); *United States v. Harper*, 545 F.3d 1230, 1233 (10th Cir. 2008). We liberally construe his pro se opening brief and application for a COA. *See Hall v. Scott*, 292 F.3d 1264, 1266 (10th Cir. 2002). To obtain a COA where, as here, a district court has dismissed a filing on procedural grounds, the movant must show both "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). We need not address the constitutional question if

we conclude that reasonable jurists would not debate the district court's resolution of the procedural one. *Id.* at 485.

A prisoner may not file a second or successive § 2255 motion unless he first obtains an order from the circuit court authorizing the district court to consider the motion. 28 U.S.C. § 2244(b)(3)(A); *id.* § 2255(h). Absent such authorization, a district court lacks jurisdiction to address the merits of a second or successive § 2255 motion. *In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008).

In his application for a COA to this court, Jacoby does not dispute that he previously filed a § 2255 motion and that he did not obtain authorization from this court to file another one. Nor does he explain how the district court erred in its procedural ruling dismissing the motion for lack of jurisdiction. Instead, he argues the merits of his underlying newly discovered evidence claims. Because Jacoby has not shown that jurists of reason would debate whether the district court's procedural ruling was correct, we deny a COA.

III. Authorization

In the alternative, Jacoby seeks authorization to file a second or successive § 2255 motion based on new evidence. To be entitled to authorization, he must show that he has “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.” 28 U.S.C. § 2255(h)(1). But he does not offer any newly discovered evidence. Instead, he points to evidence that pre-dates his conviction and that he knew about long before he filed his

first § 2255 motion. Indeed, much of the supposedly new evidence he relies on in the motion at issue here is the same evidence that underpinned the ineffective assistance of counsel claims he raised in his first motion. Because he has not identified any newly discovered evidence, much less any that would establish his actual innocence, he has failed to meet the standard for authorization in § 2255(h)(1).

IV. Conclusion

We deny both a COA and Jacoby's alternative request for authorization. The denial of authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E). We grant Jacoby's motion for leave to proceed on appeal without prepayment of costs and fees.

Entered for the Court

A handwritten signature in black ink, appearing to read 'C. M. Wolpert', with a long horizontal stroke extending to the right.

CHRISTOPHER M. WOLPERT, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Kathryn H. Vratil

Civil Action No. 19-cv-02467-KHV
Criminal Action No. 10-cr-00502-KHV-1

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

MICHAEL JACOBY,

Defendant-Movant.

ORDER DENYING MOTION UNDER 28 U.S.C. § 2255

The matter is before the Court on defendant's *Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody* (Doc. #914) filed August 26, 2019. In his § 2255 Motion, Mr. Jacoby asserts a single claim of "actual innocence and miscarriage of justice." *Id.* at 4

The Court must construe the § 2255 motion liberally because Mr. Jacoby is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not be an advocate for a *pro se* litigant. *See Hall*, 935 F.2d at 1110. For the reasons stated below, the Court dismisses defendant's § 2255 motion for lack of jurisdiction.

BACKGROUND

Following a three-week jury trial, Mr. Jacoby was convicted of eleven counts of wire fraud, three counts of money laundering, and two counts of bank fraud. Doc. #520-1. He was sentenced to 108 months imprisonment and five years of supervised release. Doc. #652. On

direct appeal, the Tenth Circuit affirmed Mr. Jacoby's conviction and sentence. Doc. #797, *United States v. Zar*, 790 F.3d 1036 (10th Cir. 2015). The United States Supreme Court denied his petition for a writ of certiorari. Doc. #812.

On January 19, 2016, Mr. Jacoby filed a motion to vacate pursuant to 28 U.S.C. § 2255 asserting four claims for relief. Doc. #813. On November 9, 2017, the Court denied Mr. Jacoby's § 2255 motion because each of his claims lacked merit. Doc. #880. On December 4, 2017, Mr. Jacoby filed a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e), (Doc. #888), which the Court denied on December 22, 2017, (Doc. #892). Mr. Jacoby appealed the denial of his § 2255 motion, but the Tenth Circuit denied a certificate of appealability and dismissed the appeal. Doc. #910, *United States v. Jacoby*, 750 Fed. App'x 689 (10th Cir. Oct. 4, 2018). He requested a rehearing en banc, which the Tenth Circuit denied. Doc. #911. On February 25, 2019, the United States Supreme Court again denied a petition for writ of certiorari. Doc. #913. Mr. Jacoby filed the instant § 2255 motion on August 26, 2019. Doc. #914.

ANALYSIS

Because Mr. Jacoby filed a prior § 2255 motion that was denied on the merits, the instant § 2255 motion is a second or successive motion. Pursuant to § 2255(h) and 28 U.S.C. § 2244(b)(3), Mr. Jacoby must obtain an order from the Tenth Circuit authorizing this Court to consider it. *See In re Cline*, 531 F.3d 1249, 1250 (10th Cir. 2008) (per curiam). Absent such authorization, the district court lacks jurisdiction to consider the § 2255 motion. *See id.* at 1251.

Mr. Jacoby does not allege that he has obtained the necessary authorization from the Tenth Circuit to file a second or successive § 2255 motion. Therefore, the Court must either dismiss

the § 2255 motion for lack of jurisdiction or, if it is in the interest of justice, transfer the matter to the Tenth Circuit pursuant to 28 U.S.C. § 1631. *See id.* at 1252. The factors to be

considered in deciding whether a transfer is in the interest of justice include whether the claims would be time barred if filed anew in the proper forum, whether the claims alleged are likely to have merit, and whether the claims were filed in good faith or if, on the other hand, it was clear at the time of filing that the court lacked the requisite jurisdiction.

Id. at 1251. When “there is no risk that a meritorious successive claim will be lost absent a § 1631 transfer, a district court does not abuse its discretion if it concludes it is not in the interest of justice to transfer the matter.” *Id.* at 1252. In order to present a meritorious successive claim, a federal prisoner must demonstrate the claim is based on either “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,” 28 U.S.C. § 2255(h)(1), or “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable,” 28 U.S.C. § 2255(h)(2).

Mr. Jacoby fails to demonstrate that he is raising a claim based on newly discovered evidence pursuant to § 2255(h)(1) or a claim pursuant to a new and retroactive rule of constitutional law under § 2255(h)(2). Although he asserts that he has evidence that was not presented to the jury, he does not allege that such evidence was “newly discovered.” Therefore, the claim does not fall within § 2255(h)(1). *See United States v. Maravilla*, 566 F. App’x 704, (10th Cir. 2014) (§ 2255(h)(1) requires new evidence of actual factual innocence).

Because Mr. Jacoby fails to demonstrate that the claim which he seeks to assert is meritorious, the Court finds that a transfer is not in the interest of justice. *See In re Cline*, 531

F.3d at 1252. Instead, the § 2255 motion will be dismissed for lack of jurisdiction.

Under Rule 11(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts, a “district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” Under 28 U.S.C. § 2253(c)(2), the Court may issue a certificate of appealability “only if the applicant has made a substantial showing of the denial of a constitutional right.” Such a showing is made only when “a prisoner demonstrates ‘that jurists of reason would find it debatable’ that a constitutional violation occurred, and that the district court erred in its resolution.” *United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The Court denies a certificate of appealability because Mr. Jacoby has not made a substantial showing of the denial of a constitutional right.

The Court also certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith and therefore *in forma pauperis* status will be denied for the purpose of appeal. See *Coppedge v. United States*, 369 U.S. 438 (1962). If Mr. Jacoby files a notice of appeal he also must pay the full \$505 appellate filing fee or file a motion to proceed *in forma pauperis* in the United States Court of Appeals for the Tenth Circuit within 30 days in accordance with Fed. R. App. P. 24.

IT IS THEREFORE ORDERED that defendant’s *Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody* (Doc. #914) is **DISMISSED for lack of jurisdiction**.

IT IS FURTHER ORDERED that under 28 U.S.C. § 2253(c)(2) and Rule 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts, a certificate of appealability is **DENIED**.

IT IS FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal is **DENIED** without prejudice to the filing of a motion seeking leave to proceed *in forma pauperis* on appeal in the United States Court of Appeals for the Tenth Circuit.

IT IS FURTHER ORDERED that the Application to Proceed in District Court Without Prepaying Fees or Costs (Doc. # 915) is **DENIED as moot**.

DATED this 18th day of September, 2019 at Kansas City, Kansas.

BY THE COURT:

s/ Kathryn H. Vratil
KATHRYN H. VRATIL
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-02467-KHV
Criminal Action No. 10-cr-00502-KHV-1

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL JACOBY,

Defendant.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Order Denying Motion Under 28 U.S.C. § 2255 Motion [Docket No. 916] of United States District Judge Kathryn H. Vratil entered on September 18, 2019, it is

ORDERED that defendant's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody [Docket No. 914] is DISMISSED for lack of jurisdiction. It is further

ORDERED that, under 28 U.S.C. § 2253(c)(2) and the Rules Governing Section 2255 Proceedings for the United States District Courts, a certificate of appealability is DENIED. It is further

ORDERED that the corresponding Civil Action No. 19-cv-02467-KHV is dismissed.

Dated at Denver, Colorado this 18th day of September, 2019.

FOR THE COURT:

Jeffrey P. Colwell, Clerk

By s/ S. Grimm
Deputy Clerk