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United States Court of Appeals
Tenth Circuit

October 1, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GREGORY D. CROSBY, a/k/a Gregory D. Cosby,

Petitioner - Appellant,

v.

BILL TRUE, Warden,

Respondent - Appellee.

No. 20-1288
(D.C. No. 1:20-CV-01191-LTB-GPG)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MATHESON**, **KELLY**, and **EID**, Circuit Judges.

Pro se federal prisoner Gregory D. Crosby appeals the dismissal of his Amended Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241.[1] Exercising

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] A federal prisoner is not required to obtain a certificate of appealability to seek review of a district court's denial of a habeas application under § 2241. *Eldridge v. Berkebile*, 791 F.3d 1239, 1241 (10th Cir. 2015).

Appendix B
Attachment

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jurisdiction under 28 U.S.C. 1291, we affirm. We also deny his request to proceed *in forma pauperis* ("*ifp*").[2]

I. BACKGROUND

In 2014, this court affirmed the denial of a previous § 2241 application that Mr. Crosby filed in 2013 regarding the same conviction he is challenging here. *Crosby v. Oliver*, 561 F. App'x 754 (10th Cir. 2014) (unpublished). Our decision set forth procedural and legal background that is relevant to this appeal:

> Mr. Crosby was convicted of attempted bank robbery under 18 U.S.C. § 2113(a) and giving false information under 18 U.S.C. § 1038. We affirmed his conviction on direct appeal. *See United States v. Crosby,* 416 Fed.Appx. 776, 777–78 (10th Cir.2011). He moved for relief under 28 U.S.C. § 2255, but the district court denied his motion, and we denied a certificate of appealability and dismissed the appeal. *See United States v. Crosby*, 468 Fed.Appx. 913 (10th Cir.2012). He filed a motion for new trial, which the district court construed as a second § 2255 motion and denied. We again denied a certificate of appealability and dismissed the appeal. *See United States v. Crosby*, 515 Fed.Appx. 771 (10th Cir.2013). He now seeks relief under 28 U.S.C. § 2241.
>
> "A petition brought under 28 U.S.C. § 2241 typically attacks the execution of a sentence rather than its validity and must be filed in the district where the prisoner is confined." *Brace v. United States*, 634 F.3d 1167, 1169 (10th Cir.2011) (internal quotation marks omitted). "A § 2255 motion, on the other hand, is generally the exclusive remedy for a federal prisoner seeking to attack the legality of detention, and must be filed in the district that imposed the sentence." *Id.* (brackets and internal quotation marks omitted). But the

[2] Because Mr. Crosby appears pro se "we liberally construe his filings, but we will not act as his advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

> "so-called savings clause of § 2255" permits a federal prisoner to proceed under § 2241 in the rare circumstance when a § 2255 motion provides "an inadequate or ineffective remedy to challenge a conviction." *Id.* (internal quotation marks omitted); *see* 28 U.S.C. § 2255(e). "The petitioner bears the burden of demonstrating that the remedy in § 2255 is inadequate or ineffective." *Brace*, 634 F.3d at 1169.

Id. at 755. We affirmed because Mr. Crosby wished to contest a jury instruction—a challenge to his conviction, not to the execution of his sentence. *Id.* We rejected his arguments that a § 2255 motion provided an inadequate or ineffective remedy. *Id.* at 755-56.

Earlier this year, Mr. Crosby filed the § 2241 application underlying this appeal. He claimed that the "[t]rial court erred when the $3,000 was not mentioned during trial. This matter comes on petitioner['s] claim that the original court fail[ed] to hear evidence relating to $3,000.00 not being mentioned." ROA at 80. His application further referred to "the fact of $3,000.00 dollar not recover[ed] or found in the vehicle." *Id.* at 84. He alleged that "[§] 2255 has been inadequate and ineffective to prove his innocence." *Id.* at 86. In short, he challenges his conviction because the trial court failed to mention that the money he was convicted of attempting to rob from a bank was not found.

The district court denied Mr. Crosby's § 2241 application and dismissed for lack of statutory jurisdiction. It adopted the magistrate judge's recommendation, which determined that Mr. Crosby had failed to show that a § 2255 motion was inadequate or ineffective. *Id.* at 109-10; *see id.* at 97-99 (magistrate judge's recommendation).

II. DISCUSSION

"When reviewing the denial of a habeas petition under § 2241, we review the district court's legal conclusions de novo and accept its factual findings unless clearly erroneous." *al–Marri v. Davis*, 714 F.3d 1183, 1186 (10th Cir. 2013).

A § 2255 motion is ordinarily the only means to challenge the validity of a federal conviction following the conclusion of direct appeal. *Brace*, 634 F.3d at 1169. Under a narrow exception in § 2255(e), the "savings clause," a federal prisoner may file a § 2241 application challenging the validity of his conviction only if a § 2255 motion is "inadequate or ineffective to test the legality of his detention." *Abernathy v. Wandes*, 713 F.3d 538, 547 (10th Cir. 2013) (quoting 28 U.S.C. § 2255(e)). In *Prost v. Anderson*, 636 F.3d 578 (10th Cir. 2011), this court stated the rule to challenge a conviction under § 2241: "The relevant metric or measure, we hold, is whether a petitioner's argument challenging the legality of his detention could have been tested in an initial § 2255 motion. If the answer is yes, then the petitioner may not resort to the savings clause and § 2241." *Id.* at 584.[3]

Mr. Crosby has failed to show that § 2255(e) applies. The magistrate judge's recommendation correctly explained that Mr. Crosby's having sought and been denied § 2255 relief does not show that § 2255 is inadequate or ineffective. *See Bradshaw v*

[3] In his brief, Mr. Crosby urges this court to "[r]evisit the *Prost* test." Aplt. Br. at 9. But "[u]nder the doctrine of *stare decisis*, this panel cannot overturn the decision of another panel of this court . . . absent *en banc* reconsideration or a superseding contrary decision by the Supreme Court." *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000).

Story, 86 F.3d 164, 166 (10th Cir. 1996). Further, Mr. Crosby's having previously been barred from bringing a second or successive § 2255 motion also does not satisfy § 2255(e). *See Caravalho v. Pugh*, 177 F.3d 1177, 1179 (10th Cir. 1999) (citing *United States v. O'Bryant*, No. 98-1179, 1998 WL 704673, at *2 (10th Cir. Oct. 2, 1998) (unpublished)).

Mr. Crosby's innocence assertion is unavailing. A prisoner can establish actual innocence in post-conviction proceedings only by bringing forward new exculpatory evidence. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) (citing *House v. Bell*, 547 U.S. 518, 538 (2006); *Schlup v. Delo*, 513 U.S. 298, 329 (1995)). Mr. Crosby has produced no new evidence. Nor has he otherwise presented meritorious arguments to challenge the district court's dismissal.

III. CONCLUSION

We affirm the district court's judgment. We deny Mr. Crosby's motion to proceed *ifp*.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-01191-LTB-GPG

GREGORY D. CROSBY, a/k/a Gregory D. Cosby,

Applicant,

v.

BILL TRUE, Warden,

Respondent.

JUDGMENT

Pursuant to and in accordance with the Order of Dismissal entered by Lewis T. Babcock, Senior District Judge, on August 6, 2020, it is hereby

ORDERED that Judgment is entered in favor of Respondent and against Applicant.

DATED at Denver, Colorado, this 6th day of August, 2020.

FOR THE COURT,

JEFFREY P. COLWELL, Clerk

By: s/ S. Phillips,
Deputy Clerk

Appendix
Attachment A

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CC FILE COPY Rec'd Q ET 8-10-20

Civil Action No. 20-cv-01191-LTB-GPG

GREGORY D. CROSBY, a/k/a Gregory D. Cosby,

Applicant,

v.

BILL TRUE, Warden,

Respondent.

ORDER

This matter is before the Court on the Recommendation of United States Magistrate Judge filed on July 7, 2020. (ECF No. 17). Plaintiff has filed timely written objections to the Recommendation. (ECF No. 18). The Court has therefore reviewed the Recommendation *de novo* in light of the file and record in this case. On *de novo* review the Court concludes that the Recommendation is correct.

Accordingly, for the foregoing reasons, it is

ORDERED that Applicant's Objection (ECF No. 18) is overruled. It is

FURTHER ORDERED that the Recommendation of United States Magistrate Judge (ECF No. 17) is accepted and adopted. It is

FURTHER ORDERED that the Amended Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (ECF No. 13) is denied and the action is dismissed for lack of statutory jurisdiction. It is

Appendix 1
Attachment A

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FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal is denied without prejudice to the filing of a motion seeking leave to proceed *in forma pauperis* on appeal in the United States Court of Appeals for the Tenth Circuit.

DATED at Denver, Colorado, this 6th day of August, 2020.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court

NOTE/ NOA/ IFP Motion filed 8-11-20

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-01191-LTB-GPG

GREGORY D. CROSBY, a/k/a Gregory D. Cosby,

Applicant,

v.

BILL TRUE, Warden,

Respondent.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter comes before the Court on the Amended Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (ECF No. 13)[1] ("the Application") filed *pro se* by Applicant Gregory D. Crosby on June 8, 2020. The matter has been referred to this Magistrate Judge for recommendation. (ECF No. 16)[2].

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[1] "(ECF # 13)" is an example of the convention I use to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). I use this convention throughout this Recommendation.

[2] Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72(b). The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted or adopted by the District Court. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

The Court must construe Applicant's filings liberally because he is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not act as an advocate for a *pro se* litigant. *See Hall*, 935 F.2d at 1110.

The Court has reviewed the filings to date. The Court has considered the entire case file, the applicable law, and is sufficiently advised in the premises. This Magistrate Judge respectfully recommends that the action be dismissed without prejudice for lack of jurisdiction.

I. Factual and Procedural Background

Applicant, Gregory D. Crosby, is a prisoner in the custody of the Federal Bureau of Prisons (BOP), currently incarcerated at the United States Penitentiary Florence ADMAX in Florence, Colorado. A review of Court records indicate the following history regarding Mr. Crosby's federal conviction.[3] On December 8, 2009, Mr. Crosby was convicted by a jury in the District of Kansas of attempted bank robbery and conveying false information. *See United States v. Crosby*, 5:09-cr-40049-KHV (D. Kan.) at ECF No. 57. On March 11, 2010, he was sentenced to a total of 262 months imprisonment. (*Id.* at ECF No. 72). On March 23, 2011, the Tenth Circuit affirmed his convictions. *United States v. Crosby*, 416 Fed. Appx. 776 (10th Cir. 2011). On July 8, 2011, Mr. Crosby filed his first § 2255 motion in the District of Kansas. *See United States v. Crosby*, 5:09-cr-40049-KHV (D. Kan.) at ECF No. 95. The Court denied the § 2255 motion on March 16, 2012, and the Tenth Circuit affirmed on June 21, 2012. *See id.* at

[3] A court can take judicial notice of its records and files. *See St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979).

ECF No. 111; *United States v. Crosby*, 468 Fed. App'x. 913 (10th Cir. 2012), *cert. denied*, 133 S. Ct. 314 (2012).

Next, on October 22, 2012, Mr. Crosby filed a motion for reconsideration in the District of Kansas, which was denied on January 18, 2013 as an unauthorized second or successive § 2255 motion. *See United States v. Crosby*, 5:09-cr-40049-KHV (D. Kan.) at ECF Nos. 127 and 135. The Tenth Circuit affirmed and denied Mr. Crosby's request for a certificate of appealability on May 30, 2013. *United States v. Crosby*, No. 13-3023, 515 Fed. App'x. 771, 772 (10th Cir. 2013), *cert. denied*, 134 S. Ct. 361 (2013).

Undeterred, on February 9, 2015, Mr. Crosby again filed a § 2255 motion, which was denied as an unauthorized second or successive § 2255 motion on March 23, 2015. *See United States v. Crosby*, 5:09-cr-40049-KHV (D. Kan.) at ECF Nos. 150 and 153. The Tenth Circuit denied his request for a certificate of appealability on June 5, 2015. *Id.* at ECF No. 158.

Again, on February 14, 2020, he filed a § 2255 motion, which was denied as an unauthorized second or successive §2255 motion on April 2, 2020. *See United States v. Crosby*, 5:09-cr-40049-KHV (D. Kan.) at ECF Nos. 196 and 198. His appeal requesting a certificate of appealability is still pending. *See United States v. Crosby*, 20-3078 (10th Cir.) (appeal docketed April 28, 2020).

In addition to the numerous successive filings in the District of Kansas, on October 17, 2013, Mr. Crosby filed an Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 in this Court challenging his federal conviction. *See Crosby v. Oliver*, 13-cv-02845-LTB, ECF No. 1. This Court denied his § 2241 application on November 15, 2013 because he had an adequate and effective remedy in the

sentencing court. *Id.* at ECF No. 6. The Tenth Circuit affirmed. *See Crosby v. Oliver*, 13-1513, 561 Fed. Appx. 754 (10th Cir. April 14, 2014), *cert. denied* 574 U.S. 843 (2014).

On April 28, 2020, Mr. Crosby initiated the instant habeas corpus action. (ECF No. 1). On June 8, 2020, he filed *pro se* an Amended Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (ECF No. 13), challenging the validity of his federal sentence. He asserts the following claim: "Trial Court erred when the $3,000 was not mentioned during trial." (*Id.* at 4). He alleges that he has tried to raise this claim numerous times, but that "§ 2255 has been inadequate and ineffective to prove his innocence." (*Id.* at 10).

II. Analysis

The purposes of an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 and a motion to vacate under 28 U.S.C. § 2255 are distinct and well established. "A petition under 28 U.S.C. § 2241 attacks the execution of a sentence rather than its validity and must be filed in the district where the prisoner is confined." *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996). "A 28 U.S.C. § 2255 petition attacks the legality of detention . . . and must be filed in the district that imposed the sentence." *Id.* (citation omitted). "The purpose of section 2255 is to provide a method of determining the validity of a judgment by the court which imposed the sentence, rather than by the court in the district where the prisoner is confined." *Johnson v. Taylor*, 347 F.2d 365, 366 (10th Cir. 1965) (per curiam).

A habeas corpus petition pursuant to 28 U.S.C. § 2241 "is not an additional, alternative, or supplemental remedy, to the relief afforded by motion in the sentencing

court under § 2255." *Williams v. United States*, 323 F.2d 672, 673 (10th Cir. 1963) (per curiam). Instead, "[t]he exclusive remedy for testing the validity of a judgment and sentence, unless it is inadequate or ineffective, is that provided for in 28 U.S.C. § 2255." *Johnson v. Taylor*, 347 F.2d 365, 366 (10th Cir. 1965); *see* 28 U.S.C. § 2255(e).

Mr. Crosby bears the burden of demonstrating that the remedy available pursuant to § 2255 is inadequate or ineffective. *See Prost v. Anderson*, 636 F.3d 578, 584 (10th Cir. 2011). This burden is not easily satisfied because "[o]nly in rare instances will § 2255 fail as an adequate or effective remedy to challenge a conviction or the sentence imposed." *Sines v. Wilner*, 609 F.3d 1070, 1073 (10th Cir. 2010); *see also Caravalho v. Pugh*, 177 F.3d 1177, 1178 (10th Cir. 1999) (noting that the remedy available pursuant to § 2255 is inadequate or ineffective only in "extremely limited circumstances"). The test for determining whether the remedy provided in the sentencing court pursuant to § 2255 is inadequate or ineffective is whether Mr. Crosby's claim could have been raised in an initial § 2255 motion. *See Prost*, 636 F.3d at 584. "If the answer is yes, then the petitioner may not resort to the savings clause [in § 2255(e)] and § 2241." *Id.* The opportunity to seek a § 2255 remedy must be deemed "genuinely absent" before a prisoner may properly file a § 2241 application. *Prost,* 636 F.3d at 588. For example, the savings clause may be met when the original sentencing court has been abolished or dissolved, and the applicant has nowhere to file a § 2255 motion. *See id.*; *see also Caravalho*, 177 F.3d at 1178 (listing cases). "The savings clause doesn't guarantee results, only process." *Prost*, 636 F.3d at 590.

Mr. Crosby fails to demonstrate that the remedy available to him pursuant to § 2255 in the sentencing court is inadequate or ineffective. The fact that Mr. Crosby

has sought and been denied relief pursuant to § 2255 does not mean that the remedy provided in § 2255 is inadequate or ineffective. *See Bradshaw*, 86 F.3d at 166 (quoting *Williams*, 323 F.2d at 673 ("Failure to obtain relief under § 2255 does not establish that the remedy so provided is either inadequate or ineffective."). The fact that Mr. Crosby is barred from raising his claim in a second or successive motion pursuant to § 2255, by itself, also does not demonstrate that the remedy provided in § 2255 is inadequate or ineffective. *See Caravalho*, 177 F.3d at 1179. Therefore, I recommend that the § 2241 application be denied because Mr. Crosby has an adequate and effective remedy pursuant to § 2255 in the sentencing court.

III. Recommendation

For the reasons set forth herein, this Magistrate Judge respectfully RECOMMENDS that the Amended Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (ECF No. 13) be denied and the action be dismissed for lack of statutory jurisdiction.

DATED July 7, 2020.

BY THE COURT:

Gordon P. Gallagher
United States Magistrate Judge