IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10816-J

EMBERY J. MCBRIDE,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee.

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

ORDER:

Embery J. McBride, a Georgia prisoner, moves for a certificate of appealability ("COA") in order to appeal the district court's denial of his *pro se* 28 U.S.C. § 2254 petition, challenging his 1982 Georgia convictions for rape and aggravated assault. He received a total sentence of five years' imprisonment for the 1982 convictions, although it appears that he may have been released early. In 1986, McBride was convicted on new charges for crimes that occurred in 1985: rape and aggravated sodomy. He remains incarcerated on those 1986 convictions.[1]

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), by demonstrating "reasonable jurists would find the

[1] McBride has filed federal habeas petitions, pursuant to § 2254, challenging his 1986 convictions, including a petition which the district court denied, and this Court affirmed in 1994. *See McBride v. Sharpe*, 25 F.3d 962 (11th Cir. 1994).

district court's assessment of the constitutional claims debatable or wrong" or that the issues "deserve encouragement to proceed further," *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000). McBride has not done so here.

Reasonable jurists would not debate the district court's conclusion that it was without jurisdiction to consider McBride's challenge to his 1982 convictions because he was not "in custody" pursuant to those convictions, as the five-year term of imprisonment imposed for those convictions has expired. *See Maleng v. Cook*, 490 U.S. 488, 490–91 (1989). *See also id.* at 492 ("Once the sentence imposed for a conviction has completely expired, the collateral consequences of a conviction are not themselves sufficient to render an individual 'in custody' for purposes of a habeas attack upon it."). Reasonable jurists would also not debate the district court's conclusion that, even if it liberally construed his petition as challenging his 1986 convictions, it was also without jurisdiction because McBride had already filed at least one federal habeas petition challenging those 1986 convictions, and he had not received authorization from this Court to file a successive habeas petition. *See Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003) (holding that the district court lacks jurisdiction to consider a second or successive petition absent authorization from this Court).

Because McBride has not satisfied the *Slack* test, his motion for a COA is DENIED.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10816-J

EMBERY J. MCBRIDE,

Petitioner-Appellant,

versus

WARDEN,

Respondent-Appellee.

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

Before: MARTIN and JORDAN, Circuit Judges.

BY THE COURT:

Embery J. McBride has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2, of this Court's June 20, 2019, order denying his motion for a certificate of appealability to review the denial of his federal habeas corpus petition, 28 U.S.C. § 2254. Upon review, his motion for reconsideration is DENIED because he has offered no meritorious arguments to warrant relief.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

EMBERY J. MCBRIDE, *

Petitioner, *

vs. * CASE NO. 4:18-CV-180 (CDL)

Warden WALTER BERRY, *

Respondent. *

O R D E R

After a de novo review of the record in this case, the Report and Recommendation filed by the United States Magistrate Judge on December 4, 2018 is hereby approved, adopted, and made the Order of the Court, including the denial of a certificate of appealability. The Court considered Petitioner's objections to the Report and Recommendation and finds that they lack merit.

Petitioner has also filed a "Rule 60(b)" motion (ECF No. 9). A Rule 60(b) motion is a method of obtaining relief "from a final judgment, order, or proceeding." Fed. R. Civ. P. 60(b). Petitioner's Rule 60(b) motion in this case is premature. At the time Petitioner filed his motion, no final judgment, order, or proceeding existed from which Petitioner could obtain any relief. After examining the substance of the motion, however, the Court will liberally construe it as a motion to amend or supplement Petitioner's initial habeas petition. *See* Pet'r's Rule 60(b) Mot.

2, ECF No. 9 ("This motion is to be incorporated with petitioner's habeas corpus petition, motion for appointment of counsel and exhibits[.]"); *see also* Fed. R. Civ. P. 15(a). In this motion, Petitioner reiterates his claims that his 1982 conviction was fraudulent, illegal, and otherwise void because the indictment was not properly presented. The Court has reviewed this motion and finds Petitioner has still failed to demonstrate that he is "in custody" for purposes of a challenge to his 1982 conviction. *See Maleng v. Cook*, 490 U.S. 488, 490-91 (1989). As such, Petitioner's Petition, as amended, is still subject to dismissal for the reasons set forth in the Magistrate Judge's Recommendation. Consequently, Petitioner's motion to amend or supplement (ECF No. 9) is denied as futile and moot.

IT IS SO ORDERED, this 15th day of February, 2019.

S/Clay D. Land
CLAY D. LAND
CHIEF U.S. DISTRICT COURT JUDGE
MIDDLE DISTRICT OF GEORGIA