

Appendix (A)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-2425

Peter George Noe

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the District of Minnesota
(0:07-cv-01207-JMR)

JUDGMENT

Before KELLY, WOLLMAN, and STRAS, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

September 01, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,

Plaintiff,

v.

Case No. 03-cr-08 (JNE) (1)
ORDER

Peter George Noe,

Defendant.

A jury found Defendant guilty of conspiring to distribute methamphetamine and conspiring to distribute marijuana. The Court sentenced him to 480 months' imprisonment. Defendant appealed. The United States Court of Appeals for the Eighth Circuit affirmed. *United States v. Noe*, 411 F.3d 878 (8th Cir. 2005).

In 2007, Defendant filed a Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255. The Court denied the motion and issued a certificate of appealability. Defendant appealed. The Eighth Circuit affirmed. *Noe v. United States*, 601 F.3d 784 (8th Cir. 2010). It has since declined on several occasions to authorize Defendant to file a successive § 2255 motion.

Citing 18 U.S.C. § 3582(c)(1)(A), Defendant recently filed a "motion to amend sentence." He also moved for the appointment of counsel. Asserting that Defendant's "motion to amend sentence" is an unauthorized second or successive § 2255 motion, the United States opposed the motion. Defendant subsequently filed another motion for appointment of counsel. Later, he filed a reply, which raises new arguments for a reduced sentence, and a motion to amend his reply. For the reasons set forth below, the

Court (1) dismisses Defendant's "motion to amend sentence" as an unauthorized second or successive § 2255 motion, (2) denies his motions for appointment of counsel, (3) grants his motion to amend his reply, (4) construes his reply as a motion for a reduced sentence under § 3582(c)(1)(A), and (5) reserves ruling on his motion for a reduced sentence under § 3582(c)(1)(A) pending additional briefing.

Except under certain circumstances, "[t]he court may not modify a term of imprisonment once it has been imposed." 18 U.S.C. § 3582(c). A defendant may seek a reduced term of imprisonment by filing a motion "after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier." *Id.* § 3582(c)(1)(A). If the court finds that "extraordinary and compelling reasons warrant such a reduction" and "that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission," the court "may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable." *Id.*

In his "motion to amend sentence," Defendant asserted that "[s]everal courts have found that nothing in the statutory text of 3582(c) nor the sentencing guidelines precludes a judge from making its own determination of what are 'extraordinary and compelling' circumstances warranting a reduction of sentence." He asserted that such circumstances are present because his trial attorney sexually assaulted the mother of a co-defendant days

before the trial and conspired to sell methamphetamine during the attorney's representation of Defendant. Because his trial attorney was indicted after he appealed the denial of his § 2255 motion, Defendant maintained that he could not present his claims in his original § 2255 motion. Defendant asserted that the Court "should find that 'extraordinary and compelling' reasons exist to reduce [his] sentence under the compassionate release statute as amended by the First Step Act and order [him] to serve the remainder of his sentence on home confinement."

The government opposed Defendant's motion. It argued that Defendant's motion "is not a proper motion for compassionate release." The government reasoned that Defendant's motion, notwithstanding his invocation of § 3582(c)(1)(A), "has nothing to do with Noe's medical condition or any other recognized basis for compassionate release." The government maintained that Defendant's "motion actually is a section 2255 petition masquerading as a motion for compassionate release." The government asserted that Defendant's motion should be denied as an unauthorized second or successive § 2255 motion: "Because the defendant's motion has nothing to do with compassionate release, but rather is in reality a second or successive section 2255 petition for which Noe has received no pre-authorization from the Eighth Circuit, the motion should be summarily denied."

Defendant filed a reply. He asserted that he "is a non-violent drug offender with no true history of violence" and that the case against him was "greatly exaggerated." Acknowledging the government's recitation of § 3582(c)(1)(A)'s exhaustion requirement, Defendant asserted that the government did not claim he failed to exhaust

his administrative rights, that he does not need to exhaust them “because the claims [he] has raised deal[] with court issues so the BOP lacks discretion and so for [him] to ask would be futile,” and that he nevertheless exhausted his administrative rights. Defendant made numerous complaints about his trial attorney. Defendant asserted that he did not raise some of his claims in his original § 2255 motion because an individual who represented him then was not an attorney. Defendant stated that he has made extensive rehabilitation efforts, that he “has spent the majority of his time in a program or class,” and that none of the programs is required. He submitted several certificates, a list of programs he has completed, records of classes that he has taken, and a list of classes for which he is on a waiting list. Defendant concluded that the Court should grant his motion and “order resentencing.” He stated that resentencing him under the terms of a plea bargain he was offered would be fair to all parties involved.¹

One week after he submitted his reply, Defendant moved for leave to amend it. He sought to include as an exhibit to his reply an article that is apparently written by the defendant in *United States v. Marks*, 03-CR-6033L, 2020 WL 1908911 (W.D.N.Y. Apr. 20, 2020), *appeal docketed*, No. 20-1404 (2d Cir. Apr. 23, 2020). The Court grants Defendant’s motion for leave to amend his reply.

¹ In his “motion to amend sentence,” Defendant asserted that the government offered him a plea bargain and that “[t]he government, on record, told the Court [the government] did not feel Noe deserved more [than] 20 years.”

Motion to amend sentence and motions for appointment of counsel

“A post-conviction filing that fits the description of § 2255 . . . is a motion under § 2255, and subject to its restrictions, no matter what the pleader says.” *Rey v. United States*, 786 F.3d 1089, 1091 (8th Cir. 2015) (alteration in original) (quoting *Godoski v. United States*, 304 F.3d 761, 763 (7th Cir. 2002)). Section 2255 states:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a).

Although Defendant’s “motion to amend sentence” is not cast as a § 2255 motion, it “fits the description of § 2255.” He is in custody under sentence of this Court. Defendant asserted that his trial attorney sexually assaulted the mother of a co-defendant days before the trial and engaged in “the same type of crime” as Defendant. Thus, he seeks release based on claims that he “was deprived of his Sixth Amendment right to effective representation by conflict-free counsel.” *Kiley v. United States*, 914 F.3d 1142, 1144 (8th Cir. 2019); *see United States v. Lopesierra-Gutierrez*, 708 F.3d 193, 200-02 (D.C. Cir. 2013); *United States v. Hanoum*, 33 F.3d 1128, 1130-32 (9th Cir. 1994). Defendant’s claims resemble, in part, those he unsuccessfully attempted to present to the Eighth Circuit in his appeal from the denial of his original § 2255 motion. *Noe*, 601 F.3d at 792 (“Finally, Noe asks that we expand the certificate of appealability to consider a

variety of other claims, including those of actual innocence and a conflict of interest arising from Garcia's sexual relationship with Schultz's mother. . . . [W]e decline to expand the certificate."). The Court concludes that Defendant's "motion to amend sentence" is a § 2255 motion. *See Godoski*, 304 F.3d at 764 ("She is in custody and seeks relief from a criminal sentence on the ground that it was imposed in violation of the Constitution because her lawyer rendered ineffective assistance. So her claim arises under § 2255"); *cf. United States v. Arojojoye*, 806 F. App'x 475, 478 (7th Cir. 2020) ("Arojojoye's 'compassionate release' motion expressly sought a modification of his prison sentence based on his argument that the disparity between his sentence and his co-defendant's was unwarranted. This is a challenge to the length of the prison sentence that was made on direct appeal and in the first § 2255 motion. And 'any post-judgment motion in a criminal proceeding that fits the description of a motion to vacate, set aside, or correct a sentence set forth in the first paragraph of section 2255 should be treated as a section 2255 motion.'"); *United States v. Handerhan*, 789 F. App'x 924, 926 (3d Cir. 2019) (per curiam) ("We note . . . that § 3582(c)(1)(A) provides a mechanism to seek a reduction in the term of a sentence, not to challenge its validity. The terms of neither the statute nor its policy statement provide for release on the basis of arguments like Handerhan's that were or could have been raised on direct appeal or in a § 2255 motion, let alone for defendants like Handerhan who already have completed a § 2255 proceeding and who are subject to the restrictions on filing second or successive § 2255 motions.").

"[A] second or successive § 2255 motion must now be authorized 'by a three-judge panel of the court of appeals.' This rule may not be evaded 'by simply filing a

successive § 2255 motion in the district court.”” *Baranski v. United States*, 880 F.3d 951, 955 (8th Cir. 2018) (citation omitted) (quoting 28 U.S.C. § 2244(b)(3)(B) and *Boykin v. United States*, 242 F.3d 373 (8th Cir. 2000) (per curiam) (unpublished table decision)); see 28 U.S.C. § 2255(h). Defendant’s “motion to amend sentence” is a second or successive § 2255 motion. *See Arojojoye*, 806 F. App’x at 478; cf. *Banister v. Davis*, 140 S. Ct. 1698, 1706 (2020) (“[W]e have considered ‘the implications for habeas practice’ of allowing a type of filing, to assess whether Congress would have viewed it as successive.”). The Eighth Circuit did not authorize its filing. Accordingly, the Court dismisses Defendant’s “motion to amend sentence” as an unauthorized second or successive § 2255 motion. *See United States v. Echerivel*, 500 F. App’x 568, 568-69 (8th Cir. 2013) (per curiam); *Boyd v. United States*, 304 F.3d 813, 814 (8th Cir. 2002) (per curiam). The Court declines to issue a certificate of appealability. *See United States v. Lambros*, 404 F.3d 1034, 1036-37 (8th Cir. 2005) (per curiam). The Court denies his motions for appointment of counsel. *See Pennsylvania v. Finley*, 481 U.S. 551, 556 (1987); *McCall v. Benson*, 114 F.3d 754, 756 (8th Cir. 1997).

Defendant’s reply

Defendant’s reply raises arguments for a reduced sentence that were not included in his “motion to amend sentence.” The Court construes the reply as a motion for a reduced sentence under 18 U.S.C. § 3582(c)(1)(A). The Court will issue a briefing schedule in due course.

Conclusion

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. Defendant's "motion to amend sentence" [Docket No. 359] is DISMISSED as an unauthorized second or successive motion under 28 U.S.C. § 2255.
2. A certificate of appealability is DENIED.
3. Defendant's motions for appointment of counsel [Docket Nos. 361 & 366] are DENIED.
4. Defendant's motion for leave to amend his reply [Docket No. 373] is GRANTED. Defendant's reply is construed as a motion for a reduced sentence under 18 U.S.C. § 3582(c)(1)(A). A briefing schedule will be issued in due course.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: June 26, 2020

s/ Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge

UNITED STATES DISTRICT COURT
District of Minnesota

United States of America,

Case No. CR 03-08 JNE (1)

Plaintiff

v.

JUDGMENT IN A CRIMINAL CASE

Peter George Noe

Defendant.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED THAT:

1. Defendant's "motion to amend sentence" [Docket No. 359] is DISMISSED as an unauthorized second or successive motion under 28 U.S.C. § 2255.
2. A certificate of appealability is DENIED.
3. Defendant's motions for appointment of counsel [Docket Nos. 361 & 366] are DENIED.
4. Defendant's motion for leave to amend his reply [Docket No. 373] is GRANTED. Defendant's reply is construed as a motion for a reduced sentence under 18 U.S.C. § 3582(c)(1)(A). A briefing schedule will be issued in due course.

Date: June 30, 2020

KATE M. FOGARTY, CLERK

s/Katie Thompson

By: Katie Thompson
Deputy Clerk