

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

JESUS A. TINAJERO-PORRAS - Petitioner,

V.

UNITED STATES OF AMERICA - Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Jesus A. Tinajero-Porras
Reg. No. 16230-064
U.S. Penitentiary
P.O. BOX 1000
Leavenworth, KS 66048

APPENDIX 1

APPENDIX 1

DECISION OF THE 10TH CIRCUIT COURT OF APPEALS

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APPENDIX

DECISION OF THE 10TH

COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

September 25, 2017

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JESUS A. TINAJERO-PORRAS,

Defendant - Appellant.

No. 17-6108
(D.C. No. 5:06-CR-00115-R-1)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **KELLY, BRISCOE**, and **MATHESON**, Circuit Judges.

Jesus A. Tinajero-Porras, a federal prisoner appearing pro se, filed a petition for a writ of audita querela, which the district court treated as a second or successive 28 U.S.C. § 2255 motion and denied for lack of jurisdiction. To appeal from that decision, Tinajero-Porras must obtain a certificate of appealability (COA). *See United States v. McIntyre*, 313 F. App'x 160, 162 (10th Cir. 2009) (requiring COA to appeal from denial of writ of audita querela treated as § 2255 motion). We deny a COA and dismiss the matter.

Tinajero-Porras was convicted by a jury of multiple drug offenses, and his direct appeal was unsuccessful. *See United States v. Tinajero-Porras*, 275 F. App'x 794, 796

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

(10th Cir. 2008). His first motion for relief under 28 U.S.C. § 2255 was also unsuccessful. It was followed by a motion for relief under Fed. R. Civ. P. 60(b), which the district court treated as an unauthorized successive § 2255 motion and dismissed for lack of jurisdiction. Tinajero-Porras's request for a COA was denied. *See United States v. Tinajero-Porras*, 670 F. App'x 657, 658 (10th Cir. 2016).

Tinajero-Porras then filed the underlying petition for a writ of audita querela, asserting that he should be resentenced because the court failed to properly apply U.S.S.G. § 1B1.3(a)(1)(B)'s provisions in determining the relevant conduct for his offenses. The district court treated the petition as a second or successive § 2255 motion and denied it for lack of jurisdiction. Tinajero-Porras now seeks a COA to appeal that decision.

To be entitled to a COA, Tinajero-Porras must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

"A § 2255 motion is one claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." *United States v. Nelson*, 465 F.3d 1145, 1148 (10th Cir. 2006) (internal quotation marks omitted). Although Tinajero-Porras entitled his pleading as a petition for a writ of audita querela and even instructed the court not to treat it as a § 2255 motion, "[i]t is the relief

sought, not [the] pleading's title, that determines whether the pleading is a § 2255 motion." *Id.* at 1149. Because he is alleging that his sentence is unlawful, the pleading is properly treated as a § 2255 motion.

Moreover, "a writ of audita querela is not available to a petitioner when other remedies exist, such as a motion to vacate sentence under 28 U.S.C. § 2255." *United States v. Torres*, 282 F.3d 1241, 1245 (10th Cir. 2002) (internal quotation marks omitted); *see also Caravalho v. Pugh*, 177 F.3d 1177, 1178 (10th Cir. 1999) ("The exclusive remedy for testing the validity of a judgment and sentence, unless it is inadequate or ineffective, is that provided for in 28 U.S.C. § 2255." (internal quotation marks omitted)). Courts have found the remedy under § 2255 to be inadequate or ineffective only in extremely limited circumstances, *see Caravalho*, 177 F.3d at 1178, none of which is present here.

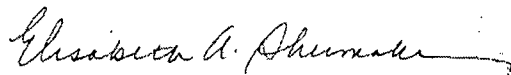
Tinajero-Porras contends that a § 2255 remedy is not available because his claim is based on non-constitutional sentencing error arising from a clarifying amendment to the Sentencing Guidelines. But "§ 2255's substantive and procedural barriers by themselves do not establish that § 2255 is inadequate or ineffective." *Id.* (citing *Triestman v. United States*, 124 F.3d 361, 376 (2d Cir. 1997)). "[T]he mere fact that [petitioner] is precluded from filing a second § 2255 petition does not establish that the remedy in § 2255 is inadequate." *Id.* at 1179.

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. *See* 28 U.S.C. §§ 2244(b)(3)(A), 2255(h). In the absence of such authorization,

a district court lacks jurisdiction to address the merits of a second or successive § 2255 motion. *See In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008) (per curiam). Reasonable jurists could not debate that the district court was correct to treat Tinajero-Porras's pleading as an unauthorized second or successive § 2255 motion and to deny it for lack of jurisdiction.

Accordingly, we deny Tinajero-Porras's request for a COA. We grant his motion to proceed on appeal without prepayment of costs or fees and deny as moot Appellee's motion for an extension of time.

Entered for the Court

A handwritten signature in cursive script, appearing to read "Elisabeth A. Shumaker", written in dark ink.

ELISABETH A. SHUMAKER, Clerk

APPENDIX 2

APPENDIX 2

10TH CIRCUIT COURT OF APPEALS ORDER DENYING
PETITION FOR REHEARING AND REHEARING EN BANC

APPENDIX

APPENDIX

10TH CIRCUIT COURT

ORDER DENYING

PETITION FOR REHEARING

AND REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

October 23, 2017

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

No. 17-6108

JESUS A. TINAJERO-PORRAS,

Defendant - Appellant.

ORDER

Before **KELLY, BRISCOE, and MATHESON**, 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



ELISABETH A. SHUMAKER, Clerk

APPENDIX 3

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OPINION AND ORDER OF THE DISTRICT COURT

APPENDIX

APPENDIX

OPINION

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

JESUS A. TINAJERO-PORRAS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. CR-06-115-R
	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

Before the Court is Petitioner's Petition for a Writ of Error Audita Querela pursuant to 18 U.S.C. § 1651. The Petition is DENIED.

In September 2006, a jury in the United States District Court for the Western District of Oklahoma convicted Petitioner of drug charges arising out of a conspiracy to possess with intent to distribute 5 kilograms or more of cocaine and 1,000 kilograms or more of marijuana. [Doc. 68]. This Court imposed prison terms of 360 and 48 months, to be served concurrently. [Doc. 77]. On appeal, Petitioner raised several challenges to his sentence. The Tenth Circuit affirmed. [Doc. 105]; *United States v. Tinajero-Porras*, 275 F. Appx. 794, 796 (10th Cir. 2008). Shortly thereafter Petitioner moved to vacate his sentence under 28 U.S.C. § 2255 [Doc. 146], which this Court denied. [Doc. 167].¹ Petitioner then filed a

¹ This Court subsequently granted Plaintiff's Motion to Reconsider its denial of habeas relief [Doc. 173], finding that it had failed to address some of Petitioner's claims. After briefing by both parties, the Court again declined to grant Petitioner's motion under 28 U.S.C. § 2255 [Doc. 180].

Motion to Reduce Sentence under 18 U.S.C. § 3582(c)(2) [Doc. 207], which this Court also denied [Doc. 210].

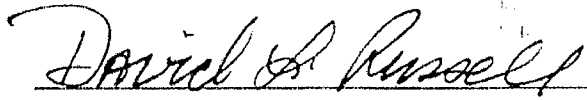
Petitioner's present motion asserts that this Court has jurisdiction under 28 U.S.C. § 1651 and should therefore resentence him due to the Court's alleged failure to properly apply USSG § 1B1.3(a)(1)(B)'s provisions in determining the relevant conduct of Petitioner's offense. Yet in light of 28 U.S.C. § 2255(h)'s bar on second or successive habeas petitions, Petitioner's Motion must be denied because the Court lacks jurisdiction to entertain Petitioner's claim. Petitioner seeks to sidestep this procedural bar by styling his motion as one for a writ of audita querela under the All Writs Act, 28 U.S.C. § 1651. In fact, Petitioner specifically instructs the Court not to characterize his Motion as one under 28 U.S.C. § 2255 or 18 U.S.C. § 3582. Yet the Tenth Circuit has made clear that "a writ of audita querela is not available to a petitioner when other remedies exist, such as a motion to vacate sentence under 28 U.S.C. § 2255." *United States v. Torres*, 282 F.3d 1241, 1245 (10th Cir. 2002). Further, "the mere fact [a petitioner] is precluded from filing a second § 2255 petition does not establish that the remedy in § 2255 is inadequate" and therefore unavailable as a remedy. *Carvalho v. Pugh*, 177 F.3d 1177, 1179 (10th Cir. 1999). Petitioner's Motion is therefore DENIED. *See also United States v. McIntyre*, 313 Fed.Appx. 160, 162 (10th Cir. 2009) (affirming the district court's denial of a second habeas petition that was styled under 28 U.S.C. § 1651).

The Court further denies Petitioner a Certificate of Appealability ("COA") under Rule 11(a) of the Rules Governing Section 2255 Cases in the United States District Courts. Where a habeas petition is denied on procedural grounds, Petitioner is entitled to a COA

only if he demonstrates 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). Petitioner has not made this showing. He may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22 if he wishes to appeal the Court’s ruling on his Motion.

In conclusion, Petitioner’s motion under 28 U.S.C. § 1651 is DENIED.

IT IS SO ORDERED this 1st day of May 2017.


DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE