

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-17379-B

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHNNY BRETT GREGORY,

Defendant-Appellant.

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

Before: TJOFLAT and HULL, Circuit Judges.

BY THE COURT:

Johnny Brett Gregory has filed a motion for reconsideration, pursuant to 11th Cir. R. 27-2, of this Court's June 26, 2017, order denying leave to proceed *in forma pauperis* in his appeal. Upon review, Gregory's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

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Appeal from the United States District Court
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ORDER:

Johnny Brett Gregory is a federal prisoner seeking leave to proceed *in forma pauperis* ("IFP") in his appeal from the district court's denial of his 18 U.S.C. § 3582(c)(2) motion and several other motions. He has also moved this Court for sanctions and costs, an initial hearing *en banc*, clarification, recusal of Chief Judge Carnes, and appointment of a special master.

Gregory pled guilty, pursuant to a written plea agreement, to possession with intent to distribute at least 50 grams of methamphetamine, in violation of 21 U.S.C. § 841 (Count 1), and possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. § 924(c) (Count 2). In his plea agreement, Gregory agreed that he was subject to a mandatory minimum 15 years' imprisonment. He voluntarily abandoned all rights to a firearm listed in the plea agreement in order for the Federal Bureau of Investigation ("FBI") to dispose of it appropriately. The agreement stated that, if Gregory's cooperation with the government

exhibit 11/Appendix 11

qualified as substantial assistance, the government would consider whether to file a motion for a downward departure, but it stated that “the determination as to whether he has provided ‘substantial assistance’ rest[ed] solely with the Government.” In October 2005, the district court sentenced him to the mandatory minimum of 120 months as to Count 1 and 60 months as to Count 2, to be served consecutively. Gregory filed a 28 U.S.C. § 2255 motion to vacate sentence, which was denied. Gregory then filed several post-conviction motions that were dismissed as unauthorized second or successive § 2255 motions.

In 2015, Gregory began filing a large number of motions, including a *pro se* motion for reduction of sentence, pursuant to 18 U.S.C. § 3582(c)(2), based on Amendment 782 to the Sentencing Guidelines. He asserted that he qualified for the sentencing reduction based on his cooperation with the government. Gregory then filed a motion to proceed *pro se* with respect to his § 3582(c)(2) motion because he and his appointed counsel disagreed regarding what issues to raise. Gregory next filed a motion for specific performance, requesting that the court direct the government to file a motion for a downward departure based on his cooperation so that he could benefit from Amendment 782. Gregory then filed a “Motion Pursuant to Northern District Georgia Local Rule 7.1(b),” requesting that the court grant his motion for specific performance because the government had failed to respond.

Gregory thereafter filed a motion for retroactive application of *Johnson v. United States*, 135 S. Ct. 2551 (2015). He asserted that 18 U.S.C. § 922(g)(1) and § 924(c)(2) were invalidated by *Johnson*. He asserted that he had not been convicted of a prior felony and that the government had prosecuted him based on his race. Gregory then moved to stay his motion for retroactive application of *Johnson* because he was seeking leave from this Court to file a second or successive § 2255 motion.

Gregory next moved the district court for an evidentiary hearing, pursuant to *Norris v. United States*, 820 F.3d 1261 (11th Cir 2016), to determine whether the government's decision to prosecute him was based on racial prejudice. He asserted that he had evidence that a similarly situated white defendant was not prosecuted, even though the defendant was arrested in the same case and on the same day.

The court filed an administrative order staying all *pro se* motions filed in the district court seeking relief under Amendment 782. Gregory then moved to modify the administrative order to add that the government had failed to file a motion for downward departure. Gregory then moved to quash the court's stay of his § 3582(c)(2) motion.

Gregory further moved for withdrawal of his plea agreement, arguing that the government had breached the plea agreement when it filed a petition to forfeit his handgun. After an Assistant United States Attorney ("AUSA") successfully moved for withdrawal as counsel, Gregory filed a notice of appeal from the grant of the motion to withdraw as counsel and an IFP motion. His appeal was docketed in this court as Appeal No. 16-15646. Gregory later moved the district court for clarification based on fee status, stating that the court had not docketed his IFP motion filed with his notice of appeal. Gregory then moved the district court to suspend this Court's transcript information order form in Appeal No. 16-15646.¹

On October 11, 2016, the district court entered an order disposing of all of Gregory's pending motions. The district court denied Gregory's § 3582(c)(2) motion, stating that, because Gregory was sentenced to the mandatory minimum for Count 1, Amendment 782 did not lower his applicable guideline range. As to Gregory's motions to force the government to file a motion

¹ This Court subsequently dismissed the appeal from the district court's grant of the AUSA's motion to withdraw because Gregory lacked standing. This Court reasoned that Gregory was not aggrieved by the district court's order granting withdrawal of counsel.

for a reduction of sentence, the district court noted that the plea agreement stated that the determination as to whether he had provided substantial assistance rested solely with the government. The district court denied his motion to modify the administrative order and denied as moot his motions to quash the court's stay of his § 3582(c)(2) motion and to proceed *pro se*. The district court denied his motion for retroactive application of *Johnson* and denied as moot his motion to stay his retroactive *Johnson* claim. As to his motion for an evidentiary hearing regarding racial bias, the district court determined that, assuming that his argument was not another improper § 2255 motion, his claim failed because he only provided conclusory allegations with no apparent basis in fact. The district court denied his motion to proceed on appeal IFP and denied as moot his motions for clarification and to suspend his transcript information form. Finally, the district court denied his motion for withdrawal of his plea agreement.

The district court further imposed an anti-filing injunction against Gregory. The district court noted that, since pleading guilty almost ten years prior under a plea agreement that strictly limited his ability to appeal, Gregory had filed numerous motions, motions for reconsideration, and appeals to this Court, which had ten different court case numbers for him. The district court ordered that Gregory was "(1) enjoined from relitigating specific claims or claims arising from the same set of factual circumstances as all of his prior motions, and (2) required to seek leave of court before filing any future motions or appeals."

Gregory filed a motion in this Court seeking to challenge the district court's October 11, 2016, order. This Court construed it as a notice of appeal and transferred the filing to the district court. In his motion, Gregory stated that the district court's anti-filing injunction violated his due process rights. Gregory has now moved this Court for leave to proceed IFP, arguing that the

district court abused its discretion by denying his motion for leave to proceed IFP and dismissing several of his other motions. Gregory also has moved this Court to impose sanctions on several attorneys, asserting that they had learned of perjury and misconduct by the government, but failed to report it to the Georgia Bar. He further moves for an initial hearing *en banc*, asserting that the record is sufficiently developed after a decade of litigation and involved extraordinary circumstances. Gregory seeks clarification as to whether certain documents were joined to his anti-filing injunction. Gregory also has filed an emergency motion for clarification, asserting that the district court was confused with regard to his motion for a hearing. Gregory has moved for Chief Judge Carnes to be recused from an *en banc* hearing, arguing that the chief judge had incorrectly ruled on a previous action. He has moved for appointment of a special master, pursuant to Federal Rule of Appellate Procedure 48, to investigate fraud by the government in the underlying proceedings. Finally, Gregory has filed several documents that have been construed as notices, including notices of alleged attorney misconduct, judicial notice of an affidavit, a request for leave to file a petition for disclosure of grand jury materials, and a special motion discussing possible misconduct by FBI agents.

IFP

Because Gregory seeks leave to proceed on appeal IFP, his motion is subject to a frivolity determination. 28 U.S.C. § 1915(e)(2)(B). 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).

§ 3582(c)(2)

This Court reviews *de novo* a district court's legal conclusions as to the scope of its authority under § 3582(c)(2). *United States v. Jones*, 548 F.3d 1366, 1368 (11th Cir. 2008). Once pronounced, a district court's authority to modify a sentence of imprisonment is narrowly

limited by statute. *United States v. Phillips*, 597 F.3d 1190, 1194-95 (11th Cir. 2010). Nevertheless, a district court may modify a defendant's term of imprisonment where the defendant was sentenced "based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). Any reductions, however, must be "consistent with applicable policy statements issued by the Sentencing Commission." *Id.* The applicable policy statement, found in § 1B1.10, states that where an amendment does not have the effect of lowering a defendant's applicable guideline range, § 3582(c)(2) relief is unauthorized. U.S.S.G. § 1B1.10(a)(2)(B). Amendment 782 to the Sentencing Guidelines amended § 2D1.1 by revising the Drug Quantity Table in § 2D1.1(c) to raise the drug quantity needed to qualify for each offense level. U.S.S.G. App. C, Amend. 782.

Gregory's appeal of the denial of his § 3582(c)(2) motion is frivolous. Gregory cannot show that the district court erred in determining that he was ineligible for a sentence reduction because Amendment 782 did not lower his applicable guideline range. As the district court noted, the sentencing court calculated Gregory's guideline range as 108 to 135 months' imprisonment, but Gregory was sentenced pursuant to a statutory minimum sentence of 10 years as to Count 1 and a minimum of 5 years as to Count 2, to run consecutively. Because a reduction of his guideline range would not alter the statutory minimum for his convictions, he was not entitled to relief on his § 3582(c)(2) motion. *See* U.S.S.G. § 1B1.10(a)(2)(B). He argued in his motion for specific performance that the government was required by the plea agreement to file a motion for downward departure, which would have made him eligible for § 3582(c)(2) relief. However, the plea agreement made clear that the "determination as to whether [Gregory] ha[d] provided 'substantial assistance' rest[ed] solely with the Government." Therefore, the district court correctly determined that Gregory was not entitled to § 3582(c)(2) relief or specific

performance. Accordingly, his related motions to proceed *pro se*, to amend the administrative order, and to quash the stay of his § 3582(c)(2) motion were moot.

Remaining District Court Motions

Gregory's *Johnson*-based motions, his motion for an evidentiary hearing, and his motion to withdraw his guilty plea were all collateral attacks on his convictions. Generally, "collateral attacks on the validity of a federal sentence must be brought under § 2255." *Darby v. Hawk-Sawyer*, 405 F.3d 942, 944 (11th Cir. 2005). Thus, because Gregory previously had filed a § 2255 motion that was denied with prejudice, he could not seek to file further post-conviction motions challenging his convictions without leave from this Court, which he did not obtain. *See Gilbert v. United States*, 640 F.3d 1293, 1323 (11th Cir. 2011) (*en banc*) (holding that, when a federal prisoner seeks to assert or reassert a claim for relief, instead of pointing out a defect in the integrity of an earlier § 2255 proceeding, his Fed. R. Civ. P. 60(b) motion is the equivalent of a second or successive motion).

As to his motion for an evidentiary hearing, other than his conclusory statement that a white man was also arrested and not prosecuted, he provided no evidence to support his claim of racial bias. Therefore, the district court correctly denied his motion for an evidentiary hearing. Gregory also asserted that he should be allowed to withdraw his plea based on the AUSA's withdrawal from the case and the forfeiture of a firearm. However, he has not shown a breach by the government and he provides no explanation of why, based on these facts, he should be permitted to withdraw his plea. As to his motions regarding his appeal from the grant of the AUSA's motion to withdraw as counsel, the motions were rendered moot by the district court's denial of IFP status and this Court's subsequent dismissal for lack of standing.

Anti-Filing Injunction

“District courts are authorized by the All Writs Act, 28 U.S.C. § 1651(a), to restrict access to vexatious and abusive litigants,” and this Court reviews the entry of such an anti-filing injunction under an abuse-of-discretion standard. *Miller v. Donald*, 541 F.3d 1091, 1096 (11th Cir. 2008). This Court has long held that a vexatious litigant “can be severely restricted as to what he may file and how he must behave in his applications for judicial relief,” but “cannot be completely foreclosed from any access to the court.” *Procup v. Strickland*, 792 F.2d 1069, 1074 (11th Cir. 1986) (*en banc*). Among the reasonable measures that a district court may employ to curtail repetitive and vexatious litigation are the following: (1) “enjoin[ing] prisoner litigants from relitigating specific claims or claims arising from the same set of factual circumstances”; (2) “requir[ing] litigants to accompany all future pleadings with affidavits certifying that the claims being raised are novel, subject to contempt for false swearing”; (3) “direct[ing] the litigant to attach to future complaints a list of all cases previously filed involving the same, similar, or related cause of action”; and (4) “direct[ing] the litigant to seek leave of court before filing pleadings.” *Id.* at 1072.

A review of Gregory’s lengthy history of filing frivolous and duplicative motions indicates that the imposition of the injunction was justified. Furthermore, the injunction is not overbroad, as it specifically limits the targeted filings to those raising claims arising from the same set of factual circumstance as all of his prior motions and allows him to file future motions and appeals if he seeks and obtains leave of the court. *See id.* Therefore, Gregory has no non-frivolous argument that the district court abused its discretion in issuing a filing injunction.

Accordingly, because any appeal in this case would be frivolous, his motion for leave to proceed IFP is DENIED.

Remaining Motions in This Court

Gregory provides no facts to support his motion for sanctions, other than his own conclusory assertion that the attorneys knew of misconduct by the government. A review of the record in the district court does not indicate that the government has behaved in a manner worthy of sanctions. See 28 U.S.C. § 1927 ("Any attorney . . . admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably or vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct."). Thus, Gregory's motion for sanctions is DENIED.

Gregory's recusal motion appears to be based on Chief Judge Carnes's dismissal of a complaint against a district court judge under the Judicial Conduct and Disability Rules. Other than the dismissal itself, Gregory points to no facts that suggest that Chief Judge Carnes should be recused from the current action. Therefore, Gregory's motion to recuse Chief Judge Carnes is DENIED. Because Gregory's appeal is frivolous, his motions for an initial hearing *en banc* and for appointment of a special master are DENIED. His motions for clarification appear to be further attempts to reassert the arguments contained in his underlying motions, and, thus, his motions for clarification are DENIED.

Frank M. Hall
UNITED STATES CIRCUIT JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**