UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 24-1738

Gregory Bartunek

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the District of Nebraska - Omaha
(8:21-cv-00467-RFR)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 12, 2024

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

/s/ Maureen W. Gornik

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

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May 31, 2024

Gregory Bartunek
FEDERAL CORRECTIONAL INSTITUTION
29948-047
P.O. Box 9000
Seagoville, TX 75159-9000

RE: 24-1738 Gregory Bartunek v. United States

Dear Gregory Bartunek:

Enclosed is a copy of the dispositive order entered today in the referenced case.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing must be received by the clerk's office within the time set by FRAP 40 in cases where the United States or an officer or agency thereof is a party (within 45 days of entry of judgment). Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. Except as provided by Rule 25(a)(2)(iii) of the Federal Rules of Appellate Procedure, pro se petitions for rehearing are not afforded a grace period for mailing and are subject to being denied if not timely received.

Maureen W. Gornik
Acting Clerk of Court

MTB

Enclosure(s)

cc: Clerk, U.S. District Court, District of Nebraska
Donald James Kleine

District Court/Agency Case Number(s): 8:21-cv-00467-RFR

UNITED STATES COURT OF APPEALS
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Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the District of Nebraska - Omaha
(8:21-cv-00467-RFR)

JUDGMENT

Before SMITH, GRUENDER, and BENTON, 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.

The motion to supplement is denied.

May 31, 2024

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

/s/ Maureen W. Gornik

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, v. GREGORY BARTUNEK, Defendant.	**8:17CR28** **MEMORANDUM AND ORDER**

This matter is before the Court on defendant Gregory Bartunek's ("Bartunek") *pro se* Motion for Relief (Filing No. 497) pursuant to Federal Rule of Civil Procedure 60(b). The government opposes Bartunek's motion (Filing No. 501). Having liberally construed Bartunek's motion and supporting arguments, *see United States v. Sellner*, 773 F.3d 927, 932 (8th Cir. 2014), the Court denies his multifaceted request for relief.

I. BACKGROUND

On January 19, 2017, Bartunek was charged (Filing No. 1) with one count of distributing child pornography, in violation of 18 U.S.C. § 2252A(a)(2) ("Count I"), and one count of possessing child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B) ("Count II"). The Court appointed counsel to represent him (Filing No. 10).

Unhappy with his counsel's inability to avoid his pretrial detention, Bartunek sought the appointment of new counsel (Filing Nos. 29 and 33). When the Court denied the request because Bartunek did not "show justifiable dissatisfaction with his current representation," *United States v. Boone*, 437 F.3d 829, 839 (8th Cir. 2006), Bartunek knowingly and voluntarily waived his right to counsel and began representing himself, with the federal public defender appointed as stand-by counsel (Filing Nos. 36 and 41).

For the next eleven months, Bartunek actively filed pretrial motions regarding detention, discovery, dismissal, speedy trial, suppression, and other matters. In all, he filed close to fifty motions.

As trial neared, Bartunek changed his mind about representing himself and asked the Court to appoint counsel for him (Filing No. 298). The Court originally reappointed the federal public defender, but at Bartunek's request (Filing No. 305), eventually appointed Andrew J. Wilson ("Wilson") to represent him pursuant to the Criminal Justice Act of 1964, as amended, 18 U.S.C. § 3006A (Filing No. 309).

Before trial, Wilson and the government explored the possibility of a plea agreement. According to Bartunek, he rejected the government's plea offer and decided to go to trial because Wilson failed to sufficiently apprise him of all the risks. With hindsight, Bartunek now regrets that decision.

After a three-day trial, a jury found Bartunek guilty of both counts on October 31, 2018 (Filing No. 349). They deliberated for just an hour and thirty-two minutes. Bartunek again blamed Wilson for the adverse outcome.

At sentencing, the Court sustained some of Bartunek's objections to the revised presentence investigation report (Filing No. 365) and partially granted his motion for a downward variance (Filing No. 366). The Court ultimately sentenced Bartunek to concurrent sentences of 204 months in prison on Count I and 120 months in prison on Count II, each to be followed by 15 years of supervised release.

Bartunek appealed his conviction, challenging "two evidentiary rulings and the denial of a motion for a mistrial." *See United States v. Bartunek*, 969 F.3d 860, 861 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 1439 (2021). The Eighth Circuit carefully reviewed Bartunek's arguments but found "no reversible error." *Id.* at 861-65.

On December 14, 2021, Bartunek filed a 118-page Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Filing No. 446). The motion contained more than 28 grounds for relief purportedly supported by more than 500 pages of briefing (Filing Nos. 448-455 and 458). On initial review, the Court concluded the motion was "deeply flawed yet not so flawed as to require summary dismissal" of all his claims (Filing No. 457). The Court granted Bartunek leave to amend but advised him to avoid "the prolixity and repetition that mar[red] his first effort."

On April 4, 2022, Bartunek amended his motion, increasing his asserted grounds for relief from 28 to 44 (Filing No. 468). After a thorough review of Bartunek's amended motion and extensive briefing (Filing No. 469), the Court dismissed with prejudice Bartunek's claims based on 31 of those 44 grounds and ordered the government to respond to the other 13—most of which related to claims of prosecutorial misconduct and ineffective assistance of counsel (Filing No. 470). *See United States v. Bartunek*, No. 8:17CR28, 2022 WL 1443658, at *1-2 (D. Neb. May 6, 2022).

After the matter was fully briefed, the Court carefully reviewed Bartunek's remaining claims and again denied relief. *See United States v. Bartunek*, No. 8:17CR28, 2022 WL 20727795, at *12-13 (D. Neb. Oct. 4, 2022). The Court also denied Bartunek's renewed request that the Court recuse itself based on unfounded allegations of judicial misconduct. *See id.* at *12. Because Bartunek did not make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), the Court did not issue a certificate of appealability. *See id.*

Bartunek again appealed. *See Bartunek v. United States*, No. 22-3523, 2023 WL 6475447, at *1 (8th Cir. Feb. 14, 2023), *cert. denied*, 144 S. Ct. 155 (2023). The Eighth Circuit followed suit—summarily denying Bartunek's application for a certificate of appealability and dismissing the appeal. *See id.*

II. DISCUSSION

A. Rule 60(b)

Refusing to fold no matter his hand, Bartunek now moves pursuant to Rule 60(b) for relief from the Court's orders denying his § 2255 motion. Bartunek states his "Grounds for Relief include mistake, newly discovered evidence, fraud, and other reasons that justif[y] relief."

"Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005) (drawing a distinction between Rule 60(b) motions that attack "the substance of the federal court's resolution of a claim on the merits" and those that assert "some defect in the integrity of the federal habeas proceedings"). More precisely, Rule 60(b) provides that the Court may—"[o]n motion and just terms"—"relieve a party . . . from a final judgment, order, or proceeding for" any of the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Bartunek appears to rely on subsections (1), (2), (3), and (6).

Although it is generally a rule of civil procedure and may initially seem out of place in a case challenging a criminal sentence, "Rule 60(b) has an unquestionably valid role to play in habeas cases." *Gonzalez*, 545 U.S. at 534. Still, obtaining relief is not easy. *Harley*

v. Zoesch, 413 F.3d 866, 870 (8th Cir. 2005). The rule—which seeks to strike a balance between finality and justice—"provides for extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances." *Id.* (quoting *Atkinson v. Prudential Prop. Co.*, 43 F.3d 367, 371 (8th Cir. 1994)). It does not allow a defendant to bypass the statutory process for filing a second or successive § 2255 motion. *See Gonzalez*, 545 U.S. at 531; 28 U.S.C. § 2255(h); *United States v. Lambros*, 404 F.3d 1034, 1036 (8th Cir. 2005) (per curiam) ("It is well-established that inmates may not bypass the authorization requirement of 28 U.S.C. § 2244(b)(3) for filing a second or successive § 2254 or § 2255 action by purporting to invoke some other procedure.").

To prevent any such shenanigans or skulduggery, the Eighth Circuit encourages district courts confronted with a Rule 60(b) motion that challenges the denial of a § 2255 motion to conduct "a brief initial inquiry to determine whether the allegations in the Rule 60(b) motion in fact amount to a second or successive collateral attack under" § 2255. *Boyd v. United States*, 304 F.3d 813, 814 (8th Cir. 2002) (per curiam). If they do, the Court should either "dismiss [the motion] for failure to obtain authorization from the Court of Appeals or" transfer it to that court. *Id.*

A Rule 60(b) motion is a second or successive § 2255 application if it "seeks to add a new ground for relief" or attacks the Court's "previous resolution of the claim *on the merits*.'" *Gonzalez*, 545 U.S. at 532; *accord Ward v. Norris*, 577 F.3d 925, 933 (8th Cir. 2009). More-specific examples include motions seeking "to present a claim of constitutional error omitted from the movant's initial habeas petition" or "to present 'newly discovered evidence' in order to advance the merits of a claim previously denied." *Spitznas v. Boone*, 464 F.3d 1213, 1216 (10th Cir. 2006).

In contrast, a motion is a genuine Rule 60(b) motion if it "attacks 'some defect in the integrity of the federal habeas proceedings' or if [it] 'merely asserts that a previous ruling which precluded a merits determination was in error—for example, a denial for such

reasons as failure to exhaust, procedural default, or statute-of-limitations bar.'" *Williams v. Kelley*, 858 F.3d 464, 470 (8th Cir. 2017) (quoting *Gonzalez*, 545 U.S. at 532 & n.4).

B. Bartunek's Claims

Bartunek's claims present something of a mixed bag. Some of his claims allege defects in the integrity of his § 2255 proceedings. Many others improperly attempt to rehash the merits of his failed claims. The Court addresses each of his eight grounds for relief in turn.

Grounds One and Two

Bartunek first alleges the Court erred in holding him "to a higher standard than the liberal standards afforded to pro se litigants" in denying his request for post-conviction relief. He also contends the Court violated his Sixth Amendment right to counsel by failing to appoint counsel to represent him on his § 2255 motion. As Bartunek sees it, his right to counsel at sentencing extended to his "entire § 2255 proceedings." Neither argument has merit.

Contrary to Bartunek's suggestion, the Court "liberally construed" all of his filings and gave him ample opportunity to fairly present his scores of claims for relief. *Sellner*, 773 F.3d at 932 (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam)). The Court not only allowed him a chance to refine his arguments but also let him exceed the established word limits in presenting his voluminous grounds for relief.

The Court then carefully considered every one of his 44 grounds for relief. It simply found none of them warranted relief in his case. *See Schooley v. Kennedy*, 712 F.2d 372, 373 (8th Cir. 1983) ("[P]ro se litigants are not excused from compliance with relevant rules of the procedural and substantive law.") (citing *Faretta v. California*, 422 U.S. 806, 834-35 n. 46 (1975)).

As for the right to counsel, Bartunek is mistaken as to the extent of his rights. "[T]here is no general right to counsel in post-conviction habeas proceedings for criminal

defendants." *United States v. Craycraft*, 167 F.3d 451, 455 (8th Cir. 1999). "[T]he right to appointed counsel extends to the first appeal of right, and no further." *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). Bartunek's cursory attempt to distinguish *Finley* because it involved 28 U.S.C. § 2254 instead of § 2255 is unavailing. *See Craycraft*, 167 F.3d at 455.

While the Court could have appointed counsel for collateral review, it determined the totality of Bartunek's circumstances did not warrant it. They still don't.

Ground Three

At first blush, Bartunek's third ground—that the Court erred in denying him an evidentiary hearing—could be seen as raising a defect in the proceedings. But a closer look reveals that it is actually an attack on the merits because the decision to hold a hearing depends on the Court's determination that his motion and the files and records of his "case conclusively show[ed]" that he was not entitled to any relief. 28 U.S.C. § 2255(b); *accord Love v. United States*, 949 F.3d 406, 411 (8th Cir. 2020).

Bartunek expressly challenges that overall determination and some of the Court's specific rulings on his § 2255 claims. Such claims must be dismissed. *See, e.g., Rouse v. United States*, 14 F.4th 795, 799 (8th Cir. 2021) (noting that under the Antiterrorism and Effective Death Penalty Act of 1996, which "imposed significant restrictions on second or successive" § 2255 motions, "any claim adjudicated in a prior petition 'shall be dismissed'" (quoting 28 U.S.C. § 2244(b)(1)). All of those determinations were also subject to appeal. *See Kan. City S. Ry. Co. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 825 n.4 (8th Cir. 1980) (en banc) ("It is basic that [Rule] 60(b) is not a substitute for appeal."). At any rate, the lack of an evidentiary hearing is not grounds for relief in this case under Rule 60(b).

Ground Four

In his fourth ground, Bartunek asserts he "has new evidence to support his motion." *See* Fed. R. Civ. P. 60(b)(2). More specifically, he cites evidence "that his brother and

sister-in-law could corroborate the fact that he was not home on March 26, 2016, when the alleged distribution of child pornography occurred." He again faults the Court for failing to hold a hearing to allow him to present this evidence.

This ground fails for at least three reasons. First, it is primarily an extension of Bartunek's claim that the Court should have held an evidentiary hearing. Second, as the government points out, Bartunek argued in support of his amended § 2255 motion that his brother and sister-in-law had evidence of his innocence. The Court denied that claim. *See Rouse*, 14 F.4th at 800 (explaining that newly discovered evidence provided to support a claim the Court previously denied falls "squarely within the class of Rule 60(b) claims to which the Supreme Court applied § 2244(b) restrictions in *Gonzalez*"). Third, even if the evidence was "newly discovered" in some real sense, Rule 60(b)(2) requires Bartunek to show that he could not—"with reasonable diligence"—have discovered the evidence "in time to move for a new trial." He does not show that or meet any other part of his burden.[1]

Ground Five

Bartunek's fifth ground alleges fraud, misrepresentation, and other misconduct by the government. "A Rule 60(b) motion asserting fraud" in a defendant's § 2255 proceeding may "constitute a true 60(b) motion," but it "requires a more nuanced analysis" that "depends on the fraud alleged." *Spitznas*, 464 F.3d at 1216. "If the alleged fraud" relates only to fraud perpetrated on the Court during the § 2255 proceedings, "then the motion will be considered a true 60(b) motion." *Id.* If the fraud on the Court "includes (or necessarily implies) related fraud on" the Court during trial or sentencing, "then the motion will ordinarily be considered a second or successive petition because any ruling would

[1]"To succeed under Rule 60(b)(2), [Bartunek] must establish four elements: '(1) the evidence was discovered after trial; (2) due diligence was exercised to discover the evidence; (3) the evidence is material and not merely cumulative or impeaching; and (4) the evidence is such that a new trial would probably produce a different result.'" *Holmes v. United States*, 898 F.3d 785, 791 (8th Cir. 2018) (quoting *U.S. Xpress Enters., Inc. v. J.B. Hunt Transp., Inc.*, 320 F.3d 809, 815 (8th Cir. 2003)).

inextricably challenge the underlying conviction proceeding." *Id.* Bartunek's allegations fit the second category.

Bartunek asserts that in responding to Bartunek's § 2255 motion, the government "made several statements of fact and law that were fraud, misrepresentation, and/or misconduct" that prevented Bartunek from fully and fairly presenting his claims. Yet Bartunek goes on to clarify that the government "deliberately and repeatedly deceived the court into believing that the government did not use misleading or false testimony" and did not make its own misstatements "of fact and law" in his criminal case. In other words, the thrust of Bartunek's current allegations of fraud are that the government perpetuated the fraud it committed before the grand jury, at trial, and at sentencing—fraud claims the Court has already denied. That constitutes an unauthorized successive petition, not a true fraud claim under Rule 60(b)(3). *See Spitznas*, 464 F.3d at 1216 (explaining that allegations that the government presented fraudulent testimony in a § 2255 proceeding "that was separate and distinct from any previous fraud alleged to have tainted the initial conviction or direct appeal may be the subject of a true 60(b) motion").

To the limited extent Bartunek raises separate and distinct "deceptions" and "mischaracterizations of the record" in the government's response to his § 2255 motion, the Court finds them insufficient to warrant relief. "To prevail on a Rule 60(b)(3) claim, the moving party must show by clear and convincing evidence that the opposing party engaged in fraud or other misconduct and that this conduct prevented the moving party from fully and fairly presenting its case." *Wagstaff & Cartmell, LLP v. Lewis*, 40 F.4th 830, 842 (8th Cir. 2022) (internal marks omitted) (quoting *In re Levaquin Prods. Liab. Litig.*, 739 F.3d 401, 404 (8th Cir. 2014)). Bartunek has not done that.

Ground Six

Bartunek next argues that the Court's "rulings, which precluded a merits determination on several claims, were in error." The government contends Bartunek is

merely trying to assert new grounds for relief and attacking the Court's denial of his amended § 2255 motion.

The government's argument is generally well-taken. Bartunek does seek to repackage and relitigate a host of issues that have been exhaustively addressed throughout this case. *See, e.g.*, *Rouse*, 14 F.4th at 799. Yet the broader issue is that Bartunek's claim is largely based on the false premise that the Court "erroneously dismissed most of Bartunek's claims as procedurally defaulted wi[]thout a merits determination." Again, the Court dismissed the vast majority of Bartunek's challenged claims because they had already been fully litigated, did not qualify for collateral review under § 2255, or lacked merit. The Court fully explained why each claim failed. Bartunek's steadfast disagreement with the substantive rulings of this Court and the Eighth Circuit is not proper grounds for relief.

Even if some of Bartunek's claims, liberally construed, could fall within Rule 60(b), the Court finds his allegations and arguments do not establish the "exceptional circumstances" required to justify the "extraordinary relief" that Rule 60(b) provides. *Harley*, 413 F.3d at 870 ("Relief is available under Rule 60(b)(6) only where exceptional circumstances have denied the moving party a full and fair opportunity to litigate his claim and have prevented the moving party from receiving adequate redress."); *see also Williams*, 858 F.3d at 471 (concluding that even if a "motion was not a second or successive habeas petition," the moving party had "not shown 'extraordinary circumstances' that would justify relief from judgment under Rule 60(b)(6)").

Ground Seven

Bartunek's seventh ground fares no better. He asserts the Court "failed to issue a certificate [of appealability] for any of [his] claims in violation of the law." He further contends this Court and the Eighth Circuit failed to properly apply the appropriate standard in denying a certificate of appealability.

It should go without saying that this Court has no authority to alter the Eighth Circuit's decision on this or any point. And to the extent the Court can alter its own ruling at this point under Rule 60(b) or otherwise, it sees no error, let alone exceptional circumstances warranting such a change. *Cf. Lambros*, 404 F.3d at 1036 (explaining "the certificate requirement under 28 U.S.C. § 2253(c)(1) may not be circumvented through creative pleading").

Ground Eight

Bartunek last argues that requiring the Court "to rule on [its] own errors, abuses of discretion, misconduct and vindictiveness, violated [his] Due Process rights." Bartunek raised essentially the same issue in (1) a Motion to Recuse (Filing No. 461) filed just before the Court ruled on his amended § 2255 motion and (2) the conclusion of that motion, arguing that his allegations of judicial misconduct made it "unreasonable to believe that [a judge] would rule against himself." The Court denied the claim then, and Bartunek cannot reassert it here under the guise of Rule 60(b). *See Lambros*, 404 F.3d at 1036.

What's more, Bartunek is wrong to suggest that it is patently unfair and unreasonable to think that a judge would even reconsider—let alone correct—their own errors. It happens all the time.[2] His last argument is, at root, just the latest reincarnation of his unsuccessful effort from the outset of this case to have the Court recuse itself. *See Bartunek*, 2022 WL 20727795, at *12; *United States v. Bartunek*, No. 8:17CR28, 2017 WL 1956882, at *1 (D. Neb. May 10, 2017) (applying 28 U.S.C. § 455(a)).

Bartunek maintains the Court has it in for him. The claim is still unfounded. *See United States v. Eagle Chasing,* 965 F.3d 647, 651 (8th Cir. 2020) (noting judges are "presumed to be impartial"); *Harris v. Missouri*, 960 F.2d 738, 740 (8th Cir. 1992) ("An

[2]For example, on February 14, 2022, the Court granted Bartunek's Motion to Reconsider (Filing No. 459) and gave him leave to proceed in forma pauperis (Filing No. 462).

unfavorable judicial ruling . . . does not raise an inference of bias or require the trial judge's recusal.").

As Bartunek acknowledges, § 2255(a) expressly allows a defendant seeking relief to "move the court which imposed the sentence to vacate, set aside or correct the sentence." Rule 4(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts likewise directs such motions "to the judge who conducted the trial and imposed sentence." Even if the Court could revisit these issues under Rule 60(b), Bartunek has not provided a compelling reason to stray from the usual course here.

C. No Certificate of Appealabilty

A defendant must have a certificate of appealability before he can "appeal the denial of any motion that effectively or ultimately seeks habeas corpus or § 2255 relief." *Lambros*, 404 F.3d at 1036; *see also* 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1). That "certificate requirement applies to an appeal from the denial of a Rule 60(b) motion seeking to reopen a habeas case." *Lambros*, 404 F.3d at 1036.

To obtain a certificate, Bartunek must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Because he has not made that showing, no certificate will issue in this case.

In light of the foregoing,

IT IS ORDERED:

1. Defendant Gregory Bartunek's Motion for Relief (Filing No. 497) is dismissed with respect to all claims that constitute a second or successive § 2255 motion. All his other claims are denied.
2. No certificate of appealability will issue.
3. The Clerk of Court is directed to mail a copy of this Memorandum and Order to Bartunek at his address of record.

Dated this 26th day of March 2024.

BY THE COURT:

Robert F. Rossiter, Jr.
Chief United States District Judge