

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-16002-FF

ARNE SOREIDE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeals from the United States District Court
for the Southern District of Florida

Before: WILLIAM PRYOR, JORDAN and JULIE CARNES, Circuit Judges.

BY THE COURT:

Arne Soreide appeals the district court's dismissal of his current motion to vacate his sentence, pursuant to 28 U.S.C. § 2255, for lack of jurisdiction after the court found it to be successive. Soreide previously filed a § 2255 motion that the district court denied, but he argues that the court did not do so on the merits. The government has filed a motion for summary affirmance and to stay the briefing schedule.

Summary disposition is appropriate either where time is of the essence, such as "situations where important public policy issues are involved or those where rights delayed are rights denied," or where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case," or so that, "as is more frequently the case, the appeal is frivolous." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158,

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1162 (5th Cir. 1969). Summary disposition is a tool available to us for cases or issues that do not warrant extended discussion. *See United States v. Paradies*, 98 F.3d 1266, 1277 n.13 (11th Cir. 1997) (determining that “less meritorious issues [that] do not warrant discussion” are subject to summary affirmance).

A § 2255 movant “shall move in the appropriate court of appeals for an order authorizing” the district court to consider a successive motion. 28 U.S.C. § 2244(b)(3)(A); *see also* 28 U.S.C. § 2255(h) (noting that “[a] second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain” newly discovered evidence or a new rule of constitutional law). The successive application bar deprives the district court of subject matter jurisdiction. *In re Bradford*, 830 F.3d 1273, 1277 (11th Cir. 2016) (“The Supreme Court and this Court have held that § 2244(b)(3)(A) is jurisdictional.”).

District courts appoint counsel for a § 2255 movant where the interests of justice require it—for example, where the legal issues are unusually complex—but a movant is not entitled to counsel as a matter of right. *See* 28 U.S.C. § 2255(g); 18 U.S.C. § 3006A(a)(2)(B).

Here, the record demonstrates that the district court denied Soreide’s first § 2255 motion on the merits and that he filed the current motion without this Court’s permission. His argument that the district court’s decision that the interests of justice did not require appointment of counsel to represent Soreide at the evidentiary hearing is unpersuasive because the court’s decision was reasonable; the issue on which the evidentiary hearing was being held—whether counsel was ineffective for failing to file a direct appeal—was not unusually complex, and Soreide had no absolute entitlement to representation in the proceeding. *See* 28 U.S.C. § 2255(g); 18 U.S.C. § 3006A(a)(2)(B). As a result, the district court properly determined that

Soreide's current motion was successive and dismissed it for lack of jurisdiction. 28 U.S.C. § 2244(b)(3)(A); *In re Bradford*, 830 F.3d at 1277. The government is clearly right as a matter of law, *Groendyke Transp., Inc.*, 406 F.2d at 1162, and its motion for summary affirmance is GRANTED and its motion to stay the briefing schedule is DENIED as moot.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 16-61212-CIV-COHN-WHITE
03-60235-CR-COHN

ARNE SOREIDE,

Movant,

VS.

UNITED STATES OF AMERICA,

Respondent.

ORDER ADOPTING REPORT AND RECOMMENDATION

THIS CAUSE is before the Court upon the Report re Dismissal for Failure to Obtain Authorization Pursuant to 28 U.S.C. § 2244 (b)(3) [DE 18] ("Report") of United States Magistrate Judge Patrick A. White submitted on August 8, 2016. Pursuant to 28 U.S.C. § 636(b)(1), the Court has conducted a review of the Report, Mr. Soreide's objections [DE 19], the record in this case, and is otherwise advised in the premises. In consideration of the foregoing, it is

ORDERED AND ADJUDGED as follows:

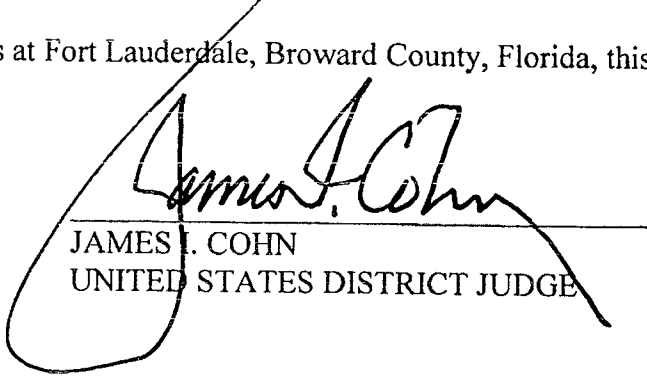
1. The Report re Dismissal for Failure to Obtain Authorization Pursuant to 28 U.S.C. § 2244(b)(3) [DE 18] is **ADOPTED**.
2. Movant Arne Soreide's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody [DE 1] is **DISMISSED** as successive.
3. Pursuant to Rule 11 (a) of the Rules Governing Section 2255 Cases, Soreide is

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DENIED a certificate of appealability. The Court notes that pursuant to Rule 22(b)(1) of the Federal Rules of Appellate Procedure, Soreide may now seek a certificate of appealability from the Eleventh Circuit.

4. The Court will enter a separate Final Judgment consistent with this Order.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 30th day of August 2016.



JAMES I. COHN
UNITED STATES DISTRICT JUDGE

cc: Magistrate Judge Patrick A. White
Neil Karadbil, AUSA
Arne Soreide, Pro Se
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-61212-Civ-COHN
(03-60235-Cr-COHN)
MAGISTRATE JUDGE P.A. WHITE

ARNE SOREIDE,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

REPORT RE DISMISSAL
FOR FAILURE TO OBTAIN
AUTHORIZATION PURSUANT TO
28 U.S.C. §2244(b) (3)

I. Introduction

Arne Soreide, a federal prisoner currently confined at the McRae Correctional Institution in McRae, Georgia has filed a pro se motion to vacate, pursuant to 28 U.S.C. §2255, challenging the constitutionality of his conviction and sentence, entered in case no. 03-60235-Cr-Cohn.

This Cause has been referred to the Undersigned for consideration and report pursuant to 28 U.S.C. §636(b) (1) (B), (C); S.D.Fla. Local Rule 1(f) governing Magistrate Judges, S.D. Fla. Admin. Order 2003-19; and, Rules 8 and 10 Governing Section 2255 Cases in the United States District Courts.

The Court has reviewed the movant's motion (Cv-DE#1), the government's response to this court's order to show cause (Cv-DE#13), the Presentence Investigation Report ("PSI"), the court's Statement of Reasons ("SOR"), and all pertinent portions of the underlying criminal file as well as, the movant's prior §2255

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motion to vacate, assigned case no. 07-60401-Cv-Cohn.¹

II. Claim

This court, recognizing that movant is *pro se*, afforded him liberal construction pursuant to Haines v. Kerner, 404 U.S. 419 (1972). Movant alleges that his latest appellate attorney, Faith Mesnekoff, committed Sixth Amendment violations when she failed to investigate the laws as applied to the facts of the case. (Cv-DE#1). Specifically, he apparently argues that the Sentencing Guidelines were incorrectly calculated, improper grouping of the crimes of conviction, insufficient evidence for the money laundering convictions and unconstitutional restitution.

III. Background and Procedural History

A jury found Soreide guilty of one count of conspiracy to commit mail and wire fraud, twenty-four counts of mail fraud, two counts of wire fraud, five counts of money laundering in violation of 18 U.S.C. §§2 and 1956(a)(1)(B)(I), nine counts of money laundering in violation of 18 U.S.C. §§2 and 1956(a)(1)(A)(I), and twenty-five counts of engaging in prohibited monetary transactions, one count of filing a fraudulent income tax return, and one count of filing a fraudulent corporate tax return. (Cr-DE#123). The Court sentenced him to concurrent terms of 60 months imprisonment for the conspiracy charges, 236 months imprisonment for money laundering, 120 months imprisonment for engaging in prohibited monetary transactions, and 36 months imprisonment for filing fraudulent tax returns. (Cr-DE#161).

¹The undersigned takes judicial notice of its own records as contained on CM/ECF in those proceedings. See Fed.R.Evid. 201.

Soreide appealed and challenged his convictions and sentences. (Cr-DE#287). The Eleventh Circuit Court of Appeals affirmed his convictions, but vacated the sentence because the Court considered the Sentencing Guidelines to be binding as opposed to advisory and remanded for resentencing. See United States v. Soreide, 177 Fed.Appx. 31 (11th Cir. 2006). The same sentence was imposed at the resentencing hearing. (Cr-DE#302). Soreide did not appeal from the amended judgment.

In 2007, movant filed a timely \$2255 motion to vacate, assigned case no. 07-60401-Cv-Cohn. In that proceeding, movant raised a total of thirteen claims, twelve of which he asserted that his lawyers were ineffective and one claim asserting that there was insufficient evidence to support the convictions for fraud. (07-60401-Cv-Cohn;DE#1). Undersigned entered a Report recommending denial of the claims on the merits. (Id.:DE#17). The district court adopted the Report, except for the portion addressing counsel's failure to file a notice of appeal of the resentence imposed. (Id.:DE#21). Following an evidentiary hearing, the district court denied movant's \$2255 motion to vacate in its entirety. (Id.:DE#25). Thereafter, the Eleventh Circuit denied movant's motion for a certificate of appealability. (Id.:DE#50,51). Movant's petition for writ of certiorari was also denied. (Id.:DE#52).

Following the denial of the \$2255 motion to vacate, movant filed a Federal Rule of Civil Procedure 60(b) motion for relief from judgment. (Id.:DE#55). The district court denied movant's motion as untimely. (Id.:DE#59). Thereafter, the Eleventh Circuit dismissed movant's motion for a certificate of appealability. (Id.:DE#68).

Relentless in his filings, he subsequently filed a second

motion for relief from judgment, pursuant to Federal Rule of Civil Procedure 60(b)(4) and (d)(3). (Id.:DE#70). The district court denied the motion as untimely and the Eleventh Circuit dismissed movant's motion for a certificate of appealability. (Cv-DE#71, 72, 74, 78, 79). His petition for writ of certiorari was also denied. (Cv-DE#77).

Undeterred, movant then filed a motion to amend/correct errors from the 2006 resentencing pursuant to Federal Rule of Criminal Procedure 36. (Cr-DE#333). His motion was denied. (Cr-DE#334). The Eleventh Circuit affirmed the district court order denying relief. (Cr-DE#353); see United States v. Soreide, 522 Fed. Appx. 516, 517 (11th Cir. 2013). Movant's motion for rehearing was denied and the mandate issued on September 25, 2013. (Cr-DE#353).

During the pendency of the Rule 36 motion, in 2013, movant filed a notice of appeal seeking review of the amended judgment entered following the resentencing in October of 2006. (Cr-DE#302,350). The Eleventh Circuit granted movant's motion for appointment of counsel. (Cr-DE#355). Ultimately, appellate counsel moved to withdraw from further representation of movant and filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). See United States v. Soreide, 604 Fed.Appx. 913 (11th Cir. 2015). The Eleventh Circuit *per curiam* affirmed the sentence in an unpublished opinion and granted counsel's motion to withdraw. Id.; (Cr-DE#364).

Movant has now returned to this court, filing the instant second \$2255 motion to vacate alleging ineffective assistance of his latest appellate counsel.

IV. Discussion

Unauthorized Successive 2255

As previously narrated, a review of the records of this court establishes that movant filed a previous motion to vacate, pursuant to the provisions of 28 U.S.C. §2255, challenging the constitutionality of his conviction and sentence. See Soreide v. United States, Case No. 07-60401-Civ-Cohn (S.D. Fla. 2007). The 2007 motion was denied on the merits.

In this latest 2016 proceeding, he also challenges the constitutionality of his conviction and sentence. Pursuant to 28 U.S.C. §2244(b)(3)(A), "[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." See 28 U.S.C. §2244(b)(3)(A); Felker v. Turpin, 518 U.S. 651 (1996); In re Medina, 109 F.3d 1560 (11th Cir. 1997). "A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals" and may be granted "only if [the assigned panel of judges] determines that the application makes a *prima facie* showing that the application satisfies the requirements of [28 U.S.C. §2244(b)(2)]." See 28 U.S.C. §2244(b)(3)(B) and (C).

A federal prisoner can file a second or successive §2255 motion if that motion is the result of new evidence of innocence or of a new rule of constitutional law made retroactive to cases on collateral review by the U.S. Supreme Court. See 28 U.S.C. §2255(h)(1)-(2). A second or successive petition, however, must be

certified by the court of appeals to contain newly discovered evidence or a new rule of constitutional law. See Id., See also United States v. Bell, 447 Fed.Appx. 116 (11th Cir. Nov. 18, 2011) (unpublished decision) (stating that appellant's "Motion for Clarification"—in which he claimed that district court lacked jurisdiction to impose his mandatory life sentences because government's 21 U.S.C. §851 notice of sentence enhancement was defective—"is properly construed as a motion to vacate under 28 U.S.C. §2255," over which the district court lacked jurisdiction because appellant "had already filed a §2255 motion" and had not obtained authorization from the Eleventh Circuit to file another one).

The movant's 2007, §2255 proceeding constituted an adjudication on the merits for purposes of invoking the second or successive requirements of 28 U.S.C. §2244(b)(3). Thus, the movant's only remedy lies in filing a successive §2255 motion, which he is attempting to do here. Movant, however, does not allege that he obtained the requisite permission from the Eleventh Circuit Court of Appeals prior to filing this petition. This failing operates as a jurisdictional bar that precludes this district court's consideration of the merits of the instant petition. See 28 U.S.C. §2244(b)(3)(A); Fugate v. Dep't of Corr's, 301 F.3d 1287, 1288 (11th Cir.), cert. den'd, 536 U.S. 980 (2002). If the movant intends to pursue this case, he should forthwith apply to the United States Eleventh Circuit Court of Appeals for the authorization required by 28 U.S.C. §2244(b)(3)(A). See Cate v. Ayers, 2001 WL 1729214, *3 (E.D.Cal. 2001) (holding that the law is clear that a dismissal based on the statute of limitations is an adjudication on the merits of the claim). The movant will be provided with a form to apply for such authorization with this report.

While movant's challenges to his conviction and sentence may be cognizable under an initial 28 U.S.C. §2255(a), he has already filed, and had denied on the merits, a prior motion to vacate pursuant to 28 U.S.C. §2255. Therefore, the instant motion is clearly successive, subject to dismissal for his failure to seek authorization from the Eleventh Circuit to file another §2255 motion. See United States v. Searcy, 448 Fed.Appx. 984 (11th Cir. 2011), cert. den'd, ___ U.S. ___, 132 S.Ct. 2784 (2012) (citing, 28 U.S.C. §2255(h)).

Thus, this Court lacks jurisdiction to consider movant's present motion because it is a second or successive motion under §2255. See Hill v. Hopper, 112 F.3d 1088, 1089 (11th Cir. 1997). As such, movant must obtain an order from the Eleventh Circuit Court of Appeals authorizing this Court to consider the motion. 28 U.S.C. §§2244(b)(3), 2255(h).

Notwithstanding, if movant intends to pursue this case, he should forthwith apply to the United States Eleventh Circuit Court of Appeals for the authorization required by 28 U.S.C. §2244(b)(3)(A). Movant will be provided with a form to apply for such authorization with this report.

V. Certificate of Appealability

As amended effective December 1, 2009, §2255 Rule 11(a) provides that "[t]he district court must issue or deny a certificate of appealability ("COA") 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)." See Rule 11(a), Rules Governing Section 2255 Proceedings for the United States District

Courts. A §2255 movant "cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. §2253(c)." See Fed.R.App.P. 22(b)(1). Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. See 28 U.S.C. §2255 Rule 11(b).

However, "[A] certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." See 28 U.S.C. §2253(c)(2). To make a substantial showing of the denial of a constitutional right, a §2255 movant must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336-37 (2003) (citations and quotation marks omitted); see also Slack v. McDaniel, 529 U.S. 473, 484 (2000); Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001).

After review of the record in this case, the Court finds the movant has not demonstrated that he has been denied a constitutional right or that the issue is reasonably debatable. See Slack, 529 U.S. at 485; Edwards v. United States, 114 F.3d 1083, 1084 (11th Cir. 1997). Consequently, issuance of a certificate of appealability is not warranted and should be denied in this case. Notwithstanding, if movant does not agree, he may bring this argument to the attention of the district judge in objections.

VI. Conclusion

For all of the foregoing reasons, this 2016 proceeding should

be dismissed for lack of jurisdiction since it is an unauthorized successive §2255 motion to vacate and movant has not obtained the certification required by 28 U.S.C. §2244 (b)(3)(A) from the Eleventh Circuit Court of Appeals. It is further recommended that all pending motions, not otherwise ruled upon be dismissed as moot, that no certificate of appealability issue, and that this case be closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

SIGNED this 8th day of August, 2016.


UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-16002-FF

ARNE SOREIDE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeals from the United States District Court
for the Southern District of Florida

Before: WILLIAM PRYOR, JORDAN and JULIE CARNES, Circuit Judges.

BY THE COURT:

Arne Soreide moves for reconsideration of our order summarily affirming the district court's dismissal of his motion to vacate his sentence, filed pursuant to 28 U.S.C. § 2255, for lack of jurisdiction after the court found it to be successive.

We allow motions for reconsideration of our orders, provided that the motion is filed within 21 days of the entry of the order. 11th Cir. R. 27-2. A motion for reconsideration cannot be used to relitigate old matters, raise new arguments, or present evidence that could have been considered prior to the entry of judgment. *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir. 2009).

Here, Soreide has raised no ground for reconsideration because he repeats his arguments from his response to the government's motion for summary affirmance and has not presented any

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new evidence. He is attempting to relitigate old matters, and to the extent that any of his arguments are new, they all could have been raised prior to the entry of judgment. *See Wilchombe*, 555 F.3d at 957. Accordingly, his motion is DENIED.