

United States District Court  
Southern District of Texas

**ENTERED**

November 29, 2017

David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

|                           |   |                              |
|---------------------------|---|------------------------------|
| UNITED STATES OF AMERICA, | § |                              |
|                           | § |                              |
| Plaintiff-Respondent,     | § |                              |
|                           | § |                              |
| v.                        | § | CRIMINAL ACTION NO. H-96-143 |
|                           | § | CIVIL ACTION NO. H-16-1828   |
| FREDERICK LEE BOWMAN,     | § |                              |
|                           | § |                              |
| Defendant-Movant.         | § |                              |

ORDER ADOPTING RECOMMENDATION OF THE MAGISTRATE JUDGE

Pending is the Government's Motion to Dismiss (Document No. 110) Defendant/§ 2255 Movant Frederick Lee Bowman's Motion and Amended Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence (Document Nos. 97 & 99). The Court has received from the Magistrate Judge a Memorandum and Recommendation recommending that the Government's Motion to Dismiss be GRANTED, and that Bowman's Motion and Amended Motion to Vacate, Set Aside or Correct Sentence be DENIED and DISMISSED WITH PREJUDICE. Bowman has filed Objections to the Memorandum and Recommendation (Document No. 125), in which he also raises a new argument, namely, that Johnson and Welch should apply equally to statutorily enhanced sentences under 18 U.S.C. § 924(c). As the Magistrate Judge observed in her Memorandum and Recommendation, however, that argument is foreclosed currently by Fifth Circuit precedent. See Memorandum and Recommendation, at 4-5. The Court, after having

made a *de novo* determination of the Government's Motion to Dismiss, the Magistrate Judge's Memorandum and Recommendation, and Bowman's Objections, is of the opinion that the findings and recommendations of the Magistrate Judge should be and hereby are accepted by the Court. Therefore, it is

ORDERED and ADJUDGED for the reasons set forth in the Memorandum and Recommendation of the United States Magistrate Judge filed September 11, 2017, which is adopted in its entirety as the opinion of the Court, that the Government's Motion to Dismiss (Document No. 110) is GRANTED, and Movant Frederick Lee Bowman's § 2255 Motion and Amended Motion to Vacate, Set Aside or Correct Sentence (Document Nos. 97 & 99) are DENIED and DISMISSED WITH PREJUDICE. It is further


ORDERED that a certificate of appealability is DENIED. A certificate of appealability from a habeas corpus proceeding will not issue unless the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard "includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 120 S. Ct. 1595, 1603-1604 (2000) (internal quotations and citations omitted). Stated differently, where the claims have been dismissed on the merits, the petitioner "must demonstrate that

reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Id. at 1604; Beazley v. Johnson, 242 F.3d 248, 263 (5<sup>th</sup> Cir.), cert. denied, 122 S.Ct. 329 (2001). When the claims have been dismissed on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack, 120 S. Ct. at 1604. A district court may deny a certificate of appealability *sua sponte*, without requiring further briefing or argument. Alexander v. Johnson, 211 F.3d 895, 898 (5<sup>th</sup> Cir. 2000).

For the reasons set forth in the Memorandum and Recommendation, which has been adopted as the opinion of the Court, the Court determines that reasonable jurists would not find debatable the substantive determination made herein. Thus, a certificate of appealability is DENIED.

The Clerk will enter this Order and send copies to all parties of record.

Signed at Houston, Texas on this 28<sup>th</sup> day of November, 2017.

  
EWING WERLEIN, JR.  
UNITED STATES DISTRICT JUDGE