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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

United States of America)	CV 10-9766 RSWL
)	CR 04-732-RSWL-1
Plaintiff/Respondent,)	
)	
v.)	AMENDED ORDER RE:
)	PETITIONER'S APPLICATION
)	FOR 28 U.S.C. § 2255 TO
Ray Maxwell,)	VACATE, SET ASIDE, OR
)	CORRECT SENTENCE BY A
Defendant/Petitioner.)	PERSON IN FEDERAL
)	CUSTODY [CV 17]
)	

Before the Court is Petitioner Ray Maxwell's ("Petitioner") Application for 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody filed February 10, 2014 [CV 17]. In response, the Government filed a Motion to Dismiss Petitioner's Application [CR 1066]. Having reviewed all papers submitted pertaining to this Motion, the Court **NOW FINDS AND RULES AS FOLLOWS:**

The Court hereby **GRANTS** the Government's Motion to Dismiss [CR 1066] and **DISMISSES** Petitioner's Application [CR 1064, CV 17].

1 **I. BACKGROUND**

2 On March 27, 2007, Petitioner pled guilty to
3 Conspiracy to Commit Armed Bank Robbery pursuant to 18
4 U.S.C. § 371, one count of Attempted Armed Bank Robbery
5 and two counts of Armed Bank Robbery pursuant to 18
6 U.S.C. § 2113(a), and one count of Discharging a
7 Firearm During a Crime of Violence pursuant to 18
8 U.S.C. § 924(c)(1)(A)(iii) [CR 544, 556]. This Court
9 sentenced Petitioner to a term of 360 months on May 5,
10 2008 [CR 883-884]. Petitioner appealed his judgment on
11 May 13, 2008 [CR 879] and the Ninth Circuit affirmed
12 Petitioner's conviction on direct review on January 21,
13 2010 [CR 997].

14 Petitioner now claims that because he was under the
15 influence of medications to treat his mental illness at
16 the time of his guilty plea, he was not competent to
17 accept this plea deal or to plead guilty, and his trial
18 counsel rendered ineffective assistance of counsel by
19 allowing him to do so.

20 Petitioner previously filed a Motion to Vacate, Set
21 Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255
22 on December 17, 2010 [CV 1, CR 1014].

23 Petitioner also filed a motion requesting that the
24 Court recuse itself on August 25, 2011 [CV 10]. That
25 motion was referred to Judge Wilson on August 29, 2011
26 [CV 11]. Judge Wilson denied Petitioner's motion to
27 have Judge Lew recuse himself on September 23, 2011 [CV
28 13].

1 Subsequent to Judge Wilson's ruling, on December 9,
2 2011, this Court denied Petitioner's original Motion to
3 Vacate, Set Aside, or Correct Sentence pursuant to 28
4 U.S.C. § 2255 [CV 14]. This Court also denied
5 Petitioner's Motion for Reconsideration filed January
6 5, 2012 [CV 15, 16].

7 Petitioner filed a Notice of Appeal of the Court's
8 rulings denying Petitioner's motions on March 26, 2012
9 [CR 1052]. This Court issued an Order denying a
10 certificate of appealability on April 18, 2012 [CR
11 1054]. The Ninth Circuit followed suit on February 8,
12 2013 [CR 1059].

13 II. LEGAL STANDARD

14 A. Successive 28 U.S.C. § 2255 Motions

15 Congress enacted the Antiterrorism and Effective
16 Death Penalty Act in 1996, "codifying the judicially
17 established principles reflected in the abuse-of-the-
18 writ doctrine and further restricting the availability
19 of relief to habeas petitioners." United States v.
20 Lopez, 577 F.3d 1053, 1060-61 (9th Cir. 2009) (citing
21 Felker v. Turpin, 518 U.S. 651, 664 (1996)).

22 "A petitioner is generally limited to one motion
23 under § 2255, and may not bring a 'second or successive
24 motion' unless it meets the exacting standards of 28
25 U.S.C. § 2255(h)." United States v. Washington, 653
26 F.3d 1057, 1059 (9th Cir. 2011). Under that section,
27 a motion cannot be considered unless it has
28 first been certified by the court of appeals to

1 contain either "(1) newly discovered evidence
2 that, if proven and viewed in light of the
3 evidence as a whole, would be sufficient to
4 establish by clear and convincing evidence that
5 no reasonable factfinder would have found the
6 movant guilty of the offense," or "(2) a new
7 rule of constitutional law, made retroactive to
8 cases on collateral review by the Supreme
9 Court, that was previously unavailable."

10 Id. (quoting 28 U.S.C. § 2255(h)). If § 2255(h)
11 applies, but a petitioner has not received permission
12 from the court of appeals to file a successive § 2255
13 petition, then the district court is without
14 jurisdiction. Id. at 1065. In other words, if a
15 petitioner fails to comply with the procedure
16 requirements for filing a successive § 2255 motion, his
17 motion must ordinarily be dismissed. See United States
18 v. Allen, 157 F.3d 661, 664 (9th Cir. 1998) (citing
19 Nelson v. United States, 115 F.3d 136 (2d Cir. 1997)).

20 **III. DISCUSSION**

21 Petitioner has previously filed a § 2255 motion
22 with this Court [CV 1, CR 1014], which this Court
23 denied on December 9, 2011 [CV 14, CR 1046]. The
24 grounds for Petitioner's previous § 2255 Motion
25 included a claim of ineffective assistance of counsel
26 by virtue of Petitioner's medication-influenced state.
27 Dkt. # CV 1 at 5. Petitioner's instant Application is
28 premised on the exact same ground - that he was unable

1 to make a knowing and voluntary plea due to his drug-
2 influenced state and that his counsel failed to present
3 that information to the Court. Mot. at 2.

4 Petitioner's instant Application is clearly a
5 "second or successive" § 2255 motion. 28 U.S.C. §
6 2255(h). Petitioner plainly appears to contend as much
7 as he titles his Application as one for 28 U.S.C. §
8 2255 [CV 17].

9 Alternatively, Petitioner appears to contend that
10 his Motion is one to amend made under Federal Rule of
11 Civil Procedure 15(c). Reply at 2. However, this
12 Court has already ruled on Petitioner's previous § 2255
13 motion [CV 14, CR 1046] and Petitioner's motion to
14 amend is more properly construed as a second or
15 successive § 2255 motion (see Beaty v. Schriro, 554
16 F.3d 780, 783 n.1 (9th Cir. 2009) (holding that a
17 petitioner cannot amend his petition after the district
18 court has ruled and proceedings have begun in the
19 circuit court)). This is particularly true as the
20 grounds for his instant Application are practically
21 identical to those raised in his previous § 2255
22 motion. See Allen, 157 F.3d at 664 (quoting United
23 States v. Gutierrez, 116 F.3d 412 (9th Cir. 1997)) ("a
24 'ground is successive if the basic thrust or gravamen
25 of the legal claim is the same, regardless of whether
26 the basic claim is supported by new and different legal
27 arguments.'").

28 Petitioner's similar contentions under 28 U.S.C. §

1 2255(f)(3) and (4) and Federal Rule of Civil Procedure
2 7 are also without merit. Reply at 1.

3 28 U.S.C. § 2255(f)(3) and (4) simply provide that
4 a one year limitations period on the filing of § 2255
5 motions runs from "(3) the date on which the right
6 asserted was initially recognized by the Supreme Court,
7 if that right has been newly recognized by the Supreme
8 Court and made retroactively applicable to cases on
9 collateral review" and "(4) the date on which the facts
10 supporting the claim or claims presented could have
11 been discovered through the exercise of due diligence."
12 28 U.S.C. § 2255(f)(3) and (4). Neither provision
13 applies here as Petitioner does not make any arguments
14 regarding a newly recognized right made retroactively
15 applicable to cases on collateral review or regarding
16 newly discovered evidence.

17 Federal Rule of Civil Procedure 7 simply lists the
18 types of pleadings allowed and provides that "[a]
19 request for a court order must be made by motion."
20 Fed. R. Civ. P. 7. It is entirely unclear how this
21 Rule applies to the instant matter.

22 In any event, the Ninth Circuit has not certified
23 that Petitioner's instant Application contains either
24 newly discovered evidence or a new rule of
25 constitutional law. Petitioner does not appear to
26 offer any such certification. Without such a
27 certification, this Court does not have jurisdiction to

1 consider Petitioner's Application. Washington, 653
2 F.3d at 1065. Accordingly, the Court **DISMISSES**
3 Petitioner's Application as barred by 28 U.S.C. §
4 2255(h)'s bar against second or successive motions.

5 **IV. CONCLUSION**

6 For the foregoing reasons, this Court **GRANTS** the
7 Government's Motion to Dismiss [CR 1066] and **DISMISSES**
8 Petitioner's Application [CR 1064, CV 17].

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11 **IT IS SO ORDERED.**

12 DATED: June 23, 2014

13
14 RONALD S.W. LEW

15 **HONORABLE RONALD S.W. LEW**
16 Senior U.S. District Judge
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