

A P P E N D I X A

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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May 09, 2018

Steven M. Larimore
U.S. District Court
400 N MIAMI AVE
MIAMI, FL 33128-1810

Appeal Number: 17-14225-CC
Case Style: Jesse Witherspoon v. USA
District Court Docket No: 0:17-cv-61546-WPD
Secondary Case Number: 0:09-cr-60191-WPD-1

The enclosed copy of this Court's Order of Dismissal is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Julie F. Cohen, CC/lt
Phone #: (404) 335-6170

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-14225-CC

JESSE WITHERSPOON,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

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

Before: TJOFLAT, WILLIAM PRYOR, and JORDAN, Circuit Judges.

BY THE COURT:

Jesse Witherspoon appeals the district court's dismissal of his motion to vacate sentence, 28 U.S.C. § 2255, as an unauthorized successive motion to vacate. In the motion, Witherspoon argued that the statutory restrictions placed on the filing of successive § 2255 motions was unconstitutional in light of *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir.) (*en banc*), *cert. denied*, 138 S. Ct. 502 (2017), in which we set out the exclusive circumstances under which the savings clause of § 2255(e) permits a federal prisoner to file a habeas corpus petition under 28 U.S.C. § 2241. Witherspoon filed his original § 2255 motion in 2011, which was denied. The district court dismissed the instant § 2255 motion for lack of jurisdiction, because Witherspoon had failed to receive our permission to file a successive motion to vacate.

On appeal, Witherspoon argues that the court erred by dismissing his § 2255 motion, because the court erroneously misconstrued his motion as successive motion to vacate. Witherspoon contends that, because he sought to attack the restrictions placed on second or successive § 2255 motions, the court was required to address the motion. The government has moved for summary affirmance, and to stay the briefing schedule, arguing that the district court lacked jurisdiction to entertain Witherspoon's motion to vacate.

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 where, as is more frequently the case, the appeal is frivolous." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).

We review questions concerning jurisdiction *de novo*. *Williams v. Chatman*, 510 F.3d 1290, 1293 (11th Cir. 2007). A district court does not have jurisdiction to entertain an unauthorized second or successive § 2255 motion. *Farris v. United States*, 333 F.3d 1211, 1216 (11th Cir. 2003).

A prisoner in federal custody may file a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255, claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack. 28 U.S.C. § 2255(a). A second or successive motion must be certified as provided in 28 U.S.C. § 2244 by a panel of the

appropriate court of appeals. 28 U.S.C. § 2255(h). This certification must be obtained before the second or successive motion is filed in the district court. 28 U.S.C. § 2244(b)(3)(A).

The government's motion for summary affirmance is due to be granted, as its position—that the court lacked jurisdiction to entertain Witherspoon's § 2255 motion—is clearly right as a matter of law. *See Groendyke*, 406 F.2d at 1162. Witherspoon filed his original § 2255 motion in 2011, which was denied. As such, he required our permission to file any second or successive motion to vacate. *See* 28 U.S.C. §§ 2244(b)(3)(A), 2255(h). Because Witherspoon failed to seek our permission before filing the instant § 2255 motion, the district court lacked jurisdiction to entertain the motion, and it properly dismissed the motion as impermissibly successive. *See Farris*, 333 F.3d 1216.

Therefore, the government's position is correct as a matter of law, and there is no substantial question as to the outcome of the case. *See Groendyke*, 406 F.2d at 1162. Accordingly, the government's motion for summary affirmance is GRANTED, and its motion to stay the briefing schedule is DENIED as moot.

A P P E N D I X **B**

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604



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ORDER

October 3, 2017

By the Court:

No. 17-2651	THOMAS CUNNINGHAM, Petitioner v. UNITED STATES OF AMERICA, Respondent
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The following is before the court: **MOTION TO VACATE, CORRECT OR SET ASIDE**, filed on August 14, 2017, by the pro se petitioner.

This court has received from Thomas Cunningham a "Motion to Vacate" that he had addressed to the District Court for the Northern District of Illinois. In substance, Cunningham's filing seeks no relief from us. Instead, Cunningham appears to ask that a district court consider whether he may use 28 U.S.C. § 2241 rather than the more typical section § 2255 to collaterally attack his federal conviction and sentence because, Cunningham says, section 2255 is inadequate to test the legality of his confinement. Alternatively, he seems to ask the district court for a declaration that certain federal statutes are unconstitutional. Without opining on the merits of these contentions or Cunningham's choice of venue, we transmit Cunningham's papers to the district court for further processing there.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-61546-CIV-DIMITROULEAS
(11-62486-CIV-DIMITROULEAS)
(09-60191-CR-DIMITROULEAS)

JESSE WITHERSPOON,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

FINAL JUDGMENT AND ORDER DISMISSING MOTION TO VACATE

THIS CAUSE is before the Court upon Movant Witherspoon's unsworn July 31, 2017¹ Motion to Vacate [DE-1]. The Court has considered the Court files and Pre-Sentence Investigation Report (PSIR) and having presided over the trial of this cause, finds as follows:

1. On July 30, 2009, Witherspoon was indicted and charged with Possession of a Firearm and Ammunition by a Convicted Felon. [CR-DE-1]. On February 19, 2010, this Court denied a motion to suppress. [CR-DE-47].
2. On February 19, 2010, Witherspoon waived his right to a jury trial. [CR-DE-55] and proceeded to a bench trial. [CR-DE-52]. There was a Stipulated Factual Proffer Statement [CR-DE-53]. Witherspoon was found guilty. [CR-DE-68, p. 15].
Witherspoon understood that the Court had to impose a fifteen (15) year mandatory minimum if he qualified as an Armed Career Criminal. [CR-DE-68, p. 13].
3. On May 4, 2010, Witherspoon was sentenced to 180 months in prison as an Armed Career Criminal, [CR-DE-59] because of the mandatory minimum. [CR-DE-69, p. 3]. He had

¹ Filed August 3, 2017.

two prior state convictions for Possession with Intent to Deliver Cocaine: 95-2770CF10A (para. 21 of PSIR) and 99-11808CF10A (para. 33 of PSIR) and a federal conviction for Possession with Intent to Distribute Cocaine Base: 00-6009-CR-Zloch (para. 37 of PSIR). There were no objections to the PSIR. [CR-DE-69, p. 3]. The federal conviction involved three drug sales to a confidential source. (para. 37 of PSIR). The sentence was ordered to run concurrently with 00-6009-CR-Zloch, [CR-DE-69, p. 5], which again was a federal conviction for Possession with Intent to Distribute Cocaine Base. [DE-37 in 00-6009-CR-Zloch].

4. On December 13, 2010, the Eleventh Circuit Court of Appeals affirmed. [CR-DE-77]. *U.S. v. Witherspoon*, 405 Fed. Appx. 369 (11th Cir. 2010). His conviction became final ninety (90) days later when he did not file a petition for certiorari in the US Supreme Court. *Bond v. Moore*, 307 F. 3d 770, 774 (11th Cir. 2002).
5. In a timely Motion to Vacate, Witherspoon contended that his trial counsel was ineffective in not objecting to his being classified as an Armed Career Criminal. Witherspoon contended that his conviction in 95-2770-CF10A did not qualify as a predicate offense because it may have consisted of only merely possessing or purchasing cocaine. He also relied on *Shelton v. D.O.C.*, 802 F. Supp. 2d 1289 to argue that the statute was unconstitutional. [DE-1 in 11-62486-CIV]. The Court denied relief on November 23, 2011. [DE-5 in 11-62486-CIV]. On May 22, 2012, the Eleventh Circuit Court of Appeals denied a Certificate of Appealability. [DE-11 in 11-62486-CIV].
6. On March 26, 2012, Witherspoon contended that the predicate conviction in 17th Judicial Circuit case number 95-2770CF10A was uncounseled. Nowhere in Witherspoon's original Motion to Vacate [DE-1 in 11-62486-CIV] or his Memorandum [DE-2 in

11-62486-CIV] did he complain that 95-2770 CF was uncounseled. In fact, the certified copy of conviction attached to this court's previous order, denying motion to vacate, [DE-5, p. 5 in 11-62486-CIV], indicates that Witherspoon was represented by Karen Klein in 95-2770 CF10A. A juvenile, who is convicted in adult court, can have his conviction considered to be a serious drug offense. *See U.S. v. Ortiz*, 413 Fed. Appx. 114, 115 (11th Cir. 2011). Witherspoon cited no constitutional authority that a juvenile who is unrepresented in juvenile court, but has representation when the case is transferred to adult court and disposed of, can collaterally attack his adult conviction. Witherspoon did not show that the juvenile case was not merely a place holder until the adult charges could be direct-filed. In Florida, the prosecutor has the authority to direct file felony charges against a 16 or 17 year old. *State v. Wright*, 669 So. 2d 1132, 1133 (Fla. 3d DCA 1996). Even if there had been a transfer hearing in juvenile court where Witherspoon was unrepresented, which seems highly unlikely,² Witherspoon cited to no federal authority that his later counseled conviction in adult court would be voidable. There were no objections to the PSIR. [CR-DE-69, pp. 2-3]. There was no contention at sentencing that Witherspoon's conviction in 95-2770 CF was uncounseled. The Court has held that Rule 60(b) can not be used to attack a criminal conviction. *Smith v. U.S.*, 433 Fed. Appx. 891, 892 (11th Cir.) *cert. denied*, 132 S. Ct. 600 (2011). It is not a vehicle to add another ground for a collateral relief to a previously denied motion to vacate. *Farris v. U.S.*, 333 F. 3d 1211, 1215 (11th Cir. 2003); *Pruitt v. U.S.*, 274 F. 3d 1315, 1319 (11th Cir. 2001). The Court denied relief on May 8, 2012. [DE-12 in 11-62486-CIV].

7. In a March 10, 2016, collateral attack, Witherspoon sought a declaratory judgment on the retroactivity of certain Supreme Court opinions. Secondly, Witherspoon sought leave of

² Witherspoon's unsworn allegations of an incomplete record would not have merited relief.

court to file another Rule 60(b) motion alleging ineffective assistance of counsel in failing to object to his classification as an Armed Career Criminal [DE-13, 14 in 11-62486-CIV]. In effect, Witherspoon was seeking to file a successive motion to vacate. That permission can only come from the Eleventh Circuit Court of Appeals. Moreover, this Court exercised discretion in not rendering an advisory opinion under the Declaratory Judgment statute. Additionally, the Court held that Witherspoon had previously litigated the issue of the constitutionality of the Florida Statute that formed a predicate crime for his enhancement. The law of the case prevented re-litigation. The Court denied relief on March 16, 2016. [DE-15 in 11-62486-CIV].

8. In this latest collateral attack, Witherspoon is critical of the relatively recent Eleventh Circuit case: *McCarthan v. Director, Goodwill Industries-Suncoast, Inc.*, 851 F. 3d 1076 (11th Cir. 2017), *pet. filed, July 12, 2017*. He also complains about his federal predicate conviction being a serious drug offense, as he contends the statute has no penalty provision.

9. This is another successive petition, and this Court lacks jurisdiction over this matter. Even if the Court had jurisdiction, it would deny relief.

Wherefore, Witherspoon's Motion to Vacate [DE-1] is **DISMISSED**, without prejudice to his seeking permission from the Eleventh Circuit Court of Appeals to file a successive Motion to Vacate under 28 U.S.C. 2255.

The Court **DENIES** a Certificate of Appealability.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 7th day of August, 2017.


WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Jesse Witherspoon, #55951-004
c/o FCC Coleman Medium
PO Box 1032
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U.S. Atty's Office

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JESSE WITHERSPOON,

CASE NO. 17-61546-CIV-DIMITROULEAS)
(11-62486-CIV-DIMITROULEAS)
(09-60191-CR-DIMITROULEAS)

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

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**FINAL JUDGMENT FOR RESPONDENT: ORDER DENYING CERTIFICATE OF
APPEALABILITY**

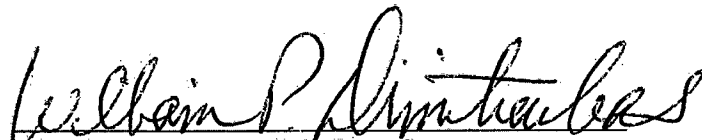
THIS CAUSE is before the Court upon the Final Judgment and Order Dismissing Motion to Vacate, signed today, August 7, 2017. Accordingly, pursuant to Rule 58 (a) Fed. R. Civ. Proc. and Rule 11(a), Section 2255 Proceedings, it is

ORDERED AND ADJUDGED as follows:

- I. Judgment is entered on behalf of Respondent, against the Movant, Jesse Witherspoon.
2. On consideration of a Certificate of Appealability, the Court will deny such certification as this Court determines that Petitioner has not shown a violation of a substantial constitutional right. The Court notes that pursuant to Rule 22(b)(1), Fed. Rules App. Proc Petitioner may now seek a certificate of appealability from the Eleventh Circuit Court of Appeals.
3. The Clerk shall close this case and deny any pending motions as moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this

7th day of August, 2017.


WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

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