

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re:

DANNY LEE GREEN,

Movant.

Nos. 07-6178 & 07-6183
(D.C. No. CR-89-103-F)

ORDER
Filed October 30, 2007

Before **LUCERO**, **EBEL**, and **MURPHY**, Circuit Judges.

Movant Danny Lee Green, a federal prisoner proceeding pro se, has filed a motion for remand. Green filed two motions in district court, both styled as Federal Rule of Civil Procedure 60(b) motions, that the district court determined were unauthorized second or successive 28 U.S.C. § 2255 motions. By separate orders, the district court transferred both matters to this court. *See Coleman v. United States*, 106 F.3d 339, 341 (10th Cir. 1997) (per curiam) (directing district courts to transfer unauthorized second or successive habeas motions to this court in the interest of justice pursuant to 28 U.S.C. § 1631). We have consolidated them for resolution.

In 1989, Green pleaded guilty to nine counts of narcotic law violations. He was sentenced to twenty years on count one and two, and thirty years on the

remaining seven counts, all to run concurrently. His conviction and sentence were affirmed on direct appeal. *United States v. Green*, Nos. 89-6420 and 91-6067, 1991 U.S. App. Lexis 10545 (10th Cir. May 9, 1991) (unpublished order and judgment). He has filed at least four motions in district court seeking to set aside his sentence. After his third attempt to seek direct review of his conviction and sentence, this court sanctioned Green in 2003 for filing multiple frivolous and untimely appeals. *Green v. United States*, No. 03-6267 (10th Cir. Feb. 26, 2004) (unpublished order).

Green filed his first § 2255 motion in 1991, which was denied. *United States v. Green*, No. 92-6297 (10th Cir. Apr. 15, 1993) (affirming denial) (unpublished). He has since filed two motions for authorization to file a second or successive § 2255 motion, which we have denied. *Green v. United States*, No. 06-6029 (10th Cir. Mar. 14, 2006) (unpublished order); *Green v. United States*, No. 00-6432 (10th Cir. Sept. 26, 2001) (unpublished order).

No. 07-6183. In March 2007, Green filed the first “Rule 60” motion in district court seeking to set aside his sentence (District Court Docket No. 679). As noted, the district court determined it was a second or successive § 2255 motion, and transferred it to this court for authorization. Green now moves this court for an order remanding the matter to the district court, arguing that he does not need this court’s authorization to file his proposed motion in the district court. We deny the motion.

As Green knows, a second § 2255 motion submitted by a federal prisoner is considered successive and is barred, except in very limited circumstances. *See* § 2255, para. 8 and 28 U.S.C. § 2244(b). Before this court may permit a federal prisoner to file a second § 2255 motion, he must show that he is raising a claim based on a new rule of retroactively applied constitutional law or a claim based on newly discovered evidence. *See* § 2255, para. 8. This “bar against successive § 2255” motions may not be avoided “by simply styling a petition under a different name.” *United States v. Torres*, 282 F.3d 1241, 1246 (10th Cir. 2002).

A post-judgment motion is subject to the requirements of 28 U.S.C. § 2244, even if presented in a Rule 60(b) motion, if it asserts or reasserts a claim of error on the merits of the movant’s criminal conviction. *See Gonzalez v. Crosby*, 545 U.S. 524, 532 & n.4 (2005). In Green’s March 2007 motion, he contends that the government failed to file an information stating its intent to seek an increase of the statutory sentence, and thus, his sentence is void. In substance, his motion clearly asserts or reasserts a substantive federal claim to set aside his underlying conviction and sentence. He is not challenging a procedural ruling or a defect in the integrity of the prior federal habeas proceeding. *See id.* Thus, the district court properly treated his motion as a successive § 2255 motion. Therefore, we deny the motion for remand.

No. 07-6178. After the district court transferred Green’s March 2007 motion to this court, Green filed his second motion in district court styled as a

Rule 60(b) motion (District Court Docket No. 688). In this motion, Green claims that his sentence was invalid because his career offender base offense level was incorrectly determined and there was no mention of drug quantity in the indictment. The district court ruled that this motion also constituted another attempt by Green to file an unauthorized second or successive § 2255 motion and transferred it to this court on July 6, 2007.

On August 2, 2007, Green was sent written notice by this court giving him thirty days to file a motion in this court for permission to file a second or successive § 2255 motion. That deadline was later extended to September 17, 2007. To date, Green has not filed the requested motion for permission. Accordingly, matter No. 07-6178 is dismissed.

In No. 07-6183, the motion for remand is DENIED and the matter is TERMINATED. In No. 07-6178, the matter is DISMISSED.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk