

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

JAN 14 2021

GIUSEPPE VIOLA, AKA Joseph John
Viola,

Petitioner-Appellant,

v.

DAVID SHINN, Director; EDWIN
JENSEN,

Respondents-Appellees.

No. 20-16654

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

D.C. No. 2:20-cv-01107-DJH-MHB
District of Arizona,
Phoenix

ORDER

Before: THOMAS, Chief Judge, and BRESS, Circuit Judge.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015); *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (order).

Any pending motions are denied as moot.

DENIED.

ASH

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Giuseppe Viola,

Petitioner,

v.

David Shinn, et al.,

Respondents.

No. CV-20-01107-PHX-DJH (MHB)

ORDER

Petitioner Giuseppe Viola, who is confined in the Arizona State Prison Complex-Yuma, has filed a pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 (Doc. 1), an Application to Proceed In Forma Pauperis (Doc. 2), and an Emergency Motion for Temporary Restraining Order (Doc. 3). The Court will deny the motion, and dismiss the Petition and this action.

I. Application to Proceed In Forma Pauperis

Petitioner's Application to Proceed In Forma Pauperis indicates that his inmate trust account balance is less than \$25.00. Accordingly, the Court will grant Petitioner's Application to Proceed In Forma Pauperis. *See* LRCiv 3.5(b).

II. Petition

Petitioner was convicted in Maricopa County Superior Court, case #CR 1990-010323, of five counts of fraudulent schemes and artifices; his current projected release date is in 2041.¹

¹ *See* Arizona Department of Corrections "Inmate Datasearch" (available at <https://corrections.az.gov/public-resources/inmate-datasearch>) (search for "Inmate No.

Petitioner also notes that he was previously convicted in the United States District Court for the Northern District of California, case no. CR 10-00588-EJD, of one count of mail fraud, for which he was sentenced to 105 months of imprisonment to be served concurrently with his sentences in Maricopa County case no. CR 1990-010323 and in the custody of the Arizona Department of Corrections. Petitioner further notes that “[d]uring the past year, the federal term of imprisonment was terminated ... leaving only the Arizona sentence.” As such, Petitioner is currently incarcerated solely on his state convictions.

In his Petition, Petitioner names David Shinn as Respondent and the Arizona Attorney General as an Additional Respondent. Petitioner seeks release from prison due to the ongoing COVID-19 pandemic, asserting that because he is elderly and has an underlying heart condition, he is likely to suffer severe consequences if he contracts the virus.

III. Failure to Allege a Constitutional Violation

Section 2241(c)(3), 28 U.S.C. empowers a federal court to grant habeas corpus relief when a prisoner is “in custody in violation of the Constitution or laws or treaties of the United States.” This power is circumscribed for prisoners — like Petitioner — who are in state custody by 28 U.S.C. § 2254(a), which requires the Court to “entertain an application for a writ of habeas corpus [o]n behalf of a person in custody pursuant to the judgment of a State court **only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.**” (Emphasis added.)

Here, Petitioner seeks relief “as provided by” 18 U.S.C. § 3624(c)(2) and 34 U.S.C. § 60541(g)(5)(a). However, as noted previously, Petitioner has completed his federal sentence, and is no longer in federal custody. For that reason, 18 U.S.C. § 3624(c)(2) and 34 U.S.C. § 60541(g)(5)(a) do not apply to Petitioner’s current incarceration.² Accordingly, Petitioner’s only basis for relief is 28 U.S.C. § 2241, but, because he is a state

050936”) (*last visited* June 8, 2020).

² 18 U.S.C. § 3624(c)(2) provides for prelease of prisoners in the custody of the federal Bureau of Prisons. Similarly, 34 U.S.C. § 60541(g)(5)(a) establishes a program for the release of elderly “federal prisoners.” Petitioner is neither in the custody of the federal Bureau of Prisons, nor is he a federal prisoner.

1 prisoner, to be entitled to habeas relief under § 2241 he must demonstrate that he is “in
 2 custody in violation of the Constitution or laws or treaties of the United States.” Absent
 3 from Petitioner’s grounds for relief is any statement that he is in custody in violation of the
 4 Constitution or the laws or treaties of the United States. Rather, as noted, Petitioner only
 5 seeks relief “as provided by” 18 U.S.C. § 3624(c)(2) and 34 U.S.C. § 60541(g)(5)(a), which
 6 do not apply to him. Thus, the Court lacks jurisdiction over this case.

7 Further, “§ 2254 is the exclusive avenue for a state prisoner challenging the
 8 constitutionality of his detention ... even if the petitioner is not challenging the underlying
 9 state court conviction ... so long as the person is in custody pursuant to the judgment of a
 10 state court.” *Frost v. SCI Albion*, 2011 WL 4502835, *3 (W.D. Pa. Sept. 28, 2011) (citing
 11 *Felker v. Turpin*, 518 U.S. 651, 662 (1996) (“Our authority to grant habeas relief to state
 12 prisoners is limited by § 2254, which specifies the conditions under which such relief may
 13 be granted to “a person in custody pursuant to the judgment of a State court.”)). The
 14 majority of district courts to address similar petitions filed by state court prisoners seeking
 15 relief due to the threat COVID-19 poses to them have treated such petitions as seeking
 16 relief under 28 U.S.C. § 2254 and have dismissed for failure to exhaust. *See e.g. Denbow*
 17 *v. Maine Dep’t of Corr.*, No. 1:20cv00175, 2020 WL 3052220, at * (D. Me. June 8, 2020)
 18 (denying TRO sought by state prisoner pursuant to § 2241 and applying § 2254
 19 requirements to petition); *Bussinger v. Gramp*, No. 20cv05600, 2020 WL 2989080, at *1
 20 (D. N.J. June 3, 2020) (dismissing state prisoner’s § 2241 petition for lack of jurisdiction
 21 and noting subject to dismissal for lack of exhaustion); *Brooks v. Wolcott*, No. 20cv00516,
 22 2020 WL 2553030, at *5 (W.D. N.Y. May 20, 2020) (converting § 2241 petition filed by
 23 state prisoner to § 2254 petition under circuit law); *Frazier v. Kelley*, No. 4:20cv00434,
 24 2020 WL 2561956, at *1 (E.D. Ark. May 19, 2020) (denying preliminary injunction sought
 25 by state prisoners in proposed class action under § 1983 and § 2241); *Griffin v. Cook*, No.
 26 3:20cv00589, 2020 WL 2735886, *1 (D. Conn. May 6, 2020) (dismissing § 2254 petition
 27 seeking relief based upon threat of covid to vulnerable petitioner for failure to exhaust and
 28 absent showing exhaustion futile); *Makin v. Wainwright*, No. 3:20cv00912, 2020 WL

2085141, at *1 (N.D. Ohio Apr. 30, 2020) (§ 2241 petition construed under § 2254 and dismissed for lack of exhaustion).

As a result, because the Petition challenges Petitioner's custody pursuant to a state court judgment, this Court does not have jurisdiction under § 2241 to hear his claims. Because this defect cannot be cured by amendment, the Court will dismiss this action.³

IT IS ORDERED:

(1) Petitioner's Application to Proceed In Forma Pauperis (Doc. 2) is **granted**.

(2) Petitioner's Petition for Writ of Habeas Corpus (Doc. 1) and this action are **dismissed** for lack of jurisdiction, and the Clerk of Court must enter judgment accordingly.

(3) Petitioner's Emergency Motion for Temporary Restraining Order (Doc. 3) is **denied** as moot.

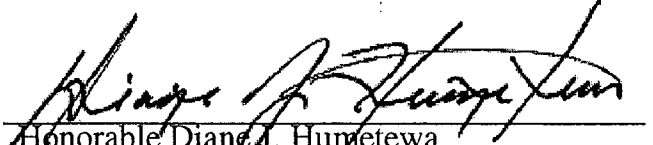
(4) Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, in the event Petitioner files an appeal, the Court declines to issue a certificate of appealability because reasonable jurists would not find the Court's procedural ruling debatable. *See*

³ The Court further notes that before it may grant habeas corpus relief to a state prisoner, the prisoner must exhaust remedies available in the state courts. 28 U.S.C. § 2254(b)(1); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). An Arizona petitioner sentenced to less than the death penalty may exhaust his federal claims by presenting them in a procedurally proper way to the Arizona Court of Appeals on direct appeal and/or in post-conviction proceedings, without seeking discretionary review in the Arizona Supreme Court. *Crowell v. Knowles*, 483 F. Supp. 2d 925, 928-30, 933 (D. Ariz. 2007) (following 1989 statutory amendment, Arizona Court of Appeals has jurisdiction over criminal convictions involving less than a death sentence); *cf. Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999) (citing pre-1989 statute). To exhaust a claim, a petitioner must describe "both the operative facts and the federal legal theory on which his claim is based so that the state courts [could] have a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim." *Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005) (quoting *Kelly v. Small*, 315 F.3d 1063, 1066 (9th Cir. 2003), *overruled in part on other grounds by Robbins v. Carey*, 481 F.3d 1143 (9th Cir. 2007)). The failure to exhaust subjects the Petition to dismissal. *See Gutierrez v. Griggs*, 695 F.2d 1195, 1197 (9th Cir. 1983).

If a prisoner has a direct appeal or initial petition for post-conviction relief pending in state court, the federal exhaustion requirement is not satisfied. *See Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983) (pending appeal); *Schnepp v. Oregon*, 333 F.2d 288, 288 (9th Cir. 1964) (pending post-conviction proceeding); *see also Henderson v. Johnson*, 710 F.3d 872, 874 (9th Cir. 2013) ("*Sherwood* stands for the proposition that a district court may not adjudicate a federal habeas petition while a petitioner's direct state appeal is pending"). The prisoner must await the outcome of the pending state-court challenge before proceeding in federal court, "even where the issue to be challenged in the writ of habeas corpus has been finally settled in the state courts." *Sherwood*, 716 F.3d at 634.

1 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

2 Dated this 10th day of June, 2020.

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6 Honorable Diane J. Humetewa
United States District Judge
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No. 20-16654

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District of Arizona,
Phoenix

ORDER

Before: McKEOWN and BUMATAY, Circuit Judges.

Appellant's motion for reconsideration en banc (Docket Entry No. 6) is
denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

**Additional material
from this filing is
available in the
Clerk's Office.**