

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA

OPINION AND ORDER

v.

05-cr-124-wmc

JASON WILLIAM ABNEY

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Defendant Jason William Abney has filed a motion for relief from his sentence pursuant to Fed. R. Civ. P. 60(b). Alternatively, Abney seeks relief in the form of a writ of *audita querela*. Because neither remedy is available, his request will be denied.

BACKGROUND

On November 14, 2005, Abney pled guilty to charges of conspiracy to distribute a controlled substance, namely, methamphetamine, in violation of 21 U.S.C. § 846. With a three-level downward adjustment for acceptance of responsibility, Abney had a total offense score of 33 levels. With ten points and a resulting placement in Criminal History Category V, Abney faced a range of imprisonment of between 210 and 260 months. On January 23, 2006, the district court sentenced Abney to serve 240 months in prison, followed by a three-year term of supervised release under the advisory guidelines. Abney did not pursue an appeal or file a motion for relief from his sentence under 28 U.S.C. § 2255.

In 2010, the government filed a motion for a reduction in sentence pursuant to Fed. R. Crim. P. 35, citing Abney's substantial assistance in the prosecution of another. This court granted the government's motion and reduced Abney's total offense score by

two levels from 33 to 31. As a result, Abney faced a range of imprisonment of 168 to 210 months. On June 10, 2010, this court sentenced Abney to 175 months.

Abney now seeks relief from that sentence under Fed. R. Civ. P. 60(b) on the grounds that his sentence was incorrectly calculated under the United States Sentencing Guidelines. In particular, Abney claims that the PSR prepared for his original sentencing in 2006, improperly assessed 1 criminal history point for a sentence of probation that he received from St. Cloud, Stearns County, Minnesota. Abney maintains that he was never sentenced to probation in Stearns County. In support, he presents a letter dated September 8, 2008, which he purports to be from a Stearns County supervisor. The letter states that there was no record of Abney receiving probation in Stearns County.

#### OPINION

Abney may not use Fed. R. Civ. P. 60(b) to obtain relief from a criminal judgment because the Federal Rules of Civil Procedure are only applicable in “suits of a civil nature.” FED. R. CIV. P. 1, 81. In other words, Fed. R. Civ. P. 60(b) “simply does not provide for relief from a judgment in a criminal case.” *United States v. O’Keefe*, 169 F.3d 281, 289 (5th Cir. 1999); *see also United States v. Breit*, 754 F.2d 526, 530 (4th Cir. 1985) (observing that “there is no provision similar to FRCP 60(b) for relief after final judgment or order in effect for criminal cases”).

Abney also seeks relief in the form of a writ of *audita querela*, which is a common law writ affording an old procedure for obtaining relief from a judgment. *See United States*

*v. Kimberlin*, 675 F.2d 866, 869 (7th Cir. 1982) (citing 7 MOORE & LUCAS, MOORE'S FEDERAL PRACTICE 33-46 (2d ed. 1979)). In that respect, the Seventh Circuit has observed that the writ of *audita querela* is available only to “a judgment debtor who seeks a rehearing of a matter on grounds of newly discovered evidence or newly existing legal defenses.” *Melton v. United States*, 359 F.3d 855, 856 (7th Cir. 2004) (quoting *Black's Law Dictionary* 126 (7th ed. 1999)). A criminal defendant is not a judgment debtor. *Melton*, 359 F.3d at 856. Thus, much like Fed. R. Civ. P. 60(b), the writ of *audita querela* “has no apparent relevance to criminal sentences.” *Melton*, 359 F.3d at 856.

To the extent that Abney is seeking collateral review of his sentence, his request for relief is governed by 28 U.S.C. § 2255. As noted above, Abney has not previously sought collateral review pursuant to § 2255. Because prisoners are only entitled to one round of collateral review under § 2255, the court must give the defendant notice and an opportunity to withdraw his motion before re-characterizing his request as one governed by § 2255. *See Castro v. United States*, 540 U.S. 375, 383 (2003). Therefore, Abney will be directed to respond in writing whether he intends to pursue relief under § 2255 by submitting his claims on an appropriate form, which has been approved for filing a motion to vacate, set aside or correct sentence by a person in federal custody. If he is intent on doing so, however, Abney will need to address the statute of limitations found in 28 U.S.C. § 2255(f), which expired one-year from the date his conviction became final in 2006.

ORDER

IT IS ORDERED that:

1. The motion filed by defendant Jason William Abney for relief from the judgment pursuant to Fed. R. Civ. P. 60(b) or a writ of *audita querela* (dkt. # 21) is DENIED.
2. Abney is directed to respond in writing within fourteen (14) days whether he intends to pursue relief under 28 U.S.C. § 2255 by submitting his claims on the enclosed form, which is approved for filing a motion to vacate, set aside or correct sentence by a person in federal custody. He may also use any similar form available at the prison law library. If Abney submits his claim on a proper form, his request for relief will be treated as a motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255. If Abney does not respond within the time allowed, the court will consider the pending motion to be voluntarily withdrawn.

Entered this 29th day of April, 2014.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge