

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

UNITED STATES OF AMERICA,

Plaintiff,

v.

JACINTO HERNANDEZ,

Defendant.

Case No. 04-20115

MEMORANDUM AND ORDER

On November 23, 2009, this court entered a Memorandum and Order (doc. 881) denying Jacinto Hernandez's motion to stay proceedings, for production of documents, and to appoint counsel (doc. 877). The Government has now filed with this court a Notice (doc. 883) explaining that Mr. Hernandez had tendered to the Government a reply in support of his motion. The Government received the reply on November 18, but was unaware that Mr. Hernandez had failed to file that document with the court as well. After receiving this court's order denying the motion, the Government realized that Mr. Hernandez had not properly filed his reply with the court, and so the Government tendered it to the clerk's office for filing (doc. 882).

The court has reviewed Mr. Hernandez's reply and, given that the court has already denied the motion, it will construe the reply as a motion to reconsider. A motion to reconsider shall be based on (1) an intervening change in controlling law, (2) the

availability of new evidence, or (3) the need to correct clear error or prevent manifest injustice. *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law. *Id.* at 1012.

Mr. Hernandez asserts that his motion to stay should be granted to allow him to more fully explain the arguments raised in his original § 2255 petition. But as this court explained in its order, the arguments Mr. Hernandez wishes to develop are substantively different from those he identified in his original § 2255 petition. As such, any amendment would be untimely and futile.

Mr. Hernandez also reiterates his request for documents. As explained, however, he has failed to demonstrate how the documents would be necessary to support his original § 2255 petition.

Mr. Hernandez again requests an appointed attorney, but this court remains satisfied that Mr. Hernandez can adequately articulate his claims for relief without the assistance of counsel.

Finally, this court wishes to remind Mr. Hernandez of the proper procedure for filing documents. According to the Government's latest filing, Mr. Hernandez has twice sent the Government documents but failed to properly file. Any future documents Mr. Hernandez seeks to file must be mailed to the Clerk's Office at the following address:

259 Robert J. Dole United States Courthouse
500 State Avenue
Kansas City, Kansas 66101

IT IS THEREFORE ORDERED BY THE COURT that Mr. Hernandez's reply, construed as a motion to reconsider, (doc. 882) is denied.

IT IS SO ORDERED this 30th day of November, 2009.

s/ John W. Lungstrum _____
John W. Lungstrum
United States District Judge