

NOT FOR PUBLICATION

FILED

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MAY 28 2019

**MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS**

SAMUEL DOWELL,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 19-35110

D.C. No. 3:18-cv-01939-BR

MEMORANDUM*

**Appeal from the United States District Court
for the District of Oregon
Anna J. Brown, District Judge, Presiding**

Submitted May 21, 2019**

Before: THOMAS, Chief Judge, FRIEDLAND and BENNETT, Circuit Judges.

Samuel Dowell appeals pro se from the district court's judgment denying his "Extraordinary Writ Challenge." We have jurisdiction under 28 U.S.C. § 1291. We review de novo, *see United States v. Walgren*, 885 F.2d 1417, 1420 (9th Cir. 1989), and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Dowell contends that the district court erred in concluding that he was attempting to attack his conviction. Rather, he argues that he was seeking a “class action civil writ” under 28 U.S.C. § 1651 based on the unconstitutionality of the federal statutes proscribing child pornography, 18 U.S.C. §§ 2250-2260. As an initial matter, Dowell points to no authority suggesting that 28 U.S.C. § 1651 is a proper vehicle for such an action. Moreover, child pornography is not protected by the First Amendment, *see New York v. Ferber*, 458 U.S. 747, 764 (1982), and the Commerce Clause authorizes Congress to criminalize its intrastate possession, *see United States v. Sullivan*, 797 F.3d 623, 631-32 (9th Cir. 2015). The district court, therefore, properly denied relief.

AFFIRMED.

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AUG 28 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

SAMUEL DOWELL,

No. 19-35110

Petitioner-Appellant,

D.C. No. 3:18-cv-01939-BR
District of Oregon,
Portland

v.

UNITED STATES OF AMERICA,

ORDER

Respondent-Appellee.

Before: THOMAS, Chief Judge, FRIEDLAND and BENNETT, Circuit Judges.

Dowell's request for appointment of counsel is denied.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Dowell's petition for rehearing en banc (Docket Entry No. 4) is denied.

No further filings will be entertained in this closed case.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In Re SAMUEL DOWELL,
Petitioner,

Case No. 3:18-cv-01939-BR

JUDGMENT

v.

UNITED STATES OF AMERICA,
Respondent.

BROWN, Judge.

Based on the Record,

IT IS ORDERED AND ADJUDGED that this Action is dismissed.

DATED this 24th day of January, 2019.

Anna J. Brown
ANNA J. BROWN
United States Senior District Judge

1 - JUDGMENT -

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In Re SAMUEL DOWELL, and others
similarly situated,

Petitioner,

Case No. 3:18-cv-01939-BR

ORDER

v.

UNITED STATES OF AMERICA,

Respondent.

BROWN, Senior Judge.

Petitioner, an inmate at FCI Sheridan, initiated this action by filing a document entitled "Extraordinary Writ Challenge," through which Petitioner seeks to challenge the constitutionality of 18 U.S.C. §§ 2250-2260. For the reasons that follow, the Court summarily DISMISSES this action.

Petitioner was convicted in this Court on a plea of guilty to one charge of Possession of Child Pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) and (b)(2). *United States v. Dowell*, Case

1 - ORDER -

No. 3:14-cr-00488-HZ-1 (Docket No. 38). District Judge Marco A. Hernández sentenced Petitioner to 120 months of imprisonment and 15 years of supervised release. *Id.*

On June 18, 2018, Petitioner filed a "Motion to Dismiss the Indictment" in his criminal case on the basis that Congress lacked authority and subject matter jurisdiction to enact 18 U.S.C. §§ 2251-2260. *Id.* at Docket No. 39. Petitioner argued Congress does not have the authority to pass legislation prohibiting child pornography because such legislation discriminated on the basis of religion. Specifically, Petitioner claimed that child pornography statutes "chill the free expression of ancient religious tenets of the Islamic religion as well as the free speech of unmarried individuals." Petitioner further argued that the laws violate the Constitution because possession of child pornography does not necessarily involve interstate commerce. On June 21, 2018, Judge Hernández denied Petitioner's motion as "procedurally improper and meritless." *Id.* at Docket No. 40.

On November 1, 2018, Petitioner filed his "Extraordinary Writ Challenge" in this action.¹ In it, Petitioner alleges claims identical to those rejected by Judge Hernández. As such, Petitioner's claims are barred by collateral estoppel. See *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992)

¹The Court notes that Petitioner does not allege the jurisdictional basis upon which he brings this action.

(collateral estoppel prevents parties from re-litigating issues that were adjudicated in a previous dispute between the same parties); *Fairly v. United States*, 373 Fed.Appx. 700, at *1 (9th Cir. 2010) (collateral estoppel prevented petitioner from re-litigating issue in habeas case brought under 28 U.S.C. § 2241 where issue was decided against petitioner in prior 28 U.S.C. § 2255 proceeding).

Moreover, to the extent Petitioner intends to challenge the legality of his own conviction he must do so through a motion to vacate pursuant to 28 U.S.C. § 2255, not a civil action. To the extent the Court may liberally construe this action as being brought under *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971), Petitioner cannot pursue civil rights claims in a *Bivens* action because his conviction has not been declared invalid or otherwise impugned. See *Heck v. Humphrey*, 512 U.S. 477 (1994); *Martin v. Sias*, 88 F.3d 774, 775 (9th Cir. 1996) (holding that the rational of *Heck* applies to *Bivens* actions).

Finally, the statutes prohibiting the production and possession of child pornography do not violate the Constitution. See *United States v. Sullivan*, 797 F.3d 623, 632-33 (9th Cir. 2015) (Congress may regulate even purely intrastate production of child pornography and criminalize its intrastate possession) (citations omitted); *New York v. Ferber*, 458 U.S. 747, 757 (1982) (pornography showing minors can be prohibited based on the government's

compelling interest in prosecuting those who promote the sexual exploitation of children). Accordingly, Petitioner's claims lack merit.

CONCLUSION

For these reasons, the Court DENIES Petitioner's "Extraordinary Writ Challenge" (ECF No. 2) and DISMISSES this action.

IT IS SO ORDERED.

DATED this 24th day of January, 2019.

Anna J. Brown

ANNA J. BROWN
United States Senior District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

In Re SAMUEL DOWELL, and others
similarly situated,

Case No. 3:18-cv-01939-BR

Petitioner,

ORDER TO PROCEED
IN FORMA PAUPERIS

v.

UNITED STATES OF AMERICA,

Respondent.

BROWN, Senior Judge.

Petitioner moves to proceed *in forma pauperis* (ECF No. 1). An examination of the application reveals that petitioner is unable to afford the costs of this action. Accordingly, IT IS ORDERED that the provisional *in forma pauperis* status given the petitioner is confirmed. The petition may go forward without the payment of fees or costs.

IT IS SO ORDERED.

DATED this 24th day of January, 2019.

Anna J. Brown
ANNA J. BROWN
United States Senior District Judge