

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-12477-E

JAMES BERNARD JONES, JR.,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

ENTRY OF DISMISSAL: Pursuant to the 11th Cir.R.42-1(b), this appeal is DISMISSED for want of prosecution because the appellant James Bernard Jones, Jr. has failed to pay the filing and docketing fees to the district court within the time fixed by the rules., effective December 18, 2018.

DAVID J. SMITH
Clerk of Court of the United States Court
of Appeals for the Eleventh Circuit

by: Gloria M. Powell, E, Deputy Clerk

FOR THE COURT - BY DIRECTION

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

JAMES BERNARD JONES, Jr.,)
)
 Movant,)
)
v.)
)
UNITED STATES OF AMERICA,)
)
 Respondent.)

FILED
Scott L. Poff, Clerk
United States District Court
By jburrell at 12:42 pm, May 03, 2018

CV418-045
CR409-416

REPORT AND RECOMMENDATION

James Bernard Jones, Jr. has complied with the Court's order to refile his self-styled "Petition for Writ [of] Habeas Corpus" -- which sought reconsideration of his sentence, rather than challenged its execution -- as either a 28 U.S.C. § 2255 or § 2241 motion. Docs. 111 & 112.¹ Though he has elected to complete the court's § 2241 form petition, it is clear that he challenging the *validity* of his sentence and not its execution. See doc. 113 (contending that prosecutorial and agency misconduct taint his conviction and that he was improperly characterized as a career offender in the Presentence Investigative

¹ The Court is citing to the criminal docket in CR409-416 unless otherwise noted, and all page numbers are those imprinted by the Court's docketing software.

Report because Florida battery is not a crime of violence). Indeed, Jones readily admits that (despite the title of his petition) he is actually seeking the vacatur of his sentence under § 2255. Doc. 113 at 6 (explaining “exactly what [he] want[s] the court to do: Vacate the conviction.”).

The Court thus must reconstrue Jones’ motion as a § 2255 motion to vacate his sentence. Normally, such reconstrual requires a *Castro* warning² that if he chooses to proceed with his motion, he will lose his ability to file any successive petition on this same matter without first seeking permission to do so from the Eleventh Circuit. This is, however, Jones’ *second* § 2255 motion to vacate his sentence,³ for which he requires permission from the Eleventh Circuit.

To file a second or successive § 2255 motion, movant first had to file an application with the Eleventh Circuit for an order authorizing the

² See *Castro v. United States*, 540 U.S. 375, 383 (2003) (“the district court must notify the pro se litigant that it intends to recharacterize the pleading [as a § 2255 motion], warn the litigant that this recharacterization means that any subsequent § 2255 motion will be subject to the restrictions on ‘second or successive’ motions, and provide the litigant an opportunity to withdraw the motion or to amend it so that it contains all the § 2255 claims he believes he has.”); *Pena v. United States*, 2016 WL 6609223 at * 1 (S.D. Ga. Sept. 28, 2016).

³ See doc. 70 (motion to vacate his sentence under 28 U.S.C. § 2255), docs. 76, 81 & 82 (denying § 2255 motion), doc. 87 (appeal opinion affirming denial of his § 2255 motion), doc. 96 (appeal opinion on remand from the Supreme Court for reconsideration in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), reaffirming denial of his § 2255 motion).

district court to consider the motion. 28 U.S.C. § 2244(b)(3)(A); *Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003). A panel of the court of appeals must certify that the second or successive motion contains:

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h); *In re Anderson*, 396 F.3d 1336, 1337 (11th Cir. 2005). “Without authorization” from the court of appeals, a “district court lack[s] jurisdiction to consider [a movant’s] second or successive” motion. *Carter v. United States*, 405 F. App’x 409, 410 (11th Cir. 2010). It is undisputed that Jones has not received authorization from the Eleventh Circuit to file a successive motion. Doc. 112 at 4. This Court thus lacks jurisdiction to consider his petition. *In re Bradford*, 830 F.3d 1273, 1277 (11th Cir. 2016); *United States v. Holt*, 417 F.3d 1172, 1175 (11th Cir. 2005); see also *Medberry v. Crosby*, 351 F.3d 1049, 1061 (11th Cir. 2003) (“when a federal prisoner’s claims fall within the ambit of § 2255, the prisoner is subject to that section’s restrictions”).

James Bernard Jones, Jr.'s reconstrued § 2255 motion should be **DISMISSED** as an unauthorized, successive petition. Applying the Certificate of Appealability (COA) standards set forth in *Brown v. United States*, 2009 WL 307872 at * 1-2 (S.D. Ga. Feb. 9, 2009), the Court discerns no COA-worthy issues at this stage of the litigation, so no COA should issue either. 28 U.S.C. § 2253(c)(1); Rule 11(a) of the Rules Governing Habeas Corpus Cases Under 28 U.S.C. § 2254 ("The district court *must* issue or deny a certificate of appealability when it enters a final order adverse to the applicant") (emphasis added).

This Report and Recommendation (R&R) is submitted to the district judge assigned to this action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule 72.3. Within 14 days of service, any party may file written objections to this R&R with the Court and serve a copy on all parties. The document should be captioned "Objections to Magistrate Judge's Report and Recommendations." Any request for additional time to file objections should be filed with the Clerk for consideration by the assigned district judge.

After the objections period has ended, the Clerk shall submit this R&R together with any objections to the assigned district judge. The

district judge will review the magistrate judge's findings and recommendations pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to timely file objections will result in the waiver of rights on appeal. 11th Cir. R. 3-1; see *Symonett v. V.A. Leasing Corp.*, 648 F. App'x 787, 790 (11th Cir. 2016); *Mitchell v. United States*, 612 F. App'x 542, 545 (11th Cir. 2015).

SO REPORTED AND RECOMMENDED, this 3rd day of M,
2018.


UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

FILED
U.S. DISTRICT COURT
SAVANNAH DIV.
2018 MAY 29 PM 4:53

JAMES BERNARD JONES, JR.,)

Petitioner,)

v.)

UNITED STATES OF AMERICA,)

Respondent.)

CLERK

SO. DIST. OF GA.

CASE NOS. CV418-045
CR409-416

O R D E R

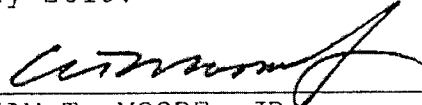
Before the Court is the Magistrate Judge's Report and Recommendation (Doc. 7), to which objections have been filed (Doc. 8). After a careful de novo review of the record, the Court concludes that Petitioner's objections are without merit. Accordingly, the Report and Recommendation is **ADOPTED** as the Court's opinion in this case. As a result, Petitioner's construed 28 U.S.C. § 2255 petition (Doc. 1) and amended petition (Doc. 5) are **DISMISSED**. In addition, Petitioner is not entitled to a Certificate of Appealability ("COA"), rendering moot any request for in forma pauperis status on appeal. The Clerk of Court is **DIRECTED** to close this case.

In his objections, Petitioner objects to the Magistrate Judge's recommendation that his purported 28 U.S.C. § 2241 petition be construed as seeking relief under

28 U.S.C. § 2255. (Doc. 8 at 1-2.) However, Petitioner is clearly attacking the validity of his sentence, not its execution. (Id. at 6 ("Movant request[s] his sentence vacated and immediate release for the unlawful detention that has been improperly imposed").) Section 2241 applies only where Section 2255 would be "inadequate or ineffective to test the legality of [Petitioner's] detention." 28 U.S.C. § 2255(e); see Wattleton v. Beeler, 186 F. App'x 852, 853 (11th Cir. 2006). Petitioner previously raised the same arguments in a § 2255 petition that he now advances in his purported § 2241 petition. (Compare CV413-142, Doc. 1, with CV418-045, Doc. 1.) Since these claims have already been addressed, Petitioner is unable to show that § 2255 is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255. Therefore, the Court agrees with the Magistrate Judge that the Court must construe his present petition as seeking relief under § 2255. See Wattleton, 186 F. App'x at 853. As a result, the current petition must be dismissed because Petitioner previously filed a § 2255 petition and has not received permission from the Eleventh Circuit Court of Appeals to file a successive petition. Id. ("[A] petitioner who has filed and was denied a § 2255 motion may not circumvent the successive-petition rule simply by filing a

petition under § 2241." (citing Wofford v. Scott, 177 F.3d 1236, 1245 (11th Cir. 1999))).

SO ORDERED this 29th day of May 2018.



WILLIAM T. MOORE, JR.
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

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