IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-11478-B

JAMES R. YOUNG,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: MARTIN, ROSENBAUM, and LAGOA, Circuit Judges.

BY THE COURT:

James Young, a federal prisoner, was convicted in 1994 of violating 18 U.S.C. §§ 922(g) and 924(e). He was sentenced to 262-months imprisonment. He now seeks leave to proceed in forma pauperis ("IFP") to appeal the district court's dismissal of his amended 28 U.S.C. § 2255 motion. He also asks for a certificate of appealability ("COA"). After careful consideration, we deny Young's motion

for a COA as unnecessary. We also grant Young leave to proceed IFP and dismiss his appeal as frivolous.

APPENDIX A

* * *

After Young's conviction, this Court affirmed his convictions and sentence, and the Supreme Court denied certiorari. In February 2000, he filed his first 28 U.S.C. § 2255 motion, which the district court denied as untimely. In 2005, Young requested authorization to file a successive § 2255 motion, which we denied. In 2015, he filed another § 2255 motion, raising a claim under Johnson v. United States, 135 S. Ct. 2551 (2015), which the district court dismissed as an unauthorized, successive motion. In January 2017, Young again requested authorization to file a successive § 2255 motion, which this Court denied.

In January 2019, Young moved for appointment of counsel and "emergency habeas review," asserting that he was "actual[ly] innocen[t]" under Rehaif v. United States, 139 S. Ct. 2191 (2019). He also sought relief pursuant to the All Writs Act, 28 U.S.C. § 1651. The district court issued an order recharacterizing his filing as a § 2255 motion because it collaterally attacked his convictions, and the court directed Young to refile the motion in the proper form. Young filed the instant amended § 2255 motion, which the government moved to dismiss.

A magistrate judge issued a report and recommendation ("R&R"), recommending that the district court dismiss Young's amended § 2255 motion for

lack of jurisdiction, as he had not obtained authorization from this Court prior to filing a successive § 2255 motion. Over Young's objections, the district court adopted the R&R, dismissed his § 2255 motion, and denied him a COA.

* * *

First, Young seeks a COA from our Court to appeal the district court's order dismissing his § 2255 motion.

This Court has held that the dismissal of a successive habeas petition for lack of subject matter jurisdiction does not constitute a "final order in a habeas corpus proceeding" for purposes of 28 U.S.C. § 2253(c). Hubbard v. Campbell, 379 F.3d 1245, 1247 (11th Cir. 2004). Instead, this Court may review that dismissal as a "final decision" under 28 U.S.C. § 1291. Thus, under Hubbard, Young does not require a COA to proceed. See 379 F.3d at 1247. For this reason, we deny his motion for a COA as unnecessary.

* * *

Next, Young seeks leave of this Court to proceed IFP. See Fed. R. App. P. 24(a)(5). We may grant a prisoner leave to proceed IFP if he "show[s] inability to pay or give security for fees and costs." 16AA Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3970.1 (4th ed. Apr. 2020 update); see 28 U.S.C. § 1915(a)(1). Young's affidavit of indigency satisfies this requirement. As a result, Young need not prepay fees and costs associated with this appeal.

* * *

Last, because Young is proceeding IFP, his appeal is subject to a frivolity determination. See 28 U.S.C. § 1915(e)(2). An action is frivolous if it is without arguable merit either in law or fact. Napier v. Preslicka, 314 F.3d 528, 531 (11th Cir. 2002). An IFP appeal is subject to dismissal at any time the court determines it is frivolous. 28 U.S.C. § 1915(e)(2)(B)(i)–(ii); see Dingler v. Georgia, 725 F. App'x 923, 927 (11th Cir. 2018) (per curiam) (unpublished) (stating that § 1915(e)(2)(B) "applies to anyone proceeding in forma pauperis" (citing, inter alia, Troville v. Venz, 303 F.3d 1256, 1260 (11th Cir. 2002))).

Here, there are no non-frivolous issues for Young to appeal. Before a prisoner may file a second or successive habeas petition, he first must obtain an order from the court of appeals authorizing the District Court to consider the petition. See 28 U.S.C. § 2244(b)(3)(A). Absent authorization from this Court, the district court lacks jurisdiction to consider a second or successive petition. See Farris v. United States, 333 F.3d 1211, 1216 (11th Cir. 2003).

The district court properly determined that it lacked jurisdiction to entertain Young's § 2255 motion. Starting in 2010, Young filed several § 2255 motions attacking his 1994 convictions. Young, therefore, was required to seek this Court's authorization prior to filing the instant motion, which he did not do. See

* * *

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The district court properly determined that it lacked jurisdiction to entertain Young's § 2255 motion. Starting in 2010, Young filed several § 2255 motions attacking his 1994 convictions. Young, therefore, was required to seek this Court's authorization prior to filing the instant motion, which he did not do. See

28 U.S.C. § 2244(b)(3)(A). Accordingly, the district court lacked jurisdiction to entertain his § 2255 motion. See Farris, 333 F.3d at 1216.

To the extent that Young moved for relief under the All Writs Act, his invocation of this Act "does not create any substantive federal jurisdiction." Klay v. United Healthgroup, Inc., 376 F.3d 1092, 1099 (11th Cir. 2004). Additionally, relief is unavailable under the Act where, as here, "a statute specifically addresses the particular issue at hand." See id. at 1100 (quotation marks omitted). Specifically, as noted above, the proper avenue for relief is § 2255, as Young attempts to collaterally attack his conviction. To obtain relief through his § 2255 motion, he must request our authorization to file a successive § 2255 motion. 28 U.S.C. § 2244(b)(3)(A).

We see no non-frivolous basis for challenging the district court's order dismissing Young's amended § 2255 motion. For the reasons stated, Young's motion for a COA is DENIED AS UNNECESSARY. His motion for IFP is GRANTED, and his appeal is DISMISSED.

APPEAL DISMISSED.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

APPENDIX B

UNITED STATES OF AMERICA,

vs. Case Nos.: 1:94cr1036/MW/GRJ
1:19cv164/MW/GRJ

JAMES R. YOUNG,

REPORT AND RECOMMENDATION

This matter is before the court upon Petitioner's amended "Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a person in Federal Custody." (ECF No. 37.) The Government has moved to dismiss the petition, and Petitioner has responded in opposition and filed supplemental authority in support of his motion. (ECF Nos. 285, 287, 288.)

The case was referred to the undersigned for the issuance of all preliminary orders and any recommendations to the district court regarding dispositive matters. *See* N.D. Fla. Loc. R. 72.2; *see also* 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b). After a review of the record and the arguments presented, the court concludes that the court does not have jurisdiction over Petitioner's successive motion, and it should be dismissed

without an evidentiary hearing. *See* Rules 8(a) and (b) Governing Section 2255 Cases.

BACKGROUND and ANALYSIS

Petitioner was sentenced on December 14, 1994 to a term of 262 months' imprisonment after a jury convicted him of violations of 18 U.S.C. §§ 922(g) and 924(e). His conviction was affirmed on appeal and the Supreme Court denied certiorari. (ECF Nos. 55, 57.) Petitioner has filed a number of post-conviction petitions in this court since 2000.

In February of 2000, Petitioner filed a motion to vacate under 28 U.S.C. § 2255, which was denied as untimely. (ECF. Nos. 58, 60, 61.) After Petitioner objected, the court reopened the matter and conducted an evidentiary hearing to determine whether Petitioner had timely delivered his petition to prison authorities for mailing. The court again dismissed the petition as untimely, finding Petitioner had submitted fraudulent evidence at the hearing. (*See* ECF Nos. 88, 89.) In 2005, the Eleventh Circuit denied Petitioner's request to file a successive § 2255 motion. (ECF No. 113.) Petitioner pursued a Rule 60(b) motion in 2015, which was also denied. (ECF Nos. 199, 200.) In September of 2015, he filed a § 2255 motion claiming his entitlement to relief under *Johnson v. United States*,

135 S.Ct. 2551 (2015). (ECF No. 213.) This motion was denied as an unauthorized successive petition (ECF Nos. 214-16; 218), and several requests for permission to file a successive motion based on *Johnson* were denied. (*See* ECF Nos. 232, 234, 237, 239.)[1] In 2018 and 2019, Petitioner unsuccessfully challenged his conviction via Federal Rule 60(b), the "all writs act," and a writ of audita querela. (ECF Nos. 242-247; 255-257, 259.)

In July of 2019 he filed a motion to appoint counsel and for emergency habeas review pursuant to *Rehaif v. United States*, 139 S. Ct. 2191 (2019). (ECF No. 274.) To ensure preservation of Petitioner's rights, this court recharacterized Petitioner's motion as one arising under 28 U.S.C. § 2255, provided appropriate information pursuant to *Castro v. United States*, 540 U.S. 375, 383 (2003), and directed him to file an amended motion if he wished to so proceed. (ECF No. 275.) Petitioner filed an amended motion, which the Government moved to dismiss. It is his amended motion that is now before the court.

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[1] In January of 2017, a three-judge panel of the Eleventh Circuit denied Petitioner's request for leave to file a second or successive § 2255 motion, despite Judge Martin's concurrence, expressing her belief that Petitioner's ACCA sentence was unlawful after *Johnson*. (ECF No. 239 at 5-7.)

As Petitioner is well aware, before a second or successive application for § 2255 relief is filed in the district court, the litigant must typically move in the appropriate court of appeals for an order authorizing the district court to consider the application. 28 U.S.C. § 2244(b)(3) and § 2255(h); *Felker v. Turpin,* 518 U.S. 651 (1996); *United States v. Holt*, 417 F.3d 1172, 1175 (11th Cir. 2005); *Carter v. United States,* 405 Fed. App'x 409 (11th Cir. 2010). Petitioner's successive motion falls within the larger subset of cases for which such authorization is required, as he is challenging the same judgment he challenged in his initial motion. This authorization is required even when, as here, a litigant asserts that his motion is based on the existence of 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)(2). Petitioner has not obtained authorization from the Eleventh Circuit Court of Appeals to file a successive motion, and therefore, the instant motion to vacate must be dismissed without prejudice.[2]

[2] In light of the Eleventh Circuit's opinion in *In re Palacios*, 931 F. 3d 1314, 1314-15 (11th Cir. 2019), it is unlikely that such authorization will be forthcoming.

Petitioner has also filed two motions requesting emergency conditional release and a motion requesting release to home confinement. (ECF Nos. 282, 286, 289.) Each of these motions is premised upon his belief that the pending § 2255 motion is due to be granted. As such, they should also be denied.

CERTIFICATE OF APPEALABILITY

Rule 11(a) of the Rules Governing Section 2255 Proceedings provides that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," and if a certificate is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." A timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rule 11(b), § 2255 Rules.

After review of the record, the court finds no substantial showing of the denial of a constitutional right. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000) (explaining how to satisfy this showing) (citation omitted). Therefore, it is also recommended that the court deny a certificate of appealability in its final order.

The second sentence of Rule 11(a) provides: "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.

Based on the foregoing, it is respectfully **RECOMMENDED**:

1. The amended Motion to Vacate, Set Aside or Correct Sentence (ECF No. 280) should be summarily **DENIED and DISMISSED**.
2. Petitioner's Motion Request for an Emergency Conditional Release Order (ECF No. 282), his Renewed Motion (ECF No. 286) and his Motion for release to Home Confinement (ECF No. 289) should be **DENIED**.
3. A certificate of appealability should be **DENIED**.

IN CHAMBERS at Gainesville, Florida, this 24th day of February 2020.

s/Gary R. Jones
GARY R. JONES
United States Magistrate Judge

NOTICE TO THE PARTIES

Objections to these proposed findings and recommendations must be filed within fourteen (14) days after being served a copy thereof. Any different deadline that may appear on the electronic docket is for the court's internal use only, and does not control. A copy of objections shall be served upon all other parties. If a party fails to object to the magistrate judge's findings or recommendations as to any particular claim or issue contained in a report and recommendation, that party waives the right to challenge on appeal the district court's order based on the unobjected-to factual and legal conclusions. *See* 11th Cir. Rule 3-1; 28 U.S.C. § 636.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA GAINESVILLE DIVISION

UNITED STATES OF AMERICA,

v. **Case No. 1:94cr1036-MW/GRJ**

JAMES R. YOUNG,

Petitioner,

_____/

ORDER ACCEPTING REPORT AND RECOMMENDATION

This Court has considered, without hearing, the Magistrate Judge's Report and Recommendation, ECF No. 290, and has also reviewed *de novo* Petitioner's objections to the report and recommendation, ECF No. 291. Accordingly

IT IS ORDERED:

The report and recommendation is **accepted and adopted**, over Petitioner's objections, as this Court's opinion. The Clerk shall enter judgment stating, "The amended Motion to Vacate, Set Aside, or Correct Sentence, ECF No. 280, is summarily **DENIED and DISMISSED**. Petitioner's Motion Request for an Emergency Conditional Release Order, ECF No. 282, his Renewed Motion, ECF

No. 286, and his Motion for Release to Home Confinement, ECFD No. 289, are **DENIED**. A Certificate of Appealability is **DENIED**." The Clerk shall also close the file.

SO ORDERED on March 11, 2020.

s/ MARK E. WALKER
Chief United States District Judge

[Motion Request For COA And]

Motion for Permission to

Appeal In Forma Pauperis and Affidavit

United States Court of Appeals for the Eleventh Circuit

JAMES R. YOUNG,
Plaintiff/Appellant,

v.

UNITED STATES OF AMERICA,
Respondent.

Court of Appeals No. 20-11478
District Court No. 1:94-cr-01036-MW/GAJ
1:19-cv-164-MW/GRJ

APPENDIX C

Instructions: Complete all questions in this application and then sign it. Do not leave any blank question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.

Affidavit in Support of Motion

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)

Date: _____ Signed: James R. Young

1. My issues on appeal are: Appellant/Petitioner, JAMES R. YOUNG, would like to note that the district court nor magistrate judge has responded in any way to any of my claims of record that were before that court for it's review and consideration in this matter. This due process violation offends Clisby, 960 F.2d at 936. My questions for Appeal and request for COA are:

(1) Whether Petitioner's "recharacterized" motion to a §2255 motion under Castro could also be considered a second and successive motion both at the same time - [Petitioner's response] - Pursuant to the reading of Castro, once a court uses it's discretion to 'recharacterize' a defendant's so-named motion as his first §2255 in that instance to preserve a defendant's right to proper review [and issues Castro's warning], it is then 'subsequent' motions to follow filed 'after' that motion, that would be considered as successive. Not the instant motion itself. Petitioner, therefore, requests a COA be granted for review of this issue and the lower Court's denial of due process. See United States v. Gupta, 572 F.3d 878, 889 (11th Cir. 2009).

(2) Whether Petitioner's constitutional right to be protected under the Second Amendment was violated - [Petitioner's response] - In this instance, yes, Petitioner's right to be protected under the Second Amendment was violated because Petitioner had plead nolo contendere to the state of Fla. priors being considered as change-of-'status' prior 'convictions', but under Florida and federal law, that misjudgment of 'status' was error 'then' [See United States v. Thompson, 756 F. Supp. 1492 (N.D. Fla. 1991), United States v. Willis, 106 F.3d 966, 967 (11th Cir. 1997), and 'now' in light of Rehaif now requiring that proof of mens rea 'status' be shown. My 'innocence' plead state 'status' shows I didn't ~~Knowingly~~ violate 3922(g).

Petitioner had never lost his rights under the Second Amendment due to those Florida pleas not being considered 'convictions' for purposes of Fla. Stat. §790.23 or for federal statute §922(g), and, therefore, his Second Amendment rights should have been protected due to state and federal law concerning 'status'. This fact is now clearly shown in Rehaif by the Supreme Court. See also Stewart v. United States, 646 F.3d 856, (11th Cir. 2011) for when an issue of claim newly becomes 'ripe', Boyd v. United States, 754 F.3d 1298 (11th Cir. 2014).

Wherefore, Petitioner's 'then' 'status'... 'now' undoubtedly falls outside the sweep of the § 922(g) federal statute category pursuant to and in light of Rehaif under § 2255(f)(4) review.

(3) Whether the district court erred in dismissing Petitioner's instant § 2255(f)(4) motion as successive - [Petitioner's response] - The district court erred in dismissing Petitioner's § 2255(f)(4) motion as successive because section 'f' of 2255, doesn't contain involvement with, nor review for, or even consider 'successive' motions. Petitioner, therefore, requests COA be granted on this issue because the district court used the wrong standard of review where it should have been judging whether Petitioner had timely filed his § 2255(f)(4) motion in light of Rehaif, within one year. See McIver v. United States, 307 F.3d 1327, 1329 (11th Cir. 2002), Stewart v. United States, 646 F.3d 856, 865 (11th Cir. 2011), and Slack v. McDaniel, 529 U.S. 473, 485-86, 120 S.Ct. 1595, 1604-05, 146 L.Ed.2d 542 (2000).

(4) Whether Petitioner's instant § 2255(f)(4) motion in light of Rehaif was timely and retroactively applicable - [Petitioner's response] - The added knowledge of 'status' mens rea element established in Rehaif is a new 'fact' that triggers a fresh one year statute of limitations under § 2255(f)(4). Petitioner, thus, meets the 'new fact' and 'timeliness' requirements due to his 'status' now being made a required element of § 922(g) for prosecution, in Rehaif. Again, Petitioner's actual plea 'status' with his state priors used in this case as 'convictions' was 'I say I am innocent of these charges' as an accepted term of the contract. The Court and the government agreed to my stipulation of term request and the lawyer promised me I wouldn't lose my rights to possess over that specific plea. Both federal and state law supported and [supports] this position. Now in light of Rehaif, Petitioner's 'innocence' term, documents a court record from the state showing why there is 'factual' proof Petitioner had every reason to not believe his 'status' had never changed to negative. Although Petitioner states he had still never bought, sold, or stole a firearm. Therefore, for the above reasons, COA should be granted on this issue. See Clisby, 960 F.2d at 936; Long v. United States, 626 F.3d 1167 (11th Cir. 2010), and the Teague doctrine.

(5) Whether pursuant to Rule 8(a) and a Clisby violation Petitioner was entitled to an evidentiary hearing or merits review by the district court to avoid piecemeal litigation and for it to be able to provide the court of Appeals a complete record for review - [Petitioner's Response] - Pursuant to Rule 8(a) and Clisby, simply because Petitioner was presenting 'new facts' within and beyond the record in his § 2255(f)(4) motion, showing actual innocence, and filing in a timely non-successive manner, a review on the merits or an evidentiary hearing was warranted. However, the Magistrate and the district judge in this case chose to not address any area of presentation submitted to them by the Petitioner and now this court in this appeal and request for COA, is left with a barren record for it's review which is due to no fault of the Petitioner. The lower court chose to not provide a 'complete' record for this court's review of the issues I claimed in the lower court, however, that act denies due process. Petitioner, therefore, requests COA be granted for the Clisby violation in this case, the failure to conduct an evidentiary hearing due to matters inside and outside the record, and because of the denial of due process by the lower court failing to develop a record of the claims for appellate review. See attached Exhibits "A" and "B" showing the judges' non-response to any claims made by Petitioner. See also Clisby, 960 F.2d at 936; Long v. United States, 626 F.3d 1167 (11th Cir. 2010); United States v. Gupta, 572 F.3d 878, 889 (11th Cir. 2009).

Based on all the above facts and references to the live record of Petitioner in this case, Petitioner humbly asks this Court to grant COA on his question raised, and that he be remanded back to the district court for the reasons chosen by this Court. This case warrants that the district court should have to present a 'Complete' and proper record on the grounds raised to it by the Petitioner, in an effort to effect a more reasonably sound appeal. See United States v. Gupta, 572 F.3d 878, 889 (11th Cir. 2009).

The purpose for me handwriting this motion is the fact that we can't leave our cells due to the Corona Virus. Please forgive any errors that I've made due to being pro se.

Respectfully Submitted,

James R. Young

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