

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

DERRICK WAYNE BURTON §
VS. § CIVIL ACTION NO. 1:05cv409
UNITED STATES OF AMERICA §

MEMORANDUM OPINION

Derrick Wayne Burton, proceeding *pro se*, filed this motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255.

Factual Background

In 1997, a federal grand jury returned a two-count indictment against movant and three co-defendants. In count 1, all the defendants were charged with conspiracy to distribute and to possess with the intent to distribute marijuana and crack cocaine, in violation of 21 U.S.C. § 846. In count 2, all the defendants were charged with possession of crack cocaine with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1). A Second Superseding Indictment was subsequently returned which included charges against additional defendants. Following a jury trial, movant was convicted of both offenses. He was sentenced to 235 months imprisonment and a five year term of supervised release. The convictions were affirmed by the United States Court of Appeals for the Fifth Circuit in an unpublished opinion. *United States v. Gilbert*, No. 98-41040 (Oct. 21, 1999).

Movant subsequently filed a motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. The motion to

vacate was denied by this court on November 26, 2001. *Burton v. United States*, No. 1:00cv776. The Fifth Circuit denied movant's request for a certificate of appealability. *United States v. Burton*, No. 02-40123 (Sep. 11, 2002).

Discussion

After considering the prior proceedings in movant's case, it must be concluded that movant's current filing constitutes a second motion to vacate, set aside or correct sentence. Pursuant to 28 U.S.C. § 2255, a second or successive motion to vacate may only be entertained by a district court if it has been certified by the appropriate court of appeals to be based on either: (1) newly discovered evidence that if proven would prevent any reasonable factfinder from finding the movant guilty of the offense charged or (2) a previously unavailable new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court.

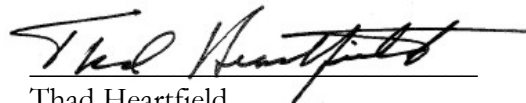
As described above, movant previously filed a motion to vacate challenging his convictions. The prior motion to vacate was denied on the merits. Accordingly, movant must receive permission from the Fifth Circuit before proceeding with a second motion to vacate. As movant does not state he has received such permission, his current filing must be dismissed without prejudice as successive.

Conclusion

For the reasons set forth above, this motion to vacate, set aside or correct sentence will be dismissed without prejudice for

failure to obtain certification from the Fifth Circuit. A judgment shall be entered in accordance with this Memorandum Opinion.

SIGNED this the **22** day of **June, 2005**.

A handwritten signature in cursive script, reading "Thad Heartfield", written in black ink. The signature is positioned above a horizontal line.

Thad Heartfield
United States District Judge