

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 25 2022

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

JOAQUIN MENDEZ HERNANDEZ,

Petitioner-Appellant,

v.

CATRICIA HOWARD,

Respondent-Appellee.

No. 22-15145

D.C. No. 4:21-cv-00541-SHR-BGM
District of Arizona,
Tucson

ORDER

Before: RAWLINSON and NGUYEN, Circuit Judges.

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); *Porter v. Adams*, 244 F.3d 1006, 1007 (9th Cir. 2001) (order) (holding that a successive 28 U.S.C. § 2255 motion disguised as a 28 U.S.C. § 2241 petition requires a certificate of appealability).

Any pending motions are denied as moot.

DENIED.

ASH

1
2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Joaquin Mendez Hernandez,
10 Petitioner,

11 v.

12 Catricia Howard,
13 Respondent.
14

No. CV 21-00541-TUC-SHR (BGM)

**Order Dismissing Petition and
Closing Case**

15 Petitioner Joaquin Mendez Hernandez, who is confined in the United States
16 Penitentiary in Tucson, Arizona (USP-Tucson), has filed a pro se Petition for Writ of
17 Habeas Corpus pursuant to 28 U.S.C. § 2241 (Doc. 1).

18 **I. Background**

19 Pursuant to a guilty plea and plea agreement, Petitioner was convicted in the United
20 States District Court for the Southern District of Georgia of one count of conspiracy to
21 engage in sex trafficking, in violation of 18 U.S.C. § 1594(c). (*United States v. Mendez-*
22 *Hernandez*, 4:13-CR-00004-LGW-CLR (S.D. Ga. 2013)). On February 19, 2014,
23 Petitioner was sentenced to life imprisonment. (Doc. 775 in 4:13-CR-00004-LGW-CLR).
24 Petitioner did not appeal his conviction and sentence.¹

25 On March 25, 2015, Petitioner sought to “reopen [the] right to appeal.” (Doc. 865
26

27 ¹ The Court notes that Petitioner waived the right to appeal his conviction and
28 sentence as part of his plea agreement unless his sentence exceeded the statutory maximum,
or the sentence exceeded the guideline range as found by the court. (Doc. 774 in 4:13-CR-
00004-LGW-CLR).

1 in 4:13-CR-00004-LGW-CLR). By Order dated October 7, 2015, the motion was
2 denied. (Doc. 879 in 4:13-CR-00004-LGW-CLR).

3 On December 12, 2016, Petitioner filed his first motion pursuant to 28 U.S.C.
4 § 2255, alleging in part that his attorney had provided ineffective assistance by not timely
5 filing a notice of appeal and failing to investigate “[Petitioner’s] involvement in the
6 case.” (Doc. 902 in 4:13-CR-00004-LGW-CLR). By Order dated January 12, 2017, the
7 motion was denied as untimely. (Doc. 906 in 4:13-CR-00004-LGW-CLR). Petitioner
8 appealed the denial, but by Order dated September 19, 2017, the Eleventh Circuit Court of
9 Appeals denied the appeal. (*Mendez-Hernandez v. United States*, No. 17-10987 (11th Cir.
10 Sept. 19, 2017); *see also* Docs. 909, 918 in 4:13-CR-00004-LGW-CLR).

11 On May 14, 2018, Petitioner filed his second § 2255 motion, again alleging in part
12 that his attorney had provided ineffective assistance by failing to timely file a notice of
13 appeal. (Doc. 928 in 4:13-CR-00004-LGW-CLR). By Order dated June 20, 2018, the
14 sentencing court dismissed the motion as an unauthorized second or successive § 2255
15 motion pursuant to 28 U.S.C. §§ 2244 and 2255(h). (Doc. 933 in 4:13-CR-00004-LGW-
16 CLR). Petitioner did not appeal the dismissal of the motion, but instead sought
17 authorization from the Eleventh Circuit to file a second or successive § 2255 motion,
18 indicating therein that he “received ineffective assistance of counsel because he was denied
19 his right to appeal his sentence.” (*In Re: Joaquin Mendez-Hernandez*, No. 19-10975-H
20 (11th Cir. April 12, 2019).) By Order dated April 12, 2019, the Eleventh Circuit denied
21 the application because the claim “was raised in [Petitioner’s] initial § 2255 motion, as well
22 as a successive application.” (*In re: Joaquin Mendez-Hernandez*, No. 19-10975) (11th Cir.
23 Apr. 19, 2019); *see also* Doc. 942 in 4:13-CR-00004-LGW-CLR).

24 On August 20, 2019, Petitioner filed his third § 2255 motion, again alleging that his
25 attorney failed to timely file a notice of appeal. (Doc. 943 in 4:13-CR-00004-LGW-CLR).
26 By Order dated December 23, 2019, the sentencing court again dismissed the motion as an
27 unauthorized second or successive § 2255 motion pursuant to 28 U.S.C. §§ 2244 and
28 2255(h). (Doc. 946 in 4:13-CR-00004-LGW-CLR). Petitioner did not appeal the

1 dismissal.

2 On September 27, 2021, Petitioner filed a Petition for Writ of Habeas Corpus
3 pursuant to 28 U.S.C. § 2241 in this Court. (*Hernandez v. Howard*, 4:21-CV-00385-TUC-
4 SHR (BGM) (D. Ariz. 2021)). Therein, Petitioner alleged that his attorney provided
5 ineffective assistance by failing to file a notice of appeal and failing to “investigate
6 [Petitioner’s] real involvement in the case,” that his sentence was improperly enhanced,
7 and that the sentencing court refused to credit him with a downward departure “for
8 acceptance of responsibility in exchange for [Petitioner’s] guilty plea.” (Doc. 1 in 4:21-
9 CV-00385-TUC-SHR (BGM) at 4-7). By Order dated October 19, 2021, the Court found
10 that the Petition was, in effect, a disguised § 2255 Motion over which it had no
11 jurisdiction. (Doc. 6 in 4:21-CV-00385-TUC-SHR (BGM)). Accordingly, the Court
12 dismissed the Petition; Judgment was entered the same day. (Docs. 6 and 7 in 4:21-CV-
13 00385-TUC-SHR (BGM)). Petitioner appealed the dismissal to the Ninth Circuit Court of
14 Appeals. (*Hernandez v. Howard*, case no. 21-16822 (9th Cir. 2021)). That appeal remains
15 pending.

16 On December 20, 2021, Petitioner filed the instant § 2241 Petition.

17 **II. Petition**

18 In his Petition, Petitioner names USP-Tucson Warden Catricia Howard as
19 Respondent. As with his previous § 2241 Petition, Petitioner alleges that his attorney
20 provided ineffective assistance by failing to file a notice of appeal (Ground One) and failing
21 to “investigate [Petitioner’s] real involvement in the case” (Ground Two), that his sentence
22 was improperly enhanced (Ground Three), that the sentencing court refused to credit him
23 with a downward departure “for acceptance of responsibility in exchange for [Petitioner’s]
24 guilty plea” (Ground Four), and that his claims are “applicable” because “his 2255 was
25 ineffective or inadequate to test the legality of his detention” (Ground Five).

26 **III. Discussion**

27 The Court has previously discussed the standards for evaluating whether a § 2241
28 petition has been properly brought, and will not repeat that discussion here in the interest

1 of brevity. (See Doc. 6 in 4:21-CV-00385-TUC-SHR (BGM) at 3-5). Further, Grounds
2 One through Four are identical to the grounds in Petitioner's previous § 2241 action, and
3 will thus be dismissed for the same reasons as those set forth in 4:21-CV-00385-TUC-SHR
4 (BGM). (See Doc. 6 in 4:21-CV-00385-TUC-SHR (BGM) at 5). Petitioner's fifth
5 "ground"—that he has been unable to previously bring his claims—is merely a gatekeeping
6 argument for why Grounds One through Four should be considered, and is not itself a
7 separate ground for relief. As such, the Petition is duplicative of Petitioner's previous
8 § 2241 petition, and subject to dismissal for the same reasons as his previous petition.
9 Thus, the Court will dismiss the § 2241 Petition and this case. See 28 U.S.C. § 2255(a);
10 *Tripathi v. Henman*, 843 F.2d 1160, 1163 (9th Cir. 1988).


11 **IT IS ORDERED:**

12 (1) Petitioner's Petition Under 28 U.S.C. § 2241 (Doc. 1) and this case are
13 **dismissed.**

14 (2) The Clerk of Court must **enter judgment accordingly and close this case.**

15 (3) Although Petitioner has brought his claims in a § 2241 petition, a certificate
16 of appealability is required where a § 2241 petition attacks the petitioner's conviction or
17 sentence. See *Porter v. Adams*, 244 F.3d 1006, 1007 (9th Cir. 2001). Pursuant to Rule
18 11(a) of the Rules Governing Section 2255 Cases, in the event Petitioner files an appeal,
19 the Court declines to issue a certificate of appealability because reasonable jurists would
20 not find the Court's procedural ruling debatable. See *Slack v. McDaniel*, 529 U.S. 473,
21 484 (2000).

22 Dated this 13th day of January, 2022.

23
24
25
26
27
28

Honorable Scott H. Rash
United States District Judge