

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

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JOSEPH N. RUSSO,

ORDER

v.

07-cv-96-wmc

05-cr-141-jcs

UNITED STATES OF AMERICA,

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In 2006, a jury found Joseph N. Russo guilty of unlawful possession of a firearm as a felon and the district court sentenced him to serve 110 months in prison. Russo filed a direct appeal, which the Seventh Circuit dismissed as frivolous. *See United States v. Russo*, 210 F. App'x 525, 2006 WL 3749666 (7th Cir. Dec. 18, 2006). On April 12, 2007, the district court denied Russo's motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255. Russo's appeal from that decision was dismissed on July 17, 2007, for failure to file a docketing statement. Russo subsequently filed a "notice appeal," in which he asks this court to "reconsider" whether he is entitled to relief under § 2255. That motion will be denied.

Russo's notice of appeal, which is dated August 26, 2011, is well outside the time limit prescribed for direct appellate review. *See Fed. R. App. P. 4(a)(1)(B)* (providing that a notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is the United States). Liberally construed, the notice could be considered as a motion for relief from the judgment under Fed. R. Civ. P. 60(b). Review of the motion shows, however, that Russo does not attack

the decision on April 12, 2007, which denied his motion for relief under 28 U.S.C. § 2255. Instead, Russo raises the following grounds for relief from his underlying conviction: (1) he was denied the right to effective assistance of counsel in connection with his trial and sentencing; (2) his conviction was not supported by sufficient evidence because there was no proof that the firearms were in working order; (3) his conviction was obtained with evidence obtained in violation of the Fourth Amendment; and (4) the sentencing court erred by departing upward and increasing his punishment for obstruction of justice.

The government has filed a response, arguing that Russo's pending motion is an improper attempt to re-litigate his previous § 2255 motion and to resurrect an untimely appeal. The court agrees. By raising substantive grounds for relief in this manner, Russo's pending motion constitutes a second or successive petition for purposes of 28 U.S.C. § 2244(b). *See Gonzalez v. Crosby*, 545 U.S. 524, 530-31 (2005). To proceed with these claims in district court, Russo must first obtain permission to file a successive petition from the United States Court of Appeals for the Seventh Circuit. 28 U.S.C. § 2244(b)(3). Absent prior authorization from the Seventh Circuit, this court lacks jurisdiction to consider his proposed claims.

Under Rule 11 of the Rules Governing Section 2254 Cases, the court must issue or deny a certificate of appealability when entering a final order adverse to petitioner. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Tennard v. Dretke*, 542 U.S.

274, 282 (2004). Where denial of relief is based on procedural grounds, the petitioner also must show that jurists of reason “would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Because Russo’s motion contemplates a successive collateral attack on a state court judgment, reasonable jurists would not likely disagree that review is barred for lack of prior authorization under 28 U.S.C. § 2244(b). Therefore, no certificate of appealability will issue.

ORDER

IT IS ORDERED that:

1. Joseph N. Russo’s motion for reconsideration is DENIED.
2. A certificate of appealability is DENIED.

Entered this 30th day of April, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge