

96CV5557-25D-MO
clw

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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DON ELDER,

Petitioner,

MEMORANDUM & ORDER

-against-

96 CV 5557 (RJD)

UNITED STATES OF AMERICA,

Respondent.

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DEARIE, District Judge.

On September 24, 1998, petitioner, Don Elder, filed a second motion seeking relief from his sentence. This second motion seeks relief under Rule 60(b) of the Federal Rules of Civil Procedure or alternatively under 28 U.S.C. § 2255. After reviewing petitioner's papers it is clear that the motion is a "second or successive" § 2255 petition and, therefore, requires an order from the Court of Appeals authorizing consideration of the petition. The motion is transferred to the Court of Appeals for the Second Circuit for certification under 28 U.S.C. § 2244.

Background

On June 26, 1995, Elder pled guilty to two counts of obstructing commerce by robbery and attempting to obstruct commerce by robbery in violation of 18 U.S.C. § 1951 (the "Hobbs Act"). Elder also pled guilty to one count of using and carrying a firearm during and in relation to a Hobbs Act conspiracy in violation of 18 U.S.C. § 924(c) (the "firearm conviction"). Elder was sentenced, on December 20, 1995, to 201 months imprisonment, which included 60 months for the firearm conviction, followed by a three year term of supervised release.

Elder appealed his firearm conviction claiming that conspiracy did not constitute a crime of violence within the meaning of § 924(c). United States v. Elder, 88 F.3d 127 (2d Cir. 1996). The Court of Appeals affirmed petitioner's conviction finding that Elder's admitted acts "were

sufficient to establish that he 'used' [a] firearm within the meaning of § 924(c), in connection with a conspiracy that was itself a crime of violence." Id. at 129.

On November 13, 1996, Elder filed a pro se writ of habeas corpus petition, pursuant to 28 U.S.C. § 2255, claiming that he was illegally sentenced. Elder claimed that his guilty plea to the firearm count and a sentencing enhancement imposed under § 2B3.1 of the United States Sentencing Guidelines resulted in "double counting" in violation of the Fifth Amendment Double Jeopardy Clause. Elder argued that the 60 month sentence imposed for the firearm conviction should run concurrently, rather than consecutively, to the sentence imposed for the Hobbs Act convictions. Petitioner reasoned that consecutive sentences resulted in double punishment for the same crime, namely using a firearm in a crime of violence.

This Court denied the motion to vacate, dismissed petitioner's claim, and denied a certificate of appealability. Shortly thereafter, the Court of Appeals for the Second Circuit also denied Elder's motion for a certificate of appealability and dismissed the appeal. On September 24, 1998, Elder filed the current pro se motion titled "Defendant's Rule 60(b) Motion or in the Alternative Motion to Vacate an Illegal Sentence" under the same docket number as his first writ of habeas corpus.

Discussion

Pro se pleadings are given liberal construction and allegations are construed in favor of the pro se litigant. Haines v. Kerner, 404 U.S. 519, 520 (1972). In this most recent motion, Elder argues that his consecutive sentences violate the Double Jeopardy Clause of the Fifth Amendment and seeks to have his sentence vacated. Petitioner's instant motion seeks the same relief founded on the same basis as the motion denied by this Court on September 12, 1997.

Petitioner claims to have new evidence that would have, if it had been available, changed the outcome of the first petition under § 2255. That however, is an issue for the Court of Appeals to consider in deciding whether or not to certify petitioner's successive petition. See 28 U.S.C. §§ 2255, 2244(b)(3)(A) (1996). Petitioner's first petition was decided and the case was closed. This Court may not entertain successive petitions unless they are certified. 18 U.S.C. § 2255 (1996).

Under Rule 60(b) of the Federal Rules of Civil Procedure, under certain circumstances, a court may relieve a party from a final judgment. Fed. R. Civ. Pro. 60(b). A Rule 60(b) motion, however, may not be used as a "substitute for an appeal." Matarese v. LeFevre, 801 F.2d 98, 107 (2d Cir. 1986). As stated above, Elder has previously moved under 18 U.S.C. § 2255, to vacate his sentence and this Court dismissed that motion and denied a certificate of appealability. Elder properly appealed that decision and the Court of Appeals denied petitioner's motion for a certificate of appealability and dismissed the appeal. The use of a Rule 60(b) motion is not the appropriate vehicle to address Elder's current allegations. To consider petitioner's motion under Rule 60(b) would circumvent Congress' clear intent in reforming the habeas corpus procedures. Petitioner's instant motion, therefore, must be deemed his second § 2255 petition filed in federal court. This Court may not entertain successive petitions unless they are certified. 18 U.S.C. § 2255 (1996).

In 1996, Congress amended § 2244 to require that a second or successive petitions be certified by the appropriate court of appeals to meet a prescribed standard for review. The Second Circuit has held that a district court receiving a second or successive § 2255 petition not so certified should transfer the petition to the Court of Appeals in the interest of justice. United States v. Liriano, 95 F.3d 119, 123 (2d Cir. 1996).

Accordingly, this case is transferred to the United States Court of Appeals for the Second Circuit in the interest of justice pursuant to 28 U.S.C. § 1631. This Court is not issuing a certificate or appealability nor recommending that an order authorizing the successive petition be granted. The Court is merely transferring petitioner's most recent motion to the Court of Appeals for the Second Circuit as required by Liriano.

The Clerk of the Court is directed to close this case.

SO ORDERED.

Dated: Brooklyn, New York
October 15, 1998


RAYMOND J. DEARIE
United States District Judge