

APPENDIX

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted October 10, 2019
Decided October 24, 2019

Before

JOEL M. FLAUM, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 19-1237

VIVEK SHAH,
Petitioner-Appellant,

Appeal from the United States District
Court for the Northern District of Illinois,
Eastern Division.

v.

No. 18 C 7990

MARCUS HOLMES,
Respondent-Appellee.

Gary Feinerman,
Judge.

O R D E R

Vivek Shah appeals from the denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2241. He filed the petition in the Northern District of Illinois, where he is currently on federal supervision, but the district court construed it as successive § 2255 motion and dismissed it. *See* 28 U.S.C. § 2255(h). Although Shah's filing cannot properly be construed as a motion under § 2255, we affirm the judgment because, as the district court alternately concluded, he is not entitled to review under § 2241.

First, some background. In 2013, Shah pleaded guilty in the Southern District of West Virginia to one count of transmitting a threat in interstate commerce with the intent to extort, 18 U.S.C. § 875(b), and seven counts of mailing threatening

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communications with the intent to extort, *id.* § 876(b). The district court sentenced him to 87 months in prison followed by three years' supervised release. He did not appeal.

About two years later, Shah filed, in the Southern District of West Virginia, a motion to vacate his convictions under 28 U.S.C. § 2255. Citing *Elonis v. United States*, 135 S. Ct. 2001 (2015), Shah argued that he was innocent because he did not "intend" to threaten anyone. *Elonis* held that a conviction under 18 U.S.C. § 875(c)—which, unlike subsection (b), contains no express *mens rea* requirement—requires proof that a defendant knew of the communication's threatening nature.¹ While Shah's § 2255 motion was pending, the Fourth Circuit ruled that *Elonis* did not affect convictions under § 875(b), which—like § 876(b)—expressly requires an "intent to extort." *United States v. White*, 810 F.3d 212, 223 (4th Cir. 2016). Shah subsequently filed a "Second Supplemental Brief in Support of Motion to Invalidate Plea Agreement," urging the district court to ignore *White* as "not retroactively applicable." *Shah v. United States*, 2016 WL 6762748, at *3 (S.D. W. Va. Oct. 19, 2016) (report and recommendation).

The Southern District of West Virginia dismissed the § 2255 motion as untimely, reasoning that Shah did not file it within a year after his conviction became final, and that *Elonis* did not restart his limitations period under § 2255(f)(3). *Shah v. United States*, 2017 WL 3168425 (S.D. W. Va. July 26, 2017), *appeal dismissed*, 756 F. App'x 329 (4th Cir. 2019). As the Fourth Circuit made clear in *White*, *Elonis* dealt only with the elements of § 875(c). *See* 2017 WL 3168425, at *5. So that case did not establish a new constitutional rule that Shah could use to challenge his convictions under §§ 875(b) and 876(b). *See id.*

Shah then filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241 in the Northern District of Illinois. (The respondent, Marcus Holmes, is the district's Chief U.S. Probation Officer.) Citing *White*, Shah argues that he is innocent of his § 875(b) conviction because he did not have the "specific intent" to extort his victims for money (despite admitting as much in his plea agreement). Rather, Shah avers, he sent "hoax" extortion letters that he hoped would bring him publicity and boost his acting career. He further contends that § 2255 is inadequate because his argument relies on the Fourth Circuit's "new statutory interpretation" of § 875(b) in *White*, which was decided more than a year after the deadline to file his first § 2255 motion. Therefore, Shah avers, he should be able to proceed under § 2241.

¹ 18 U.S.C. § 875(c) forbids "transmit[ting] in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another...."

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The Northern District of Illinois construed the § 2241 petition as a § 2255 motion, dismissed it as successive, and denied a certificate of appealability. For technical reasons, this course was mistaken. Because Shah filed the petition in the district of custody—rather than the district of conviction—this is “a genuine proceeding under § 2241” that “cannot be treated as an action under § 2255.” *Collins v. Holinka*, 510 F.3d 666, 667 (7th Cir. 2007); *see also* 28 U.S.C. §§ 2241(a), 2255(a). And a certificate of appealability is not required to appeal the rejection of a § 2241 petition. *See id.* § 2253(c).

Nevertheless, as the district court also recognized, Shah cannot proceed under § 2241. The district of custody may “entertain” a federal prisoner’s § 2241 petition only when § 2255 is “inadequate or ineffective to test the legality of his detention.” *Id.* § 2255(e). In this circuit, that means a § 2241 petitioner must establish that:

- (1) the claim relies on a statutory interpretation case, not a constitutional case, and thus could not have been invoked by a successive § 2255 motion;
- (2) the petitioner could not have invoked the decision in his first § 2255 motion and the decision applies retroactively; and
- (3) the error is grave enough to be deemed a miscarriage of justice.

Beason v. Marske, 926 F.3d 932, 935 (7th Cir. 2019); *see also In re Davenport*, 147 F.3d 605, 611 (7th Cir. 1998). Although Shah’s claim relies on a statutory-interpretation case—*White*—he invoked that decision in the supplemental briefing in his first § 2255 motion. (We assume, without deciding, that an out-of-circuit case can furnish the basis for a § 2241 petition in this circuit.) And the Southern District of West Virginia expressly considered *White* in denying his motion. *See* 2017 WL 3168425, at *5; *see also Roundtree v. Krueger*, 910 F.3d 312, 313 (7th Cir. 2018) (“[N]one of this circuit’s decisions … permits relitigation under § 2241 of a contention that was actually resolved in a proceeding under § 2255, unless the law changed after the initial collateral review.”).

In his brief in this court, Shah argues that he “raised at least two *White*-related claims in the Southern District of West Virginia,” but one “was never adjudicated by that court.” But this alleged error, on its own, does not render § 2255 inadequate or ineffective within the meaning of § 2255(e). In any event, the holding in *White* cuts against Shah, not for him, so any error cannot be deemed a miscarriage of justice.

Accordingly, we AFFIRM the district court judgment.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VIVEK SHAH,)
Petitioner,)
vs.) 18 C 7990
RICHARD HART,)
Respondent.)
Judge Gary Feinerman

ORDER

Petitioner's motion for leave to proceed *in forma pauperis* [3] is granted. The five-dollar filing fee is waived. For the reasons stated below, the habeas corpus petition [1] is dismissed as an unauthorized second and successive 28 U.S.C. § 2255 motion. A certificate of appealability will not issue. Enter judgment order. Civil case closed.

STATEMENT

Petitioner Vivek Shah, a federal prisoner presently incarcerated at a halfway house in Chicago, Illinois, brings this *pro se* habeas corpus petition under 28 U.S.C. § 2241 challenging his criminal conviction from the Southern District of West Virginia. Doc. 4 at 1. In 2013, Shah pleaded guilty to one count of transmitting in interstate commerce a threat with intent to extort in violation of 18 U.S.C. § 875(b), and seven counts of mailing threatening communications in violation of 18 U.S.C. § 876(b). *Shah v. United States*, 2017 WL 3168425, at *1 (S.D. W. Va. July 26, 2017), *appeal docketed*, No. 17-7053 (4th Cir. Aug. 16, 2017). He was sentenced to 87 months of imprisonment followed by a three-year supervised release term. *Ibid.*

In June 2015, Shah filed a 28 U.S.C. § 2255 motion in the Southern District of West Virginia, asserting, among other grounds for relief, that he was innocent in light of *Elonis v. United States*, 135 S. Ct. 2001 (2015). 2017 WL 3168425, at *1. The court rejected Shah's innocence claim, holding that *Elonis* and the Fourth Circuit's application of *Elonis* in *United States v. White*, 810 F.3d 212 (4th Cir. 2016), did not advance his cause. 2017 WL 3168425, at *4-6. The court also rejected Shah's argument that his claims were cognizable via a habeas corpus petition under 28 U.S.C. § 2241. *Id.* at *6. As the court explained, Shah could not demonstrate that a § 2255 motion was an inadequate or ineffective remedy to test the legality of his detention, which meant that he could not avail himself of the "savings clause" of § 2255(e) to bring a § 2241 petition. *Ibid.* The court's judgment is currently on appeal before the Fourth Circuit. *United States v. Shah*, No. 17-7053 (4th Cir.).

Shah then brought to this court his present 28 U.S.C. § 2241 habeas corpus petition, which reiterates two arguments from his earlier § 2255 motion—first, that he is innocent in light of Fourth Circuit’s *White* decision, and second, that the savings clause of § 2255(e) allows him to bring a § 2241 petition. Doc. 4 at 6 (“I [Shah] am relying exclusive[ly] on the Fourth Circuit’s January 7, 2016 decision in [White] ...[, which] could not have been invoked in an earlier § 2255 motion”) (underline omitted). However, arguments adjudicated in a prior § 2255 motion cannot be reasserted in a § 2241 petition. *See Roundtree v. Krueger*, 910 F.3d 312, 313 (7th Cir. 2018) (holding that a prisoner dissatisfied with the denial of a § 2255 motion should appeal that ruling, not bring a new § 2241 proceeding). That is precisely what Shah is attempting to do here, for in denying his § 2255 motion, the Southern District of West Virginia considered and rejected the arguments he reasserts in his present § 2241 petition.

Moreover, in attempting to invoke the § 2255(e) savings clause to justify proceeding under § 2241, Shah claims that *White* is a new decision that was not available in his § 2255 case. But that is incorrect, as the Southern District of West Virginia considered *White* and *Elonis* in rejecting his § 2255 motion. 2017 WL 3168425, at *4-6. Moreover, Shah discussed *Elonis* in a supplemental brief that he filed in support of his original § 2255 motion a month *after* the Fourth Circuit issued its decision in *White*. *Id.* at *1. It follows that § 2255(e) does not apply and therefore that Shaw may not proceed under § 2241.

Accordingly, Shah’s § 2241 petition is in fact an unauthorized second and successive § 2255 motion, which must be dismissed because no court of appeals has authorized him to bring it. *See Melton v. United States*, 359 F.3d 855, 858 (7th Cir. 2004); *United States v. James*, 2013 WL 182747, at *3 (N.D. Ill. Jan. 15, 2013). The warning requirements of *Castro v. United States*, 540 U.S. 375 (2003), are inapplicable to this successive collateral attack because Shah previously litigated (and continues to appeal) his earlier § 2255 motion. 2017 WL 3168425, at *1; *see Melton*, 359 F.3d at 857 (explaining that the limitations *Castro* places on “[r]echaracterizing a prisoner’s *initial* post-judgment motion as a collateral attack subject to § 2255” do not apply to “a prisoner’s *successive* collateral motions”). The Court declines to issue a certificate of appealability under 2255 Rule 11(a) because there is no substantial showing of a denial of a constitutional right. *See* 28 U.S.C. § 2253(c); *White v. United States*, 745 F.3d 834, 835 (7th Cir. 2014); *Arredondo v. Huibregtse*, 542 F.3d 1155, 1165 (7th Cir. 2008).

This is a final decision ending this case in this court. If Shah wishes to appeal, he must file a notice of appeal with this court within thirty days of the entry of judgment. Fed. R. App. P. 4(a)(1)(A). Shah need not bring a motion to reconsider this ruling to preserve his appellate rights. However, if Shah desires reconsideration, he may file a motion under Federal Rules of Civil Procedure 59(e) or 60(b). Any Rule 59(e) motion must be filed within 28 days of this judgment. Fed. R. Civ. P. 59(e). Any Rule 60(b) motion must be filed within a reasonable time and, if seeking relief under Rule 60(b)(1), (2), or (3), must be filed no more than one year after this judgment. Fed. R. Civ. P. 60(c)(1). The time to file a Rule 59(e) or Rule 60(b) motion cannot be extended. Fed. R. Civ. P. 6(b)(2). A timely Rule 59(e) motion suspends the deadline for filing an appeal until the Rule 59(e) motion is ruled upon, Fed. R. App. P.

4(a)(4)(A)(iv), but a Rule 60(b) motion suspends the deadline for filing an appeal only if the motion is filed within 28 days of judgment, and only until the Rule 60(b) motion is ruled upon, *id.* 4(a)(4)(A)(iv).



January 8, 2019

United States District Judge

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 8, 2019

Before

JOEL M. FLAUM, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

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VIVEK SHAH,
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MARCUS HOLMES, Chief Probation
Officer,
Respondent-Appellee.

No. 1:18-cv-7990
Gary Feinerman,
Judge.

O R D E R

On consideration of the petition for rehearing filed by petitioner on October 28, 2019, all members of the original panel have voted to deny the petition for rehearing.

Accordingly, the petition for rehearing is hereby DENIED.