IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-12860-H

NASEDRA K. LUMPKIN,

Petitioner - Appellant,

versus

ATTORNEY GENERAL STATE OF FLORIDA,
NICHOLAS COX,
Statewide Prosecutor, in his official capacity,
JULIE HOGAN,
Statewide Prosecutor, in her official capacity,
HARRIS PRINTZ,
Public Defender, in his official capacity,

Respondents - Appellees.

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

ENTRY OF DISMISSAL: Pursuant to the 11th Cir.R.42-1(b), this appeal is DISMISSED for want of prosecution because the appellant Nasedra K. Lumpkin has failed to pay the filing and docketing fees to the district court within the time fixed by the rules., effective May 13, 2019.

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

by: Gerald B. Frost, H, Deputy Clerk

FOR THE COURT - BY DIRECTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.:18-CV-80577-MIDDLEBROOKS/WHITE

NASEDRA K. LUMPKIN,

Petitioner,

v.

PAMELA JO BONDI, in her official capacity as Attorney General of the State of Florida, NICHOLAS COX, JULIE HOGAN, and HARRIS PRINTZ,

Respondents.
_____/

ORDER ADOPTING REPORT AND DISMISSING COMPLAINT

THIS CAUSE comes before the Court on Magistrate Judge Patrick A. White's Report and Recommendation ("Report"), issued on May 25, 2018. (DE 10). Petitioner timely filed Objections to the Report on June 8, 2018. (DE 12).

Petitioner filed what he claims is a complaint under 42 U.S.C. § 1985 for civil rights violations. (DE 1, "Complaint"). The Report finds that this Motion should be dismissed for lack of jurisdiction as it is an unauthorized successive motion. As explained in the Report, Movant may seek authorization from the Eleventh Circuit by completing the form attached to the Report (as well as following its instructions) and sending it to the Eleventh Circuit. Upon a careful, *de novo* review of the Report, the Objections, and the record, the Court agrees with the Report's recommendation to dismiss the Complaint as an unauthorized successive 28 U.S.C. § 2254 habeas petition and to deny a certificate of appealability. Accordingly, it is hereby

ORDERED AND ADJUDGED that:

1) The Report (DE 10) is **RATIFIED, AFFIRMED, and ADOPTED**

2) The Complaint (DE 1) is **DISMISSED WITHOUT PREJUDICE** for lack of jurisdiction due to Petitioner failing to obtain authorization from the Eleventh Circuit Court of Appeals as required by 28 U.S.C. § 2244(b)(3).

3) A Certificate of Appealability is **DENIED**.

4) All pending motions are **DENIED as MOOT**.

5) The Clerk of Court shall **CLOSE** this case and **DENY** all pending motions **AS MOOT**.

DONE AND ORDERED in Chambers in West Palm Beach, Florida, this 26 day of June, 2018.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record;
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-cv-80577-Middlebrooks
MAGISTRATE JUDGE P.A. WHITE

NASEDRA LUMPKIN,

Petitioner,

v.

PAMELA JO BONDI ET AL.,[1]

Respondent.

REPORT OF
MAGISTRATE JUDGE

I. Introduction

Nasedra Lumpkin, a state prisoner confined at Florida State Prison in Raiford, Florida, has filed a pro se filing. Therein, he relies upon 42 U.S.C. § 1985 in order to attack his conviction and sentence entered in **Case No. 2009-cf-005842** from the Circuit Court in and for Palm Beach County. This Cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. § 636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2254 Cases in the United States District Courts. For its consideration, this Court reviewed the purported § 1985 complaint(DE#1). This Court also reviewed relevant state and federal dockets that are identified in this Report or that were made part of the record per this Court's order of directions. Accordingly, despite the pleading's label as a § 1985 complaint, the instant filing is actually an unauthorized successive habeas petition.[2]

[1] This note reflects that a § 2254 federal habeas petition, which challenges a conviction or sentence arising out of Florida's state courts, should ordinarily identify the Secretary for the Florida Department of Corrections, who at this time is Julie L. Jones.

[2] Section 2243, governing applications for writ of habeas corpus, provides:

> A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show

II. Procedural History[3]

Mr. Lumpkin was convicted of conspiracy to commit burglary of a structure causing damage in excess of $1,000 and grand theft over $100,000 in case no 09-cf-05842 in the Circuit Court in and for Palm Beach County. A direct appeal followed in Appellate Case No. 4D12-1831. On November 13, 2014, the Fourth District Court of Appeal *per curiam* affirmed without a written opinion. See Lumpkin v. State, 151 So. 3d 1262 (Fla. 4th DCA 2014). A petition for writ of certiorari was not pursued.

After exhausting in state court, Mr. Lumpkin filed a § 2254 habeas corpus petition in this Court on August 31, 2016. (Case No. 16-cv-81553-Rosenberg, DE#1). A report and recommendation recommending denial issued on November 16, 2017, which was adopted on December 11, 2017. (Case No. 16-cv-81553-Rosenberg, DE#52 and 62). The Eleventh Circuit declined to grant COA on April 9, 2018. (Case No. 16-cv-81553-Rosenberg, DE#74).

> cause why the writ should not be granted, **unless it appears from the application that the applicant or person is not entitled thereto.**

28 U.S.C. § 2243 (emphasis added). Rule 4 of the Rules Governing Section 2254 Cases provides in pertinent part:

> The clerk must promptly forward the petition to a judge under the court's assignment procedure, and the judge must promptly examine it. **If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.**

Rule 4, Rules Governing Section 2254 Cases (emphasis added). Thus, a district court has the power, under Rule 4 of the Rules Governing Section 2254 Cases, to examine and dismiss frivolous habeas petitions prior to any answer or other pleading by the state. See also Wingfield v. Sec'y, Fla. Dep't of Corr., 203 Fed. App'x 276, 277-78 (11th Cir. 2006) (discussing general principles of Rule 4 with regard to frivolous claims).

[3] The following procedural history relies upon the procedural history set forth in Case no. 16-cv-81553-Rosenberg.

Less than a month later, on April 27, 2018, Mr. Lumpkin filed by mail the instant filing, which purports to be a complaint under 42 U.S.C. § 1985.[4] (DE#1 at 1, 4).

III. Discussion

A. Applicable Law

i. *Construction of Pleadings*

It is often stated that a pleader is "the master" of his or her complaint. See, e.g., Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc., 535 U.S. 826, 831 (2002) (relying upon Caterpillar Inc. v. Williams, 482 U.S. 386, 398-99 (1987)) Yet, it is also well-settled that a Court must look behind the label of a prisoner's postconviction motion to determine if he is, in substance, seeking a different form of relief. See, e.g., Gilbert v. United States, 640 F. 3d 1293, 1323 (11th Cir. 2011) (en banc) (construing a purported Rule 60(b) motion as a successive habeas petition). Thus, where a § 2254 petitioner seeks relief under the guise of a different label, Courts must construe the motion for what it actually is—a § 2254 motion. See id. (explaining this principle in a § 2255 context).

ii. *Unauthorized "Second or Successive" Habeas Petitions*

On April 24, 1996, the habeas corpus statutes were amended. Included in the amendments is a change in 28 U.S.C. § 2244, which

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[4] "Absent evidence to the contrary in the form of prison logs or other records," a prisoner's filings are presumed and "deemed filed the date [they] are delivered to prison authorities for mailing." Washington v. United States, 243 F. 3d 1299, 1301 (11th Cir. 2001). See also Houston v. Lack, 487 U.S. 266, 270-71 (1988)(extending the federal "prison mailbox rule" to persons in state custody filing in federal court).

provides in pertinent part:

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless -
>
> > (A) the application shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (B)(I) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> >
> > (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
>
> (3)(A) **Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.**

(emphasis added).

Put simply, if a § 2254 is an unauthorized successive petition because the petitioner did not obtain prior authorization to file a successive § 2254 from the Eleventh Circuit Court of Appeals, the district court must dismiss. See United States v. Holt, 417 F. 3d 1172, 1175 (11th Cir. 2005) (per curiam).

"The phrase 'second or successive' is not self-defining." Panetti v. Quarterman, 551 U.S. 930, 943 (2007). In fact, the Supreme Court has "declined to interpret 'second or successive' as referring to all § 2254 applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior § 2254 application." Id. (relying upon Slack v. McDaniel, 529 U.S. 473, 487 (2000)).

However, "[i]n the usual case, [the general rule stands that] a petition filed second in time and not otherwise permitted by the terms of § 2244 will not survive AEDPA's 'second or successive' bar." Id. at 947. The Supreme Court has declined to establish the fine contours of what kind of second-in-time petitions would qualify for the Panetti exception. See id. Notwithstanding, the Panetti decision instructs that, a second-in-time federal habeas petition may not be barred as "second or successive" when a new claim has become ripe since the initial federal habeas petition. See id. at 946-47 ("Instructing prisoners to file premature claims, particularly when many of these claims will not be colorable even at a later date, does not conserve judicial resources....The statutory bar on 'second or successive' applications does not apply to a Ford claim brought in an application filed when the claim is first ripe.").

B. Properly Construing the Instant Pleading

Consistent with that long-standing principle that courts should look at the substance of what is alleged, and not merely at its label, it is clear that Mr. Lumpkin has filed the purported § 1985 complaint as a smokescreen. After peering beyond the smoke, the undersigned concluded that none of the allegations are properly raised by way of 42 U.S.C. § 1985.

Instead, Mr. Lumpkin merely seeks to challenge the validity of his conviction or sentence by adding "a new ground for relief" or "attack[ing] the federal court's previous resolution of a claim on the merits," meaning the motion is properly construed as a § 2254 motion. See, e.g., Williams v. Chatman, 510 F. 3d 1290, 1293-94 (11th Cir. 2007) (relying upon this principle in the context of a purported Fed R. Civ. P. 60(b) motion); United States v. Bell, 447 Fed. App'x 116, 118 (11th Cir. 2011) (concluding a motion for clarification challenging subject matter jurisdiction for deficient § 851 notice was properly construed as a § 2255 motion). See also Granda v. United States, 702 Fed. App'x 938 (2017)(concluding that a claim that a sentencing enhancement was unconstitutionally applied was properly construed as a § 2255 despite the invocation of the ancient writ of audita querela, which was replaced by Fed. R. Civ. P. 60); Hardy v. United States, 443 Fed. App'x 489 (11th Cir. 2011) (reasserting the same claim previously raised in a § 2255 petition and masking it with Fed. R. Civ. P. 60 reveals the motion should properly be construed as a§ 2255 motion). Because Mr. Lumpkin already filed a § 2254 petition, this Court must next assess whether the instant § 2254 motion is "second or successive."[5]

C. The Instant § 2254 is "Second or Successive"

[5] As Mr. Lumpkin already filed a § 2254 petition, this Court has no obligation to give him notice of the consequences of recharacterization, afford him an opportunity to object to such recharacterization, nor provide a window for withdrawal or amendment of the filing. See, e.g., Castro v. United States, 540 U.S. 375, 383 (2003) (providing that when district courts construe a pro se litigant's filings as an initial § 2255 motion, district courts must notify the pro se litigant that it intends to recharacterize, warn that recharacterization means subsequent § 2255 motions will be subject to the "second or successive" restriction, and afford an opportunity to withdraw the motion or to amend it); Rivas v. Warden, FCC Coleman-USP I, 711 Fed. App'x 585 (11th Cir. 2018) (applying Castro to a § 2254 context).

As explained earlier, "[t]he phrase 'second or successive' is not self-defining." Panetti v. Quarterman, 551 U.S. 930, 943 (2007). Notwithstanding, the instant Petition is clearly successive. Unlike Mr. Panetti's claim that he was incompetent to be executed, the nature of Mr. Lumpkin's claims do not implicate facts that unusually render the claim to become ripe years after direct or federal habeas review has concluded. See Tompkins v. Sec'y, Fla. Dep't of Corr, 557 F. 3d 1257, 1259-60 (11th Cir. 2009) (relying upon Panetti, 551 U.S. at 942-43, 946-47). Unlike a Ford claim, Mr. Lumpkin merely "wants to raise claims that can be and routinely are raised in initial habeas petitions." Tompkins, 557 F. 3d at 1260.[6]

Given that Mr. Lumpkin did not have authorization from the United States Eleventh Circuit Court of Appeals as required by 28 U.S.C. § 2244 (b)(3)(A), the Petition should be dismissed for lack of jurisdiction unless and until the Eleventh Circuit authorizes this Court to consider Mr. Lumpkin's successive challenge. See, e.g., Burton v. Stewart, 549 U.S. 147, 157 (2007)("[Petitioner] neither sought nor received authorization from the Court of Appeals before filing his 2002 petition, a 'second or successive' petition challenging his custody, and so the District Court was without jurisdiction to entertain it."); Williams v. Chatman, 510 F. 3d

[6] As the Eleventh Circuit put it, "[t]he violation of constitutional rights asserted in [Gardner, Brady, and Giglio claims] occur, if at all, at trial or sentencing and are ripe for inclusion in a first petition." Tompkins, 557 F. 3d at 1260. Mr. Lumpkins' claims are no different. Even if new evidence had been relied upon by Mr. Lumpkin, the Eleventh Circuit has explained that claims of newly discovered evidence do not qualify for the Panetti exception. See Tompkins, 557 F. 3d at 1260 ("Cutting and pasting language from the Panetti opinion and contorting that language's meaning, Tompkins would have us hold that any claim based on new evidence is not 'ripe' for presentation until the evidence is discovered, even if that discovery comes years after the initial habeas petition is filed. That is not what the Supreme Court in Panetti meant by 'ripe.'"). Cf. Stewart v. United States, 646 F. 3d 856, 863 (11th Cir. 2011) (concluding in a § 2255 context that a second-in-time federal habeas petition was not "second or successive" where the court was "not faced with a claim based on facts that were merely undiscoverable").

1290, 1295 (11th Cir. 2007) ("Because he was attempting to relitigate previous claims that challenge the validity of his conviction, Williams was required to move [the Eleventh Circuit] for an order authorizing the district court to consider a successive habeas petition."). See also Magwood v. Patterson, 561 U.S. 320, 331-32 (2010)(noting that the AEDPA's bar on second and successive habeas corpus applications applies only to a second or successive application challenging the same state court judgment).

If Mr. Lumpkin insists on pursuing this case, he should swiftly apply to the United States Eleventh Circuit Court of Appeals for the authorization required by 28 U.S.C. § 2244 (b)(3)(A).[7] **The petitioner will be provided with a form to apply for such authorization with this report.** It is, therefore, recommended that this case be dismissed.

IV. Certificate of Appealability

According to Rule 11 of the Rules Governing Section 2254 Cases for the United States District Courts, a district court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Under 28 U.S.C. § 2253(c) (2), a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." A prisoner satisfies this standard by demonstrating that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong and that any dispositive procedural ruling by the district court is debatable. Miller-El v. Cockrell, 537 U.S. 322, 366 (2003); Slack v. McDaniel,

[7] Curiously and indicative of Mr. Lumpkin's knowing abuse of the writ, on April 9, 2018, the Eleventh Circuit declined to grant COA from the denial of habeas relief, meaning he instituted this action less than twenty days after losing on initial habeas review. (Case no. 16-cv-81553-Rosenberg, DE#74).

529 U.S. 473, 484 (2000). Thus, a petitioner need not show that an appeal would succeed among some jurists. Miller-El, 537 U.S. at 337. After all, "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." Id. at 338.

Petitioner has failed to make a substantial showing that reasonable jurists would find debatable the undersigned's determination that this Court has no jurisdiction. Consequently, a certificate of appealability should not issue.

Finally, as now provided by the Rules Governing § 2254 Cases, Rule 11(a) states: "Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." If there is an objection to this recommendation by either party, that party may bring this argument to the attention of the district judge in the objections permitted to this report and recommendation.

V. Conclusion and Recommendations

In sum, it is recommended that the construed petition for habeas corpus relief be **DISMISSED** for lack of jurisdiction due to Petitioner failing to obtain authorization from the Eleventh Circuit Court of Appeals as required by 28 U.S.C. § 2244(b)(3). Further, as explained earlier, **COA should should not issue**. Finally and as such, this case should be **CLOSED**.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report. Failure to file timely objections shall bar plaintiff from a *de novo*

determination by the district judge of an issue covered in this report and shall bar the parties from attacking on appeal factual findings accepted or adopted by the district judge except upon grounds of plain error or manifest injustice. See 28 U.S.C. § 636(b)(1); Henley v. Johnson, 885 F. 2d 790,794 (1989); Thomas v. Arn, 474 U.S. 140, 149 (1985); RTC v. Hallmark Builders, Inc., 996 F. 2d 1144, 1149 (11th Cir. 1993); LoConte v. Dugger, 847 F. 2d 745 (11th Cir. 1988).

Signed this 24th day of May, 2018.

UNITED STATES MAGISTRATE JUDGE

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