UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 4-89-82(5)(DSD/FLN)
Civil No. 99-28(DSD)

United States of America,

Plaintiff,

v. **ORDER**

John Gregory Lambros,

Defendant.

This matter is before the court upon defendant's motion pursuant to Fed. R. Civ. P. 59(e) to alter or amend the court's order of October 23, 2003, in which it denied defendant's motion to vacate a previous order on the basis of an intervening change of law. For the following reasons, the motion is denied.

Defendant's motion is premised on his belief that the United States Court of Appeals for the Eighth Circuit lacked jurisdiction over his prior Rule 60(b) motion in the absence of a certificate of appealability. However, challenges to the jurisdiction of the court of appeals are not within the province of the district court. See 28 U.S.C. § 1331 (conferring limited jurisdiction upon the district courts); Baker v. Riss & Co., 444 F.2d 257, 259 (8th Cir. 1971) ("[f]ederal courts have only such jurisdiction as is conferred upon them by Congress.").

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Further, Rule 59(e) "deals only with alteration or amendment of the original judgment in a case...." See Fed. R. Civ. P. 59(e) Advisory Committee Notes, 1946 Amendment, Note to Subdivision (e). Therefore, Rule 59(e) is not the appropriate means by which to challenge the court's order denying defendant's Rule 60(b) motion.[1]

Finally, the court finds defendant's argument that the court of appeals lacks jurisdiction to review the denial of a Rule 60(b) motion prior to the issuance of a certificate of appealability ("COA") to be unsupported by the law of the Eighth Circuit.[2]

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[1] Because the "original judgment in the case" is the judgment of conviction, defendant's motion could arguably be construed as yet another successive § 2255 motion brought without circuit court approval. See e.g., Morales v. United States, 304 F.3d 764, 767 (8th Cir. 2002) (construing motion pursuant to 5 U.S.C. § 702 as successive § 2255 motion); Blair v. Armontrout, 976 F.2d 1130, 1134 (8th Cir. 1992) (construing Rule 60 motion as successive § 2255 motion). As such, the motion would necessarily be subject to summary dismissal. See 28 U.S.C. § 2255. In that case, it would also fail because Rule 59 is a civil rule with no application to judgments in criminal cases. However, because defendant's Rule 59(e) motion appears to attack only the court's order of October 23, 2003, denying Rule 60(b) relief, the court will not construe the motion as a successive § 2255 motion.

[2] Defendant's reliance on Zeitvogel is misplaced. See Zeitvogel v. Bowersox, 103 F.3d 56, 57 (8th Cir. 1996). That case does not hold that a COA is a jurisdictional prerequisite to an appeal of the denial of a Rule 60(b) motion. It does, however, show that when a request for a COA is directed to the court of appeals, that court will consider the merits of the underlying motion and the district court's reasons for denying the motion, as the Eighth Circuit did in the present case. See id.

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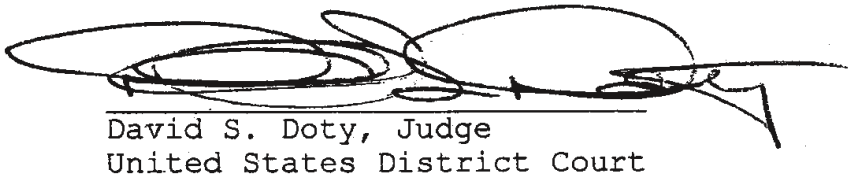
Accordingly, **IT IS HEREBY ORDERED** that defendant's Rule 59(e) motion to alter or amend the judgment is denied.

Dated: November 6, 2003



David S. Doty, Judge
United States District Court

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