



United States Court of Appeals
for the Fifth Circuit

A True Copy
Certified order issued Apr 06, 2023

Jude W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

No. 23-50085

United States Court of Appeals
Fifth Circuit

FILED

April 6, 2023

UNITED STATES OF AMERICA,

Lyle W. Cayce
Clerk

Plaintiff—Appellee,

versus

EMMANUEL ANTOINE HEMPHILL,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:22-CV-1401

CLERK'S OFFICE:

Under 5TH CIR. R. 42.3, the appeal is dismissed as of April 6, 2023, for want of prosecution. The appellant failed to timely pay the fee.

LYLE W. CAYCE
Clerk of the United States Court
of Appeals for the Fifth Circuit

By: CASEY A. SULLIVAN, Deputy Clerk

ENTERED AT THE DIRECTION OF THE COURT

Appendix A. 4 of 4.

January 12, 2023

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

BY: _____

JU
DEPUTYUNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISIONEMMANUEL HEMPHILL,
#94863-280

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

SA-12-CR-354-OLG-1

FINAL JUDGMENT

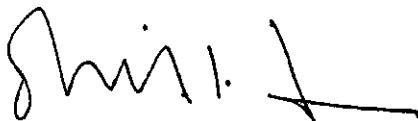
The Court considered the Judgment to be issued in the above styled and numbered cause. Pursuant to the Order dismissing Movant Emmanuel Hemphill's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 of even date herewith without prejudice for want of jurisdiction,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that Movant's Motion to Vacate, Set Aside, or Correct Sentence Under 28 U.S.C. § 2255 (Dkt. No. 297) is **DISMISSED WITHOUT PREJUDICE**. **IT IS FURTHER ORDERED** that all pending motions related to this motion, if any, are **DENIED AS MOOT**.

FINALLY, IT IS ORDERED that a **CERTIFICATE OF APPEALABILITY WILL NOT ISSUE**, and this case is **DISMISSED** and **CLOSED**.

It is so **ORDERED**.

SIGNED this 12th day of January, 2023.



ORLANDO L. GARCIA
United States District Judge

FILED

January 12, 2023

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXASBY: _____ JU
DEPUTYUNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISIONEMMANUEL HEMPHILL,
#94863-280,§
§
§
§
§

V.

SA-12-CR-00354-OLG-1

UNITED STATES OF AMERICA

ORDER OF DISMISSAL

Before the Court is Movant Emmanuel Hemphill's *pro se* and self-styled "Motion to Amend His Motion for Relief from Final Judgment Under Rule 60(b)." (Dkt. No. 297.) In 2014, a jury convicted Hemphill of conspiracy to possess with intent to distribute cocaine base and possession with intent to distribute cocaine base, and the Court sentenced Hemphill to 137 months of imprisonment. Hemphill challenged his convictions and sentences in a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255, which this Court denied on the merits in 2017. (Dkt. No. 289.)

On August 31, 2022, the Court received Hemphill's *pro-se*, self-styled "Motion For Relief From Final Judgment Under Rule 60(b)," in which Hemphill sought to challenge his 2014 conviction and sentence. (Dkt. No. 292.) The Court construed the motion as a motion to vacate pursuant to § 2255 and dismissed the motion without prejudice for lack of jurisdiction because Hemphill failed to present an order to this Court from the Fifth Circuit Court of Appeals authorizing the filing of the successive § 2255 motion. (Dkt. No. 294.)

On December 1, 2022, the Court received the pending "Motion to Amend His Motion for Relief from Final Judgment Under Rule 60(b)." (Dkt. No. 297). In the Motion, Hemphill argues that his "Motion For Relief From Final Judgment Under Rule 60(b)" should have been treated as a Rule 60(b) motion. Hemphill alleges juror bias in his criminal proceeding and seeks relief

pursuant to Rule 60(b)(3) of the Federal Rules of Civil Procedure, which permits relief from a civil judgment on the basis of “fraud . . . misrepresentation, or misconduct by an opposing party.”

Because Hemphill seeks to challenge his criminal sentences and convictions, the Court construes his pleading as a Motion to Vacate pursuant to § 2255. Although Hemphill does not label his pleading as a § 2255 Motion, § 2255 provides the primary means of collateral attack on a federal sentence. *Tolliver v. Dobre*, 211 F.3d 876, 877 (5th Cir. 2000). Section 2255 further provides that before a second or successive motion to vacate, set aside, or correct sentence is filed in the district court, a movant must move in the appropriate court of appeals for an order authorizing the district court to consider the motion. *See* 28 U.S.C. §§ 2255, 2244(b)(3).

Pursuant to the amendments to §§ 2255 and 2244(b), the Court finds Hemphill’s successive motion should be dismissed because he has not obtained prior approval to file a successive motion. *See United States v. Fulton*, 780 F.3d 683 (5th Cir. 2015) (holding the district court does not have jurisdiction to consider a successive § 2255 motion and remanding to the district court with instructions to dismiss the successive motion for want of jurisdiction). Hemphill failed to present an order to this Court from the Fifth Circuit Court of Appeals authorizing the filing of this successive Motion; therefore, this Court lacks jurisdiction to proceed with this § 2255 Motion.

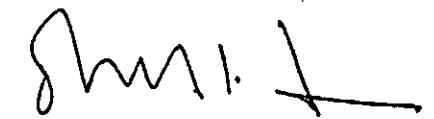
IT IS THEREFORE ORDERED that the Court construes Dkt. No. 297 as a Motion to Vacate pursuant to 28 U.S.C. § 2255.

IT IS FURTHER ORDERED that the Clerk of the Court shall open a companion civil cause for this matter, in keeping with its practices for docketing new motions to vacate pursuant to 28 U.S.C. § 2255 and shall file a copy of this Order in the new cause.

Finally, **IT IS ORDERED** that, to the extent Hemphill seeks to set aside his sentence and conviction, in whole or in part, his motion to vacate pursuant to 28 U.S.C. § 2255 is **DISMISSED WITHOUT PREJUDICE** for want of jurisdiction and a certificate of appealability is **DENIED**.

It is so **ORDERED**.

SIGNED this 12th day of January, 2023.



ORLANDO L. GARCIA
United States District Judge