

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-10147
Non-Argument Calendar

D.C. Docket Nos. 4:13-cv-00221-WTM-GRS,
4:95-cr-00123-WTM-3

ANDRE C. MYERS,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

(June 3, 2015)

Before WILLIAM PRYOR, MARTIN and JULIE CARNES, Circuit Judges.

PER CURIAM:

Andre Myers, a federal prisoner proceeding pro se, appeals the district court's dismissal of his fourth 28 U.S.C. § 2255 motion as second or successive. In 1995, Myers was convicted of one count of distribution of a controlled substance and one count of conspiracy to possess cocaine base and cocaine hydrochloride with the intent to distribute. Because he had prior felony drug convictions, he was subject to an enhanced sentence pursuant to 21 U.S.C. § 841(b)(1)(A) and was sentenced to life imprisonment.

In 2008, after the district court had already denied Myers's first § 2255 motion on the merits, a state court vacated one of Myers's previous felony drug convictions. Since that time, Myers has filed an additional three § 2255 motions arguing that he is actually innocent of his enhanced sentence. Each of these motions has been dismissed as second or successive.

Federal courts generally may not consider second or successive § 2255 motions. 28 U.S.C. § 2255(h). However, "the phrase second or successive is not self-defining and it does not refer to all habeas petitions filed second or successively in time." Boyd v. United States, 754 F.3d 1298, 1301 (11th Cir. 2014). Myers's current motion—his fourth in time—is not second or successive to his initial § 2255 motion, denied on the merits in 2002, because his actual innocence claim based on the vacatur of his state-court conviction did not exist at that time. See id. at 1302. His current motion is also not second or successive to

his 2009 or 2012 motions because those motions were not adjudicated on the merits. See id. Therefore, as the government concedes, the district court erred when it dismissed Myers's motion as second or successive.

VACATED AND REMANDED.