

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-51004



A True Copy
Certified order issued Jul 30, 2019

John W. Cayce
Clerk, U.S. Court of Appeals, Fifth

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RUBEN PATRICK VALDES,

Defendant-Appellant

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

ORDER:

Ruben Patrick Valdes, federal prisoner # 33070-180, seeks a certificate of appealability (COA) to challenge the district court's dismissal of his 28 U.S.C. § 2255 motion attacking the concurrent 327-month imprisonment terms imposed following his convictions for conspiracy to transport and conceal aliens and for transporting aliens. The district court determined that the § 2255 motion was successive and dismissed it for lack of jurisdiction because Valdes 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) (involving a 28 U.S.C. § 2254 petition). To obtain a COA, Valdes must show "that jurists of reason could disagree with the district court's

APPENDIX A

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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).

Valdes could have raised his claim that counsel was ineffective for failing to adequately challenge the computation of his criminal history at the time that he filed his initial § 2255 motion. *See United States v. Orozco-Ramirez*, 211 F.3d 862, 863, 867 (5th Cir. 2000). Therefore, reasonable jurists could not disagree that the instant § 2255 motion is successive. *See id.*; *see Buck*, 137 S. Ct. at 773.

Because Valdes did not obtain an order from this court authorizing the district court to consider the successive motion, the district court did not have jurisdiction to entertain it. *See* § 2244(b)(3)(A); *see Key*, 205 F.3d 773 at 774. It follows that Valdes’s claim does not deserve encouragement to proceed further. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Accordingly, his motion for a COA is DENIED. His motion for leave to proceed in forma pauperis on appeal also is DENIED.

A handwritten signature in black ink, appearing to read "SKD", followed by a long horizontal line.

STUART KYLE DUNCAN
UNITED STATES CIRCUIT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION**

RUBEN PATRICK VALDES,
Reg. No. 33070-180,
Movant,

v.

**UNITED STATES
OF AMERICA,**
Respondent.

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**EP-18-CV-332-PRM
EP-02-CR-1326-PRM-1**

MEMORANDUM OPINION AND ORDER

On this day, the Court considered Movant Ruben Patrick Valdes's [hereinafter "Movant"] pro se "Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody" (ECF No. 200)¹ [hereinafter "Motion"], filed on November 1, 2018, in the above-captioned cause. After due consideration, the Court is of the opinion that Movant's Motion should be dismissed for lack of subject matter jurisdiction, for the reasons that follow. In addition, the Court will deny Movant a certificate of appealability.

¹ "ECF No." refers to the Electronic Case Filing number for documents docketed in cause number EP-02-CR-1326-PRM-1. Where a discrepancy exists between page numbers on filed documents and page numbers assigned by the ECF system, the Court will use the latter page numbers.

I. BACKGROUND

Movant conspired with others to transport illegal aliens within the United States. See Second Superseding Indictment, Feb. 5, 2003, ECF No. 54. He was directly linked to the heat-stroke deaths of two aliens found in the back of an unventilated and unrefrigerated trailer on July 27, 2002.

See id.

A grand jury in El Paso, Texas, returned a two-count "Second Superseding Indictment" on February 5, 2003. *Id.* It charged Movant with conspiring to transport and harbor aliens for financial gain and transporting aliens for financial gain. *Id.*

A jury found Movant guilty of both counts on April 17, 2003. The jury also found that the offenses resulted in the deaths of one or more persons. The Court entered final judgment on June 19, 2003, sentencing Movant to concurrent 327-month terms of imprisonment followed by concurrent five-year terms of supervised release. *J. in a Criminal Case*, June 19, 2003, ECF No. 145. The Court also ordered Movant to pay a \$25,000 fine and a \$200 special assessment. *Id.*

The Fifth Circuit Court of Appeals affirmed Movant's sentence on June 2, 2004. *United States v. Valdes*, 102 F. App'x 841 (5th Cir. 2004),

ECF No. 180.

Movant successfully filed his first § 2255 Motion on October 6, 2005. Am. Mot. to Vacate, Oct. 6, 2005, ECF No. 187. The Court denied it on the merits on March 5, 2007. Mem. Op. & Order, Mar. 5, 2007, ECF No. 193. Movant sought a certificate of appealability, but the Fifth Circuit dismissed his appeal on June 12, 2007, when he “failed to timely pay docketing fee.” *United States v. Valdes*, No. 07-50405 (5th Cir. June 12, 2007), ECF No. 198.

Movant’s instant § 2255 Motion followed over eleven years later on November 1, 2018. Therein, Movant alleges that his trial counsel provided ineffective assistance when counsel failed to investigate and object to factual errors in Movant’s Presentence Investigation Report.

II. APPLICABLE LAW

Before a movant may proceed with a second or successive § 2255 motion, *a court of appeals panel* must first certify that it contains:

- (1) newly discovered evidence that . . . 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 collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h) (2012). These restrictions eliminate “the need for the

district courts to repeatedly consider challenges to the same conviction unless an appellate panel first f[ind[s] that those challenges ha[ve] some merit.” *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000) (citing *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998)). Hence, a district court lacks subject matter jurisdiction to consider a second or successive motion unless the appellate court—which, here, is the Fifth Circuit—first grants the movant permission to file the successive petition. *See Crone v. Cockrell*, 324 F.3d 833, 836–37 (5th Cir. 2003) (“[T]he district court did not have subject matter jurisdiction to consider Crone’s application because Crone did not obtain an order from this Court authorizing the district court to consider the successive application.”); *Key*, 205 F.3d at 774 (“[Section] 2244(b)(3)(A) acts as a jurisdictional bar to the district court’s asserting jurisdiction over any successive habeas petition until this court has granted the petitioner permission to file one.”); *United States v. Rich*, 141 F.3d 550, 553 (5th Cir. 1998) (upholding the dismissal of a § 2255 motion where movant had not sought or acquired certification from the Fifth Circuit to file a second or successive § 2255 motion).

III. ANALYSIS

Because there is nothing in the record to indicate that Movant sought

and received the appropriate certification from the Fifth Circuit prior to filing his instant § 2255 Motion—or that since filing his motion he has obtained the necessary certification—the Court concludes it is without jurisdiction to entertain his second § 2255 Motion. *See In re Tatum*, 233 F.3d 857, 858 (5th Cir. 2000) (“Before a successive 28 U.S.C. § 2255 motion may be filed in district court, the movant must obtain authorization from this court for the district court to consider the movant’s successive § 2255 motion. 28 U.S.C. § 2244 (b)(3)(A), § 2255.”). Accordingly, the Court will dismiss Movant’s second § 2255 Motion. *See W.D. Tex. Local Rule CV-3(b)(6)* (“A second or successive . . . motion for relief pursuant to 28 U.S.C. § 2255 will be dismissed without prejudice unless accompanied by a certificate issued by a panel of the Fifth Circuit.”). This dismissal, however, is without prejudice to his right to submit a motion in the Fifth Circuit for leave to file a second or successive § 2255 motion.

IV. CERTIFICATE OF APPEALABILITY

A movant may not appeal a final order in a habeas corpus proceeding “[u]nless a circuit justice or judge issues a certificate of appealability.” 28 U.S.C. § 2253(c)(1)(B) (2012). To warrant a grant of the certificate as to claims that the district court rejects solely on procedural grounds, the

movant must show both 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.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also United States v. Jones*, 287 F.3d 325, 329 (5th Cir. 2002) (applying *Slack* to a certificate of appealability determination in the context of § 2255 proceedings). Here, the Court determines that jurists of reason would not debate the Court’s procedural ruling. Accordingly, the Court will deny Movant a certificate of appealability. *See* 28 U.S.C. foll. § 2255 R. 11(a) (“The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.”).

V. CONCLUSION

The Court concludes it is without jurisdiction to entertain Movant’s second or successive § 2255 Motion. In addition, the Court concludes Movant is not entitled to a certificate of appealability. Therefore, the Court enters the following orders:

IT IS ORDERED that Movant Ruben Patrick Valdes’s pro se “Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody” (ECF No. 200) and his civil cause are

DISMISSED WITHOUT PREJUDICE for lack of subject matter jurisdiction.

IT IS FURTHER ORDERED that Movant Ruben Patrick Valdes is **DENIED** a **CERTIFICATE OF APPEALABILITY**.

IT IS FURTHER ORDERED that all pending motions in this cause, if any, are **DENIED AS MOOT**.

IT IS FINALLY ORDERED that the District Clerk shall **CLOSE** this case.

SIGNED this 8 day of November, 2018.



PHILIP R. MARTINEZ
UNITED STATES DISTRICT JUDGE

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