

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-12236-C

In re: CALVIN LATIMER,

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the
Middle District of Florida

ORDER: Pursuant to the 11th Cir. R. 42-1(b), this petition is hereby DISMISSED for want of prosecution because the Petitioner Calvin Latimer failed to pay the filing and docketing fees to the clerk of this court within the time fixed by the rules; Motion for writ of mandamus is MOOT.

Effective February 25, 2022.

DAVID J. SMITH
Clerk of Court of the United States Court
of Appeals for the Eleventh Circuit

FOR THE COURT - BY DIRECTION

Calvin H. Latimer

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

For Consideration

No. 21-12236-C

#3

In re: CALVIN LATIMER,

Petitioner.

On Petition for Writ of Mandamus from the United States District Court for the
Middle District of Florida

Before: ROSENBAUM and GRANT, Circuit Judges.

BY THE COURT:

Calvin Latimer, proceeding *pro se*, has filed a "Motion to Dismiss or Rehear," which we construe as a motion for reconsideration of our denial of his motions for leave to proceed *in forma pauperis* ("IFP") and for appointment of counsel as to his petition for a writ of mandamus. His mandamus petition arises from a complaint he filed against the Social Security Administration ("SSA") in the U.S. District Court for the Western District of North Carolina that was transferred to the U.S. District Court for the Middle District of Florida and then dismissed. In his petition, Latimer appears to ask this Court to correct alleged mistakes that the U.S. District Court for the Middle District of Florida and other courts made in dismissing or rejecting his claims against the SSA. In an order issued on October 13, 2021, we concluded that Latimer had the adequate alternate remedy of appealing all those decisions. To the extent that he challenged the transfer of his case to the Middle District of Florida, we determined that he did not have a clear and indisputable right

to relief because it was the only court with proper venue. We also denied his motion for appointment of counsel.

A party seeking rehearing or reconsideration must specifically allege any point of law or fact that this Court overlooked or misapprehended. *See* Fed. R. App. P. 40(a)(2). A reconsideration motion is analogous to a petition for a panel rehearing, which must “state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended.” Fed. R. App. P. 40(a)(2). In the district court context, we have held that “[a] motion for reconsideration cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment.” *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir. 2009) (quotation marks omitted).

Under 28 U.S.C. § 1915(a), a United States court may authorize the commencement of any proceeding, without prepayment of fees, by a person who submits an affidavit that includes a statement of assets that he possesses and indicates that he is unable to pay such fees. 28 U.S.C. § 1915(a). However, we may dismiss an action at any time if it determines that the allegation of poverty is untrue, or the action or appeal is frivolous. *Id.* § 1915(e)(2).

Mandamus is available only in drastic situations when no other adequate means are available to remedy a clear usurpation of power or abuse of discretion. *United States v. Shalhoub*, 855 F.3d 1255, 1259, 1263 (11th Cir. 2017); *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1004 (11th Cir. 1997). Mandamus may not be used as a substitute for appeal or to control decisions of the district court in discretionary matters. *Jackson*, 130 F.3d at 1004. The petitioner has the burden of showing that he has no other avenue of relief, and that his right to relief is clear and indisputable. *Mallard v. United States Dist. Court*, 490 U.S. 296, 309 (1989).

An individual seeking judicial review of the final decision of the Commissioner of Social Security shall bring the action “in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia.” 42 U.S.C. § 405(g). When an action is brought in the wrong venue, the district court “shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.” 28 U.S.C. § 1406(a). A district court’s decision to transfer a case based on improper venue pursuant to § 1406(a) is interlocutory and non-appealable. *See Middlebrooks v. Smith*, 735 F.2d 431, 432-433 (11th Cir. 1984).

Appointment of counsel in a civil case is not a constitutional right and is only justified in exceptional circumstances. *Fowler v. Jones*, 899 F.2d 1088, 1096 (11th Cir. 1990). Exceptional circumstances exist where, *inter alia*, the facts and legal issues are so novel or complex as to require the assistance of a trained practitioner. *Id.*

Here, Latimer does not raise any points of law or fact that we overlooked or misapprehended. *See Fed. R. App. P. 40(a)(2)*. As we stated in our earlier order, to the extent he is challenging the district court’s dismissal of his complaint, he had the adequate alternative remedy of appealing the dismissal, which he did, though his appeal was dismissed for want of prosecution. *See Mallard*, 490 U.S. at 309. To the extent he is challenging the Western District of North Carolina and the Fourth Circuit’s disposition of his 2012 complaint, he had and exercised the adequate alternative remedy of appealing the dismissal and petitioning the Supreme Court for certiorari, which was denied. *See Mallard*, 490 U.S. at 309. Furthermore, to the extent Latimer argues that because he was not successful in any of his proceedings or appeals, those avenues of relief were not adequate, that argument fails. Latimer was afforded adequate legal remedies,

irrespective of whether his actual pursuit of those remedies was successful, and he cannot use his mandamus petition or his construed motion for reconsideration to relitigate his Social Security claims or as a substitute for an appeal. *See Wilchombe*, 555 F.3d at 957; *Jackson*, 130 F.3d at 1004.

In addition, to the extent that Latimer is challenging the transfer of his case to the Middle District of Florida or requesting that this Court order it transferred back to the Western District of North Carolina, he has no clear and indisputable right to relief because venue only existed in the Middle District of Florida, where he resided. 42 U.S.C. § 405(g); 28 U.S.C. § 1406(a). Finally, he has not shown that we erred in denying him appointed counsel. This case does not involve complex legal issues. *See Fowler*, 899 F.2d at 1096.

Latimer's reconsideration motion does not demonstrate any point of law or fact that we misapprehended in denying his IFP motion based on the frivolity of his mandamus petition under 28 U.S.C. § 1915(e)(2), or in denying him appointed counsel. Accordingly, his construed motion for reconsideration is hereby **DENIED**.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CALVIN LATIMER,

Plaintiff,

v.

CASE NO. 8:21-cv-135-WFJ-JSS

COMMISSIONER, SOCIAL
SECURITY ADMINISTRATION,

Defendant.

ORDER

Before the Court is Plaintiff's motion to appoint counsel (Dkt. 38), and the report of the United States Magistrate Judge recommending that the motion be denied (Dkt. 39). No objections to the report and recommendations have been filed, and the time for doing so has passed.

After an independent review, the Court agrees with the analysis of the magistrate judge and orders as follows:

1. The Report and Recommendation (Dkt. 39) is adopted and confirmed in all respects and made a part of this Order.

2. Plaintiff's motion to appoint counsel (Dkt. 38) is denied.

3. The document filed by Plaintiff at docket entry 40 will not be construed as responsive to the report and recommendation, and to the extent it was filed as an amended complaint, is dismissed without prejudice.

4. Should Plaintiff wish to file an amended complaint consistent with the report and recommendation, he must file such an amended complaint on or before March 16, 2021, and so designate the pleading as an amended complaint, or this case will be dismissed.

DONE AND ORDERED at Tampa, Florida, on March 1, 2021.



WILLIAM F. JUNG
UNITED STATES DISTRICT JUDGE

Copy furnished to:
Plaintiff, *pro se*

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