

APPENDIX A

APPENDIX A

The decision of the Tenth Circuit Court of Appeals.

February 16, 2018
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JASON McKINNEY,

Defendant - Appellant.

No. 17-3125
(D.C. No. 2:06-CR-20078-JWL-1)
D. Kansas

ORDER AND JUDGMENT*

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

After examining the briefs and appellate record, this court has determined unanimously that oral argument would not materially assist 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.

On March 29, 2017, Appellant Jason McKinney filed a *pro se* pleading styled "Petition for Writ of Error Audita Querela." McKinney sought a reduction

*This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

in the 360-month sentence he received for violating 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(iii), possession with intent to distribute fifty grams or more of crack cocaine. Relying on Amendment 790 to the United States Sentencing Guidelines, which clarified the “jointly undertaken criminal activity” analysis, *see* USSG § 1B1.3(a)(1)(B), McKinney argued the district court miscalculated the quantity of drugs for which he was responsible under USSG § 2D1.1. McKinney previously challenged his sentence by filing motions pursuant to 28 U.S.C. § 2255 and 18 U.S.C. § 3582(c), both of which were denied.

The district court denied McKinney’s motion, concluding *audita querela* relief was not available because other avenues of relief, namely 28 U.S.C. § 2255 and 18 U.S.C. § 3582(c), are available to McKinney and those avenues are not inadequate or ineffective. *United States v. Torres*, 282 F.3d 1241, 1245 (10th Cir. 2002) (“[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.” (quotation omitted)). On appeal, McKinney argues § 2255 is not an avenue for relief because the claim he seeks to raise is a non-constitutional claim based on a clarifying amendment to the Guidelines and such a claim cannot be raised in a § 2255 motion. This court has already considered, and rejected, this argument. *United States v. Tinajero-Porras*, 697 F. App’x 609, 611 (10th Cir. 2017)

(unpublished disposition).¹ Although *Tinajero-Porras* is an unpublished disposition, its reasoning is persuasive and its conclusion was based on this court's opinion in *Carvalho v. Pugh*, 177 F.3d 1177, 1178 (10th Cir. 1999) (holding "§ 2255's substantive and procedural barriers by themselves do not establish that § 2255 is inadequate or ineffective").

The district court's order denying McKinney's petition for a writ of *audita querela* is affirmed.

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge

¹We may consider non-precedential, unpublished decisions for their persuasive value. See Fed. R. App. P. 32.1; 10th Cir. R. 32.1(A).

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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Tenth Circuit

March 16, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

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v.

No. 17-3125

JASON MCKINNEY,

Defendant - Appellant.

ORDER

Before **MATHESON, KELLY**, and **MURPHY**, 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 B

APPENDIX B

The decision of the District Court..

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS**

United States of America,

Plaintiff,

v.

Case No. 06-20078-01-JWL

Jason McKinney,

Defendant.

MEMORANDUM & ORDER

In June 2007, defendant Jason McKinney pled guilty to one count of possession with intent to distribute 50 grams or more of cocaine base in violation of 21 U.S.C. § 841(b)(1)(A)(iii) and one count of use of a firearm in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c). In March 2009, the court sentenced Mr. McKinney to 320 months imprisonment on the first count and sixty months imprisonment on the second count, to run consecutively. The Tenth Circuit affirmed the court's judgment on appeal. Thereafter, this court denied in part and dismissed in part Mr. McKinney's motion to vacate under 28 U.S.C. § 2255. The Tenth Circuit agreed that Mr. McKinney was not entitled to relief under § 2255 and denied his request for a certificate of appealability.

This matter is presently before the court on Mr. McKinney's petition for writ of error audita querela under 18 U.S.C. § 1651 in which he continues his efforts to have this court modify his sentence in light of Amendment 790, which clarified the circumstances in which acts of others involved in a jointly undertaken criminal activity can be attributed to the defendant for sentencing purposes. Even assuming that the "ancient common law writ of audita querela"

remains available as a form of relief, *see United States v. Spring*, 614 Fed. Appx. 386 (10th Cir. 2015) (calling that assumption a “generous” one), Mr. McKinney is clearly not entitled to it. It has long been settled that a writ of audita querela is “not available to a petitioner when other remedies exist.” *See id.* (citing *United States v. Torres*, 282 F.3d 1241, 1245 (10th Cir. 2002)). Other remedies clearly exist for Mr. McKinney to challenge his sentence and he has in fact pursued those remedies under 28 U.S.C. § 2255 and 18 U.S.C. § 3582(c). The fact that Mr. McKinney’s efforts were not successful, or that § 2255 significantly restricts successive motions, does not render those avenues inadequate or ineffective. *See id.* Because he has not shown that other avenues of relief are inadequate or ineffective, Mr. McKinney has not established that he is entitled to the writ he seeks. *See id.* The motion is denied.

IT IS THEREFORE ORDERED BY THE COURT THAT Mr. McKinney’s petition for writ of error audita querela (doc. 288) is denied.

IT IS SO ORDERED.

Dated this 16th day of May, 2017, at Kansas City, Kansas.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge