

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

March 10, 2020

Lyle W. Cayce
Clerk

No. 19-10812
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ISMAEL RICO,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:15-CR-152-4

Before JOLLY, JONES, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Ismael Rico, federal prisoner # 49569-177, appeals the district court's denial of his Federal Rule of Civil Procedure 60(b)(4) motion for relief from the 2016 judgment convicting him of, and sentencing him for, conspiracy to possess with the intent to distribute 50 grams or more of a mixture and substance containing a detectable amount of methamphetamine. Among the grounds on which the district court denied Rico's motion was that the Federal Rules of

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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Civil Procedure do not apply in criminal proceedings. On appeal, Rico contends that his judgment is void because it imposed “punishment for criminal conduct” (*i.e.*, Guidelines enhancements) that was not part of the “indictment charges” to which Rico pled guilty and because the sentencing court lacked subject matter jurisdiction.

Rule 60 does not apply in criminal proceedings. *See United States v. O’Keefe*, 169 F.3d 281, 289 (5th Cir. 1999); FED. R. CIV. P. 1. Thus, the district court did not err in denying Rico’s Rule 60(b)(4) motion on this basis. Moreover, because Rico’s Rule 60(b)(4) motion sought to challenge his conviction and sentence on grounds that he could have raised in his prior 28 U.S.C. § 2255 motion, the motion is properly construed as an unauthorized successive Section 2255 motion, which the district court lacked jurisdiction to consider. *See* 28 U.S.C. § 2244(b)(3)(A); § 2255(h); *Gonzalez v. Crosby*, 545 U.S. 524, 531–32 (2005); *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000).

We can uphold “the district court’s judgment on any grounds supported by the record.” *Sojourner T v. Edwards*, 974 F.2d 27, 30 (5th Cir. 1992). We therefore AFFIRM. Rico’s motion for release under Federal Rule of Appellate Procedure 9(a) is DENIED.