

United States Court of Appeals
for the Fifth Circuit

No. 21-30345

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ARMSTEAD KIEFFER,

Defendant—Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:17-CR-114-3

ON PETITION FOR REHEARING EN BANC

Before HIGGINBOTHAM, HIGGINSON, and DUNCAN, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

February 22, 2022

Lyle W. Cayce
Clerk

No. 21-30345
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ARMSTEAD KIEFFER,

Defendant—Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:17-CR-114-3

Before HIGGINBOTHAM, HIGGINSON, and DUNCAN, *Circuit Judges.*

PER CURIAM:*

Armstead Kieffer, federal prisoner # 22956-034, was convicted of conspiracy to commit bank robbery, in violation of 18 U.S.C. § 371; attempted armed bank robbery resulting in death, in violation of 18 U.S.C. § 2113(a), (d) and (e); causing death through use of a firearm, in violation of

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

18 U.S.C. § 924(j)(1); making a material false statement to a grand jury, in violation of 18 U.S.C. § 1623; and possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and he was sentenced to life imprisonment. *See United States v. Kieffer*, 991 F.3d 630, 633-34 (5th Cir. 2021). His convictions and sentences were confirmed. *Id.* at 633-37.

Proceeding pro se, Kieffer now appeals the district court's denial of his pro se motion for a writ of mandamus, in which he asked that the district court order the United States Attorney's Office to provide a copy of Federal Deposit Insurance Corporation (FDIC) certificate that he asserted was needed in support of his petition for a writ of certiorari to the Supreme Court.

A district court has jurisdiction over "any action in the nature of mandamus" seeking to compel a United States officer "to perform a duty owed a plaintiff." 28 U.S.C. § 1361. The authority to issue a writ of mandamus derives from the All Writs Act (AWA), 28 U.S.C. § 1651, which grants federal courts the power to issue all writs in aid of their jurisdiction. *See In re Gee*, 941 F.3d 153, 157 (5th Cir. 2019). Under the AWA, three requirements must be met before a writ of mandamus will issue. *United States v. Williams*, 400 F.3d 277, 280 (5th Cir. 2005). Relevant here, the party seeking the writ must show "that his right to issuance of the writ is clear and indisputable." *Id.* at 281.

Kieffer raises no argument challenging the district court's determination that he did not establish "a clear right" to the FDIC certificate in light of his stipulation as to the federally-insured status of the banking institutions. Instead, he appears to challenge whether the parties could stipulate to that element of the § 2113 offense and whether the stipulation was sufficient to prove that element.

Thus, Kieffer has not shown "that his right to issuance of the writ is clear and indisputable." *Williams*, 400 F.3d at 280-81. We note that insofar

as Kieffer raises claims for the first time in his reply brief, those claims are not considered, *see United States v. Jackson*, 426 F.3d 301, 304 n.2 (5th Cir. 2005), and that a motion under 28 U.S.C. § 2255 is the primary means by which a federal prisoner may raise claims “for errors that occurred at or prior to the sentencing,” *Padilla v. United States*, 416 F.3d 424, 425-26 (5th Cir. 2005) (internal quotation marks and citation omitted).

As there is no error in the district court’s denial of the motion for a writ of mandamus, the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

CRIMINAL ACTION

VERSUS

NO. 17-114

ARMSTEAD KIEFFER

SECTION "B"(1)

ORDER

IT IS ORDERED that defendant Armstead Kieffer's "Motion for a Certificate of Appealability" (Rec. Doc. 227) is **DENIED**. A certificate of appealability is "only necessary when there has been a final order in a proceeding under 28 U.S.C. § 2254 or § 2255." *Hyder v. Sanderson*, No. 3:02-CV-2145-G, 2003 WL 21946945 (N.D.Tex. Jan. 9, 2003) (citing 28 U.S.C. § 2253). Moreover, a court may only issue such a certificate "upon a substantial showing of the denial of a constitutional right." *Hyder*, 2003 WL 21946945, at *1 (citing *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000)). Because Kieffer sought relief under a writ of mandamus and not § 2254 or § 2255, there is no final order pursuant to a § 2254 or § 2255 proceeding. See Rec. Doc. 219. Additionally, Kieffer has failed to make any showing of a denial of a constitutional right.

New Orleans, Louisiana, this 21st day of June, 2021



SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

CRIMINAL ACTION

VERSUS

NO. 17-114

ARMSTEAD KIEFFER

SECTION "B" (1)

ORDER AND REASONS

Before the Court are defendant's "Motion for a Writ of Mandamus" (Rec. Doc. 219) and the government's opposition (Rec. Doc. 221). For the reasons discussed below,

IT IS ORDERED that the motion (Rec. Doc. 219) is **DENIED**.

FACTS OF THE CASE AND PROCEDURAL HISTORY

Defendant Armstead Kieffer ("Kieffer"), alongside his co-defendant and father Jerome Kieffer and a third man, were charged for crimes arising from a 2015 armed robbery of an armed truck servicing a Chase Bank ATM and a 2017 attempted robbery of an armed truck servicing a Campus Federal Credit Union ATM. Rec. Doc. 218 at 3. After a five-day trial, a jury convicted Armstead Kieffer of conspiracy to commit bank robbery, attempted armed bank robbery resulting in death, causing death through making use of a firearm, making a false statement to a grand jury, and possession of a firearm by a felon. *Id.*

On March 22, 2019, Kieffer appealed the judgment against him, arguing, among other things, that the evidence did not support his conviction. Rec. Doc. 174. On March 19, 2021, the Fifth Circuit

affirmed this Court's judgment. Rec. Doc. 218; see *United States v. Kieffer*, 991 F.3d 630 (5th Cir. 2021).

Kieffer presently seeks to file a petition for a writ of certiorari to the United States Supreme Court. Rec. Doc. 219 at 1. Before he does so, Kieffer moves for a writ of mandamus, requesting that the United States Attorney's Office provide him with a copy of the Federal Deposit Insurance Corporation (FDIC) certificate.¹ *Id.* To show that the certificate exists and is within the government's possession, Kieffer attaches excerpts from the trial transcript, wherein the government and this Court discussed that the parties' stipulations containing "the FDIC component." See generally Rec. Doc. 219-1.

Under 18 U.S.C. § 2113, the government is required to prove that the deposits of the injured bank were insured by the Federal Deposit Insurance Corporation. See 18 U.S.C. § 2113(f). During Kieffer's trial, the FDIC certificate was not physically presented to the jury because the parties stipulated that the deposits contained in both ATMs were federally insured at the time of the incidents. Rec. Doc. 219-1 at 1, 3; see Rec. Doc. 221-1 at 2.

In its opposition, the government argues that the actual certificates and testimony related to the ATM deposits were not

¹ While Kieffer requests production of the "FDIC certificate," it is unclear whether he is referring to Chase or Campus Federal Credit Union's insurance certificate. See Rec. Doc. 219 at 1. Regardless, this distinction will not affect our ultimate decision.

part of the trial record because the parties' stipulations obviated the need for such evidence. Rec. Doc. 221 at 1. Moreover, the government emphasizes that Kieffer and his trial attorney signed the stipulations, agreeing that the facts therein were true and need not be proven. *Id.* at 3.

LAW AND ANALYSIS

In seeking a writ of mandamus, the petitioner must establish "(1) a clear right to the relief, (2) a clear duty by the respondent to do the act requested, and (3) the lack of any other adequate remedy." *U.S. v. Pedroza*, 211 F.3d 593 (5th Cir. 2000) (per curiam). "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); *Kerr v. U.S. Dist. Court for Northern Dist. Of California*, 426 U.S. 394, 402 (1976).

If this Court does not order the government to produce the FDIC certificate, Kieffer argues that his right to challenge his conviction before the Supreme Court would be impaired. Rec. Doc. 219 at 3. However, the record clearly shows the parties expressly stipulated to the "federally insured" element of Section 2113 in lieu of presenting evidence to the jury in that regard. Thus, the FDIC certificate was neither submitted to this Court nor presented to the jury at trial.

Upon affirming the judgment against Kieffer, the Fifth Circuit noted that any sufficiency challenge to evidence related to this element would be unsuccessful:

The convictions in this case under § 2113(a), (d), and (e) and § 2 for attempting to rob the Campus Federal Credit Union require, in part, establishment that the Campus Federal Credit Union was federally insured as per § 2113(g). Here, the parties stipulated that the Campus Federal Credit Union was federally insured; accordingly, there was sufficient evidence on that point.

Kieffer, 991 F.3d at 637, n. 6. The *Kieffer* court cited its prior decision in *Abbott*, which held that the district court reasonably relied on the parties' stipulation to testimony regarding the bank's federal insurance, even if the defendant did not necessarily stipulate to the truth of the testimony. *United States v. Abbott*, 265 F.App'x 307, 309-10 (5th Cir. 2008).

Here, the stipulations in dispute indicated that both Jerome Kieffer and Armstead Kieffer agreed that the facts contained therein were true, including:

At the time of the October 11, 2015 robbery, JP Morgan Chase Bank, located at 1425 North Broad Street in New Orleans, Louisiana, had deposits insured by the Federal Deposit Insurance Corporation.

At the time of the May 31, 2017 armed robbery, Campus Federal Credit Union, located at 2200 Tulane Avenue in New Orleans, Louisiana, had deposits insured by the National Credit Union Administration Board.

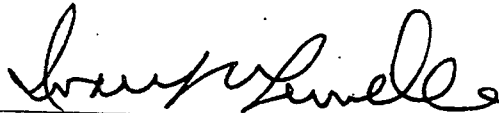
Rec. Doc. 221-1 at 2.

As explicitly set forth by the parties, the stipulations absolved the government of its burden in proving such facts beyond

a reasonable doubt at trial. *Id.* As such, the stipulations were read aloud to the jury without objection by Kieffer and his attorney. Rec. Doc. 221 at 3. Since the jury relied on the parties' stipulations in its determination of guilt, Kieffer fails to establish a "clear right" to production of certificates that were never physically presented at trial. Thus, because these documents were never part of the record on appeal, denying mandamus would not impair Kieffer's petition to the Supreme Court.

We also decline to consider Kieffer's "secondary argument", wherein he suggests that his trial and appellate attorneys' failure to disclose the certificate was "deliberate." Rec. Doc. 219 at 4. This argument appears to be an ineffective assistance of counsel claim viewed raised here as a 28 U. S. C. § 2255 motion. As such, the § 2255 motion is dismissed as premature because it is raised during the pendency of a direct appeal and related petition to the Supreme Court. See *United States v. Zuniga-Salinas*, 945 F.2d 1302, 1306 n.1 (5th Cir. 1991).

New Orleans, Louisiana, this 3rd day of June, 2021


SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA * CRIMINAL NO. 17-114
v. * SECTION: "B"
ARMSTEAD KIEFFER, et. al *

* * *

**GOVERNMENT'S OPPOSITION TO DEFENDANT
ARMSTEAD KIEFFER'S MOTION FOR A WRIT OF MANDAMUS**

NOW INTO COURT, comes the United States of America, appearing herein through the undersigned Assistant United States Attorney, and opposes defendant Armstead Kieffer's motion for a writ of mandamus, which is at Record Document 219.

Armstead Kieffer seeks a writ of mandamus compelling the United States Attorney's Office to disclose and provide Kieffer a copy of the exhibit referenced by the attorney for the government at trial page 243, which Kieffer contends is the Federal Deposit Insurance Corporation Certificate. Rec. Doc. 219 at 1. According to Kieffer, he has made numerous requests to the United States Attorney's Office for a copy of the FDIC certificate, only to have his requests go unanswered. *Id.* He further contends the certificate is needed to support his petition for a writ of certiorari in the United States Supreme Court. *Id.*

The page of the trial transcript referenced by Kieffer as proof that the government has the certificate he wants deals with stipulations between the parties that the relevant bank and credit union had deposits that were federally insured. It does not reference the actual certificates. The actual certificates and testimony related to the deposits of those institutions being federally insured were not part of the trial record because the stipulations obviated the need for that evidence.

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2021, a copy of the foregoing was filed through the Court's ECF/CM system and a hard copy was mailed to Armstead Kieffer at the address written on the envelope that was part of the filing for his motion for mandamus.

/s/ David Haller
DAVID HALLER
Assistant United States Attorney

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