

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KEEMIT HAND,	:	MOTION TO VACATE
Movant,	:	28 U.S.C. § 2255
	:	
v.	:	CRIMINAL ACTION NO.
	:	1:01-CR-0513-SDG-LTW-4
	:	
UNITED STATES OF AMERICA,	:	CIVIL ACTION NO.
Respondent.	:	1:24-CV-2674-SDG-LTW

FINAL REPORT AND RECOMMENDATION

This matter has been submitted to the undersigned Magistrate Judge for consideration of Keemit Hand's *pro se* motion under 28 U.S.C. § 2255 (Doc. 425) and the government's motion to dismiss (Doc. 436). Because Hand has not responded to the motion to dismiss, it is deemed unopposed. *See* LR 7.1(B), NDGa. For the reasons that follow, the undersigned **RECOMMENDS** that the government's motion to dismiss [436] be **GRANTED** and that Hand's § 2255 motion [425] be **DISMISSED** as impermissibly successive.

I. Procedural History

On April 5, 2002, a federal jury in the Northern District of Georgia found Hand guilty of conspiracy to distribute cocaine, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A)(ii), and possession with intent to distribute at least 5 kilograms

of cocaine, in violation of §§ 841(a)(1) and (b)(1)(A)(ii) and 18 U.S.C. § 2. (Doc. 1; Doc. 382-4 at 22.) When Hand failed to appear for sentencing on July 23, 2002, the Court issued a bench warrant. (Docket Entry dated 07/3/2002.) Nearly fifteen years later, Hand was arrested in Jamaica and extradited to the United States. (Doc. 339.) On October 19, 2017, the Court entered judgment imposing a total sentence of 188 months of imprisonment. (Doc. 364.) Hand appealed, and the United States Court of Appeals for the Eleventh Circuit dismissed Hand's challenges to his convictions pursuant to the fugitive disentitlement doctrine and affirmed his sentence on January 11, 2019. *United States v. Hand*, 758 F. App'x 838, 841 (11th Cir. 2019) (per curiam).

Hand timely filed a counselled § 2255 motion, arguing that his trial attorney provided him ineffective assistance by failing to (1) convey a plea offer made by the government prior to trial and (2) litigate a motion to suppress the search and seizure of Hand's cellphone and its contents. (Doc. 394 at 4-5.) The Court denied Hand's § 2255 motion and a certificate of appealability ("COA"). (Docs. 404; 412.) On September 15, 2020, the Eleventh Circuit denied Hand a COA. (Doc. 420.)

On June 7, 2024, Hand executed this *pro se* § 2255 motion, arguing that his 1998 conviction for possession of marijuana, which caused him to receive two

criminal history points, has since been “expunged,” and thus, his criminal history category should be reduced, and he now qualifies to be resentenced as a Zero Point Offender. (Doc. 425 at 4, 7-8.) The government responds that Hand’s § 2255 motion should be dismissed as successive and, alternatively, should be denied because Hand failed to act diligently. (Doc. 436 at 4-8.)

II. Discussion

Because Hand filed a prior § 2255 motion that was denied (Docs. 394; 404; 412), this Court may consider the instant motion only if Hand has first obtained authorization from the Eleventh Circuit to file it. *See* 28 U.S.C. § 2255(h) & § 2244(b)(3)(A). There is no indication in the record that Hand has obtained such authorization. Hand argues, however, that an exception applies based on the recent “expungement” of his prior conviction. (Doc. 425 at 7.) A prisoner’s second § 2255 motion is not impermissibly successive if it is based on the vacatur of a state conviction used to enhance his federal sentence when the vacatur occurred after the initial § 2255 proceedings concluded. *Stewart v. United States*, 646 F.3d 856, 864-65 (11th Cir. 2011). However, this exception does not apply when the prisoner’s prior conviction was merely reclassified but not vacated. *Stutson v. United States*, No. 293CR00152LSCSGC11, 2017 WL 4572314, at *4 (N.D. Ala. Oct. 13, 2017). Hand’s prior conviction was not vacated, but in December of 2023, the state trial

court restricted access to that conviction pursuant to O.C.G.A. § 35-3-37. (Doc. 425 at 10). That statute merely prevents disclosure of the prior conviction to private persons or business or, in some instances, governmental, licensing, and regulating agencies, but the conviction is not restricted to judicial officers or to criminal justice agencies for law enforcement purposes. O.C.G.A. § 35-3-37(a)(6). Because Hand's prior conviction remains valid and has not been vacated, this exception does not apply, and this *pro se* § 2255 motion is impermissibly successive. Accordingly, the Court lacks jurisdiction to consider Hand's second § 2255 motion. *See Carter v. United States*, 405 F. App'x 409, 410 (11th Cir. 2010) (per curiam) (holding that "district court lacked jurisdiction to entertain . . . second motion to vacate" because movant had not obtained "permission from [the Eleventh Circuit] to file a successive motion").

Even if the exception did apply, Hand's second § 2255 motion is due to be dismissed as untimely. "[T]he state court vacatur of a predicate conviction is a new 'fact' that triggers a fresh one-year statute of limitations under § 2255(f)(4), so long as the petitioner exercised due diligence in seeking that order." *Stewart v. United States*, 646 F.3d 856, 858 (11th Cir. 2011). "[D]iligence can be shown by prompt action on the part of the petitioner as soon as he is in a position to realize that he has an interest in challenging the prior conviction with its potential to enhance the

later sentence.” *Johnson v. United States*, 544 U.S. 295, 308 (2005). The prisoner must act diligently from “the date the District Court entered judgment in his federal case.” *Id.* at 810. The new Georgia law on which Hand apparently relied to challenge his 1998 conviction became effective on January 1, 2021. (Doc. 425 at 7; Doc. 436-1.) However, Hand did not seek restriction of that conviction under the new law until September of 2023, more than two years after the new law was enacted. (Doc. 425 at 11.) Accordingly, this § 2255 motion should be dismissed because Hand failed to act diligently.

III. Certificate of Appealability

A federal prisoner may not appeal the denial of his § 2255 motion “unless a circuit justice or a circuit or district judge issues a certificate of appealability [“COA”] under 28 U.S.C. § 2253(c).” Fed. R. App. P. 22(b)(1). Rule 11 of the Rules Governing § 2255 Cases 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 COA may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). A substantial showing of the denial of a constitutional right “includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve

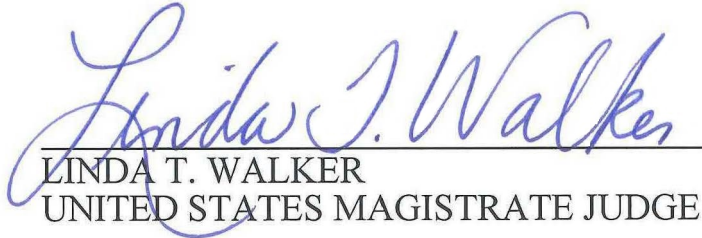
encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (citations and quotation marks omitted).

A COA is not warranted here because the dismissal of Hand’s second § 2255 motion as impermissibly successive is not debatable by jurists of reason.

IV. Conclusion

For the foregoing reasons, the undersigned **RECOMMENDS** that the government’s unopposed motion to dismiss [436] be **GRANTED**, that Hand’s second § 2255 motion [425] be **DISMISSED** as impermissibly successive, that a COA be **DENIED**, and that civil action number 1:24-CV-2674-CAP-LTW be **DISMISSED**.

SO RECOMMENDED, this 8 day of November, 2024.


LINDA T. WALKER
UNITED STATES MAGISTRATE JUDGE