

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

March 21, 2018

**Elisabeth A. Shumaker
Clerk of Court**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

PHILIP ANDRA GRIGSBY,

Defendant - Appellant.

No. 18-3014
(D.C. Nos. 6:12-CR-10174-JTM-1 &
6:15-CV-01154-JTM)
(D. Kan.)

ORDER AND JUDGMENT*

Before **McHUGH, KELLY**, and **EID**, Circuit Judges.

Philip Andra Grigsby pleaded guilty to child-pornography and firearms offenses and was sentenced to 260 years in prison. *United States v. Grigsby*, 749 F.3d 908, 909 (10th Cir. 2014). Several years after being sentenced, Grigsby filed (1) a motion to correct his presentence report (PSR) and (2) a Fed. R. Civ. P. 60(b)(4) motion alleging that the criminal judgment was void. In a combined order, the district court denied the motion to correct and dismissed the Rule 60(b)(4) motion as an unauthorized second or

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

successive 28 U.S.C. § 2255 motion. The district court further denied a certificate of appealability (COA). Grigsby now appeals from the denial of the motion to correct and seeks a COA to appeal from the dismissal of the Rule 60(b)(4) motion. We affirm the denial of the motion to correct, and we deny a COA and dismiss that portion of the appeal that concerns the Rule 60(b)(4) motion.

I. Denial of Motion to Correct

Grigsby's motion to correct asserted that based on his PSR, Bureau of Prisons psychological personnel had mistakenly concluded in a risk assessment that Grigsby's victim was an acquaintance, not his daughter. Grigsby therefore requested that the PSR be amended to indicate that his victim was his minor daughter. The district court denied relief, holding that the risk assessment "simply sets out the worker's *interpretation* of the PSR, but offers nothing in the way of any independent information showing that the PSR was erroneous." R., Vol. 1 at 54.

Fed. R. Crim. P. 36 enables a court to "at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission." Grigsby, however, has not pointed to any factual misinformation in the PSR. Rather, he complains that the PSR omitted certain information that he did not request earlier, but that he now would like to include (namely, that his victim was his minor daughter). As the district court held, Grigsby has failed to show any "error," much less the clerical type of error that is subject to correction under Rule 36, *see United States v. Lonjose*, 663 F.3d 1292, 1299 n.7 (10th Cir. 2011); *United States v. Blackwell*, 81 F.3d 945, 948-49 (10th Cir. 1996).

II. Dismissal of Rule 60(b)(4) Motion

Grigsby's Rule 60(b)(4) motion alleged the judgment was void because the indictment lacked specificity. The district court held that "[a]lthough styled as a Rule 60 motion, it is in fact a comprehensive attack on the conviction itself, and thus in reality is a successive 28 U.S.C. § 2255 [motion]." R., Vol. 1 at 54. Because this court had not authorized the motion, *see* 28 U.S.C. § 2255(h), the district court dismissed it for lack of jurisdiction, *see In re Cline*, 531 F.3d 1249, 1251-52 (10th Cir. 2008) (*per curiam*).

To appeal from this decision, Grigsby must obtain a COA. *See United States v. Harper*, 545 F.3d 1230, 1233 (10th Cir. 2008). That requires him to 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, 484 (2000). Before this court, Grigsby focuses on the merits of his underlying claims. We do not consider the merits, however, because no reasonable jurist could debate the district court's procedural decision to dismiss the Rule 60(b)(4) motion for lack of jurisdiction.

"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 is otherwise subject to collateral attack.'" *United States v. Nelson*, 465 F.3d 1145, 1148 (10th Cir. 2006) (quoting 28 U.S.C. § 2255(a)). "It is the relief sought, not [the] pleading's title, that determines whether the pleading is a § 2255 motion." *Id.* at 1149. Because Grigsby's motion alleged the district court lacked jurisdiction over his criminal

proceeding, no reasonable jurist could debate the district court's conclusion that it was effectively a § 2255 motion.

Grigsby has already pursued relief under § 2255. *See United States v. Grigsby*, 633 F. App'x 696, 697 (10th Cir. 2016) (denying a COA). He therefore cannot file another § 2255 motion without this court's authorization. 28 U.S.C. § 2255(h).

It is undisputed that Grigsby did not obtain such authorization, and without authorization, the district court had no jurisdiction to consider the filing, *see Cline*, 531 F.3d at 1251.

The district court's choices were to dismiss the filing or transfer it to this court for authorization, *see id.* at 1252, and no reasonable jurist could debate the decision to dismiss.

The denial of the motion to correct the PSR is affirmed. A COA is denied and the portion of the appeal challenging the dismissal of the Rule 60(b)(4) motion is dismissed.

Entered for the Court
Per Curiam

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,
Plaintiff,

vs.

Case No. 12-10174-JTM

PHILIP ANDRA GRIGSBY,
Defendant.

MEMORANDUM AND ORDER

In its order of January 12, 2018, the court denied defendant's Motion to Correct his Presentence Report (PSR) (Dkt. 268) and dismissed his separate Motion to Set Aside Judgment. (Dkt. 272). Defendant then filed a Notice of Appeal (Dkt. 277) as to the denial of the request to amend the PSR. The Tenth Circuit has remanded the matter for the determination of whether to issue a certificate of appealability (COA).

A COA may issue if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). 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)). A certificate is appropriate if "jurists of reason could disagree with the district court's resolution of his constitutional

claims or ... jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

The court will not issue a COA. As determined in the court's prior order, the evidence cited by defendant — a 2017 report by an unidentified worker in prison counseling services — offers no valid grounds for modifying the contents of a PSR issued four years earlier. Defendant's second motion was a successive 28 U.S.C. § 2255 motion, which the court was without jurisdiction to entertain on the merits. This determination is not subject to substantial doubt, and the same is true for the court's conclusion that a successive § 2255 motion is not justified under the facts and circumstances of the case.

IT IS SO ORDERED this 2nd day of February, 2018.

s/ J. Thomas Marten
J. THOMAS MARTEN, JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,
Plaintiff,

vs.

Case No. 12-10174-JTM

PHILIP ANDRA GRIGSBY,
Defendant.

MEMORANDUM AND ORDER

This matter is before the court on two motions by defendant Philip Andra Grigsby. The defendant was convicted in 2013 of numerous sex-related offenses and sentenced to a substantial term of imprisonment. The first motion (Dkt. 268) recently filed by defendant asks for modification of his Pre-Sentence Report (PSR). The second, denominated a Fed.R.Civ.Pr. 60(b) motion to set aside judgment, attacks his conviction. The extensive history of the present action has been summarized in prior rulings of the court, and need not be repeated here.

The court hereby denies defendant's request that "that his PSR be corrected." (Dkt. 268, at 2). The PSR (Dkt. 57) was entered March 21, 2013. The court has previously upheld

the PSR as substantially correct and denied defendant's prior motion to modify the report. (Dkt. 156). Defendant's current motion is based on nothing more than a March 17, 2017 report by a worker in the Bureau of Prisons Psychological Services Section. This document simply sets out the worker's *interpretation* of the PSR, but offers nothing in the way of any independent information showing that the PSR was erroneous.

The defendant's second motion is based on the Indictment's alleged lack of specificity. Although styled as a Rule 60 motion, it is in fact a comprehensive attack on the conviction itself, and thus in reality is a successive 28 U.S.C. § 2255. See *United States v. Andrews*, 2018 WL 316988, *1 (10th Cir. Jan. 8, 2018); *United States v. Lara-Jimenez*, 2010 WL 126154, *1-2 (D. Kan. Jan. 12, 2010). Because the defendant has not received permission from the Tenth Circuit to file a second or successive 2255 motion, the court has no jurisdiction to address the merits of the motion. See *United States v. Avila-Avila*, 132 F.3d 1347, 1348-49 (10th Cir.1997); see also 28 U.S.C. § 2244(b)(3)(A).

The court has discretion whether to transfer the matter or to dismiss it. *Trujillo v. Williams*, 465 F.3d 1210, 1222-23 (10th Cir. 2006). Because defendant's motion presents nothing in the way of new evidence or show any new, retroactive rule of constitutional law, the court in its discretion 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).

IT IS ACCORDINGLY ORDERED this 12th day of January, 2018, that defendant's Motion to Correct (Dkt. 268) is denied; defendant's Motion to Set Aside (Dkt. 272) is dismissed.

s/ J. Thomas Marten
J. THOMAS MARTEN, JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**