

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION**

MARCUS L. CROCKER,	:	
	:	
Petitioner,	:	
	:	NO. 4:18-CR-6-CDL-MSH
v.	:	NO. 4:22-CV-169- CDL-MSH
	:	
UNITED STATES OF AMERICA,	:	
	:	
Respondent.	:	
_____	:	

REPORT AND RECOMMENDATION

Pending before the Court is the Government’s motion to dismiss Petitioner Marcus Crocker’s motion and supplemental motions to vacate his sentence under 28 U.S.C. § 2255 (ECF Nos. 117, 114, 116). For the reasons explained below, it is recommended that the Government’s motion be granted.

BACKGROUND

On September 27, 2018, Crocker pleaded guilty under a superseding indictment to possession of over 28 grams of cocaine base with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B)(iii) and possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A). Change of Plea, ECF No. 40; Superseding Indictment 1-3, ECF No. 27. The remaining charges in the superseding indictment were dismissed. Judgment 1, ECF No. 60. On June 6, 2019, Crocker was sentenced to 78 months imprisonment for possession of cocaine base with intent to

distribute and 60 months—to be served consecutively—for possession of a firearm in furtherance of a drug trafficking crime, and four years supervised release. *Id.* at 2-3.

The Court received Crocker’s first motion to vacate on March 30, 2020 (ECF No. 68). As the motion did not comply with Rule 2(c) of the Rules Governing § 2255 Proceedings, the Court ordered Crocker to recast his petition using the Court’s standard § 2255 form. Order 2, Mar. 31, 2020, ECF No. 69. The Court received Crocker’s recast motion on April 28, 2020 (ECF No. 73). Crocker then moved to supplement his motion (ECF No. 80), which the Court granted on June 19, 2020 (ECF Nos. 80, 81). On October 5, 2020, the Court denied Crocker’s recast first motion to vacate as supplemented and denied a certificate of appealability. R. & R. 1, ECF No. 84; Order, ECF No. 87 (adopting recommendation). On February 22, 2021, the United States Court of Appeals for the Eleventh Circuit denied Crocker’s application for a certificate of appealability (ECF No. 113).

The Court received Crocker’s second motion to vacate on November 1, 2022 (ECF No. 114). The Court ordered the Government to respond to the motion the same day (ECF No. 115). The Court received Crocker’s supplement to the second motion to vacate on November 28, 2022 (ECF No. 116). On December 20, 2022, the Government moved to dismiss the motion to vacate, and Crocker timely responded (ECF Nos. 117, 119). This motion is ripe for review.

DISCUSSION

The Government moves to dismiss Crocker’s second motion to vacate, arguing the Court lacks jurisdiction because this is Crocker’s second or successive motion under 28

U.S.C. § 2255. Resp’t’s Mot. to Dismiss 3-5, ECF No. 117. The Court agrees and recommends that the Government’s motion be granted.

A prisoner serving a federal sentence may move the sentencing court to “vacate, set aside, or correct” a sentence “imposed in violation of the Constitution or laws of the United States.” 28 U.S.C. § 2255(a). However, “[a] second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain” newly discovered evidence or a new rule of constitutional law that has been retroactively applied to cases on collateral review. 28 U.S.C. § 2255(h). “Without [this] authorization, the district court lacks jurisdiction to consider a second or successive petition.” *United States v. Holt*, 417 F.3d 1172, 1175 (11th Cir. 2005) (per curiam).

As noted, Crocker previously filed a motion to vacate, which the Court denied. His current motion challenges the same conviction and judgment. As such, it is a second or successive motion. *See Brown v. United States*, Nos. 1:10-CR-08-WLS, 1:19-CV-154-WLS, 2019 WL 9171214, at *1 (M.D. Ga. Sept. 10, 2019) (citing *In re Green*, 215 F.3d 1195, 1196 (11th Cir. 2000) and *United States v. George*, 188 F. App’x 926 (11th Cir. 2006) (per curiam)), *recommendation adopted by* 2019 WL 9171215 (M.D. Ga. Oct. 2, 2019). Crocker did not seek or obtain permission from the Eleventh Circuit to file a second or successive motion. In neither his motion to vacate—both as originally filed and as supplemented—nor his response to the Government’s motion to dismiss does Crocker attempt to explain why his motion is not barred by § 2255(h). Instead, he cites various

cases, all of which are non-binding and irrelevant to his conviction and sentence.¹ The Court assumes he is seeking relief on the basis of what he considers “new” case law, but that does not make his motion non-successive. *See Leal Garcia v. Quarterman*, 573 F.3d 214, 221 (5th Cir. 2009) (“Newly available claims based on new rules of constitutional law . . . are *successive* Indeed, this is the reason why authorization is needed to obtain review of a successive petition.”). Consequently, this Court does not have jurisdiction to consider his current motion to vacate pursuant to § 2255.

CERTIFICATE OF APPEALABILITY

Rule 11(a) of Rules Governing Section 2255 Cases in the United States District Courts provides that “[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” A certificate of appealability may issue only if the applicant makes “a substantial showing of the denial of a constitutional

¹ Crocker cites *United States v. Merrell*, 37 F.4th 571, 574 (9th Cir. 2022), which involved stacking of sentences under 18 U.S.C. § 924(c)(1). Crocker was only convicted of one count under § 924(c), so the stacking provision is inapplicable to him. In *United States v. Perry*, 35 F.4th 293, 341-42 (5th Cir. 2022), the district court improperly charged the jury that they could convict the defendant under § 924(c)(1) based on a predicate crime of RICO conspiracy. Crocker was not charged with a RICO offense. Crocker also relies on *United States v. Perez-Gallan*, No. PE:22-CR-00427-DC, 2022 WL 16858516 (W.D. Tex. Nov. 10, 2022). In that case, the district court concluded that 18 U.S.C. § 922(g)(8)—which bars those subject to a restraining order for domestic violence from possessing a firearm—unconstitutional. *Id.* at 12 (citing *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, --U.S.--, 142 S.Ct. 2111 (2022)). This case is inapplicable to Crocker. Crocker also cites *United States v. Williams*, 558 F.3d 166 (2d Cir. 2009), *judgment vacated*, 562 U.S. 1056 (2010), *and abrogated by Abbott v. United States*, 562 U.S. 8 (2010). Even if applicable, though, this case was overruled by the United States Supreme Court. Finally, Crocker refers the Court to *United States v. Davis*, --U.S.--, 139 S.Ct. 2319 (2019) and *United States v. Taylor*, --U.S.--, 142 S.Ct. 2015 (2022), both of which addressed crimes of violence under 18 U.S.C. 924(c)(3) and are irrelevant to Crocker, whose firearm conviction was based on a drug trafficking crime. In any event, if Crocker feels there is new law relevant to his case, he needs to petition the Eleventh Circuit for authorization to file a second motion to vacate.

right.” 28 U.S.C. § 2253(c)(2). If a court denies a collateral motion on the merits, this standard requires a petitioner to demonstrate that “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a court denies a collateral motion on procedural grounds, this standard requires a petitioner to demonstrate that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.* at 478. Crocker cannot meet either of these standards and, therefore, a certificate of appealability in this case should be denied.

CONCLUSION

For the foregoing reasons, it is recommended that the Government’s motion to dismiss (ECF No. 117) Crocker’s second motion to vacate as supplemented (ECF Nos. 114, 116) be **GRANTED**. Additionally, a certificate of appealability should be denied. Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, within fourteen (14) days after being served with a copy hereof. The district judge shall make a de novo determination of those portions of the Recommendation to which objection is made. All other portions of the Recommendation may be reviewed for clear error.

The parties are hereby notified that, pursuant to Eleventh Circuit Rule 3-1, “[a] party failing to object to a magistrate judge’s findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court’s order based on unobjected-to factual

and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice.”

SO RECOMMENDED, this 1st day of February, 2023.

/s/ Stephen Hyles

UNITED STATES MAGISTRATE JUDGE