

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

JOSEPH MICHAEL MOONEY,	:	MOTION TO VACATE
Movant,	:	28 U.S.C. §2255
	:	
v.	:	CRIMINAL ACTION NO.
	:	1:07-CR-060-TWT-JSA
	:	
UNITED STATES OF AMERICA,	:	
Respondent.	:	CIVIL ACTION NO.
	:	1:24-CV-4740-TWT-JSA

MAGISTRATE JUDGE’S FINAL REPORT AND RECOMMENDATION

Joseph Michael Mooney has filed a motion to vacate his sentence pursuant to Federal Rule of Civil Procedure 60(b)(6), which the Clerk has docketed as a motion to vacate under 28 U.S.C. §2255. (Doc. 291). For the following reasons, the undersigned **RECOMMENDS** that the §2255 motion be **DISMISSED**.

I. Procedural History

On July 23, 2007, a jury in the Northern District of Georgia convicted Movant of interstate enticement of a minor to engage in sexual activity and aggravated sexual abuse with a minor. (Doc. 52). Thereafter, Senior U.S. District Judge Thomas W. Thrash, Jr. sentenced Movant to a net total of 360 months of imprisonment and a life term of supervised release. (Doc. 67); *United States v. Mooney*, 303 F. App’x 737, 739 (11th Cir. 2008) (per curiam). The Eleventh Circuit affirmed Movant’s convictions and sentences on December 16, 2008. *Mooney*, 303 F. App’x at 743.

On October 5, 2009, the United States Supreme Court denied Movant's application for a petition of certiorari. *Mooney v. United States*, 558 U.S. 908 (2009).

Movant filed his first §2255 motion in this Court through new counsel, and proceeded *pro se* after counsel withdrew from the case. (Docs. 104, 111, 113). In that §2255 motion, he raised claims that previous counsel was ineffective by failing to:

- (1) file a motion to dismiss the indictment for failure to state a claim since it did not state the essential element of actual or attempted sexual abuse of a child;
- (2) file a motion to suppress the search of Movant's laptop;
- (3) challenge Agent Southerland's testimony as inadmissible expert testimony;
- (4) call an expert to refute the Government's evidence that Movant intended to commit aggravated sexual abuse when he crossed state lines; and
- (5) present an entrapment defense.

(Doc. 104). On March 20, 2013, the undersigned entered a report and recommendation ("R&R") which recommended denying the §2255 motion, and Judge Thrash adopted the R&R over Movant's objections on April 17, 2013. (Docs. 173, 177, 179). The Eleventh Circuit denied Movant's motion for a certificate of appealability on March 21, 2014, and denied his motion for reconsideration on May 15, 2014. (Docs. 206, 207). In the interim, Movant filed an amended motion to

vacate his sentence [Doc. 176] on April 9, 2014, which the Court denied [Doc. 213] and the Eleventh Circuit affirmed [Docs. 219, 229].

Movant subsequently filed a motion for writ of error *audita querela* pursuant to 28 U.S.C. §1651, in which he argued that the indictment was defective because it did not state a crime, the courts had no jurisdiction to prosecute and hear the case, and this Court failed to address the merits of this issue. (Doc. 231). On December 16, 2016, the Court entered an Order and first noted that the writ of *audita querela* may not be granted when relief is cognizable under §2255. (Doc. 234). Because the proper vehicle for Movant to attack his sentence for lack of jurisdiction was, in fact, via a §2255 motion, the Court construed the pleading as a second or successive §2255 motion and dismissed for lack of subject matter jurisdiction because Movant had not obtained permission from the Eleventh Circuit. (Doc. 234). The Eleventh Circuit affirmed that dismissal on August 14, 2017. (Doc. 243).

Movant filed a “Motion to Recall Mandate” in the Eleventh Circuit on August 31, 2017. *Mooney v. United States*, No. 07-16002 (11th Cir. Sept. 22, 2017) (PACER). In that motion, Movant argued, *inter alia*, that the indictment failed to allege an essential element of the crime, that is, that the element of attempt or actual sexual abuse of a child. *Id.* at Doc. 2. The Eleventh Circuit denied the motion on September 22, 2017. *Id.* at Doc. 4; (Doc. 245).

Movant then filed a motion to vacate his sentence pursuant to Federal Rule 60(b)(4), arguing that the criminal indictment against him failed to state a crime because it did not state the element of attempt or actual sexual conduct. (Doc. 247). The Court also construed that motion as a successive §2255 motion, found that Movant simply had attempted to “repackage” the claims he previously argued, and dismissed it for lack of subject matter jurisdiction. (Doc. 248).

On August 17, 2018, Movant filed an application with the Eleventh Circuit for leave to file a second or successive §2255 motion raising claims of actual innocence – repackaging that same argument in connection with the indictment – and ineffective assistance of counsel, which the Eleventh Circuit denied. (Doc. 249); *see also Mooney v. United States*, No. 18-13478 (11th Cir. Sept. 10, 2018) (PACER).

Movant filed yet another §2255 motion on November 26, 2018, this time raising a claim based on the Supreme Court’s decision in *Sessions v. Dimaya*, 584 U.S. 148 (2018).¹ (Doc. 250). The Court dismissed that successive §2255 motion since the Eleventh Circuit had not authorized Movant’s request to file any such successive motion. (Docs. 252, 255).

¹ In *Dimaya*, the Supreme Court held that, similar to the violent felony definition in the residual clause in the Armed Career Criminal Act found to be unconstitutionally vague in *Johnson v. United States*, 576 U.S. 591 (2015), the crime of violence definition contained in the residual clause in 18 U.S.C. §16(b), as incorporated into the Immigration Nationality Act, also was constitutionally invalid. *Dimaya*, 584 U.S. at 170, 174.

Movant then filed a “Motion to Void Judgment for Lack of Subject Matter Jurisdiction” – purportedly under Fed. R. Civ. P. 60(b)(4) – in which he argued that his conviction is void because it rests on a non-crime, repackaging the same argument that he had argued in nearly all of his previous motions that the indictment did not state an essential element of the crime, namely, attempting to, or actually engaging in, sex with a minor. (Doc. 257). The Court that the motion “is in effect a successive Motion to Vacate Sentence under §2255” and because Movant had not obtained permission from the Eleventh Circuit, denied the motion for lack of subject matter jurisdiction. (Doc. 264).

Movant filed the instant motion, this time ostensibly pursuant to Rule 60(b)(6), and which the Clerk docketed as a §2255 motion. (Doc. 291). For the following reasons, the undersigned **RECOMMENDS** that the instant motion be **DISMISSED** as a successive §2255 motion.

II. Discussion

Rule 60(b) provides relief from a final judgment for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . , misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; or applying it prospectively is no longer

equitable; or (6) any other reason that justifies relief. Fed. R. Civ. P. 60(b). A Rule 60(b) movant must file any such motion “within a reasonable time,” and “must demonstrate a justification for relief so compelling that the district court [is] *required* to grant [his] motion.” *Rice v. Ford Motor Co.*, 88 F.3d 914, 919 (11th Cir. 1996) (emphasis in original). Movant has not done so.

To that end, “Rule 60(b) motions are subject to the restrictions on successive habeas petitions if the prisoner is attempting to raise a new ground for relief or to attack a federal court’s previous resolution of a claim on the merits, even if ‘couched in the language of a true Rule 60(b) motion.’” *Azmat v. United States*, No. 20-14262, 2022 WL 4493043, at *1 (11th Cir. Sept. 28, 2022) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 531-32 (2005), *cert. denied*, ___ U.S. ___, 144 S. Ct. 89 (2023), *reh’g denied*, ___ U.S. ___, 144 S. Ct. 440 (2023)). On the other hand, a Rule 60(b) motion should not be deemed second or successive, and the court may rule on it, if it “merely attacks a defect in the integrity of the federal habeas proceeding, such as an allegation that the district court failed to reach the merits of a movant’s claims[.]” *Wukoson v. United States*, No. 23-10222, 2024 WL 1803087, at *2 (11th Cir. Apr. 25, 2024). Movant argues that he is, in fact, raising an allegation that no court has ruled on his claim that the indictment failed to state the substantive elements required for a conviction. (Doc. 291 at 3-4). Movant professes that the claims he raises “are bona fide Rule 60(b)(6) arguments, not habeas claims in disguise, and should be

considered as such.” (*Id.* at 2). Just because Movant says his claims are not habeas claims in disguise, however, do not make it so.

“Post-conviction motions that raise ‘an asserted federal basis for relief from a state court’s judgment of conviction’ should be construed as habeas petitions, subject to the AEDPA’s requirements.” *Wheeler v. United States*, No. 21-10428, 2022 WL 1196068, at *1 (11th Cir. Apr. 22, 2022) (per curiam) (quoting *Gonzales*, 545 U.S. at 532, and applying *Gonzales* to a §2255 motion). Putting aside whether Movant filed the instant motion “within a reasonable time,” once again Movant has simply repackaged the same claim he has raised since he was convicted and sentenced over seventeen years ago – that the indictment did not charge a crime. And despite his proclamation that he is attacking the integrity of the previous proceedings, his motion does, in fact, raise a “claim” that “is an asserted federal basis for relief from” judgment. *Gonzalez*, 545 U.S. at 531.² Consequently, the instant motion is an impermissible second or successive §2255 motion, Movant did not receive

² Likewise, Movant’s statement that no court reached the merits of this particular claim is simply false. Indeed, Movant first raised this argument during sentencing – the fact of which Movant brought to the attention of the Eleventh Circuit in the brief submitted with Movant’s motion to recall the mandate – and the Court rejected it. Movant also raised the same argument with the Eleventh Circuit in his motion to recall the mandate, see *Mooney*, No. 07-16002, Doc. 4 at 4 (PACER), and in the Eleventh Circuit in his request for permission to file a successive §2255 motion – both of which the Eleventh Circuit clearly rejected when denying his motions.

permission from the Eleventh Circuit, this Court has no jurisdiction to consider it, and this action should therefore be dismissed. *See Armstrong v. United States*, 986 F.3d 1345, 1347 (11th Cir. 2021) (“Without such authorization [from the appellate court], the district court must dismiss a second or successive §2255 petition for lack of jurisdiction.”).

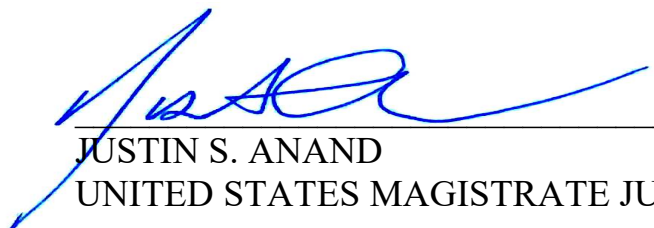
III. Conclusion

For the foregoing reasons,

IT IS RECOMMENDED that the instant motion [Doc. 291] be **DISMISSED**.³

The Clerk is **DIRECTED** to terminate the reference to the undersigned Magistrate Judge.

IT IS SO RECOMMENDED this 7th day of January, 2025.


JUSTIN S. ANAND
UNITED STATES MAGISTRATE JUDGE

³ The undersigned does not make a recommendation whether the Court should grant or deny a Certificate of Appealability (“COA”) because a prisoner does not need a COA to appeal when it dismisses a §2255 motion for lack of jurisdiction. *See United States v. Craig*, No. 21-13422, 2023 WL 2487397, at *2 (11th Cir. Mar. 14, 2023) (per curiam) (“[A] COA is not required where, as here, the appeal is from a district court’s dismissal of a §2255 motion for lack of jurisdiction.”).