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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DIRK JAONG BOUIE, JR.,
Petitioner,
v.
BOARD OF PAROLE HEARINGS,
Respondent.

No. 2:12-cv-1221 MCE AC P

ORDER

By order filed August 25, 2021, the undersigned denied petitioner’s motion for relief from judgment under Federal Rule of Civil Procedure 60(b). ECF No. 64. Petitioner now seeks a certificate of appealability. ECF No. 74.

Petitioner seeks a certificate of appealability as to the denial of his Rule 60(b)(6) motion for relief from judgment. ECF No. 74. Petitioner argues that the court erred in recharacterizing his motion as a second or successive petition, that the Ninth Circuit’s denial of leave to file a second or successive petition should be vacated, and that this court erred by refusing to file his motion as a separate action. Id.

Pursuant to Rule 11 of the Federal Rules Governing Section 2254 Cases, this court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.

[A] COA should only issue for the appeal arising from the denial of a Rule 60(b) motion in a section 2255 proceeding. . . if the movant shows that (1) jurists of reason would find it debatable whether the

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district court abused its discretion in denying the Rule 60(b) motion and (2) jurists of reason would find it debatable whether the underlying [action] states a valid claim of the denial of a constitutional right.

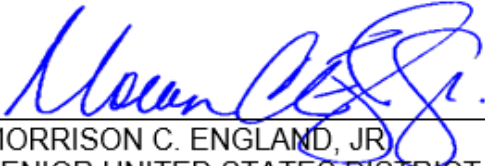
United States v. Winkles, 795 F.3d 1134, 1143 (9th Cir. 2015) (considering motion for relief from judgment arising from denial of § 2255 motion); see also Payton v. Davis, 906 F.3d 812, 818 n.8 (9th Cir. 2018) (analysis in Winkles applies to petitions for relief under § 2254).

Petitioner’s motion was denied because it sought to vacate a Ninth Circuit order denying his application for leave to file a second or successive petition for writ of habeas corpus, which this court does not have the authority to do. ECF No. 64. Although the undersigned further noted that this court is unable to consider a second or successive petition until petitioner receives authorization from the Ninth Circuit, it did not construe the motion as a second or successive petition. Id. Furthermore, because the motion was not construed as a second or successive petition, it was not improper to file it in the instant action, which concerns the same conviction, rather than filing it as a separate action. The undersigned does not find that jurists of reason would find it debatable that the denial of petitioner’s motion or the filing of the motion in this case was an abuse of discretion.

Accordingly, IT IS HEREBY ORDERED that petitioner’s motion for a certificate of appealability, ECF No. 74, is DENIED.

IT IS SO ORDERED.

Dated: December 2, 2021



MORRISON C. ENGLAND, JR.
SENIOR UNITED STATES DISTRICT JUDGE