IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40464

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ANTHONY RAY DAILEY,

Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Texas

O R D E R:

Anthony Ray Dailey, federal prisoner # 60533-080, seeks a certificate of appealability (COA) to appeal the dismissal of his 28 U.S.C. § 2255 motion challenging his concurrent 240-month prison sentences on his three convictions for bank robbery and for aiding and abetting. The district court dismissed the motion for lack of jurisdiction because Dailey had not received authorization from this court before proceeding. *See United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000).

A COA is required to appeal the dismissal of a § 2255 motion as an unauthorized successive motion. *Cardenas v. Thaler*, 651 F.3d 442, 443 (5th Cir. 2011). Dailey seeks a COA to pursue his claim that his sentences were improperly enhanced on the basis of earlier convictions. Issuance of a COA requires a showing by Dailey "that jurists of reason could disagree with the

district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (internal quotation marks and citation omitted).

Because Dailey has previously been denied § 2255 relief from his sentences, jurists of reason could not disagree that his § 2255 motion in the instant case is successive. *See Buck*, 137 S. Ct. at 773; *Burton v. Stewart*, 549 U.S. 147, 153 (2007); *In re Lampton*, 667 F.3d 585, 588 (5th Cir. 2012). Nor could jurists of reason disagree that the district court was without jurisdiction to entertain another § 2255 motion challenging the sentences absent this court's authorization. *See* § 2255(h); 28 U.S.C. § 2244(b)(3); *see also Key*, 205 F.3d at 774. As it is unsupported by any meritorious legal argument, Dailey's claim is frivolous, *see Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983), and thus no jurist of reason would conclude that this appeal should be encouraged, *see Buck*, 137 S. Ct. at 773. Accordingly, Dailey's motion for a COA is DENIED. *See Buck*, 137 S. Ct. at 773. Also, the following motions are DENIED: motion for leave to proceed IFP on appeal; motion to present evidence of deliberate fabrication by the Government, *see Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 713-14 (1986); and motion for bail. Dailey's motion for judicial notice is GRANTED.

This court has warned Dailey that frivolous, repetitive, or otherwise abusive filings would invite the imposition of sanctions, possibly including dismissal, monetary sanctions, and restrictions on his ability to file pleadings in this court and any court subject to this court's jurisdiction. Therefore, a monetary sanction of $200, payable to the clerk of this court, is IMPOSED on Dailey. Additionally, Dailey is BARRED from filing, in this court or any court subject to its jurisdiction, any challenge to his convictions or sentences until

the sanction is paid in full unless he first obtains leave of the court in which he seeks to file such a challenge. Dailey is WARNED again that filing frivolous challenges to his convictions or sentences in this court or any court subject to this court's jurisdiction will subject him to additional and progressively more severe sanctions. *See In re Lampton*, 667 F.3d at 590.

COA DENIED; IFP DENIED; MOTION FOR LEAVE TO PRESENT EVIDENCE OF DELIBERATE FABRICATION BY THE GOVERNMENT DENIED; BAIL DENIED; MOTION FOR JUDICIAL NOTICE GRANTED; SANCTION IMPOSED; ADDITIONAL SANCTION WARNING ISSUED.

Gregg Costa

GREGG J. COSTA
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

ANTHONY RAY DAILEY, #60533-080	§	
VS.	§	CIVIL ACTION NO. 6:17cv85 CRIMINAL NO. 6:04CR00067-001
UNITED STATES OF AMERICA	§	

ORDER DENYING CERTIFICATE OF APPEALABILITY

Before the Court is Anthony Ray Dailey's notice of appeal (Dkt. #15) from the dismissal of his motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 as successive. Mr. Dailey did not file the requisite motion for a certificate of appealability. Nonetheless, in cases where a petitioner has not filed a motion for a certificate of appealability, the Fifth Circuit has concluded that a notice of appeal should be construed as a motion for a certificate of appealability. *See, e.g., United States v. Youngblood*, 116 F.3d 1113 (5th Cir. 1997). Mr. Dailey's notice of appeal is thus construed as a motion for a certificate of appealability.

Mr. Dailey must obtain a certificate of appealability before he can appeal this court's decision. 28 U.S.C. § 2253(c)(1). A certificate of appealability may issue only if he has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The Supreme Court explained the requirement associated with a "substantial showing of the denial of a constitutional right" in *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603-04 (2000). In cases where a district court rejected a petitioner's constitutional claims on the merits, "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of

the constitutional claims debatable or wrong." *Id.* at 484, 120 S. Ct. at 1604. "When a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the petitioner shows, at least, 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.* The Supreme Court has held that a certificate of appealability is a "jurisdictional prerequisite" and a court of appeals lacks jurisdiction to rule on the merits until a certificate of appealability has been issued. *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 1039 (2003).

Mr. Dailey is attempting to bring a second or successive § 2255 motion based on recent decisional law. In particular, he cites *Mathis v. United States*, ____ U.S. ____, 136 S. Ct. 2243 (2016); *Hinkle v. United States*, 832 F.3d 569 (5th Cir. 569 (2016); *United States v. Tanksley*, 848 F.3d 347 (5th Cir. 2017). The Fifth Circuit has found, however, that cases such as these do not provide a basis for authorizing a successive § 2255 motion. *In re Lott*, 838 F.3d 522 (5th Cir. 2016) (denying authorization to file a successive application under § 2255(h)(2) because *Mathis* did not set forth a new rule of constitutional law that was made retroactive to cases on collateral review).

The dispositive factor in dismissing the case, however, was that the court lacks jurisdiction to consider the motion. A second or successive § 2255 motion must be certified by a panel of the appropriate court of appeals. 28 U.S.C. § 2255(h). Mr. Dailey argues that he is not required to have the motion certified by the Fifth Circuit because the recent decisions involve statutory interpretation. The Fifth Circuit has held, however, that § 2255 does not authorize successive filings based on statutory interpretation; instead, "Section 2255 authorizes a successive filing only

when the Supreme Court announces a new rule of constitutional law." *In re Lampton*, 667 F.3d 585, 590 (5th Cir. 2012). The present motion was appropriately dismissed for lack of jurisdiction because Mr. Dailey did not have permission from the Fifth Circuit to file it. *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000). Mr. Dailey has not shown that jurists of reason would find it debatable whether the § 2255 motion states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether this Court was correct in its procedural ruling. He is not entitled to a certificate of appealability. It is accordingly

ORDERED that the notice of appeal which is construed as a motion for a certificate of appealability (Dkt. #15) is **DENIED**. All motions not previously ruled on are **DENIED**.

So **ORDERED** and **SIGNED** this **24** day of **August, 2017.**

Ron Clark

Ron Clark, United States District Judge