

NO.

IN THE SUPREME COURT OF THE UNITED STATES

MARCO D. DUNCAN,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For a Writ of Certiorari to the
Eleventh Circuit Court of Appeals

Motion to Proceed In Forma Pauperis

Petitioner, MARCO D. DUNCAN, asks this Court for leave to proceed in forma pauperis. The Eleventh Circuit Court of Appeals previously appointed the undersigned counsel to represent Petitioner.



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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-15665-AA

MARCO D. DUNCAN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

ORDER:

Marco D. Duncan has moved for appointment of counsel in his challenge of the dismissal of his *pro se* motion to vacate, set aside, or correct sentence, 28 U.S.C. § 2255, as successive, and denial of his subsequent motion to alter or amend the judgment, Fed. R. Civ. P. 59(e). In his motion, he contends that the anticipated issues on appeal are: (1) whether new facts exist that were not available when he filed his first § 2255 motion and now would justify relief; (2) whether the district court was required to grant relief, even though his prior state conviction was reduced to a misdemeanor rather than vacated; (3) whether U.S. Supreme Court precedent authorizes him to file a second § 2255 motion; (4) whether his claim entitles him to Sixth Amendment protection because it is not a challenge to a sentencing enhancement; (5) whether the lower court violated the Magistrate's Act by conducting a *de novo* review on facts that were not heard by the magistrate judge nor a part of the record, but were later determined *sua sponte*

by the district court; (6) whether the district court allowed improper facts to support its decision to deny relief; (7) whether the district court was obligated to reopen the proceedings and allow him an opportunity to respond to the analysis personally conducted by the district court; and (8) whether the district court committed error by denying his Rule 59(e) motion. He also asserts that his appeal concerns the interpretation and ramification of Proposition 47, which was approved by California voters to reduce specified prior felony drug convictions to misdemeanors. He argues that his prison's law library is inadequate because it fails to provide authorities and reference materials for these issues. He asserts that counsel would assist him in preparing his complex brief and presenting relevant California statutes, court decisions, or executive orders here.

Shortly after Duncan moved for appointment of counsel, he filed his *pro se* appellant's brief. His brief raises many of the issues that he mentioned in his motion for appointment of counsel and provides relevant facts, legal authorities, and arguments.

Duncan is a federal prisoner serving a life sentence after a jury convicted him in 2003 of conspiracy to possess with intent to distribute 5 kilograms or more of cocaine. Duncan received an enhanced sentence under 21 U.S.C. § 851 because he had a prior state felony drug conviction, increasing his statutory imprisonment range from 10 years to life, to 20 years to life. He appealed, and we affirmed his conviction and sentence. In 2006, he filed an initial 28 U.S.C. § 2255 motion to vacate his sentence, which the district court denied in 2007. We denied a certificate of appealability ("COA") and leave to proceed on appeal *in forma pauperis* ("IFP").

In 2015, Duncan filed another § 2255 motion. He argued that his prior state felony conviction for possession of a controlled substance had been converted in 2014 from a felony to a misdemeanor, and, therefore, he no longer qualified for an enhanced sentence under § 851. A

magistrate judge issued a report and recommendation (“R&R”), recommending that Duncan’s § 2255 motion be dismissed. The magistrate judge found that Duncan’s motion was an unauthorized second or successive § 2255 motion, which the court did not have jurisdiction to consider, because his prior § 2255 motion had been denied on the merits, and he had not obtained authorization here before filing the second § 2255 motion.

Duncan objected, relying on the Supreme Court’s decision in *Johnson v. United States*, 544 U.S. 295, 302 (2005) (holding that the vacatur of a prior state conviction was a new fact that renewed the one-year federal statute of limitations under § 2255(f)(4)), and our decision in *Stewart v. United States*, 646 F.3d 856, 863-865 (11th Cir. 2011) (determining that a numerically second § 2255 motion was not successive because it was filed after the movant obtained the vacatur of a prior state court conviction used to enhance his federal sentence, and that “fact” was not available at the time when the movant filed his first § 2255 motion). He argued that he could not have raised his claim in his first § 2255 motion, and, therefore, his second § 2255 motion was not successive.

Over Duncan’s objections, the district court adopted the R&R and dismissed the § 2255 motion as successive. The court also noted that Duncan’s sentence enhancement had increased his minimum sentence, rather than the maximum, and the court had sentenced him to the maximum of life imprisonment. The court concluded that *Johnson* and *Stewart* did not apply, as Duncan’s prior conviction was not vacated, but was merely reduced from a felony to a misdemeanor. The court reasoned that, because Duncan’s sentence did not exceed the statutory maximum and could be re-imposed even without the challenged enhancement, and because Duncan did not raise a claim of actual innocence, no habeas relief was warranted. It also denied Duncan a COA and leave to proceed on appeal IFP.

Duncan filed a Fed. R. Civ. P. 59(e) motion for reconsideration. He argued that the district court was required to restrict its *de novo* review only to portions of the R&R to which he had filed objections and was not permitted to consider analysis not contained in the R&R. He also reiterated that his § 2255 motion was not successive. The court denied the motion without further explanation. Duncan filed a timely notice of appeal as to the court's dismissal of his § 2255 motion and denial of his Rule 59(e) motion.

Duncan sought a COA, construed from his notice of appeal, and IFP status here. Duncan's construed motion for a COA from both the dismissal of his § 2255 motion and the denial of his Rule 59(e) motion was denied as unnecessary. *See Hubbard v. Campbell*, 379 F.3d 1245, 1247 (11th Cir. 2004). Also, his motion for leave to proceed on appeal IFP was granted. Duncan was a pauper and the appeal of the dismissal of his § 2255 motion was not frivolous. The record showed that Duncan previously filed a § 2255 motion in 2006 that was considered on its merits. However, the claim in Duncan's second § 2255 motion was based on the conversion of his underlying state court conviction to a misdemeanor in 2014, which was a fact that did not arise or exist until after the conclusion of his initial § 2255 proceeding. *See Stewart*, 646 F.3d at 863-65. Although Duncan's claim may not warrant § 2255 relief, he asserted a non-frivolous argument that the district court erred in dismissing his § 2255 motion as successive.

There is no constitutional right to counsel in federal habeas proceedings. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). Rather, we may appoint counsel to a person seeking collateral relief under § 2255, who is financially eligible, only if we determine that the interests of justice so require. *See* 18 U.S.C. § 3006A(a)(2)(B); *see also Schultz v. Wainwright*, 701 F.2d 900, 901 (11th Cir. 1983) (explaining that counsel must be appointed "only when the interests of justice or due process so require"). "Appointment of counsel in civil cases is . . . a

privilege justified only by exceptional circumstances, such as the presence of facts and legal issues so novel or complex as to require the assistance of a trained practitioner.” *Kilgo v. Ricks*, 983 F.2d 189, 193 (11th Cir. 1993) (quotation omitted). The key is whether the *pro se* party needs help presenting the essential merits of his position to the court. *Id.* We have further indicated that factors to consider, at least at the district court level, when determining whether exceptional circumstances exist, include: (1) the type and complexity of the case, (2) whether the indigent is capable of adequately presenting his case, (3) whether the indigent is in a position to adequately investigate the case, and (4) whether the evidence will consist in large part of conflicting testimony so as to require skill in the presentation of evidence and in cross examination. *Fowler v. Jones*, 899 F.2d 1088, 1096 (11th Cir. 1990).

Duncan’s motion for appointment of counsel is GRANTED.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE