

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September 29, 2026

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DONOVAN GENE MERCER,

Defendant - Appellant.

No. 26-6077
(D.C. Nos. 5:17-CV-00207-M &
5:14-CR-00280-PRW-1)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **PHILLIPS, KELLY**, and **MORITZ**, Circuit Judges.

Defendant Donovan Mercer, appearing pro se, seeks a certificate of appealability (COA) in order to appeal the district court's denial of his motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(6). For the following reasons, we deny Mr. Mercer's request for a COA and dismiss this matter.

I. BACKGROUND

In 2015, Mr. Mercer was convicted of three counts of accessing or attempting to access a computer disk containing child pornography, in violation of 18 U.S.C.

§ 2252A(a)(5)(B) and (b)(2), and was sentenced to a term of imprisonment of 265

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

months. We affirmed Mr. Mercer's convictions on direct appeal. *See United States v. Mercer*, 653 F. App'x 622, 624, 631 (10th Cir. 2016).

Mr. Mercer filed a pro se 28 U.S.C. § 2255 motion collaterally attacking his convictions. After extensive litigation in the district court, including the appointment of counsel for Mr. Mercer and an evidentiary hearing, the district court denied Mr. Mercer's § 2255 motion and denied him a COA. We in turn concluded that Mr. Mercer failed to make a substantial showing of the denial of a constitutional right and denied a COA.

Mr. Mercer then filed a pro se motion under Federal Rule of Civil Procedure 60(b)(6) seeking to set aside the district court's judgment regarding his § 2255 motion. The district court transferred the motion to this court for consideration as a second § 2255 motion. Mr. Mercer moved both to remand to the district court and for our authorization to file his Rule 60(b)(6) motion. We denied both motions.

Mr. Mercer then filed a second pro se Rule 60(b)(6) motion seeking to reopen his case and reconsider the ruling on his original § 2255 motion. The district court concluded that Mr. Mercer "failed to identify any procedural errors in the previous rulings of the federal habeas courts and . . . therefore provided no reason to reconsider or reopen his case." R. vol. I at 211. Mr. Mercer sought a COA from this court, but we denied his request.

Most recently, Mr. Mercer filed a third pro se Rule 60(b)(6) motion seeking relief from the ruling on his § 2255 motion. Mr. Mercer argued that the district judge who presided over his § 2255 motion "erred by not examining prejudice before she dismissed" three of his claims as procedurally barred. *Id.* at 309 (internal quotation marks omitted).

The district court concluded that argument was baseless, noting that the original presiding judge “did in fact analyze actual prejudice before applying the procedural bars” to the three claims. *Id.* The district court also concluded that Mr. Mercer’s motion was untimely because “the six-year delay between the underlying order and [Mr.] Mercer’s latest challenge [wa]s unreasonable.” *Id.* at 310.

After Mr. Mercer filed a notice of appeal, we issued a limited remand so that the district court could consider whether to issue a COA. The district court denied Mr. Mercer a COA.

Mr. Mercer now asks us to issue a COA.

II. DISCUSSION

A federal prisoner must obtain a COA to appeal the denial of § 2255 relief. 28 U.S.C. § 2253(c)(1)(B). We will issue a COA only if the movant makes “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To do so, the movant must demonstrate “that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

After reviewing Mr. Mercer’s application for COA and the record, we conclude he has failed to establish his entitlement to a COA. Where, as here, a Rule 60(b)(6) motion is filed more than a year after the judgment in question, the moving party “must show extraordinary circumstances suggesting” they are “faultless” for failing to file the motion within a year of the judgment. *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd.*, 507 U.S.

380, 393 (1993) (internal quotation marks omitted). Nothing in the record indicates that Mr. Mercer made this showing. Further, a motion under Rule 60(b)(6) “must be made within a reasonable time.” Fed. R. Civ. P. 60(c)(1). We conclude that jurists of reason would not disagree with the district court’s conclusion that the six-year delay between the judgment denying his § 2255 motion and the filing of his most recent Rule 60(b)(6) motion was unreasonable.

Nor are we otherwise persuaded that jurists could conclude that the issues raised by Mr. Mercer in his motion are adequate to deserve encouragement to proceed further. The district court concluded, and the record confirms, that the judge who decided Mr. Mercer’s § 2255 motion considered the issue of prejudice before concluding that three of his claims were procedurally barred. R. vol. I at 66.

III. CONCLUSION

We deny Mr. Mercer’s application for COA, as well as his motion to proceed in forma pauperis, and dismiss this matter.

Entered for the Court

Per Curiam