

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MARCUS RASHAWN SMITH,)	
)	
Petitioner,)	
)	
v.)	CASE NO. 2:19-CV-532-WKW
)	[WO]
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

ORDER DISMISSING ACTION
AND DENYING A CERTIFICATE OF APPEALABILITY

On August 7, 2019, the Magistrate Judge filed a Recommendation (Doc. # 3) to which Petitioner has filed Objections (Doc. # 4). The Objections are due to be overruled, and the Recommendation is due to be adopted.

Notwithstanding Petitioner's argument in his Objections, Petitioner's challenge to his indictment is tantamount to a challenge to the validity of his conviction and sentence under that indictment. Therefore, Petitioner's instant motion challenging his indictment is a successive, collateral challenge to his conviction and sentence. Such a challenge must be made under 28 U.S.C. § 2255. His instant motion must be considered a successive § 2255 motion because he filed a previous § 2255 motion that was denied on the merits. Because he filed the instant 2255

motion without obtaining authorization from the Eleventh Circuit, the court does not have jurisdiction to consider its merits.

Based upon *de novo* review of the Recommendation, *see* 28 U.S.C. § 636, it is ORDERED that the Objections (Doc. # 4) are OVERRULED and that the Recommendation (Doc. # 3) is ADOPTED. Accordingly, this action is DISMISSED without prejudice. Final judgment will be entered separately.

A certificate of appealability will not be issued. For a petitioner to obtain a certificate of appealability, he must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This showing requires 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*, 529 U.S. 473, 484 (2000) (citation and internal quotation marks omitted). And, where a petition is denied on procedural grounds, he “must show not only that one or more of the claims he has raised presents a substantial constitutional issue, but also that there is a substantial issue about the correctness of the procedural ground on which the petition was denied.” *Gordon v. Sec’y, Dep’t of Corrs.*, 479 F.3d 1299, 1300 (11th Cir. 2007) (citations omitted). “A ‘substantial question’ about the procedural ruling means that the correctness of it under the law as it now stands is debatable among jurists of reason.” *Id.*

Because reasonable jurists would not find the denial of Petitioner's § 2255 motion debatable, a certificate of appealability is DENIED.

DONE this 6th day of September, 2019.

/s/ W. Keith Watkins
UNITED STATES DISTRICT JUDGE