IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

ORDER

Plaintiff,

05-C-0139-C
02-CR-0027-C-02

v.

BERNARD BRISCO,

Defendant.

- -

This proceeding was brought in March 2004 pursuant to 28 U.S.C. § 2255. It has had a long and checkered career since then. Unfortunately, the record is equally checkered and difficult to follow. To assist the court of appeals, I will summarize the events that have occurred and try to clarify the present state of the record.

After defendant Bernard Brisco filed his § 2255 motion on March 4, 2005 (Dkt. #197), I entered an order on March 14, 2005 (Dkt. # 199), denying the motion with the exception of two claims and gave defendant a deadline for supplying an affidavit setting forth facts in support of the remaining two claims. A week later, defendant moved to amend and supplement his § 2255 motion (Dkt. #202), and two days after that, he moved for an

extension of time in which to supply the affidavit required of him by the court (Dkt. #203). I granted his request for an extension of time (Dkt. #204); defendant met the deadline, although he filed three separate documents responding to the March 14 order rather than a single affidavit (Dkt. ## 205, 206 and 207).

In an order entered on May 10, 2005, I granted defendant's motion to amend and supplement and denied his § 2255 motion in full (Dkt. #208). Judgment was entered on May 10, 2005 (Dkt. #209).

On May 17, 2005, defendant filed another response to the court's March 14, 2005 order (Dkt. #210). It was not necessary to address this untimely response because it did not add anything to the responses defendant had filed previously. On May 23, 2006, defendant moved pursuant to Fed. R. Civ. P. 59 to alter or amend the May 10 judgment (Dkt. #212).

On June 2, 2005, I granted defendant's Rule 59 motion in part, vacated the May 10 judgment and asked the government to respond to defendant's claim that he was entitled to a reduction in his sentence on counts 2 and 4-7 (Dkt. #214). The government opposed defendant's claim in a brief filed on June 17, 2005 (Dkt. #215) and defendant filed a reply on July 1, 2005 (Dkt. #217). In an order entered on September 12, 2005, I denied defendant's § 2255 motion in full (Dkt. #228). Judgment was entered on that same day (Dkt. #229).

On November 14, 2005, defendant filed a notice of appeal (Dkt. #230) and a ". . .

Pro Se Motion for Reconsideration of Court's Denial of his § 2255 motion and [Rule 59] Motions and Expansion of the Court Record Pursuant to Rule 7 of the Rules Governing Habeas Corpus Proceedings in Light of Newly Discovered Evidence Under Rule 60(b)(1), 60(b)(2), and 60(b)(6) of the Federal Rules of Civil Procedure" (Dkt. #231). Before I ruled on defendant's motion, defendant filed another copy of the motion. The second version was identical to Dkt. #231, except that it included a request for issuance of a certificate of appealability (Dkt. #232). Therefore, I disregarded Dkt. #231 and considered Dkt. #232 only. In this Rule 60 motion, defendant argued that he had newly discovered evidence that the prosecutor had allowed certain witnesses to commit perjury before the grand jury.

In an order entered on January 4, 2006 (Dkt. #237), I denied defendant's Rule 60 motion on the ground that his conviction by the trial jury had rendered harmless any improprieties in the grand jury proceedings. (Defendant did not allege that his attorneys did not have access to the grand jury transcripts for impeachment purposes; his complaint was that none of his appointed counsel had showed the transcripts to him and had thus prevented him from learning of the inconsistent testimony of certain trial witnesses.) In the same order, I ruled on defendant's request for a certificate of appealability (although noting incorrectly that defendant had not filed a notice of appeal) and denied it because defendant had raised no issues of any merit. I found, however, that he was entitled to proceed in forma pauperis on appeal because the challenges he had raised were not wholly frivolous. I noted

in the order that defendant's notice of appeal might be untimely but that the timeliness of an appeal is a question reserved to the court of appeals.

Now defendant has filed a motion for reconsideration of the January 4 order denying his request for a certificate of appealability (Dkt. #239) (defendant misstates the date as January 6), a motion for clarification and correction of his Rule 60 motion (Dkt. #240), and a "corrected version" of the Rule 60 motion (Dkt. #238), as well as a new notice of appeal (Dkt. #241). Defendant explains that the purpose of the motion to clarify and correct is "to correct misspelled words which serves to clarify the motion itself." Because there is no reason to correct a motion that has already been decided, the motion to clarify and correct will be denied.

I turn then to defendant's request that I reconsider the decision to deny him a certificate of appealability, Defendant has not shown that it was error to deny the request. None of the issues he raised in his § 2255 motion met the demanding standards for such a certificate. If defendant believes that this court's denial of a certificate of appealability is erroneous, Fed. R. App. 22(b) authorizes him to seek a certificate from the court of appeals.

In examining the chain of events that have occurred in this action, I have become convinced that it was probably improper to consider defendant's first Rule 60 motion to the extent that defendant alleged that he had been denied grand jury transcripts during his trial and appeal and that he had only recently received copies of them. If the holding in Gonzalez

v. Crosby, 125 S. Ct. 2641 (2005), applies to § 2255 pleadings as well as to state court petitions filed pursuant to § 2254, the Rule 60 motion should have been filed with the court of appeals in the first place as a request for certification of a second § 2255 petition. According to Gonzalez, a claim based on newly discovered evidence must be treated as a second or successive petition and cannot be brought as a Rule 60 motion to reconsider a denial of a habeas petition. In the Court's view, allowing such a motion to be brought as a Rule 60 motion "would impermissibly circumvent the requirement that a successive habeas petition be precertified by the court of appeals as falling within an exception to the successive-petition bar." Id. at 2648. Therefore, I will take this opportunity to amend the January 4, 2006 order to read that the motion is dismissed because the court lacks authority to consider it until defendant has obtained appellate certification of a second § 2255 motion.

Defendant's motion for expansion of the record will be denied as unnecessary. If defendant has new information that he thinks warrants reversal of his conviction, he must first obtain certification from the court of appeals allowing him to file a second motion for § 2255 relief.

Finally, I turn to defendant's second notice of appeal. In this notice, defendant states that he is appealing this court's judgment entered on September 12, as well as this court's order of January 4, 2006. Defendant already filed a notice of appeal from the September 12 judgment. His request for leave to proceed in forma pauperis with respect to that appeal

was granted, although his request for a certificate of appealability was denied. To the extent that defendant's notice seeks appellate review of this court's January 4, 2006 order, as amended, I construe the notice to include a request for leave to proceed in forma pauperis on appeal and a request for a certificate of appealability.

As defendant is aware, a defendant who is found eligible for court-appointed counsel in the district court may proceed on appeal in forma pauperis without further authorization "unless the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed . . . ." Defendant had court-appointed counsel at trial. Therefore, he can proceed on appeal unless I find that his appeal is taken in bad faith. In this case, a reasonable person could not suppose that the appeal has some merit, as is required in order for the appeal to be taken in good faith. The standard for making that finding is different from the standard for deciding whether to issue a certificate of appealability. It is less demanding. Walker v. O'Brien, 216 F.3d 626, 631-32 (7th Cir. 2000). Applying this lower standard, I conclude that defendant is not proceeding in good faith. The law is clear on the subject of successive appeals. It is not debatable that he may not file repeated motions to vacate his sentence pursuant to 28 U.S.C. § 2255 without obtaining advance permission to do so from the court of appeals.

Furthermore, a certificate of appealability shall issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This

means that a district court must find that the issues the applicant wishes to raise are ones that "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." Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983). Defendant's appeal falls far short of satisfying any of these requirements. It is not debatable that he may not file repeated motions to vacate his sentence pursuant to 28 U.S.C. § 2255 without obtaining advance permission to do so from the court of appeals.

In closing, I will note that defendant has had every opportunity to be heard in this court on his claims that his sentence or conviction was legally flawed. If defendant files another motion for consideration, to clarify or to correct, or any document resembling such a motion, the clerk of court will be directed to forward the motion to me before filing. If I determine that the document includes a challenge to defendant's conviction or sentence and is not accompanied by an order of the Court of Appeals for the Seventh Circuit permitting the filing, then I will place the document in the file of this case and make no response to it.

ORDER

IT IS ORDERED that

1. Defendant Bernard Brisco's motion for reconsideration of the January 4, 2006 order denying his request for a certificate of appealability is DENIED.

2. Defendant's "Motion for Clarification and Correction of Original Rule 60(b) Motion" is DENIED as unnecessary.

3. Defendant's motion for expansion of the record is DENIED as unnecessary at this time.

Further, IT IS ORDERED that the order entered herein on January 4, 2006 is AMENDED to provide that the motion for reconsideration based on newly discovered evidence is DENIED for lack of authority to entertain it. To clarify the record, defendant's motion filed on November 14, 2005 is DENIED because, with the exception of the request for a certificate of appealability, the motion is duplicative of the motion defendant filed on December 2, 2005.

Further, IT IS ORDERED that defendant's implied request for a certificate of appealability and motion for leave to proceed on appeal in forma pauperis are DENIED. I certify that defendant's appeal from the January 4, 2006 order is not taken in good faith.

Finally, IT IS ORDERED that if defendant files another motion for consideration, to clarify or to correct, or any document resembling such a motion, the clerk of court is directed to forward the motion to me before filing. If I determine that the document includes a challenge to defendant's conviction or sentence and is not accompanied by an order of the Court of Appeals for the Seventh Circuit permitting the filing, then I will place

the document in the file of this case and make no response to it.

Entered this 9th day of February, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge