

alleging an error in a grand jury proceeding must be filed in advance of trial. Fed. R. Crim. P. 12(b)(3)(A)(v). Likewise, a motion regarding a defect in discovery must be filed pretrial. Fed. R. Crim. P. 12(b)(3)(E). Neither motion was filed prior to Rutherford's guilty plea, nor were the issues raised on appeal.

Accordingly, to prevail, Rutherford must demonstrate both cause and actual prejudice. The Petition fails to do so. Regarding the allegedly improper grand jury testimony, Rutherford cites to testimony about the statements that he made to the interviewing officer during the execution of the search warrant. Memo p.2. Rutherford broadly claims that he never made such statements and references his recorded interview. *Id.* However, those statements are largely reflected in the Factual Basis Rutherford adopted both verbally and in writing, as well as in the PSR. ECF #56, 76 ¶ 10. Moreover, the government produced a transcript of Rutherford's interview to the defense for trial, which similarly supports this testimony. Rutherford provides no basis for finding that these statements were incorrect and, even if true, he fails to demonstrate how that grand jury testimony prejudiced his case, especially in light of his decision to plead guilty and admit to the same facts during his plea colloquy.<sup>3</sup>

Similarly, Rutherford's Petition contains a lengthy discussion of the *Brady* doctrine and its requirements, but with respect to his own claim, states only "Petitioner

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<sup>3</sup> Ground Three suggests that Edgett was ineffective for failing to file a motion to compel the government to produce materials in accordance with the Jencks Act, 18 U.S.C. § 3500, *et seq.*, including the grand jury testimony he cites in Ground One. Memo p.3. The government respectfully submits that all Jencks Act material was provided to the defense, in accordance with the Pretrial Discovery Order and the statute. Indeed, Rutherford's citation to this very testimony indicates that he also has a copy of these materials. Given that Edgett received the Jencks Act materials on behalf of the defense, it is unclear to the government how he was deficient or what "motion to compel" he purportedly should have filed.

**APPENDIX "B"**

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quotation marks and citation omitted). Mandamus is a possible remedy when the district court has unduly delayed in ruling on a case. *See Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661-62 (1978) (holding that, where a district court persistently and unreasonably fails to adjudicate a case, the court of appeals may issue a writ of mandamus in order to exercise its appellate jurisdiction).

Rutherford's case has been referred to a magistrate judge. In expanding the duties of magistrate judges under 28 U.S.C. § 636(b), "Congress made clear that . . . the magistrate [judge] acts subsidiary to and only in aid of the district court. Thereafter, the entire process takes place under the district court's total control and jurisdiction." *United States v. Raddatz*, 447 U.S. 667, 681 (1980). Thus, this court neither monitors nor supervises the work of United States magistrate judges to whom cases are referred under § 636(b). If Rutherford is dissatisfied with the magistrate judge's handling of his case, he should direct his complaints to the district court judge, in this case, Judge Crone.

In any event, in Rutherford's case, there has been no undue delay. Rutherford's § 2255 motion was date-stamped as filed on May 10, 2019. After the magistrate judge ordered the Government to answer, Rutherford, in July 2019, filed his first motion for immediate release and a motion for summary judgment. The Government responded to Rutherford's § 2255 motion on August 16, 2019, and in an order entered August 21, 2019, the district court denied Rutherford's motions for immediate release and for summary judgment. Rutherford's second motion for immediate release was date-stamped as filed October 4, 2019. The magistrate judge denied the motion, and this court dismissed Rutherford's interlocutory appeal from the denial of the motion for lack of jurisdiction on December 13, 2019. *United States v Rutherford*, No. 19-40960 (5th Cir. Dec. 13, 2019) (unpublished). Rutherford filed a second motion for summary judgment, date-stamped as filed on November 4, 2019, and a third motion for immediate release, date-

**APPENDIX "C"**

*pro se* motions, affidavits, or requests for relief in this court without the advance written permission of a judge of this court. *See, e.g., In re Johnson*, 20-40328 (5th Cir. Oct. 20, 2020); *United States v. Andrade*, 134 F.3d 368 (5th Cir. 1997).

**IV. Conclusion**

Consistent with the foregoing analysis, Rutherford's Expedited Motion for Compassionate Release (#117), Application to Proceed Without Prepayment of Fees (#113), and Motion to Dismiss Indictment (#115) are DENIED. It is further ORDERED that Rutherford must seek leave of court before filing any future *pro se* motions. Any *pro se* filings made without leave of court will be rejected by the clerk and not considered by the court. The clerk of this court is directed to return to Rutherford, unfiled, any attempted submissions inconsistent with this bar.

SIGNED at Beaumont, Texas, this 15th day of December, 2020.



MARCIA A. CRONE  
UNITED STATES DISTRICT JUDGE

# United States Court of Appeals for the Fifth Circuit

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No. 20-40079

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IN RE: BRUCE ALLEN RUTHERFORD, *also known as ALLEN BRUCE RUTHERFORD,*

*Petitioner.*

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Petition for a Writ of Mandamus  
to the United States District Court  
for the Eastern District of Texas  
USDC No. 4:19-CV-348  
USDC No. 4:17-CR-41-1

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Before COSTA, DUNCAN, and OLDHAM, *Circuit Judges.*

PER CURIAM:

This panel previously GRANTED petitioner's motion for leave to proceed IFP, and further DENIED the motion for immediate release pending disposition of his § 2255 motion and the petition for writ of mandamus; and DENIED as MOOT, the request for a ruling on the mandamus petition. The panel has considered Petitioner's motion for reconsideration of the denial of the motion for release pending disposition of his § 2255 motion and the petition for writ of mandamus.

IT IS ORDERED that the motion is DENIED.

United States Court of Appeals  
for the Fifth Circuit

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No. 20-40079

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IT IS ORDERED that the motion is DENIED.



# United States Court of Appeals for the Fifth Circuit

A True Copy  
Certified order issued Aug 20, 2020

*Tyke W. Cayer*  
Clerk, U.S. Court of Appeals, Fifth Circuit

\_\_\_\_\_  
No. 20-40079  
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IN RE: BRUCE ALLEN RUTHERFORD, ALSO KNOWN AS ALLEN  
BRUCE RUTHERFORD,

*Petitioner.*

\_\_\_\_\_  
Petition for a Writ of Mandamus to the  
United States District Court for the  
Eastern District of Texas  
USDC No. 4:17-CR-41-1  
USDC No. 4:19-CV-348  
\_\_\_\_\_

Before COSTA, DUNCAN, and OLDHAM, *Circuit Judges.*

PER CURIAM:

Bruce Allen Rutherford, federal prisoner # 27006-078, has filed in this court a pro se petition for a writ of mandamus, a motion requesting leave to file his mandamus petition in forma pauperis (IFP), a request for a ruling on his mandamus petition, and a motion for immediate release. The motion to proceed IFP is GRANTED.

In his petition, Rutherford complains of delay in the adjudication of his 28 U.S.C. § 2255 motion. "Mandamus is an extraordinary remedy that should be granted only in the clearest and most compelling cases." *In re Willy*, 831 F.2d 545, 549 (5th Cir. 1987). A party seeking mandamus relief must show both that he has no other adequate means to obtain the requested relief and that he has a "clear and indisputable" right to the writ. *Id.* (internal

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quotation marks and citation omitted). Mandamus is a possible remedy when the district court has unduly delayed in ruling on a case. *See Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661-62 (1978) (holding that, where a district court persistently and unreasonably fails to adjudicate a case, the court of appeals may issue a writ of mandamus in order to exercise its appellate jurisdiction).

Rutherford's case has been referred to a magistrate judge. In expanding the duties of magistrate judges under 28 U.S.C. § 636(b), "Congress made clear that . . . the magistrate [judge] acts subsidiary to and only in aid of the district court. Thereafter, the entire process takes place under the district court's total control and jurisdiction." *United States v. Raddatz*, 447 U.S. 667, 681 (1980). Thus, this court neither monitors nor supervises the work of United States magistrate judges to whom cases are referred under § 636(b). If Rutherford is dissatisfied with the magistrate judge's handling of his case, he should direct his complaints to the district court judge, in this case, Judge Crone.

In any event, in Rutherford's case, there has been no undue delay. Rutherford's § 2255 motion was date-stamped as filed on May 10, 2019. After the magistrate judge ordered the Government to answer, Rutherford, in July 2019, filed his first motion for immediate release and a motion for summary judgment. The Government responded to Rutherford's § 2255 motion on August 16, 2019, and in an order entered August 21, 2019, the district court denied Rutherford's motions for immediate release and for summary judgment. Rutherford's second motion for immediate release was date-stamped as filed October 4, 2019. The magistrate judge denied the motion, and this court dismissed Rutherford's interlocutory appeal from the denial of the motion for lack of jurisdiction on December 13, 2019. *United States v. Rutherford*, No. 19-40960 (5th Cir. Dec. 13, 2019) (unpublished). Rutherford filed a second motion for summary judgment, date-stamped as filed on November 4, 2019, and a third motion for immediate release, date-

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stamped as filed on January 8, 2020. In an order entered March 18, 2020, the district court denied both motions, and on June 26, 2020, this court dismissed Rutherford's interlocutory appeal from the denial of summary judgment for lack of jurisdiction, denied release on bail pending appeal because he had not made the required showing, and affirmed the district court's denial of release on bail pending the disposition of the § 2255 motion on the same basis. *United States v. Rutherford*, 810 F. App'x 375 (5th Cir. 2020).

Rutherford's § 2255 motion is under active consideration in the district court. To the extent that Rutherford disagrees with that court's handling of his case, he may argue any such issue once final judgment is entered, either in a motion for a certificate of appealability or, if it is granted, on appeal. Mandamus relief is not appropriate.

The petition for a writ of mandamus is DENIED. Rutherford's motion for immediate release pending disposition of his § 2255 motion is DENIED.<sup>1</sup> His request for a ruling on his mandamus petition is DENIED AS MOOT.

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<sup>1</sup> Although Rutherford makes a conclusory assertion in his request for release that he is at high risk of COVID-19, he does not cite this as a basis for release but instead appears to seek expedited consideration of his release request on this ground. As in his interlocutory appeal, he fails to satisfy the grounds for release. See *Rutherford*, 810 F. App'x at 375.

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

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BRUCE ALLEN RUTHERFORD #27006-078 §

versus

UNITED STATES OF AMERICA

§ CIVIL ACTION NO. 4:19-CV-348  
§ CRIMINAL ACTION NO. 4:17-CR-41(1)

**ORDER**

The above-entitled and numbered civil action was referred to United States Magistrate Judge Christine A. Nowak, who issued a Report and Recommendation concluding that Movant's motion for summary judgment and motion for immediate release (Dkt. ##21, 26) should be denied. Movant did not file objections. Having reviewed the Report and Recommendation, the Court concludes that the findings and conclusions of the Magistrate Judge are correct, and adopts the same as the findings and conclusions of the Court.

It is therefore **ORDERED** that Movant's Motions for Summary Judgment (#21) and Immediate Release (Dkt. #26) are **DENIED**.

SIGNED at Beaumont, Texas, this 18th day of March, 2020.



MARCIA A. CRONE  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION

BRUCE A. RUTHERFORD, #27006-078  
VS.  
UNITED STATES OF AMERICA

CIVIL ACTION NO. 4:19CV348  
CRIMINAL ACTION NO. 4:17CR41(1)

**REPORT AND RECOMMENDATION**  
**OF UNITED STATES MAGISTRATE JUDGE**

*Pro se* Movant Bruce Allen Rutherford filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, challenging his Eastern District of Texas, Sherman Division conviction. The motion was referred to the undersigned United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case pursuant to 28 U.S.C. § 636, and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to the United States Magistrate Judge.

## **MOTION FOR SUMMARY JUDGMENT**

Movant filed a motion for summary judgment (Dkt. #21). He argues that there are no genuine issues of fact in dispute; thus, he is entitled to summary judgment. A motion for summary judgment is not a proper method of adjudicating a motion brought pursuant to 28 U.S.C. § 2255.

*See Browder v. Director, Ill. Dept. of Correction*, 434 U.S. 257, 269, n.14 (1978); *United States v. Hurley*, 2005 WL 1473828 n.5 (N.D. Tex 2005) (Not Reported in F. Supp.2d). The Rules Governing Section 2255 Proceedings for the United States District Courts (2255 Rules) do not contemplate such a motion. Although Rule 12 permits a court to apply the Federal Rules of Civil Procedure when appropriate, motions for summary judgment under Fed. R. Civ. P. 56 are not

appropriate or necessary in the habeas context. This is especially true where the motion essentially seeks the same relief as that sought in the underlying motion to vacate.

Additionally, the Court notes that Movant filed a motion for release pending the result of his federal habeas corpus proceedings (Dkt. #26). However, Movant has been adjudged guilty of a criminal offense. His charges are no longer afforded the presumption of innocence, one of the primary reasons for granting bond pending trial and direct appeals. Even there, “[t]here is no absolute right to bail pending appeal.” *Ballard v. Texas*, 438 F.2d 640 (5th Cir. 1971).

For these reasons stated, the court should summarily deny the motions.

#### **RECOMMENDATION**

It is accordingly recommended that the motion for summary judgment (Dkt. #21) and the motion for immediate release (Dkt #26) be **DENIED**.

Within fourteen days after service of the magistrate judge’s report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). To be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge’s report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Servs. Auto. Ass’n*, 79 F.3d

1415, 1430 (5th Cir. 1996) (*en banc*), *superceded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

**SIGNED this 24th day of February, 2020.**



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Christine A. Nowak  
UNITED STATES MAGISTRATE JUDGE