EXHIBIT#A

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. MONTGOMERY CARL AKERS, Defendant - Appellant.
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
807 Fed. Appx. 861; 2020 U.S. App. LEXIS 10526
No. 19-3254
April 3, 2020, Filed

Editorial Information: Prior History

{2020 U.S. App. LEXIS 1}(D.C. Nos. 2:04-CR-20089-KHV-1 & 2:09-CV-02206-KHV). (D. Kan.).United States v. Akers, 2019 U.S. Dist. LEXIS 194828 (D. Kan., Nov. 8, 2019)

Counsel For United States of America, Plaintiff - Appellee: Carrie N. Capwell, Office of the United States Attorney, District of Kansas, Kansas City, KS.

Montgomery Carl Akers, Defendant - Appellant, Pro se, Marion, IL.

Judges: Before LUCERO, BACHARACH, and MORITZ, Circuit Judges.

Opinion

{807 Fed. Appx. 862} ORDER DENYING CERTIFICATE OF APPEALABILITY*

Montgomery Carl Akers filed a collection of motions in the district court seeking to void the judgment in his original 28 U.S.C. § 2255 proceedings, to amend his restitution order, and for various other relief. The district court construed the motion to void the judgment as an unauthorized second or successive motion to vacate his sentence under 28 U.S.C. § 2255, dismissed it for lack of jurisdiction, and denied a certificate of appealability (COA). The court denied all other motions and imposed sanctions for the filings it found frivolous. Appearing pro se,1 Akers seeks a COA to challenge the district court's ruling on his motion to void the judgment and appeals several other aspects of the district court's order. He also seeks leave to proceed in forma pauperis (IFP) on appeal. Exercising jurisdiction under 28 U.S.C. § 1291, we deny the IFP motion, deny a COA and dismiss**{2020 U.S. App. LEXIS 2}** the matter with respect to the motion to void the judgment, and affirm in all other respects.

BACKGROUND

In 2006, while serving a 105-month sentence for bank fraud and other offenses, Akers pleaded guilty to wire fraud, an offense he committed from prison, and the district court sentenced him to 327 months in prison. He appealed his sentence and we affirmed. *United States v. Akers*, 261 F. App'x 110, 116 (10th Cir. 2008) (unpublished).

Akers filed his first § 2255 motion in 2009. The district court denied it on the merits and denied a COA. We denied his request for a COA and dismissed the appeal. We also denied his motion to proceed *in forma pauperis* (IFP) on appeal because he failed to advance "a reasoned, nonfrivolous argument on the law and facts to support the issues raised on appeal." .*United States v. Akers*, 384 F. App'x 758, 759 (10th Cir. 2010) (per curiam) (citing *DeBardeleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991)).

Since then, Akers has filed myriad unsuccessful motions and appeals in his criminal case attacking his conviction and sentence, including second or successive § 2255 motions and other post-judgment motions alleging, among other things, that the district court judge, prosecutor, investigators, and others engaged in a widespread conspiracy to wrongfully charge and convict him; ineffective assistance of **{807 Fed. Appx. 863}** counsel; judicial bias; fraud on the court; and**{2020 U.S. App. LEXIS 3}** lack of subject matter jurisdiction.2 In several pleadings, he also maintained that prison officials had unconstitutionally denied him access to his money and interfered with his ability to communicate with and retain private counsel, but the district court consistently rejected those claims, explaining that claims regarding the prison's post-sentencing treatment of him were not related to his criminal case and might be more properly raised in a civil suit. Some motions also challenged the validity of and sought modification of his restitution order. In denying relief on those claims, the district court held that it did not have authority to vacate the amount of restitution and that Akers had not shown changed economic circumstances warranting a modification.

In March 2019, Akers filed the motions at issue here: (1) a motion to void the judgment in his original habeas proceedings based on lack of subject matter jurisdiction; (2) a motion to amend the restitution order; (3) a motion for appointment of the Federal Public Defender (FPD) to investigate a potential Sixth Amendment claim involving recordings of attorney-client communications at Leavenworth prison where he had been housed; and (4) a motion**{2020 U.S. App. LEXIS 4}** alleging that prison officials were interfering with his ability to retain private counsel. Over the next several months, he filed more pleadings, including an addendum to and a brief in support of the motion to void the judgment, a motion for a status update, and a motion notifying the district court that he is being denied the ability to retain and secure licensed counsel to represent him with the foregoing motions.

For reasons discussed below, the district court denied all relief and, based on what it concluded were frivolous and duplicative filings, imposed monetary sanctions and filing restrictions.

DISCUSSION

In his combined opening brief and COA application, Akers indicated that he is appealing "all rulings of the district court." COA Appl. at 2, but he did not explain the basis for his appeal of some of the district court's rulings. We deny a COA as to the district court's dismissal of the motion to void the judgment and affirm the other parts of the district court's order Akers challenged in his brief, for which no COA is required.

1. Motion to Void Judgment

Akers first claims the district court erred by dismissing his motion to void the judgment and reopen his initial § 2255 proceeding. He also claims**{2020 U.S. App. LEXIS 5}** the court abused its discretion by imposing sanctions for that motion. We reject both arguments.

a. Dismissal of Motion for Lack of Jurisdiction

Akers characterized his motion to void the judgment as a Rule 60(b) motion, claiming, among other things, that the court denied his first § 2255 motion based on inaccurate information and thus violated his right to due process. But because the substance of the motion to void the judgment challenged his conviction and sentence based on essentially the same arguments he had raised in previous § 2255 motions, the district court concluded that it was yet another unauthorized second or successive § 2255 motion and dismissed it for lack for jurisdiction. *See Gonzalez v. Crosby*, 545 U.S. 524, 530, 532, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005) **{807 Fed. Appx. 864}** (explaining that a Rule 60(b) motion amounts to a second or successive petition for habeas relief if it either "seeks to

add a new ground for relief" or "attacks the federal court's previous resolution of a claim *on the merits*," and that a "claim" is "an asserted federal basis for relief from a state court's judgment of conviction") (internal quotation marks omitted). The court also denied a COA.

To appeal the district court's dismissal of his petition, Akers must first obtain a COA. 28 U.S.C. § 2253(c)(1)(B). The district court's dismissal of his petition**{2020 U.S. App. LEXIS 6}** for a lack of jurisdiction was a procedural ruling. *See United States v. Harper*, 545 F.3d 1230, 1233 (10th Cir. 2008) (per curiam). Therefore, we will grant Akers a COA only if he "shows, at least, 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, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (internal quotation marks omitted). 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) (per curiam).

Rule 60(b) cannot be used to "circumvent[] AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts." *Gonzalez*, 545 U.S. at 531. "[A] 'true' 60(b) motion . . . either (1) challenges only a procedural ruling of the habeas court which precluded a merits determination of the habeas application; or (2) challenges a defect in the integrity of the federal habeas proceeding . . . ." *Spitznas v. Boone*, 464 F.3d 1213, 1215-16 (10th Cir. 2006) (citation omitted). Regardless of how a movant characterizes**{2020 U.S. App. LEXIS 7}** a motion, it is treated as a habeas petition if it "in substance or effect asserts or reasserts a federal basis for relief" from the underlying conviction. *In re Lindsey*, 582 F.3d 1173, 1175 (10th Cir. 2009) (per curiam) (internal quotation marks omitted).

We agree with the district court's conclusion that Akers' motion was a successive § 2255 motion, not a true Rule 60(b) motion. The substance of the motion did not challenge a procedural ruling that prevented the first habeas court from considering the merits of his claims, but instead sought "vindication of a habeas claim by challenging the habeas court's previous ruling on the merits of [his] claim" some ten years ago, *Spitznas*, 464 F.3d at 1216. Because we conclude that reasonable jurists could not debate that the district court was correct in treating Akers' motion as an unauthorized second or successive § 2255 petition, we deny a COA.

b. Sanctions Order

In 2013, Akers' repetitive filings prompted the district court to warn him that future frivolous filings in his criminal proceedings would result in the imposition of a $500 sanction for every filing the district court deemed to be frivolous and possible further filing restrictions. We upheld that warning on appeal. *United States v. Akers*, 561 F. App'x 769, 771 (10th Cir. 2014). After Akers persisted in filing frivolous documents, the district**{2020 U.S. App. LEXIS 8}** court imposed a $500 sanction in 2017. It also warned him that if he continued to file frivolous documents, the court would impose greater monetary sanctions on a progressive **{807 Fed. Appx. 865}** scale.3 Akers appealed the imposition of the $500 sanction, but did not appeal the court's proposed progressive scale of monetary sanctions. We affirmed the sanction and cautioned Akers that "future frivolous appeals may result in an order requiring him to show cause to avoid appellate filing restrictions or sanctions." *See United States v. Akers*, 740 F. App'x 633, 635 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 1573, 203 L. Ed. 2d 747 (2019).

In this appeal, Akers contends that the district court erred in imposing sanctions for filing his Rule 60(b) motion because it was not frivolous, but he does not appeal the amount of the sanction

imposed. We note that he does not need a COA to appeal the sanction order because the imposition of sanctions is collateral to the merits of the underlying § 2255 motion and is thus not a final order that disposes of the merits of a habeas corpus proceeding. *See Harbison v. Bell*, 556 U.S. 180, 183, 129 S. Ct. 1481, 173 L. Ed. 2d 347 (2009) (explaining that the COA requirement in § 2253(c)(1)(a) applies to "final orders that dispose of the merits of a habeas corpus proceeding-a proceeding challenging the lawfulness of the petitioner's detention."); *see also Hickman v. Cameron*, 531 F. App'x 209, 211 (3d Cir. 2013) (per**{2020 U.S. App. LEXIS 9}** curiam) (holding that a COA is not required to appeal filing restrictions issued in order denying Rule 60(b) motion that sought relief from order denying habeas petition).

A document or argument generally is considered frivolous where it lacks an arguable basis either in law or in fact. *Neitzke v. Williams*, 490 U.S. 319, 325, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989) (legal frivolousness includes both "inarguable legal conclusion[s]" and "fanciful factual allegation[s]"). We review the district court's imposition of sanctions for frivolous filings for abuse of discretion. *Barrett v. Tallon*, 30 F.3d 1296, 1301 (10th Cir .1994). Akers has previously raised the arguments he raised in his Rule 60(b) motion numerous times and been told that they are without merit. He has also been told that he must seek authorization before filing what is in effect a second or successive § 2255 motion. In light of his continued persistence despite previous court orders, we conclude that the district court did not abuse its discretion in imposing sanctions for Akers' frivolous Rule 60(b) motion.

2. Motion to Amend Restitution

In his motion to amend restitution, Akers indicated that despite attacking the underlying judgment as void, he wanted to pay the restitution order in full. He said he would be able to do so if prison officials would stop interfering with his ability to**{2020 U.S. App. LEXIS 10}** communicate with financial advisors, preventing him from consummating the sale of his business concept for $5 billion, and denying him access to $270 million accounts receivable in a payment database. Noting that Akers "offer[ed] no legitimate reason why he would seek to expedite [his payment of] restitution while simultaneously arguing that the restitution judgment is invalid," R., Vol. 2 at 146, the court found Akers' motion frivolous because his "[s]peculative business deals [and] potential 'receivables' do not come close to satisfying [his] burden to show that [his] economic circumstances have changed enough to warrant modification of his restitution **{807 Fed. Appx. 866}** obligation" under 18 U.S.C. § 3664(k). R., Vol. 2 at 145-46. This provision in the Mandatory Victims Restitution Act permits a court to adjust a defendant's payment schedule upon a showing of a material change in economic circumstances.

It is unclear from Akers' brief on appeal whether he is challenging only the district court's frivolousness determination or whether he is also challenging the denial of the motion. Construing his brief liberally, we assume he is challenging both. Like the order imposing sanctions for his frivolous Rule 60(b) motion, Akers does**{2020 U.S. App. LEXIS 11}** not need a COA to appeal the district court's order rejecting his claims regarding restitution, because those claims did not seek relief from his conviction or sentence, so were not raised under § 2255. *See Harbison*, 556 U.S. at 183.

As for the merits, Akers was required to pay 10% of his monthly income toward restitution while he was in prison. *See* R., Vol. 2 at 144. To have the order modified, he had to show a material change in his economic circumstances. The district court properly concluded that his grandiose and speculative assertions that he had the resources to pay the full restitution amount did not prove the material change required to warrant a modification.

We find no abuse of discretion in the district court's conclusion that Akers' motion to amend restitution was frivolous and its resultant imposition of sanctions.

3. Motion Concerning Appointment of and Access to Counsel

Akers filed two motions concerning the appointment of and access to counsel. In one, he sought relief from prison officials' alleged interference with his attempts to communicate with private counsel (the "access-to-counsel motion"). The court denied the motion, concluding that Akers had no right to counsel at this stage of the criminal**{2020 U.S. App. LEXIS 12}** proceeding and explaining, as Akers had been told several times before, that claims for access to counsel at this stage of the proceedings must be brought as conditions-of-confinement claims in a civil rights action, not in a habeas petition. The court found that this motion was frivolous and sanctioned him for it.

In the second motion concerning counsel, Akers asked the court to appoint the FPD to investigate his potential claims of illegal recording of his attorney-client communications pursuant to that court's standing order directing the FPD to investigate potential improper-recording claims of inmates at Leavenworth, where Akers had been housed (the "motion for appointment of FPD"). In denying this motion, the court explained that the FPD had already been appointed to review potential claims. Though Akers had not shown that any of the attorney-client communications he had while at the prison had been recorded, the court did direct that a copy of the motion be sent to the FPD so it was aware of this potential claim. The court further found, however, that Akers' allegations that the court had conspired with the prosecutor to record his conversations and steal his mail were frivolous,**{2020 U.S. App. LEXIS 13}** and thus it sanctioned Akers for filing the motion.

On appeal, Akers does not take issue with the court's denial of the motion for appointment of the FPD, but claims the court erred by denying the access-to-counsel motion and by imposing sanctions for both motions. Again, because the underlying motions did not challenge the lawfulness of his detention, he does not need a COA to appeal the district court's rulings. *See Harbison*, 556 U.S. at 183 (holding that a prisoner seeking to appeal a final order denying a motion to enlarge the authority of appointed counsel or denying the appointment of counsel does not need a COA to proceed).

{807 Fed. Appx. 867} Relying on *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006), and *Mann v. Reynolds*, 46 F.3d 1055 (10th Cir. 1995), Akers maintains that the district court violated its "duty to insure that [he] has" access to counsel of his choice, COA Appl. at 11. But his challenge to the district court's ruling conflates two distinct issues: whether he has the right to counsel of choice at this stage in the proceeding and the proper mechanism for seeking relief based on prison officials' alleged interference with his ability to retain and communicate with private counsel.

With respect to the first issue, *Gonzalez-Lopez* held that the erroneous deprivation of a criminal defendant's choice of counsel *at trial**{2020 U.S. App. LEXIS 14}*** constitutes structural error requiring reversal. 548 U.S. at 150-52. It does not, however, support Akers' contention that the court has a duty to ensure that he has access to counsel of his choice to help him with post-conviction and habeas motions more than a decade after his conviction became final. To the contrary, "[t]here is no constitutional right to counsel beyond the direct appeal of a criminal conviction." *Coronado v. Ward*, 517 F.3d 1212, 1218 (10th Cir. 2008).

As for the second issue, the district court correctly held that the proper mechanism for Akers to challenge the prison officials' alleged interference with his ability to retain and communicate with counsel is in a civil rights action, not in a habeas petition. *See Rael v. Williams*, 223 F.3d 1153, 1154 (10th Cir. 2000) (holding that conditions-of-confinement claims must be brought in civil rights suit, not in habeas petition). Indeed, *Mann*, which Akers relies on, supports the court's determination: *Mann* involved a civil rights suit filed under 42 U.S.C. § 1983 on behalf of inmates to challenge a prison policy prohibiting barrier-free or contact visits between inmates and legal counsel on Sixth and

Fourteenth Amendment grounds. 46 F.3d at 1056; *see also id.* at 1060 (holding that "the Sixth Amendment does not require in all instances full and unfettered contact between an inmate and counsel").

We conclude that the district{**2020 U.S. App. LEXIS 15**} court did not err in denying Akers' motion for access to counsel or in holding that both that motion and Akers' allegations of court collusion in his motion regarding appointment of the FPD were frivolous and warranted the imposition of sanctions.

CONCLUSION

We deny Akers' application for a COA to appeal the order denying his motion to void judgment and dismiss the matter with respect to that portion of the district court's order. We affirm the district court's order in all other respects, and we deny Akers' IFP motion. A filing and docketing fee of $505.00 is immediately due and payable to the Clerk of the District Court. We caution Akers that future frivolous appeals concerning the conviction and sentence at issue here may result in summary disposition without discussion and/or an order requiring him to show cause why this court should not impose both appellate filing restrictions and sanctions.4*See Andrews v. {807 Fed. Appx. 868} Heaton*, 483 F.3d 1070, 1077-78 & n.10 (10th Cir. 2007). We further caution him that the fact he is a pro se litigant does not prohibit the court from imposing such sanctions. *See Haworth v. Royal*, 347 F.3d 1189, 1192 (10th Cir. 2003).

Footnotes

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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.

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Because Akers is pro se, we construe his filings liberally. *See Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972); *Garza v. Davis*, 596 F.3d 1198, 1201 n.2 (10th Cir. 2010).

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
v.	)	**CRIMINAL ACTION**
	)	
MONTGOMERY CARL AKERS,	)	**No. 04-20089-01-KHV**
	)	
Defendant.	)	
	)	

MEMORANDUM AND ORDER

On November 20, 2006, the Court sentenced defendant to 327 months in prison. On January 16, 2008, the Tenth Circuit Court of Appeals affirmed defendant's sentence. Since that time, defendant has filed a litany of frivolous motions and appeals throughout the country involving various collateral matters related to his conviction and sentence. This matter is before the Court on defendant's Motion To Void The Original Habeas Proceedings In This Case Based Upon A Lack Of Subject-Matter Jurisdiction (Doc. #475) filed March 18, 2019, defendant's Motion For Appointment Of The Federal Public Defender Per Standing Order 18-3 (Doc. #476) filed March 18, 2019, defendant's Motion To Amend The Restitution Order (Doc. #477) filed March 18, 2019, defendant's Motion For Status Update Regarding Doc. #475 Filed On March 28, 2019 (Doc. #481) filed July 10, 2019, Defendant's Motion In Notifying The District Court That He Is Being Interfered With And Being Denied The Ability To Retain And Secure Licensed Counsel To Represent Him Concerning Docket [Nos.] 475, 476, 477, 478, 479 [And] 480 Before This Court (Doc. #482) filed July 15, 2019 and defendant's Motion For Leave To Proceed On Appeal Without Prepayment Of Costs Or Fees (Doc. #485) filed October 21, 2019. For reasons stated below, defendant is not entitled to any relief. In addition, the Court sanctions defendant in

the amount of $76,000.00 for his current filings and proposes restrictions on defendant's filing of documents.

Factual And Procedural Background

While serving a 105-month sentence at USP-Leavenworth for bank fraud and related charges, defendant successfully recruited an unwitting pen pal to help him create worthless checks and engage in fraudulent activity. As a result, a grand jury returned an indictment which charged him with five counts of wire fraud.

While the indictment was pending, defendant recruited Donald Mixan, a fellow inmate at Corrections Corporation of America in Leavenworth, Kansas, to help engage in a scam involving opening accounts with counterfeit checks. After Mixan was released from custody, defendant coordinated with Mixan to execute the fraudulent scheme which involved payments to defendant's alleged wife, attorneys that defendant wanted to retain and Mixan's landlord. As a result, a grand jury returned a superseding indictment which added a count for conspiracy to commit bank fraud.

After defendant pled guilty to one count of wire fraud and was awaiting sentencing, he initiated yet another fraudulent scheme involving a pen pal who suffered from multiple sclerosis. In the end, before the fraudulent scheme could be fully executed, the pen pal's son contacted law enforcement personnel.

Still before sentencing, defendant proceeded to recruit another unwitting participant, a former cellmate's daughter, in a fraudulent scheme based on his promise of employment and financial security. The individual was unable to actually produce any fraudulent checks for defendant, but she and her family suffered financially from his conduct.

On November 20, 2006, the Court sentenced defendant to 327 months in prison. The Tenth Circuit affirmed defendant's sentence on direct appeal. See United States v. Akers, 261 F. App'x 110 (10th Cir. Jan. 16, 2008).

On September 1, 2009, the Court overruled defendant's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (Doc. #308) filed April 29, 2009. See Memorandum And Order (Doc. #321).

In addition to numerous post-conviction motions filed in this criminal matter, defendant throughout the country has filed multiple civil suits involving this case against his former attorney, the undersigned judge, the prosecutor, the FBI case agent, deputy U.S. Marshals and others. See, e.g., Akers v. Flannigan, No. 17-3094-SAC, 2017 WL 6550860 (D. Kan. Nov. 8, 2017) (dismissing action under Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) against AUSA, FBI agent and BOP legal advisor); Akers v. Walton, No. 14-CV-1330-DRH, 2015 WL 264705, at *3 (S.D. Ill. Jan. 20, 2015) (dismissing § 2241 action asserting denial of unfettered access to financial resources outside prison walls); Akers v. Walton, No. 13-CV-01090-DRH, 2013 WL 6068584, at *1 (S.D. Ill. Nov. 18, 2013) (dismissing § 2241 action alleging BOP interfered with access to finances and tampered with legal mail); Akers v. Roal-Werner, No. 12-CV-1037-DRH, 2012 WL 5193583, at *3 (S.D. Ill. Oct. 19, 2012) (dismissing § 2241 action alleging prison staff interfered with communications with counsel and denied access to finances); Akers v. Roal, No. 11-cv-622-MJR, ECF Docs. 38 and 39 filed Aug. 13, 2012 and Sept. 11, 2012 (S.D. Ill.) (dismissing Bivens action alleging prison staff interfered with communications with counsel and denied access to finances); Akers v. Hollingsworth, No. 11-CV-

00103-DRH, 2011 WL 4404121, at *1 (S.D. Ill. Sept. 21, 2011) (dismissing § 2241 action requesting "privileged, unmonitored, meaningful contact with his attorney; preventing prison staff from rejecting his attorney's correspondence; and enjoining the Bureau of Prisons from denying him the right to access and sell his legitimate assets, by phone or mail, in order to fund his legal expenses"); Akers v. Rokusek, No. 09-cv-448-KJD-PAL, ECF No. 12 (D. Nev. Mar. 19, 2010) (dismissing Bivens action against former counsel, FBI agent, AUSA and some 40 others); Akers v. Shute, No. 08-3106-SAC, 2010 WL 934616, at *2-4 (D. Kan. Mar. 11, 2010) (dismissing Bivens action alleging deputy U.S. Marshals, AUSA and FBI agent interfered with mail); Akers v. Keszei, Nos. 09-1654 & 09-1834, Judgment at 1-2, available on Pacer (1st Cir. Jan. 21, 2010) (affirming dismissal of civil rights actions filed in Districts of New Hampshire and Maine alleging FBI agents, AUSA, defense counsel and deputy U.S. Marshal interfered with business dealings and attorney communications); Akers v. Crow, 343 F. App'x 319 (10th Cir. Aug. 28, 2009) (affirming dismissal and finding frivolous Bivens action against district judge and clerk of court); Akers v. Martin, 227 F. App'x 721 (10th Cir. Mar. 23, 2007) (affirming dismissal of Bivens action against AUSA, defense counsel, FBI agent, undersigned judge and U.S. Attorney); Akers v. Keszei, No. 07-00572-JCM, 2009 WL 1530819 (D. Nev. June 1, 2009) (dismissing suit against FBI agent and others); Akers v. Vratil, No. 08-cv-2692-SBA, ECF No. 10 (N.D. Cal. Oct. 17, 2008) (transferring case to D. Kan. against undersigned judge, AUSA and deputy U.S. Marshals); Akers v. Martin, No. 07-3569, Judgment, ECF No. 16 (8th Cir. Feb. 21, 2008) (summarily affirming dismissal of FBI agent, prosecutor, prior counsel, deputy U.S. Marshals, victims of fraudulent scheme and others).

In the pending motions, defendant seeks essentially the same relief that this Court and other courts have repeatedly denied.

Analysis

I. Defendant's Motion To Void Judgment (Doc. #475)

Under Rule 60(b)(4) of the Federal Rules of Civil Procedure, defendant asks the Court to void the judgment on his initial Section 2255 motion for lack of jurisdiction. Motion To Void The Original Habeas Proceedings (Doc. #475) at 1. Initially, the Court must address how to construe defendant's motion.

The relief sought – not a motion's title – determines whether a movant filed a true Rule 60(b) motion or an unauthorized second or successive petition under Section 2255. United States v. Nelson, 465 F.3d 1145, 1149 (10th Cir. 2006); see also United States v. Torres, 282 F.3d 1241, 1242, 1246 (10th Cir. 2002) (allowing petitioner to avoid bar against successive petitions by styling petition under different name would erode procedural restraints of Sections 2244(b)(3) and 2255). A true Rule 60(b) motion (1) challenges only a procedural ruling (such as timeliness) which precluded a merits determination of the habeas application or (2) challenges a defect in the integrity of the federal habeas proceedings, provided that such a challenge does not itself lead inextricably to a merits-based attack on the disposition of a prior habeas petition. Spitznas v. Boone, 464 F.3d 1213, 1224-25 (10th Cir. 2006). An issue should be considered part of a second or successive petition "if it in substance or effect asserts or reasserts a federal basis for relief from the petitioner's underlying conviction." Id. at 1225. When determining the nature of a motion, the Court considers each issue in the motion to determine whether it represents a successive

petition, a Rule 60(b) motion or a "mixed" motion. Id. at 1224.

Defendant argues that the Court lacked subject matter and personal jurisdiction in the habeas proceeding because the superseding indictment does not charge a violation of federal law. Specifically, defendant asserts that (1) in February of 2000, Fidelity Investments was not a federally insured financial institution doing business in Kansas, (2) it was factually impossible for a grand jury in Kansas to find that he committed the charged crime, (3) the grand jury returned the superseding indictment after the statute of limitations had expired and (4) he was arrested and charged based on perjured testimony, fraud, deceit and outrageous prosecutorial misconduct. See Motion To Void The Original Habeas Proceedings (Doc. #475) at 1-3; Second Addendum To Defendant's Motion To Void The Judgment In The First Habeas Proceedings Of This Case (Doc. #478) filed March 29, 2019, at 6-7; Brief In Support Of And Clarification Of Defendant's Motion To Void The Original Habeas Proceedings In This Case Based Upon A Lack Of Subject-Matter Jurisdiction (Doc. #480) filed May 20, 2019, at 2-4 & 3 n.1.

Defendant characterizes his motion as a "true" Rule 60(b) motion because it asserts that the Court incorrectly denied relief "for failure to exhaust, procedural bar, or . . . statute of limitations." Brief In Support (Doc. #480) at 1. In reality, his claims challenge the substance of the Court's ruling on his original Section 2255 motion. In an order entered some ten years ago, the Court overruled on the merits defendant's claims that counsel provided ineffective assistance because she "coaxed defendant into pleading guilty to a crime that was legally impossible for him to have committed" and did not argue that the Court lacked subject matter jurisdiction. Memorandum And Order (Doc. #321) at 3-4. The Tenth Circuit affirmed. Now,

defendant asks the Court to reconsider its ruling on subject matter jurisdiction and the sufficiency of the indictment. See Motion To Void The Original Habeas Proceedings (Doc. #475) at 3 (district court lacked jurisdiction because "factually impossible" to commit charged crime; district court lacked personal jurisdiction over defendant for entirety of case); Second Addendum (Doc. #478) at 1 (defendant not present at USP-Leavenworth when his "unconstitutional loss of liberty began on August 30, 2004"); id. (Court "lacked authority under Article III to (1) entertain [the government's] claims, (2) detain the Defendant in federal custody, (3) allow him to stand trial or enter into plea negotiations, [and] (4) enter any judgments"); Brief In Support (Doc. #480) at 3 ("indictment is fatally deficient"); id. at 4 (court lacks subject matter jurisdiction to enter orders because defendant not "legally and factually charged with a violation of federal law"); id. at 5 (court lacked jurisdiction over crime of wire fraud alleged in superseding indictment).

All of defendant's present claims in substance or effect assert or reassert federal grounds for relief from his underlying conviction and sentence. Indeed, at least as to one of his theories, defendant concedes that he challenged the "very same jurisdictional element in his original habeas proceeding." Brief In Support (Doc. #480) at 5. Because defendant has previously sought relief under Section 2255, the Court construes his claims as part of a second or successive Section 2255 motion.[1]

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[1] See United States v. Wetzel-Sanders, 805 F.3d 1266, 1268 (10th Cir. 2015) (motion which attacks judgment of conviction or sentence when prior motion already did so constitutes second or successive motion); see also United States v. Grigsby, 715 F. App'x 868, 869 (10th Cir. 2018) (Rule 60(b)(4) motion asserting district court lacked jurisdiction over criminal proceeding effectively a § 2255 motion); United States v. Moreno, 655 F. App'x 708, 713 (10th Cir. 2016) (motion to reconsider which reargues and expands upon prior substantive challenges to conviction (continued. . . .)

Defendant argues that because his unconstitutional loss of liberty began on August 30, 2004, near the time of his initial detention, he is not attacking the "underlying conviction, sentence, or the ruling on the merits in his prior habeas proceedings." Second Addendum (Doc. #478) at 1. Defendant also maintains that he is challenging subject matter jurisdiction only in the "habeas proceeding," but his arguments are merely a reiteration of his prior challenge to the sufficiency of the indictment, which necessarily challenges the validity of his conviction. Defendant's jurisdictional claims also lead inextricably to a merits-based attack on the disposition of his prior Section 2255 motion. See Brief In Support (Doc. #480) at 2 (court mischaracterized plea proceedings to support erroneous conclusion on subject matter jurisdiction). Accordingly, the Court construes defendant's present claims about the sufficiency of the indictment and subject matter jurisdiction as an attack on his conviction.[2]

II. Relief Under 28 U.S.C. § 2255

As stated, defendant previously filed a Section 2255 motion. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, defendant may not file a second or successive motion pursuant to Section 2255 unless he first applies to the appropriate court of appeals for an order authorizing the district court to consider the motion. See

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[1](. . . .continued)
not true Rule 60(b) motion); United States v. Tucker, 642 F. App'x 926, 928 (10th Cir. 2016) (argument under Rule 60(b)(4) motion that conviction based on unconstitutional grand jury indictment falls squarely within § 2255).

[2] Even if defendant's motion could partially be construed as a Rule 60(b)(4) motion, it lacks merit and is time-barred.

28 U.S.C. §§ 2244(b)(3), 2255(h). If defendant files a second or successive motion without first seeking the required authorization, the district court may (1) transfer the motion to the appellate court if it determines that it is in the interest of justice pursuant to 28 U.S.C. § 1631 or (2) dismiss the motion for lack of jurisdiction. See In re Cline, 531 F.3d 1249, 1252 (10th Cir. 2008). The Court has discretion whether to transfer or dismiss without prejudice. Trujillo v. Williams, 465 F.3d 1210, 1222-23 (10th Cir. 2006). In making this decision, the Court considers whether the claims would be time-barred if filed anew in the proper forum, are likely to have merit and were filed in good faith or, on the other hand, if it was clear at the time of filing that the Court lacked jurisdiction. Id. at 1223 n.16.

A second or successive motion under 28 U.S.C. § 2255 may be filed in the district court if the court of appeals certifies that the motion is based on (1) newly discovered evidence that if proven and viewed in light of the evidence as a whole would establish by clear and convincing evidence that no reasonable fact finder would have found defendant guilty of the offense or (2) 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).

Because defendant did not receive authorization from the Tenth Circuit and it appears that his claims do not satisfy the authorization standards under Section 2255, the Court dismisses the motion rather than transferring it to the Tenth Circuit. See In re Cline, 531 F.3d at 1252 (district court may refuse to transfer motion which fails on face to satisfy authorization standards of Section 2255(h)); Phillips v. Seiter, 173 F.3d 609, 610 (7th Cir. 1999) (waste of judicial resources to require transfer of frivolous, time-barred cases).

Here, defendant's claims do not assert new evidence or argue that the Supreme Court has made retroactive a new rule of constitutional law. Rather, defendant raises claims that he either asserted or could have asserted on direct appeal or in his initial Section 2255 motion. Accordingly, the Court declines to transfer the present motion to the court of appeals.

III. Certificate Of Appealability

Under Rule 11 of the Rules Governing Section 2255 Proceedings, the Court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. A certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).[3] To satisfy this standard, the movant must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Saiz v. Ortiz, 392 F.3d 1166, 1171 n.3 (10th Cir. 2004) (quoting Tennard v. Dretke, 542 U.S. 274, 282 (2004)). For reasons stated above, defendant has not satisfied this standard. The Court therefore denies a certificate of appealability as to its ruling on defendant's Section 2255 motion.

IV. Motion To Amend Restitution Order (Doc. #477)

Defendant asks the Court to order the BOP to allow him to obtain a "forensic financial investigation" and to submit the investigation along with full payment of his restitution. Motion To Amend The Restitution Order (Doc. #477) at 10; see id. at 7 ("BOP staff have refused to send

[3] The denial of a Section 2255 motion is not appealable unless a circuit justice or a circuit or district judge issues a certificate of appealability. See Fed. R. App. P. 22(b)(1); 28 U.S.C. § 2253(c)(1).

mail to financial advisors, who the defendant has contacted for assistance in . . . paying the restitution order to this court."). While defendant states that he "will vigorously attack the underlying judgment in this case as invalid and void," id. at 2, he seeks to pay the restitution in full now that he purportedly has the ability to do so. Defendant states that BOP personnel have prevented him from (1) consummating the sale of his business concept for five billion dollars and (2) accessing 270 million dollars in accounts receivables. Id. at 6-7; see id. at 7 ("Defendant has a payment database with $270 million dollars in receivables contained in it that BOP personnel will not allow him to access.").

In 2015, in the Southern District of Illinois, defendant raised a similar claim under Section 2241. In that action, he sought an order directing BOP officials to allow him "to access funds of his lawful ownership in order to make a one time lump sum payment of restitution as ordered by the Court," and to provide him with an accounting of where the funds taken from his prisoner account have been applied. See Walton, 2015 WL 264705, at *1. The Honorable David R. Herndon denied defendant's request, stating as follows:

> Admirable as petitioner's intentions may be to pay off his sizeable restitution in one lump sum, neither sentencing court required him to do so. As long as he remains in prison, he must pay only 10% of his monthly income toward restitution. Further payments are deferred until after his release. Therefore, it is not necessary for this Court to order the respondent to take any action whatsoever in order for petitioner to comply with the sentencing courts' restitution orders. Furthermore, it is frivolous for petitioner to suggest that prison officials are "preventing" him from paying his court-ordered restitution, when in fact he is under no requirement at this time to pay anything more than the 10% assessment from his prisoner account.
>
> Addressing the second issue, petitioner's request for an accounting regarding any payments made pursuant to his participation in the IFRP [Inmate Financial Responsibility Program] is not a matter subject to this Court's oversight. The

> Seventh Circuit has made it clear that district courts have no authority to interfere with the BOP's discretion in its administration of the IFRP. See In Re: Buddhi, 658 F.3d 740, 741 (7th Cir. 2011). This should come as no surprise to petitioner, as this Court informed him of its inability to override the BOP's discretion as to the IFRP program, in the order dismissing his last habeas petition. Akers v. Walton, Case No. 13–cv–1090–DRH (Doc. 4).
>
> The Attorney General, not the courts, is responsible for the collection of court-ordered restitution, and this authority has been delegated to the BOP. This delegation of authority is proper, and "the courts are not authorized to override the Bureau's discretion about such matters, any more than a judge could dictate particulars about a prisoner's meal schedule or recreation (all constitutional problems to the side)." Buddhi, 658 F.3d at 741 (internal quotations and citations omitted). It would thus be improper for this Court to insert itself into the respondent's management of the IFRP by ordering an accounting of the disposition of petitioner's payments made under that program. The petition shall therefore be dismissed.

Id. at *2.

In 2017, under Bivens, defendant asked for similar relief in a civil rights complaint. See Akers v. Flannigan, No. 17-3094-SAC-DJW, 2017 WL 6551114 (D. Kan. July 6, 2017) (alleged defendants violated his "constitutional rights by preventing him from accessing $250 million in funds and by contacting potential defense counsel to dissuade them from representing" him). The Honorable Sam A. Crow dismissed the case because Akers failed to pay the filing fee. See Flannigan, 2017 WL 6550860, at *1-2.

Under the Mandatory Victims Restitution Act, 18 U.S.C. §§ 3663A, 3664, the Court may adjust defendant's payment schedule upon a showing of a material change in financial circumstances. See 18 U.S.C. § 3664(k). Defendant's present motion to seek modification of the restitution order under Section 3664(k) is frivolous. Speculative business deals or potential "receivables" do not come close to satisfying defendant's burden to show that economic

circumstances have changed enough to warrant modification of his restitution obligation. See United States v. Hill, 205 F.3d 1342, 1999 WL 801543, at *1 (6th Cir. Sept. 28, 1999) (defendant bears burden to prove by preponderance of evidence "material change" in economic circumstances) (quoting 18 U.S.C. § 3664(k)); United States v. Broadus, No. 3:10-CR-183-B (01), 2014 WL 4060048, at *1 (N.D. Tex. Aug. 15, 2014) (defendant bears burden to prove that circumstances have changed enough to warrant modification). Based on defendant's stated intention to continue to contest the validity of the restitution order, it appears that his effort to change his restitution obligation is a thinly veiled attempt to continue questionable business dealings from prison. See, e.g., International Employment Opportunities About Us Page & Operational Plan (Doc. #477-1) at 1 ("We guarantee you that if you follow our simple program, you will make $300-500 a day after your initial (7) day indoctrination period. After the (7) weeks of in-home training, you will be [sic] make no less than $750.00 a day."); id. at 8 (client is required to purchase database for $200.00 and operational database for $500.00 at final training session, "[b]y that time you will have amassed thousands of dollars in commissions," client will then pay $150.00 per week for electronic leads that are issued daily); id. at 9 ("There is no reason why you will not make at least $150.00 to 300.00 per day in commissions following our training DVD."). Defendant offers no legitimate reason why he would seek to expedite the paying of his restitution while simultaneously arguing that the restitution judgment is invalid.

Defendant has not shown that modification of the restitution order is warranted. Accordingly, the Court overrules defendant's motion to amend.

V. Motion To Appoint Federal Public Defender (Doc. #476)

Defendant asks the Court to appoint counsel to investigate potential Sixth Amendment claims involving attorney-client recordings. Under District of Kansas Standing Order No. 18-3, the Federal Public Defender ("FPD") was appointed "to represent any defendant from the District of Kansas who may have a post-conviction Sixth Amendment claim based on the recording of in-person attorney-client meetings or attorney-client phone calls by any holding facility housing federal detainees within this District." As part of the appointment, the FPD is to "review potential cases." Because the FPD has already been appointed to review potential cases involving attorney-client recordings, the Court overrules as moot defendant's motion to appoint counsel on this issue.[4]

VI. Defendant's Motion Related To Ability To Retain Counsel (Doc. #482)

Defendant argues that the BOP has interfered with his ability to retain attorney Alan Ellis in Novato, California. See Defendant's Motion (Doc. #482) at 1. In the Southern District of Illinois, defendant raised similar claims under Section 2241.[5] He has been informed that claims

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[4] At this stage, defendant has not shown that when he was at CCA-Leavenworth, the government recorded any of his attorney-client communications. Even so, to ensure that the FPD has notice of defendant's potential claim, the Court directs the Clerk to forward a copy of this Memorandum And Order to the Office of the FPD.

[5] See, e.g., Walton, 2013 WL 6068584, at *1 (BOP "reading, censoring and rejecting" legal mail to counsel); Roal-Werner, 2012 WL 5193583, at *3 (prison staff interfering with communications with counsel); Roal, No. 11-cv-622-MJR, ECF Doc. 38 at 4 (S.D. Ill. Aug. 13, 2012) (prison officials interfering with efforts to secure attorney); Hollingsworth, 2011 WL 4404121, at *1 (requesting "privileged, unmonitored, meaningful contact with his attorney; preventing prison staff from rejecting his attorney's correspondence; and enjoining the Bureau of Prisons from denying him the right to access and sell his legitimate assets, by phone or mail, in order to fund his legal expenses").

related to interference with communications with counsel must be raised as a "challenge to the conditions of his confinement . . . in a civil rights action (see Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L.Ed.2d 619 (1971)), not in a habeas case." Roal-Werner, 2012 WL 5193583, at *3.

Defendant argues that he has a Sixth Amendment right to counsel, Defendant's Motion (Doc. #482) at 2, but this argument is frivolous at this stage of the criminal proceedings. See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (because defendant has no federal constitutional right to counsel when pursuing discretionary appeals on direct review of conviction, he likewise "has no such right when attacking a conviction that has long since become final upon exhaustion of the appellate process"); Coronado v. Ward, 517 F.3d 1212, 1218 (10th Cir. 2008) (no constitutional right to counsel beyond direct appeal of criminal conviction); see also Powers v. Fed. Bureau of Prisons, 699 F. App'x 795, 798 (10th Cir. June 28, 2017) (distinguishing Luis v. United States, —— U.S. ——, 136 S. Ct. 1083, 1088 (2016), which held that "*pretrial* restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment" (emphasis added)).

The Court overrules defendant's motion seeking assistance to stop interference with his ability to retain counsel.

VII. Motion For Leave To Appeal In Forma Pauperis (Doc. #485)

Defendant seeks *in forma pauperis* status on appeal. Rule 24(a)(3), Fed. R. App. P., provides that a party who was determined to be financially unable to obtain an adequate defense in a criminal case may proceed on appeal *in forma pauperis* without further authorization unless

the district court, before or after the notice of appeal is filed, certifies that the appeal is not taken in good faith. Based on the frivolous and duplicative nature of defendant's motions, the Court certifies that defendant's Notice Of Filing Petition For Mandamus Relief Under 28 U.S.C. § 1361 (Doc. #483), which seeks to compel the Court to rule on defendant's motions, is not taken in good faith for purposes of 28 U.S.C. § 1915(a)(3). The Court therefore overrules defendant's motion.

VIII. Sanctions

On August 7, 2013, the Court ordered filing restrictions as follows:

> if defendant files any document in this criminal case which the Court deems frivolous, the Court will sanction defendant a minimum of $500.00 for each violation and may impose further restrictions on future filings in the District of Kansas. This restriction does not apply to documents filed on defendant's behalf by a licensed attorney who is admitted to practice in the District of Kansas.

Memorandum And Order (Doc. #416) at 3. The Tenth Circuit dismissed for lack of prosecution defendant's appeal of the sanctions order. See Order (Doc. #431).

Subsequently, the Court sanctioned defendant $500.00 for the filing of Defendant's Combined Motion For Recusal Of Presiding Judge Kathryn H. Vratil; And Motion To Reopen Habeas Proceedings In This Case Due To Fraud Being Perpetrated Upon The Court In The First Habeas Proceeding (Doc. #457) because it contained frivolous factual allegations and legal theories. Memorandum And Order (Doc. #466) filed June 15, 2017 at 3-5. The Court imposed further filing restrictions as follows:

> [I]f defendant files any further document in this criminal case which the Court deems frivolous, the Court will sanction defendant a minimum of $1,000.00 for the next violation, a minimum of $5,000.00 for a third violation, a minimum of $10,000.00 for a fourth violation, and a minimum of $20,000.00 for a fifth and subsequent violations.

Id. at 5. On appeal, the Tenth Circuit affirmed, stating as follows:

> We agree with the district court that filing sanctions were appropriate. See Tripati v. Beaman, 878 F.2d 351, 354 (10th Cir. 1989) (setting forth relevant factors for imposing sanctions). We are not persuaded by any of the arguments Akers advances in his briefing or in the several motions he has filed in this court. We caution Akers that future frivolous appeals may result in an order requiring him to show cause to avoid appellate filing restrictions or sanctions.

United States v. Akers, 740 F. App'x 633, 635 (10th Cir. July 2, 2018), cert. denied, 139 S. Ct. 1573 (2019).

A document or argument generally is considered "frivolous" where it lacks an arguable basis either in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989) (frivolous complaints include "fanciful factual allegation" or challenges to "inarguable legal conclusion").

Defendants' current filings contain numerous statements or arguments that are frivolous, including the following:

A. Violations 1, 2 and 3 (Docs. #475, #478 & #480)

Defendant's Motion To Void The Original Habeas Proceedings In This Case Based Upon A Lack Of Subject-Matter Jurisdiction (Doc. #475) filed March 18, 2019, defendant's Second Addendum To Defendant's Motion To Void The Judgment In The First Habeas Proceedings Of This Case (Doc. #478) filed March 29, 2019 and defendant's Brief In Support Of And Clarification Of Defendant's Motion To Void The Original Habeas Proceedings In This Case Based Upon A Lack Of Subject-Matter Jurisdiction (Doc. #480) filed May 20, 2019, all assert frivolous arguments related to jurisdiction and standing. Defendant continues to maintain that the Court lacks jurisdiction and that the indictment is legally defective because of fraud on the Court. The Court has repeatedly rejected factual allegations and legal theories which are nearly identical.

Defendant has appealed numerous orders involving these issues. For reasons stated above and in prior orders, all three documents (Doc. ##475, 478 & 480) related to defendant's motion to void the original habeas proceedings include fanciful factual allegations or legal theories.[6]

B. Violation 4 (Doc. #476)

Defendant's statement that he has "evidence of numerous Sixth Amendment violations inculpating [the undersigned judge and others] in the recording of his attorney-client phone calls and visits and theft(s) of mail" is frivolous. Motion For Appointment Of The Federal Public Defender Per Standing Order 18-3 (Doc. #476) at 1. As "evidence" of such violations, defendant cites an order from the Honorable Julie A. Robinson in United States v. Carter, No. 16-20032-02, which merely recites defendant's allegations of "fraud upon the Court by Judge Vratil and the prosecutor in his criminal proceeding" including theft of his mail and recording of attorney visits and calls. Motion For Appointment (Doc. #476) at 2. Defendant cites no evidence that

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[6] The Court has previously rejected defendant's challenges to the lawfulness of the indictment. See Memorandum And Order (Doc. #248) filed March 5, 2008 at 1-2 (rejecting jurisdictional challenge to indictment under Fed. R. Crim. P. 12(b)(3)(B) because defendant filed it after judgment was entered), appeal dismissed, 281 F. App'x 844, 845 (10th Cir.) (per curiam), cert. denied, 555 U.S. 923 (2008); United States v. Akers, 2008 WL 4911145, at *1 (D. Kan. Nov. 13, 2008) (overruling jurisdictional challenge to indictment under Fed. R. Crim. P. 12(e) which raised same arguments as prior Rule 12(b)(3)(B) motion), appeal dismissed, 317 F. App'x 798 (10th Cir.), cert. denied, 558 U.S. 1036 (2009); see also United States v. Akers, 2016 WL 3014955, at *1 (D. Kan. May 26, 2016) (rejecting allegations that indictment defective because (1) indictment does not set forth federal offense, (2) grand jury not legally constituted and (3) alleged victim not federally insured financial institution); Memorandum And Order (Doc. #466) filed June 15, 2017 at 4 (finding as frivolous claims that (1) grand jury did not return "constitutional[] and lawful" indictment, (2) judge knew "from the outset of this case" that indictment was fraudulent, and (3) judge "acquiesced in fraud perpetrated upon the court in the form of a non-exist[e]nt grand jury indictment and related grand jury and district court misconduct").

implicates the undersigned judge. For reasons the Court has repeatedly explained, defendant's allegations of unlawful coordinated conduct between the undersigned judge and the prosecutor are untrue, irrational and unsubstantiated. See, e.g., Memorandum And Order (Doc. #466) filed June 15, 2017 at 2; Memorandum And Order (Doc. #421) filed September 11, 2013 at 1; Memorandum And Order (Doc. #416) filed August 7, 2013 at 2; Memorandum And Order (Doc. #390) filed March 16, 2012 at 2; Memorandum And Order (Doc. #328) filed October 30, 2009 at 1-2; Memorandum And Order (Doc. #233) filed July 19, 2007 at 2-3.

C. Violation 5 (Doc. #477)

For substantially the reasons stated above, see supra text, Analysis, Part IV, defendant's Motion To Amend The Restitution Order (Doc. #477) filed March 18, 2019 is frivolous.

D. Violation 6 (Doc. #482)

Defendant's Motion In Notifying The District Court That He Is Being Interfered With And Being Denied The Ability To Retain And Secure Licensed Counsel To Represent Him Concerning Docket [Nos.] 475, 476, 477, 478, 479 [and] 480 Before This Court (Doc. #482) filed July 15, 2019 is frivolous. As explained above, at this stage of the proceedings, defendant has no Sixth Amendment right to counsel. In addition, at least one court has informed defendant that claims related to BOP interference with his communications with counsel must be brought as a civil rights action under Bivens, not as a habeas motion. See Roal-Werner, 2012 WL 5193583, at *3 (S.D. Ill.). Likewise, the Tenth Circuit previously characterized defendant's appeal in this criminal case on a similar issue as follows: "Th[e] appeal is frivolous. Mr. Akers requested relief in his criminal case, alleging that his custodian had interfered with his right to contact counsel by

telephone. He had apparently already requested such relief through a separate civil action. Although the district court had previously informed him that he should pursue such claims in a civil case, he appealed. We decline to reinstate a frivolous appeal." See Order (Doc. #432) filed January 24, 2014 at 1. In flagrant disregard of these rulings, defendant has again reasserted the claim in this criminal case.

E. Amount Of Sanctions

Because defendant has filed at least six documents that contain frivolous arguments, the Court sanctions defendant in a total amount of $76,000.00, which reflects the minimum amount set forth in the Memorandum And Order (Doc. #466) for each violation (i.e. $1,000 for the first subsequent violation, $5,000 for the second, $10,000 for the third and $20,000 each for the fourth, fifth and sixth subsequent violations).[7] While defendant shall remain subject to *a minimum* sanction of $20,000.00 for each document filed in this criminal case that is frivolous, the Court intends to impose progressive sanctions above this minimum amount for future violations and such sanctions will increase exponentially for each subsequent violation.

IX. Additional Filing Restrictions

In addition to monetary sanctions based on defendant's frivolous filings, filing restrictions are necessary. In related civil actions, several courts have denied Akers in forma pauperis status because he has more than three strikes under 28 U.S.C. § 1915(g). See Akers v. Keszei, No. 2:07-CV-00572-JCM, 2012 WL 1340497, at *3 (D. Nev. Apr. 18, 2012); Hollingsworth, 2011 WL

[7] Regardless of the precise number of violations, sanctions in the total amount of $76,000 are warranted.

4404121, at *2 n.1; see also Akers v. Flannigan, No. 17-3094-SAC-DJW, 2017 WL 6551114, at *1 (D. Kan. July 6, 2017) ("Mr. Akers has long been designated a three-strikes litigant under Section 1915(g) and he has repeatedly been advised that absent a showing of imminent danger, he has lost the right to proceed in forma pauperis in federal court because of his repeated filing of frivolous lawsuits."). In addition, some courts have imposed pre-filing review restrictions on defendant. See In re Akers, No. 12-80210, ECF Nos. 2 and 3 filed Mar. 1 and April 15, 2013 (9th Cir.) (noting pre-filing restriction based on defendant's 9th Circuit appeals since 2007: six dismissed for lack of jurisdiction, four dismissed for lack of prosecution, two dismissed voluntarily and one summarily affirming district court ruling); Walton, 2015 WL 264705, at *3-4 (S.D. Ill.) (after fourth habeas petition since he was banned from filing new non-habeas civil cases in district, court imposed restriction that "all papers filed in a collateral attack or habeas action by petitioner Montgomery Carl Akers, Inmate No. 02866–081, will be received and reviewed by this Court, but shall be deemed DENIED after thirty days, unless the Court orders otherwise."); Akers v. Sandoval, No. 95–1306, 1996 WL 635309, at *2 (10th Cir. Nov. 4, 1996) (upholding restriction in District of Colorado that requires leave of court before filing civil action pro se).

The right of access to the courts is neither absolute nor unconditional and the Constitution confers no right to prosecute frivolous or malicious actions. See Winslow v. Hunter, 17 F.3d 314, 315 (10th Cir. 1994). The fact that defendant is serving a prison sentence does not entitle him to file frivolous documents in perpetuity. The goal of fairly dispensing justice is compromised when the Court is forced to devote limited resources to processing repetitious and frivolous claims. In re Sindram, 498 U.S. 177, 180 (1991). Federal courts have inherent power

to regulate the activities of abusive litigants by imposing carefully tailored restrictions under appropriate circumstances. See Tripati, 878 F.2d at 352; see also Phillips v. Carey, 638 F.2d 207, 209 (10th Cir. 1981) (exercise of power to limit filing limited to well-documented and extreme cases; litigant's history must indicate that his filings are predominantly malicious, frivolous or otherwise abusive).

Here, several factors weigh in favor of limiting any further pro se filings in this case. First, defendant has a lengthy history of litigation that entails "vexatious, harassing or duplicative lawsuits." Safir v. U.S. Lines, Inc., 792 F.2d 19, 24 (2d Cir. 1986). More than ten years ago, on January 16, 2008, the Tenth Circuit Court of Appeals affirmed defendant's sentence. Defendant has filed a barrage of frivolous motions and civil cases which challenge collateral matters related to his criminal case. Since the Tenth Circuit affirmed defendant's sentence, this Court and the Tenth Circuit have collectively issued some 47 orders related to defendant's numerous motions and appeals. See District Court Orders (Doc. ## 248, 277, 280, 282, 283, 291, 292, 306, 321, 328, 335, 366, 375, 384, 388, 390, 393, 396, 408, 416, 421, 430, 437, 439, 449, 461, 473) filed between March 5, 2008 and July 26, 2018; Tenth Circuit Orders (Doc. ##265, 310, 313, 363, 370, 371, 386, 404, 411, 412, 431, 432, 433, 435, 444, 446, 455, 465, 466, 472) filed between July 28, 2008 and July 25, 2018. Defendant has filed numerous civil suits throughout the country in an attempt to argue collateral issues. Nearly all of plaintiff's filings have been duplicative, vexatious and meritless. See Werner v. Utah, 32 F.3d 1446, 1447-48 (10th Cir. 1994) (filing restrictions valid exercise of inherent powers against litigant who has "documented lengthy history of vexatious, abusive actions").

Other factors also weigh in favor of filing restrictions. Defendant certainly does not have a good faith expectation of prevailing on his claims. See Safir, 792 F.2d at 24 (court should consider "litigant's motive in pursuing litigation, e.g. whether the litigant has an objective good faith expectation of prevailing"). Defendant is not represented by counsel, and this fact has led to numerous abusive filings. See id. Defendant's abusive and repetitive filings have caused an unnecessary burden on judicial resources. The Court has been taxed by processing defendant's numerous filings and drafting orders which explain well-established concepts and legal principles that defendant surely understands. See id. (court should consider whether "litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel"). The Court finds that monetary sanctions alone are insufficient and would not adequately protect the Court and the government from future groundless filings. See id. (court should consider whether lesser sanctions would be adequate to protect courts and other parties). Further, this Court and many courts throughout the country have warned defendant concerning further filing restrictions.

Based on the above factors, the Court proposes the following filing restrictions:

> **If defendant wishes to file a document, he must file a motion that seeks leave to do so with a copy of the document attached that he proposes to file. His motion for leave and memorandum shall not exceed ten pages and no supplements will be permitted. Defendant's motion for leave must (1) address whether this Court or any other court has addressed directly or indirectly any of the arguments presented in the document that he proposes to file; (2) if this Court or another court has addressed any of the arguments, attach a copy of the order that reflects the ruling; (3) explain why the proposed document should not be construed as an unauthorized successive motion under 28 U.S.C. Section 2255 and if construed as a Section 2255 motion why he did not seek leave of the Tenth Circuit Court of Appeals to file the document; and (4) explain why the proposed document should not be**

> **construed as a challenge to the execution of his sentence under 28 U.S.C. Section 2241 or the conditions of his confinement under Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). The government will not be required to respond to the motion for leave unless the Court so orders. In addition, absent extraordinary circumstances, the Court will summarily rule on all future motions as well as the amount of sanctions for the filing of any frivolous documents. See Tenth Circuit Order (Doc. #472) filed July 25, 2018 at 5 ("we decline to assist Akers in further wasting judicial resources with extensive discussion"). The above restrictions do not apply to documents filed on defendant's behalf by a licensed attorney who is admitted to practice in the District of Kansas.**

On or before November 22, 2019, defendant may file written objections, not to exceed ten pages, to the additional proposed filing restrictions set forth here in Section IX. If defendant does not timely file an objection, the filing restrictions will go into effect on December 1, 2019.

IT IS THEREFORE ORDERED that defendant's Motion To Void The Original Habeas Proceedings In This Case Based Upon A Lack Of Subject-Matter Jurisdiction (Doc. #475) filed March 18, 2019, which the Court construes as a second or successive motion under 28 U.S.C. § 2255, is **DISMISSED for lack of jurisdiction**.

IT IS FURTHER ORDERED that a certificate of appealability as to the ruling on defendant's Section 2255 motion is **DENIED**.

IT IS FURTHER ORDERED that defendant's Motion For Appointment Of The Federal Public Defender Per Standing Order 18-3 (Doc. #476) filed March 18, 2019 is **OVERRULED**.

IT IS FURTHER ORDERED that defendant's Motion To Amend The Restitution Order (Doc. #477) filed March 18, 2019 is **OVERRULED**.

IT IS FURTHER ORDERED that defendant's Motion For Status Update Regarding Doc.

#475 Filed On March 28, 2019 (Doc. #481) filed July 10, 2019 is **OVERRULED as moot**.

IT IS FURTHER ORDERED that Defendant's Motion In Notifying The District Court That He Is Being Interfered With And Being Denied The Ability To Retain And Secure Licensed Counsel To Represent Him Concerning Docket [Nos.] 475, 476, 477, 478, 479 [and] 480 Before This Court (Doc. #482) filed July 15, 2019 is **OVERRULED**.

IT IS FURTHER ORDERED that based on defendant's filing of Defendant's Motion To Void The Original Habeas Proceedings In This Case Based Upon A Lack Of Subject-Matter Jurisdiction (Doc. #475) filed March 18, 2019, defendant's Motion For Appointment Of The Federal Public Defender Per Standing Order 18-3 (Doc. #476) filed March 18, 2019, defendant's Motion To Amend The Restitution Order (Doc. #477) filed March 18, 2019, defendant's Second Addendum To Defendant's Motion To Void The Judgment In The First Habeas Proceedings Of This Case (Doc. #478) filed March 29, 2019 and defendant's Brief In Support Of And Clarification Of Defendant's Motion To Void The Original Habeas Proceedings In This Case Based Upon A Lack Of Subject-Matter Jurisdiction (Doc. #480) filed May 20, 2019, and Defendant's Motion In Notifying The District Court That He Is Being Interfered With And Being Denied The Ability To Retain And Secure Licensed Counsel To Represent Him Concerning Docket [Nos.] 475, 476, 477, 478, 479 [and] 480 Before This Court (Doc. #482) filed July 15, 2019, which each contains frivolous factual allegations or legal theories, the Court sanctions defendant in the total amount of $76,000.00. On or before December 1, 2019, defendant shall pay this amount to the Clerk of the Court. If the Clerk of the Court does not receive full payment of the sanctions by December 1, 2019, the Clerk

shall collect any outstanding amount from defendant's inmate trust account.

IT IS FURTHER ORDERED that defendant's Motion For Leave To Proceed On Appeal Without Prepayment Of Costs Or Fees (Doc. #485) filed October 21, 2019 is **OVERRULED**.

IT IS FURTHER ORDERED that absent objection filed by November 22, 2019, the following filing restrictions will take effect on December 1, 2019:

> **If defendant wishes to file a document, he must file a motion that seeks leave to do so with a copy of the document attached that he proposes to file. His motion for leave and memorandum shall not exceed ten pages and no supplements will be permitted. Defendant's motion for leave must (1) address whether this Court or any other court has addressed directly or indirectly any of the arguments presented in the document that he proposes to file; (2) if this Court or another court has addressed any of the arguments, attach a copy of the order that reflects the ruling; (3) explain why the proposed document should not be construed as an unauthorized successive motion under 28 U.S.C. Section 2255 and if construed as a Section 2255 motion why he did not seek leave of the Tenth Circuit Court of Appeals to file the document; and (4) explain why the proposed document should not be construed as a challenge to the execution of his sentence under 28 U.S.C. Section 2241 or the conditions of his confinement under Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). The government will not be required to respond to the motion for leave unless the Court so orders. In addition, absent extraordinary circumstances, the Court will summarily rule on all future motions as well as the amount of sanctions for the filing of any frivolous documents. See Tenth Circuit Order (Doc. #472) filed July 25, 2018 at 5 ("we decline to assist Akers in further wasting judicial resources with extensive discussion"). The above restrictions do not apply to documents filed on defendant's behalf by a licensed attorney who is admitted to practice in the District of Kansas.**

IT IS FURTHER ORDERED that except as to the additional proposed filing restrictions set forth in Section IX above, this Memorandum And Order is final and the Court will summarily overrule objections or motions to reconsider on any of the issues addressed above.

The Clerk is directed to forward a copy of this order to the Tenth Circuit Court of Appeals and to the Office of the Federal Public Defender.

Dated this 8th day of November, 2019 at Kansas City, Kansas.

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

FILED
United States Court of Appeals
Tenth Circuit

June 15, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MONTGOMERY CARL AKERS,

Defendant - Appellant.

No. 19-3254
(D.C. Nos. 2:04-CR-20089-KHV-1 &
2:09-CV-02206-KHV)
(D. Kan.)

ORDER

Before **LUCERO**, **BACHARACH**, and **MORITZ**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

FILED
United States Court of Appeals
Tenth Circuit

April 21, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MONTGOMERY CARL AKERS,

Defendant - Appellant.

No. 19-3254
(D.C. No. 2:04-CR-20089-KHV-1)
(D. Kan.)

ORDER

Before **LUCERO**, **BACHARACH**, and **MORITZ**, Circuit Judges.

This matter is before the court on Appellant's motion for extension of time to file a petition for rehearing and/or rehearing en banc. The motion is granted. The petition, if any, shall be filed by June 3, 2020. No further extensions will be granted.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk