

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

DEC 18 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GARY ALLEN SCHLAKE,

Defendant-Appellant.

No. 17-35611

D.C. Nos. 9:09-cv-00070-DWM
9:06-cr-00051-DWM-1

District of Montana,
Missoula

ORDER

Before: BYBEE and MURGUIA, Circuit Judges.

The request for a certificate of appealability (Docket Entry Nos. 3, 5 & 6) is denied because appellant has not shown “that (1) jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 60(b) motion and, (2) jurists of reason would find it debatable whether the underlying section 2255 motion states a valid claim of the denial of a constitutional right.”

United States v. Winkles, 795 F.3d 1134, 1143 (9th Cir. 2015), *cert. denied* 136 S. Ct. 2462 (2016); *see also* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Any pending motions are denied as moot.

DENIED.

FILED

JUL 27 2017

Clerk, U.S. Courts
District Of Montana
Missoula Division

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

GARY ALLAN SCHLAKE,

Defendant/Movant.

Cause No. CR 04-13-M-DWM
CR 06-51-M-DWM

ORDER

On July 18, 2017, the Court denied Defendant/Movant Schlake's motions under Fed. R. Civ. P. 60. On July 20, 2017, Schlake submitted additional documents in connection with the motion. See "A Continuing Mot. to Am. and Supp." (Doc. 73) at 9; *Houston v. Lack*, 487 U.S. 266, 270-71 (1988) (prison mailbox rule). Nothing in the additional documents alters the outcome. In addition, they are untimely.

A certificate of appealability is denied. No reasonable jurist would find Schlake's submissions timely or supportive of reopening either of his original § 2255 motions. See *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

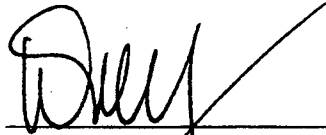
Accordingly, IT IS ORDERED:

1. The "Continuing Motion to Amend and Supplement" and all attached

documents (Doc. 73) are DENIED.

2. A certificate of appealability is DENIED. The Clerk of Court shall immediately process the appeal if Schlake files a Notice of Appeal.

DATED this 27th day of July, 2017.

A handwritten signature in black ink, appearing to read "D. Molloy", is written over a horizontal line.

Donald W. Molloy
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

DEC 18 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GARY ALLEN SCHLAKE,

Defendant-Appellant.

No. 17-35612

D.C. Nos. 9:07-cv-00121-DWM
9:04-cr-00013-DWM-1

District of Montana,
Missoula

ORDER

Before: BYBEE and MURGUIA, Circuit Judges.

The request for a certificate of appealability (Docket Entry Nos. 4, 5 & 6) is denied because appellant has not shown “that (1) jurists of reason would find it debatable whether the district court abused its discretion in denying the Rule 60(b) motion and, (2) jurists of reason would find it debatable whether the underlying section 2255 motion states a valid claim of the denial of a constitutional right.”

United States v. Winkles, 795 F.3d 1134, 1143 (9th Cir. 2015), *cert. denied* 136 S. Ct. 2462 (2016); *see also* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Any pending motions are denied as moot.

DENIED.

FILED

JUN 12 2008

PATRICK E. DUFFY, CLERK

By DEPUTY CLERK, MISSOULA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
vs.
GARY ALLAN SCHLAKE,
Defendant.

Cause No. CR 04-013-M-DWM
CV 07-121-M-DWM

ORDER RECHARACTERIZING AND DENYING MOTION AND DENYING CERTIFICATE OF APPEALABILITY

On October 1, 2007, Defendant Gary Schlake submitted to the Court a document consisting of arguments and allegations of fact surrounding the investigation of this case. In order to preserve Schlake's filing date for statute of limitations purposes, the Clerk of Court filed the document as a motion to vacate, set aside, or correct the sentence, pursuant to 28 U.S.C. § 2255. Schlake is a federal prisoner proceeding pro se.

I. Recharacterization

On December 5, 2007, pursuant to Castro v. United States, 540 U.S. 375, 383 (2003), Schlake was notified that the Court intended to proceed as if the document were a motion to vacate, set aside, or correct the sentence under 28 U.S.C. § 2255. He was given an opportunity to set forth

any additional claims he wanted to make in response to the Order. He was advised that failure to timely respond would be deemed an admission that the October 1 document should be recharacterized as a motion under 28 U.S.C. § 2255 and that the only proposed claim for relief is contained within that document.

Schlake did not respond to the Order. Accordingly, the document is recharacterized as a motion to vacate, set aside, or correct the sentence under 28 U.S.C. § 2255.

II. Preliminary Screening

Pursuant to the second paragraph of 28 U.S.C. § 2255, the Court must conduct a preliminary review of the motion to determine whether “the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” See also Rule 4(b), Rules Governing Section 2255 Proceedings for the United States District Courts.

III. Background

On March 3, 2004, a grand jury indicted Schlake on one count of using the Internet to attempt to induce a minor to engage in sexual activity that would constitute statutory rape, a violation of 18 U.S.C. § 2422(b). See Indictment (doc. 6) at 1-2; Resp. to Mot. for Bill of Particulars (doc. 19) at 2. The incident underlying the Indictment culminated in a meeting in Missoula on February 11, 2004, between Schlake and an FBI agent who had been posing as a minor in chat room correspondence with Schlake. See Offer of Proof (doc. 26); Criminal Compl. (doc. 1) (Mossbach Aff.) at 1-11. Following his arrest, Schlake admitted that he planned to take the person he thought was an underage girl back to his home to have sex with her. He also stated he had contacted other girls in chat rooms and that he had arranged a meeting with one in Great Falls (Cascade County) a

few days previously but was unable to make the trip due to illness. See Criminal Compl. (Mossbach Aff.) at 9-11; see also Mot. at 1.

On May 4, 2004, the parties filed a fully executed plea agreement. See Plea Agreement (doc. 24). On May 7, 2004, Schlake entered a guilty plea. See Minutes (doc. 27).

A sentencing hearing was held on September 10, 2004. Because Schlake pled guilty before the Supreme Court issued its decision in Blakely v. Washington, 542 U.S. 296 (2004), the United States did not get what it expected from Schlake's sentencing. Assistant United States Attorney McLean explained:

Your Honor, when this case was charged and when the defendant pled guilty, pursuant to the plea agreement, the government was expecting that he would receive a sentence of about 15 to 20 years in prison. And that was our expectation when we entered into the plea agreement. Then the Supreme Court decided Blakely. The defendant has received what some may have believed to be a very large benefit from the Supreme Court decision. It was certainly one that was not expected by the United States when we entered this plea agreement.

The reason we entered the plea agreement was because the people of Missoula and Montana need to be protected from this fellow. He clearly continues to deny any responsibility for the crimes. He asks this Court for a second chance. He got his second chance in state court. We talked about that today. He pled guilty to a misdemeanor in state court, despite having admitted having sex with two underage girls. Yet he's on probation for that crime. And while on probation, he contacts a real 15-year-old girl here in Missoula. It wasn't the FBI that he initially contacted, it was a real 15-year-old girl.

Sentencing Tr. (doc. 40) at 41:1-21. The United States asked the Court to impose an enhancement based on Schlake's two convictions in state court in Missoula County for endangering a child, but its request was denied. See id. at 8:14-9:6.

Schlake was sentenced to serve the statutory mandatory minimum of five years in prison. See 18 U.S.C. § 2242(b) (2003). He was placed on supervised release for life. See Judgment (doc.

34) at 2-3.

Schlake and the United States both appealed the sentence. On May 8, 2006, the Ninth Circuit Court of Appeals affirmed the Court's guidelines calculation and remanded for resentencing under United States v. Ameline, 409 F.3d 1073, 1084 (9th Cir. 2005) (en banc). See United States v. Schlake, Nos. 04-30424, 04-30470 (9th Cir. May 8, 2006) (doc. 49).

On September 21, 2006, Schlake was indicted on one count of using the Internet to induce a minor to engage in sexual activity constituting statutory rape, a violation of 18 U.S.C. § 2422(b). See Indictment (doc. 1) at 1-2, United States v. Schlake, No. CR 06-51-M-DWM (D. Mont. filed Sept. 21, 2006). The incident underlying that Indictment culminated in multiple meetings between Schlake and a thirteen-year-old girl in Whitefish, Flathead County, Montana. At their last meeting, on February 8, 2004 – three days before his arrest by the FBI – Schlake had sexual intercourse with the girl. See United States' Trial Br. (doc. 17) at 3.¹

The Ameline remand in this case resulted in reimposition, on December 20, 2006, of the five-year mandatory minimum. See Minutes (doc. 57); Order (doc. 58).

Schlake did not appeal from the resentencing. His conviction became final when his time to file a notice of appeal expired, or on January 3, 2007. See Chaker v. Crogan, 428 F.3d 1215, 1219 (9th Cir. 2005) (§ 2254); United States v. Guerrero, 488 F.3d 1313, 1316 & n.2 (10th Cir. 2007); Fed. R. App. P. 4(b)(1)(A)(i), 26(a).

Schlake timely filed his § 2255 motion on October 1, 2007.

¹ The Ninth Circuit Court of Appeals affirmed the conviction and sentence in this case on January 18, 2008. See United States v. Schlake, No. 07-30145 (9th Cir. Jan. 18, 2008). The record of the case, including the transcript of the jury trial, is still with the appeals court. The United States' trial brief, which was borne out at trial in the respect for which it is cited here, is available in this Court's electronic docket.

IV. Schlake's Allegations

Schlake contends that the FBI knew or should have known at the time of his prosecution in this case that he had met and had sex with another underage girl in Whitefish. Therefore, he concludes, the FBI should have fully investigated that incident, and it should have been charged along with the crime in this case. If it had, Schlake claims, it is likely that the charge in this case would have been dropped, and a plea bargain would have been reached in the Whitefish case, resulting in a five-year sentence. Thus, he would not currently be serving the five-year sentence in this case, to be followed by a 210-month sentence in the Whitefish case. See Mot. at 1-2; Schlake, No. CR 06-51-M-DWM (D. Mont. judgment entered Apr. 20, 2007).

V. Analysis

There is a legal problem and a factual problem with Schlake's claim. Both problems are insurmountable.

First, the United States has no legal obligation to bring all charges it may have against a defendant in one prosecution. Schlake seems to suggest that his second prosecution was vindictive because it was not brought until after he was sentenced to the five-year minimum in this case and the United States lost its appeal.² However, he cannot point to any impermissible factor that entered into the United States' decision to initiate the second prosecution in 2006. To argue, as Schlake does, that the second charge could have been brought along with the first is to concede that the decision to prosecute the second charge was legitimate. Moreover, Schlake admits that the FBI did

² Actually, Schlake's argument might be better characterized as a complaint that the FBI had a duty to discover the Whitefish incident and that its failure to do so should result in a de facto dismissal of the charge in this case. But that is too absurd even to contemplate.

not fully investigate the contents of his computer at the time this case was prosecuted. See Mot. at 2; see also Criminal Compl. (Mossbach Aff.) at 9-11 (Schlake's confession, omitting the Whitefish incident). There was no need to do so, since the United States reasonably anticipated that Schlake's guilty plea in this case would result in a prison term between 15 and 20 years. See also, e.g., United States' Trial Br. (doc. 17) at 5. Even after Blakely, the United States still believed that Schlake's prior convictions in state court would enhance his sentence in this case. When it found out it was wrong, it initiated the second prosecution. Because there is no reason to suppose that Schlake was singled out for further prosecution based on some impermissible factor, see United States v. One 1985 Mercedes, 917 F.2d 415, 420 (9th Cir. 1990), his claim lacks a legal foundation.

Second, given the prosecutor's remarks at Schlake's sentencing in this case, there is no reason whatsoever to believe that Schlake could have come away with a five-year plea bargain – especially because the Whitefish case involved intercourse with a teenage girl, not just an attempt that was thwarted by the FBI. His suggestion that he might have received a total of five years for both incidents is merely another instance of his failure to appreciate the significance of his criminal conduct.

VI. Certificate of Appealability

A. Governing Law

Pursuant to 28 U.S.C. § 2253(c), “[a] certificate of appealability [‘COA’] may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.” See Hohn v. United States, 524 U.S. 236 (1998); Lambright v. Stewart, 220 F.3d 1022, 1024 (9th Cir. 2000). The standard of a “substantial showing” can be satisfied on an issue-by-issue basis. Lambright, 220

F.3d at 1024 (citing 28 U.S.C. § 2253(c)(3)).

[I]n order to make a substantial showing of the denial of a federal right a petitioner . . . “must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are ‘adequate to deserve encouragement to proceed further.’”

Lozada v. Deeds, 498 U.S. 430, 432 (1991) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)). See also Slack v. McDaniel, 529 U.S. 473, 484 (2000) (petitioner “must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.”). Any doubt as to whether a petitioner has met the standard is resolved in his favor. Lambright, 220 F.3d at 1025. The Court must “state why a certificate should not issue.” Fed. R. App. P. 22(b)(1).

B. Discussion

Schlake has no legal claim of entitlement to be prosecuted on one occasion for everything the United States has the opportunity to discover about his criminal activities. His speculation that he would have received a total of 60 months, instead of a total of 300 months, for both of his sex offenses against children is insupportable. There were obvious reasons for the second prosecution. The FBI did not fully explore all the evidence it seized in this case because Schlake confessed and then pled guilty. The fact that Blakely came down after Schlake pled guilty but before he was sentenced resulted in a sentence considerably lower than the United States reasonably expected from his guilty plea. The second prosecution involved sexual intercourse between Schlake and a young teenage girl, whereas this case involved an attempt thwarted by the FBI.

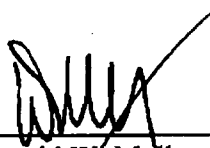
There is no reason to suspect vindictive prosecution. Schlake has not made any showing at all, much less a substantial one, that he was deprived of a constitutional right. A COA is not

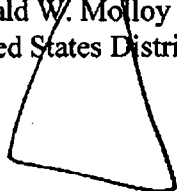
warranted.

Accordingly, IT IS HEREBY ORDERED as follows:

1. Schlake's submission of October 1, 2007, is RECHARACTERIZED as a motion to vacate, set aside, or correct the sentence under 28 U.S.C. § 2255.
2. Schlake's § 2255 motion (doc. 59) is DENIED.
2. A certificate of appealability is DENIED. The Clerk of Court shall immediately process the appeal if Schlake files a Notice of Appeal.
3. The Clerk of Court shall ensure that all pending motions in this case and in CV 07-121-M-DWM are terminated and shall close the civil file by entering judgment in favor of the United States and against Schlake.

DATED this 12th day of June, 2008.



Donald W. Molloy
United States District Court


FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

MAY 03 2017

Clerk, U.S. District Court
District Of Montana
Missoula

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

GARY ALLAN SCHLAKE,

Defendant/Movant.

Cause No. CR 04-13-M-DWM

ORDER

On June 12, 2008, the Court denied Defendant/Movant Schlake's motion to vacate, set aside, or correct the sentence under 28 U.S.C. § 2255. A certificate of appealability was also denied. *See* Order (Doc. 65) at 8. Schlake did not appeal.

Almost nine years later, on April 25, 2017, the clerk received from Schlake a letter claiming that he did not submit the document the Court recharacterized, pursuant to *Castro v. United States*, 540 U.S. 375, 383 (2003), as a motion under § 2255 and subsequently denied. *See* Mot. (Doc. 66) at 1-2; *see also* Mot. § 2255 (Doc. 59); Orders (Doc. 63, 65).

It is not clear why Schlake waited almost nine years before making this allegation. In effect, he asks the clerk to "unfile" the document because, he claims, he did not mail it to the clerk. *See* Mot. (Doc. 66) at 1 ("I want Document #59 returned to me and deleted from the record! . . . I DID NOT SEND IT TO YOU!");

id. at 2 (“I want my property returned to me. The originals!”). Parties may not order the clerk to delete documents from the record of a case. In addition, the clerk has no authority to take action in a particular case.¹ Only the Court can consider Schlake’s request to “undo” his § 2255 motion.

Schlake’s request most closely resembles a motion to set aside the order denying the § 2255 motion under Fed. R. Civ. P. 60(b). *See, e.g., Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005). Alternatively, he might be understood to allege the order should be set aside for “fraud on the court.” Fed. R. Civ. P. 60(d)(3); *Pizzuto v. Ramirez*, 783 F.3d 1171, 1180-81 (9th Cir. 2015). Schlake is aware of Rule 60, as he sought post-judgment relief in his other case, but he does not mention it here. *See* Rule 60 Mot. (Doc. 77) at 3 (“Examples of motions attacking a defect in the integrity [sic] of the federal habeas proceedings include a claim of fraud on the court”), *Schlake*, No. CR 06-51-M-DWM (D. Mont. filed Mar. 28, 2016); *id.* at 5 (“Defendant respectfully request this Honorable Court to grant him an evidentiary on [sic] this motion to reopen his motion to vacate . . . where it [sic] was a defect in the integrity of the proceedings.”). Regardless, the Court must

¹ The clerk responds to inquiries and provides copies of filed documents at a rate set by the Administrative Office of the United States Courts. As Schlake notes, in October 2007, he sent a letter inquiring as to whether he was represented by counsel. By return letter, he was advised he was not represented, but his motion seeking counsel was pending before the Court. The docket contains a staff note to that effect on Oct. 15, 2007. The note is not visible to the public because an inquiry to the clerk about a case generally is not part of the case.

liberally construe the documents he submits.²

Even with liberal construction, however, the proceedings on Schlake's § 2255 motion did not perpetrate a "fraud" on anyone. The record of the case, as well as Schlake's statements in the instant letter/motion, show that he knew he had submitted something to the Court in October 2007. It was his responsibility to keep abreast of the action. He claims it took him "the longest time" to "wrap my head around the Court's decision in its Recharacterization order," but the order told him what the clerk received and what the clerk did with it. The order also told him what the Court intended to do and did. *See* Order (Doc. 65) at 1-2; *see also* Order and *Castro* Notice (Doc. 63) at 1; Docket Entry Jan. 11, 2008. The order denying the § 2255 motion spelled out what the Court understood Schlake to allege. *Id.* at 5. Although Schlake insists he sent in only "a 'single' page," Mot. (Doc. 66) at 2; *see also* Mot. for Counsel (Doc. 60) (consisting of a single page), the order cited a two-page document as the source of Schlake's claim for relief, *see* Order (Doc. 65) at 5 ("See Mot. at 1-2").

If Schlake did not know what made the Court believe he was alleging these things ("I was baffled because I didn't allege anything," Mot. (Doc. 66) at 2), he could have asked. He could have requested copies of the docket sheet or his own

² For better or worse, there is no prohibition against "second or successive" Rule 60 motions. Therefore, recharacterizing Schlake's letter to the clerk as a motion does not prejudice Schlake. The *Castro* rule does not apply here.

submissions. He could have appealed or sought clarification by motion.³ Schlake does not say when he received the order denying his § 2255 motion, but it does not matter. It does not take a long time, nor “the longest time,” for a litigant who is reading an order to realize he does not know what pleading it is talking about. This is not fertile ground for a claim of fraud on the court. Even more incredible is Schlake’s claim of fraud *by* the court. (“This court somehow obtained it [Doc. 59] and used this paper against me illegally!” Mot. (Doc. 66) at 2.)

Schlake’s letter to the clerk, construed as a motion seeking to reopen or set aside the 2007-2008 proceeding under § 2255, is denied. A certificate of appealability is denied. Schlake has not made a showing of any substance that he was deprived of a constitutional right, either in the underlying criminal case or in the § 2255 proceedings. 28 U.S.C. § 2253(c)(2). In addition, his claim of fraud is not credible. Reasonable jurists would find no basis to disagree with the procedural ruling. *See Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Accordingly, IT IS HEREBY ORDERED as follows:

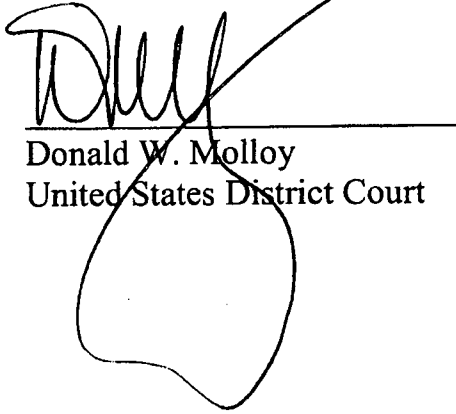
1. Schlake’s letter to the clerk, construed as a motion to reopen or set aside

³ Given Schlake’s numerous submissions in his other criminal case, *see, e.g.*, Mots. (Docs. 62, 63, 66, 67, 69, 71, 73, 75, 77, 79, 81, 84), *United States v. Schlake*, No. CR 06-51-M-DWM (D. Mont. May 18, 2009, through May 16, 2016), there is no reason to think he was unable to contact the Court.

the § 2255 proceeding (Doc. 66), is DENIED.

2. A certificate of appealability is DENIED. The Clerk of Court shall immediately process the appeal if Schlake files a Notice of Appeal.

DATED this 3rd day of May, 2017.



Donald W. Molloy
United States District Court