

April 20, 2011

UNITED STATES COURT OF APPEALS

Elisabeth A. Shumaker
Clerk of Court

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FREDERICK D. PHELPS, JR.,

Defendant-Appellant.

No. 10-3264

(D.C. Nos. 5:07-CR-40051-JAR-1 and

5:09-CV-04048-JAR)

(D. Kan.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **LUCERO, GORSUCH**, and **MATHESON**, Circuit Judges.

Frederick D. Phelps, a federal prisoner proceeding *pro se*, filed a writ of *audita querela* in the District of Kansas, attacking his sentence. But the district court held such a challenge must be brought under 28 U.S.C. § 2255. *See United States v. Torres*, 282 F.3d 1241, 1245 (10th Cir. 2002) (“[A] writ of *audita querela* is not available to a petitioner when other remedies exist, such as a motion to vacate sentence under 28 U.S.C. § 2255.” (internal quotation omitted)). Rather than dismissing Mr. Phelps’s petition, however, the court construed it as an unauthorized successive § 2255 motion and dismissed it for lack of

* This order is not binding precedent except under the doctrines of law of the case, *res judicata* and collateral estoppel.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

jurisdiction. *See In re Cline*, 531 F.3d 1249, 1251 (10th Cir. 2008) (per curiam) (“A district court does not have jurisdiction to address the merits of a second or successive § 2255 . . . claim until this court has granted the required authorization.”). We discern no error in the district court’s reasoning or result and so deny Mr. Phelps’s application for a certificate of appealability and dismiss his appeal. In addition, we deny Mr. Phelps’s motion to proceed *in forma pauperis* as he fails to present a non-frivolous argument on appeal.

ENTERED FOR THE COURT

Neil M. Gorsuch
Circuit Judge