

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

July 28, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CLINT TIRONE BARGER,

Defendant - Appellant.

No. 21-5021
(D.C. Nos. 4:21-CV-00078-GKF-JFJ &
4:17-CR-00032-GKF-1)
(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

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

Clint Tirone Barger, a federal prisoner proceeding pro se, seeks a certificate of appealability (COA) from the district court's order dismissing his 28 U.S.C. § 2255 motion for lack of jurisdiction. We deny a COA and dismiss this appeal.

I. BACKGROUND & PROCEDURAL HISTORY

Barger pleaded guilty to distribution and possession of child pornography. The district court sentenced him to 262 months' imprisonment in 2017. Consistent with the appeal waiver in his plea agreement, Barger did not appeal.

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Over a year later, Barger filed a § 2255 motion asserting ineffective assistance of counsel. The district court dismissed the motion as untimely. We denied a COA. *See United States v. Barger*, 784 F. App'x 605 (10th Cir. 2019).

Barger later moved this court for permission to file a second § 2255 motion, which we denied. *See Order, In re Barger*, No. 19-5090 (10th Cir. Oct. 24, 2019). Nonetheless, about eighteen months after our denial, Barger filed another § 2255 motion in the district court. The district court dismissed the motion for lack of jurisdiction (*i.e.*, as an unauthorized successive § 2255 motion) and denied a COA. Barger timely filed a notice of appeal from that dismissal.

II. ANALYSIS

This appeal may not proceed unless we grant a COA, *see* 28 U.S.C. § 2253(c)(1)(B), and we may not grant a COA unless Barger “ma[kes] a substantial showing of the denial of a constitutional right,” *id.* § 2253(c)(2). This means he “must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). And he must make an extra showing in this circumstance because the district court dismissed his § 2255 motion on procedural grounds, namely, lack of jurisdiction. So he must also show that “jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.*

Jurists of reason could not debate the district court’s dismissal. “Before a federal prisoner may file a second or successive motion under § 2255, the prisoner must first obtain an order from the appropriate court of appeals authorizing the

district court to consider the motion.” *In re Cline*, 531 F.3d 1249, 1250 (10th Cir. 2008) (per curiam) (citing 28 U.S.C. §§ 2244(b)(3)(A) and 2255(h)). “A district court does not have jurisdiction to address the merits of a second or successive § 2255 . . . claim until this court has granted the required authorization.” *Id.* at 1251. The district court therefore appropriately dismissed for lack of jurisdiction.

III. CONCLUSION

We deny Barger’s application for a COA and dismiss this appeal. We grant his motion to proceed without prepayment of costs or fees.

Entered for the Court

A handwritten signature in black ink, appearing to read 'Christopher M. Wolpert', with a long horizontal stroke extending to the right.

CHRISTOPHER M. WOLPERT, Clerk