

FILED: August 8, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6135
(9:98-cr-00322-PMD-2)
(9:16-cv-01484-PMD)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

BENJAMIN A. GIBBS, a/k/a Hev, a/k/a Bubba

Defendant - Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge King, Judge Agee, and Judge Wynn.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: May 26, 2017

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Plaintiff - Appellee

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J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

Benjamin Gibbs,

Petitioner,

v.

United States of America,


Respondent.

Case No.: 9:98-cr-00322-PMD-2

ORDER

Benjamin Gibbs seeks to vacate, set aside, or correct his federal prison sentence under 28 U.S.C. § 2255 (ECF No. 1296). The United States ("Government") has filed a motion to dismiss (ECF No. 1315). The Government asserts, *inter alia*, that the Court should dismiss Gibbs' § 2255 motion because it is "second or successive"¹ and the United States Court of Appeals for the Fourth Circuit has not given Gibbs permission to file it. *See* 28 U.S.C. §§ 2244(b), 2255(h). The Court agrees. Gibbs sought that permission, but the Fourth Circuit denied his request. *In re Gibbs*, No. 16-3175 (4th Cir. Jan. 18, 2017). As such, this Court lacks jurisdiction. *See United States v. Winestock*, 340 F.3d 200, 205 (4th Cir. 2003) ("In the absence of pre-filing authorization, the district court lacks jurisdiction to consider" a successive § 2255 motion). Thus, Gibbs' § 2255 motion is **DISMISSED** without prejudice.²

AND IT IS SO ORDERED.


PATRICK MICHAEL DUFFY
United States District Judge

January 18, 2017
Charleston, South Carolina

1. Gibbs filed a § 2255 motion attacking his sentence in 2002. The Court denied the motion.

2. A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A prisoner satisfies this standard by demonstrating that reasonable jurists would find both that the merits of his constitutional claims are debatable and that any dispositive procedural rulings by the district court are also debatable or wrong. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484, (2000); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). Gibbs has not satisfied that standard. Accordingly, the Court declines to issue a certificate of appealability. *See* R. 11(a), § 2255 Rules.

**Additional material
from this filing is
available in the
Clerk's Office.**