UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

vs. Case No. 2:14-cv-345-FtM-29DNF
Case No. 2:04-cr-66-FTM-29DNF

EUGENE JERMAINE MCCUTCHEON

OPINION AND ORDER

This matter comes before the Court on Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Cv. Doc. #1) and a Memorandum in Support (Cv. Doc. #2), both filed on June 23, 2014. The United States' Response in Opposition (Cv. Doc. #8) was filed on August 12, 2014.

Petitioner Eugene Jermaine McCutcheon previously filed a Petition under 28 U.S.C. § 2255 in Case No. 2:05-cv-526-FtM-29DNF. The district court denied Ground I and dismissed Ground II (2:05-cv-526, Doc. #25), and the Eleventh Circuit denied a certificate of appealability (2:05-cv-526, Doc. #34) on October 8, 2008. A prisoner may not file a second or successive motion under § 2255 without the permission of the appropriate court of appeals. 28 U.S.C. § 2255(h). Absent such permission, a district judge lacks jurisdiction to address the motion and must dismiss it. United

States v. Holt, 417 F.3d 1172, 1175 (11th Cir. 2005). Petitioner has not obtained a certification from the Eleventh Circuit Court of Appeals which allows the filing of a second or successive petition, and therefore the district court lacks subject matter jurisdiction.

Accordingly, it is hereby

ORDERED:

1. Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Cv. Doc. #1) is **DISMISSED** without prejudice.
2. The Clerk of the Court shall enter judgment accordingly and close the civil file. The Clerk is further directed to place a copy of the civil Judgment in the criminal file.

IT IS FURTHER ORDERED:

A CERTIFICATE OF APPEALABILITY (COA) AND LEAVE TO APPEAL *IN FORMA PAUPERIS* ARE DENIED. A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1); Harbison v. Bell, 556 U.S. 180, 183 (2009). "A [COA] may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," Tennard v. Dretke, 542 U.S. 274, 282

(2004), or that "the issues presented were adequate to deserve encouragement to proceed further," Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (citations and internal quotation marks omitted). Petitioner has not made the requisite showing in these circumstances.

Finally, because petitioner is not entitled to a certificate of appealability, he is not entitled to appeal *in forma pauperis* as to the successive petition.

DONE and ORDERED at Fort Myers, Florida, this 9th day of September, 2014.

JOHN E. STEELE
UNITED STATES DISTRICT JUDGE

Copies:
Counsel of Record
Eugene Jermaine McCutcheon