

890, 121 S.Ct. 214, 148 L.Ed.2d 151 (2000); *Haversat*, 22 F.3d at 797-98 (reversing a five-level downward departure as unreasonable).

Although a district court has broad discretion in determining the extent of a downward departure, that discretion is not without limits, and appellate review is not an empty exercise. In *Booker*, the Supreme Court expressly recognized "Congress' intent to provide appellate review" and explained that, by making reasonableness the standard for reviewing sentences, it was not "thereby eliminat[ing] appellate review." See 125 S.Ct. at 766. The record in the case at bar leaves this panel with the definite and firm conviction that the district court here exceeded the permissible bounds of its discretion and imposed an unreasonable sentence by sentencing Dalton to sixty months in prison. Accordingly, we reverse the judgment of the district court and remand this case for resentencing.



UNITED STATES of America,  
Appellee,

v.

John Gregory LAMBROS, Appellant.  
No. 04-1559.

United States Court of Appeals,  
Eighth Circuit.

Submitted: June 30, 2004.

Filed: April 13, 2005.

**Background:** Following his extradition from Brazil, defendant was convicted in the United States District Court for the District of Minnesota, Diana E. Murphy, J., of conspiracy to distribute cocaine and three counts of possession of cocaine with intent to distribute. Defendant was sentenced to life in prison, and he appealed.

The Court of Appeals, 65 F.3d 698, Wollman, Circuit Judge, affirmed the convictions, vacated the sentence, and remanded for resentencing. On remand, the United States District Court for the District of Minnesota resented defendant to 360 months in prison, and denied defendant's motion to vacate, and defendant appealed. The Court of Appeals, 1997 WL 538013, affirmed. Defendant moved for relief from judgment related to denial of motion to vacate. The United States District Court for the District of Minnesota construed the motion as a successive motion to vacate, and denied relief. Defendant again appealed. The Court of Appeals, 40 Fed.Appx. 316, affirmed. The United States District Court for the District of Minnesota, David S. Doty, J., denied defendant's motion for relief from judgment, in connection with the order denying his first motion for relief from judgment, and subsequently denied his motion to alter or amend the judgment. Defendant again appealed.

**Holding:** The Court of Appeals held that motion to alter or amend judgment was required to be construed as a successive motion to vacate.

Appeal dismissed.

1. Criminal Law ⇨1023(15)

An order denying a motion for relief from judgment is a final order for purposes of appeal. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

2. Criminal Law ⇨1073

Habeas Corpus ⇨818

The certificate of appealability (COA) requirement applies to an appeal from the denial of a motion for relief from judgment seeking to reopen a habeas case or a denial of a motion to vacate. 28 U.S.C.A. §§ 2253(c)(1)(B), 2254, 2255; Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

**3. Criminal Law** ⇨1668(1)**Habeas Corpus** ⇨894.1

Inmates may not bypass the authorization requirement for filing a second or successive motion to vacate or habeas petition by purporting to invoke some other procedure. 28 U.S.C.A. §§ 2244(b)(3), 2254, 2255.

**4. Criminal Law** ⇨1073**Habeas Corpus** ⇨818

A certificate of appealability (COA) is required to appeal the denial of any motion that effectively or ultimately seeks habeas corpus relief or the grant of a motion to vacate. 28 U.S.C.A. §§ 2253(c), 2254, 2255.

**5. Criminal Law** ⇨1668(3)

Defendant's motion to alter or amend judgment, seeking to amend an order denying a motion for relief from judgment, which sought relief from the denial of a motion to vacate, was required to be construed as a successive motion to vacate, requiring authorization from the Court of Appeals, since it ultimately sought to resurrect the denial of the prior motion to vacate. 28 U.S.C.A. § 2255; Fed.Rules Civ.Proc.Rules 59(e), 60(b), 28 U.S.C.A.

John Gregory Lambros, pro se.

Jeffrey S. Paulsen, Assistant U.S. Attorney, of Minneapolis, Minnesota, for appellee.

Before BYE, McMILLIAN, and  
MELLOY, Circuit Judges.

**PER CURIAM.**

Federal prisoner John Gregory Lambros appeals the district court's<sup>1</sup> order denying his Fed.R.Civ.P. 59(e) motion to alter or amend the district court's order denying his Fed.R.Civ.P. 60(b) challenge

to the denial of a previous Rule 60(b) motion. In that previous Rule 60(b) motion, Lambros challenged the 1997 denial of his 28 U.S.C. § 2255 motion attacking his drug convictions. For the reasons stated below, we dismiss the appeal.

In 1993, a jury convicted Lambros of four cocaine-related offenses, including a conspiracy count. On appeal, this court vacated the sentence on the conspiracy count, remanded for resentencing on that count, and affirmed the conviction in all other respects. *See United States v. Lambros*, 65 F.3d 698 (8th Cir.1995), *cert. denied*, 516 U.S. 1082, 116 S.Ct. 796, 133 L.Ed.2d 744 (1996). On remand, Lambros filed multiple new trial motions pursuant to Fed.R.Crim.P. 33. The district court treated the new trial motions as a single § 2255 motion and denied all the claims. Lambros appealed the 360-month prison term to which he was resentenced. This court affirmed. *See United States v. Lambros*, No. 97-1553, 1997 WL 538013 (8th Cir. Sept.2, 1997) (unpublished per curiam), *cert. denied*, 522 U.S. 1065, 118 S.Ct. 731, 139 L.Ed.2d 669 (1998). Two subsequent § 2255 motions filed by Lambros were dismissed by the district court because this court had not authorized their filing. *See* 28 U.S.C. §§ 2255 and 2244.

In 2001, Lambros filed a Rule 60(b) motion to vacate all of the previous judgments of the district court related to the denial of habeas relief. Construing the motion as a successive application for § 2255 relief, the district court denied relief because Lambros had not received authorization to file another § 2255 motion. This court affirmed. *See United States v. Lambros*, 40 Fed.Appx. 316 (8th Cir.2002) (unpublished per curiam), *cert. denied*, 537 U.S. 1195, 123 S.Ct. 1255, 154 L.Ed.2d 1032 (2003).

1. The Honorable David S. Doty, United States

District Judge for the District of Minnesota.

Lambros filed a Rule 60(b) motion asking the district court to vacate its 2001 order denying his first Rule 60(b) motion. He argued that the court had improperly construed that previous motion as a successive § 2255 application. The district court denied the second Rule 60(b) motion, and Lambros then filed a Rule 59(e) motion to alter or amend the judgment. The district court denied the Rule 59(e) motion, and Lambros filed the present appeal.

[1] Initially, we note that our appellate jurisdiction depends in part on whether a petitioner needs a certificate of appealability to appeal the denial of a Rule 60(b) motion in a habeas proceeding. *See United States v. Vargas*, 393 F.3d 172, 174 (D.C.Cir.2004). Of course, a certificate is required to appeal from "the final order in a proceeding under section 2255." 28 U.S.C. § 2253(c)(1)(B). Further, an order denying a Rule 60(b) motion is a final order for purposes of appeal. *Mohammed v. Sullivan*, 866 F.2d 258, 260 (8th Cir. 1989).

[2] This court has implicitly recognized in published opinions that the certificate requirement applies to an appeal from the denial of a Rule 60(b) motion seeking to reopen a habeas case. *See Jones v. Roper*, 311 F.3d 923, 924 (8th Cir.2002) (per curiam) (concluding district court's grant of certificate of appealability placed merits of appeal before appellate court), *cert. denied*, 537 U.S. 1040, 123 S.Ct. 582, 154 L.Ed.2d 464 (2002); *Zeitvogel v. Bowersox*, 103 F.3d 56 (8th Cir.1996) (per curiam) (published order denying certificate in appeal from denial of Rule 60(b) motion seeking relief from order denying habeas petition), *cert. denied*, 519 U.S. 1036, 117 S.Ct. 604, 136 L.Ed.2d 530 (1996). Our decision in *Zeitvogel* has been cited by other circuit courts for the proposition that this circuit interprets § 2253(c)(1) to require a certificate in Rule 60(b) cases. *See Vargas*, 393 F.3d at 174; *Reid v. Angelone*, 369 F.3d

363, 369 n. 2 (4th Cir.2004); *Kellogg v. Strack*, 269 F.3d 100, 103 (2d Cir.2001), *cert. denied*, 535 U.S. 932, 122 S.Ct. 1306, 152 L.Ed.2d 216 (2002). Finally, the weight of authority from other circuits favors requiring a certificate in these cases. *See Vargas*, 393 F.3d at 174 (holding that certificate is required to appeal denial of Rule 60(b) motion challenging denial of habeas application and stating that eight circuit courts (including Eighth Circuit) are in accord on this issue).

[3, 4] It is well-established that inmates may not bypass the authorization requirement of 28 U.S.C. § 2244(b)(3) for filing a second or successive § 2254 or § 2255 action by purporting to invoke some other procedure. *United States v. Patton*, 309 F.3d 1093 (8th Cir.2002) (per curiam) (collecting cases); *see also Boyd v. United States*, 304 F.3d 813, 814 (8th Cir. 2002) (per curiam) (if Rule 60(b) motion is actually successive habeas petition, court should dismiss it for failure to obtain authorization from court of appeals, or in its discretion, transfer motion to court of appeals). Likewise, the certificate requirement under 28 U.S.C. § 2253(c)(1) may not be circumvented through creative pleading. A certificate of appealability is required to appeal the denial of any motion that effectively or ultimately seeks habeas corpus or § 2255 relief.

[5] Because Lambros's Rule 59(e) motion, just like his previous Rule 60(b) motions, sought ultimately to resurrect the denial of his earlier § 2255 motion, we hold that a certificate of appealability is required for the present appeal. A certificate may issue if Lambros has made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2) (certificate standard); *Garrett v. United States*, 211 F.3d 1075, 1077 (8th Cir.) (per curiam) ("substantial showing" required for certificate is showing that is-

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issues are debatable among reasonable jurists, court could resolve issues differently, or issues deserve further proceedings), *cert. denied*, 531 U.S. 908, 121 S.Ct. 254, 148 L.Ed.2d 184 (2000).

When Lambros filed multiple new trial motions, after our limited remand for resentencing following his conviction, the district court correctly treated those new trial motions as seeking § 2255 postconviction relief. His subsequent Rule 60(b) motions and his most recent Rule 59(e) motion were, in reality, efforts to file successive motions for postconviction relief. Those motions were properly denied because Lambros did not have authorization from this court. Therefore, Lambros has not made a substantial showing of any error, much less constitutional error.

Accordingly, we deny a certificate of appealability and dismiss the appeal.



UNITED STATES of America,  
Plaintiff—Appellee,

v.

Stanley M. MATTIX, Defendant—  
Appellant.

No. 04–2990.

United States Court of Appeals,  
Eighth Circuit.

Submitted: April 12, 2005.

Filed: April 20, 2005.

Appeal from the United States District  
Court for the Eastern District of Arkansas.

Omar F. Greene, argued, Little Rock,  
AR, for appellant.

I. The Honorable George Howard, Jr., United  
States District Judge for the Eastern District

John Ray White, Asst. U.S. Atty., argued, Little Rock, AR, for appellee.

Before MURPHY, BRIGHT, and  
MELLOY, Circuit Judges.

PER CURIAM.

Stanley M. Mattix was indicted for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and making false statements to acquire a firearm, in violation of 18 U.S.C. § 922(a)(6). He absconded from pretrial supervision but was arrested outside the jurisdiction on an unrelated state charge. He then pled guilty to both counts of the indictment.

At sentencing the district court<sup>1</sup> treated the guidelines as advisory. The court calculated Mattix's base offense level for each offense to be 14 and added a two level enhancement for obstruction of justice under U.S.S.G. § 3C1.1, resulting in a total offense level of 16. Mattix had a criminal history category of IV, and the advisory sentencing range for each offense was 33 to 41 months. The court decided to impose concurrent sentences of 38 months. Mattix appeals.

Mattix argues that his Sixth Amendment rights were violated because a jury should have decided beyond a reasonable doubt whether he obstructed justice, citing *Blakely v. Washington*, — U.S. —, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In a motion for supplemental briefing, he argues that he should be resentenced under a truly advisory system with the guidance provided by *United States v. Booker*, — U.S. —, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), and that information about his prior convictions should have been submitted to a jury under a reasonable doubt standard, citing *Shepard v. United States*, — U.S.

of Arkansas.