

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

June 13, 2022

Lyle W. Cayce
Clerk

No. 21-30614
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JEROME KIEFFER,

Defendant—Appellant.

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

Before SOUTHWICK, OLDHAM, and WILSON, *Circuit Judges.*

PER CURIAM:*

Jerome Kieffer, federal prisoner # 37176-034, was convicted by a jury of conspiracy to commit bank robbery, in violation of 18 U.S.C. § 371; armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d); brandishing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C.

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

§ 924(c)(1)(A); attempted armed bank robbery resulting in death, in violation of § 2113(a), (d), and (e); and causing death through the use of a firearm, in violation of § 924(j)(1). He was sentenced to life imprisonment, and his convictions and sentence were affirmed on appeal. *United States v. Kieffer*, 991 F.3d 630 (5th Cir.), *cert. denied*, 142 S. Ct. 297 (2021).

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 a Federal Deposit Insurance Corporation (FDIC) certificate. Kieffer asserted that the certificate was needed in support of his then-pending 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 to [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. *See United States v. Williams*, 400 F.3d 277, 280–81 (5th Cir. 2005). Relevant here, the district court concluded that Kieffer failed to show "that his right to issuance of the writ is clear and indisputable." *Id.* at 281.

Kieffer fails to challenge that determination or to identify any error with the district court's decision to deny his motion for a writ of mandamus to compel the production of the FDIC certificate. Additionally, although Kieffer asserts that he is actually innocent and that conspiracy to commit Hobbs Act robbery is not a crime of violence, those arguments do not go to whether the district court erred by denying his motion for a writ of mandamus.

Accordingly, the district court's judgment is AFFIRMED. Should Kieffer seek to raise claims "for errors that occurred at or prior to sentencing," a motion under 28 U.S.C. § 2255 is the primary means of doing so. *Padilla v. United States*, 416 F.3d 424, 425-26 (5th Cir. 2005) (internal quotation marks and citation omitted).

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

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CLERK

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June 13, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 21-30614 USA v. Kieffer
USDC No. 2:17-CR-114-2

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and 5th Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5th Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5th Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5th Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

WHEREFORE, the United States requests that the Court deny Jerome Kieffer's motion for mandamus.

Respectfully submitted,

DUANE A. EVANS
UNITED STATES ATTORNEY

/s/ David Haller
DAVID HALLER
Assistant United States Attorney
650 Poydras Street, 16th Floor
New Orleans, Louisiana 70130
Telephone: (504) 680-3000

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2021, a copy of the foregoing was filed through the Court's ECF/CM system and a hard copy was mailed to Jerome 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

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

CRIMINAL

VERSUS

NO. 17-114

JEROME KIEFFER

SECTION "B"(1)

ORDER AND REASONS

Before the Court are defendant Jerome Kieffer's "Motion for a Writ of Mandamus" (Rec. Doc. 235) and the Government's opposition (Rec. Doc. 237) adopting its opposition (Rec. Doc. 221) to the identical motion filed by Armstead Kieffer (Rec. Doc. 219) which the Court denied on June 3, 2021 (copy attached). For the reasons discussed below,

IT IS ORDERED that the motion (Rec. Doc. 235) is **DENIED** as duplicative and frivolous.

FACTS OF THE CASE AND PROCEDURAL HISTORY

Defendant Jerome Kieffer ("Kieffer"), and his co-defendants, his son Armstead 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. 40 (Second Superseding Indictment). After a five-day trial, a jury convicted Kieffer of conspiracy to commit bank robbery, armed bank robbery, and using and carrying a firearm during the commission of a crime of violence including brandishing a firearm, attempted armed bank

robbery resulting in death and aiding and abetting, and causing death through use of a firearm and aiding and abetting. Rec. Docs. 128, 129.

On March 21, 2019, Kieffer appealed his conviction arguing, among other things, that the evidence did not support his conviction. Rec. Doc. 171; 217-1 at 3. On March 19, 2021, the Fifth Circuit affirmed this Court's judgment. Rec. Docs. 217, 217-1; see *United States v. Kieffer*, 991 F.3d 630 (5th Cir. 2021).

Kieffer moves for issuance of a writ of mandamus to have the United States Attorney's Office provide him with a copy of the Federal Deposit Insurance Corporation ("FDIC") certificate which he claims formed part of the charges against him.¹ *Id.* He contends that his right to seek writ of certiorari before the United States Supreme Court will be impaired without the certificate. Rec. Doc. 235 at 3. 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 the parties' stipulations containing "the FDIC component." Rec. Docs. 235 at 1-2, 235-1 (Exh. A).

Under 18 U.S.C. § 2113(f), the government is required to prove that the deposits of the injured bank were insured by the Federal

¹ Kieffer did not indicate whether the "FDIC certificate" he seeks is for Chase Bank or Campus Federal Credit Union. Nevertheless, this distinction will not affect the Court's decision on the motion.

Deposit Insurance Corporation. 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. *Id.*; Rec. Doc. 221-1 at 2.

In its opposition (via adoption of Rec. Doc. 221), the Government argues that the actual certificates and testimony related to the ATM deposits were not part of the trial record because the parties' stipulations obviated the need for the documents to be in 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). "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).

Kieffer argues that his right to challenge his conviction before the Supreme Court would be impaired if he does not have the

certificate. Rec. Doc. 235 at 3. However, the parties stipulated to the "federally insured" component of Section 2113 in lieu of presenting evidence to the jury in that regard. Rec. Doc. 221 at 2. Thus, the FDIC certificate was neither submitted to this Court nor presented to the jury at trial. *Id.*

On direct appeal of Kieffer's conviction, the United States Fifth Circuit held that any challenge to sufficiency of evidence related to this element of the charges 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 Fifth Circuit referenced its prior decision in *United States v. Abbott*, 265 F. App'x 307 (5th Cir. 2008), 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. *Id.* at 309-10.

In this case, the stipulations indicated that both defendants Jerome Kieffer and Armstead Kieffer agreed that the facts contained therein were true, including the following:

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 to the stipulations, the Government was absolved of its burden to prove beyond a reasonable doubt the existence of FDIC insurance at trial. *Id.* The stipulations were read aloud to the jury without objection by Kieffer and his attorney, both of whom signed the stipulations. Rec. Doc. 221 at 3. The jurors reasonably relied on the parties' stipulations in the guilt determination. Kieffer, therefore, 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 find meritless Kieffer's secondary specious argument that his trial and appellate attorneys' conduct regarding the certificate was "deliberate" and ineffective assistance. Rec. Doc. 235 at 4. A § 2255 motion is generally considered premature if raised during the pendency of a direct appeal or finality of the judgment of conviction. See *United States v. Zuniga-Salinas*, 945 F.2d 1302, 1306 n.1 (5th Cir. 1991). Considering it as a § 2255 is fruitless because it is a baseless argument that is in direct contravention of a previously noted clear factual record.

New Orleans, Louisiana this 26th day of August, 2021

A handwritten signature in black ink, appearing to read "L. J. Smith", is written over a horizontal line.

SENIOR UNITED STATES DISTRICT JUDGE

**SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001**

October 3, 2022

Jerome Kieffer
#37176-034
USP Pollock
P.O. Box 2099
Pollock, LA 71467

RE: Kieffer v. United States

Dear Mr. Kieffer:

The above-entitled petition for writ of certiorari was postmarked September 15, 2022 and received September 28, 2022. The papers are returned for the following reason(s):

The appendix to the petition does not contain the following documents required by Rule 14.1(i):

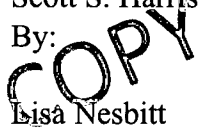
The lower court opinion(s) must be appended to the petition.

It is impossible to determine the timeliness of the petition without the lower court opinions.

Please correct and resubmit as soon as possible. Unless the petition is submitted to this Office in corrected form within 60 days of the date of this letter, the petition will not be filed. Rule 14.5.

A copy of the corrected petition must be served on opposing counsel.

When making the required corrections to a petition, no change to the substance of the petition may be made.

Sincerely,
Scott S. Harris, Clerk
By: 
Lisa Nesbitt
(202) 479-3038

Enclosures