

Appendix

Appendix Table of Contents

APPENDIX A: Tenth Circuit Opinion (May 25, 2023).....	1a
APPENDIX B: District Court Opinion (October 25, 2022).....	4a
APPENDIX C: Army Court of Criminal Appeals Opinion (August 21, 2021).....	6a
APPENDIX D: Order Denying Rehearing (July 12, 2023).	16a
APPENDIX E: Facts in Support of Petitioner's Discharge.....	17a

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DAVID J. RUDOMETKIN, Petitioner - Appellant, v. KEVIN PAYNE;* CHRISTINE WORMUTH,
Respondents - Appellees.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
2023 U.S. App. LEXIS 12894
No. 22-3250
May 25, 2023, Filed

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

{2023 U.S. App. LEXIS 1}(D.C. No. 5:22-CV-03094-JWL). (D. Kan.) Rudometkin v. Johnston, 2022 U.S. Dist. LEXIS 192728, 2022 WL 13683938 (D. Kan., Oct. 21, 2022)

Counsel DAVID J. RUDOMETKIN, Petitioner - Appellant, Pro se, Fort Leavenworth, KS.

For KEVIN PAYNE, CHRISTINE WORMUTH, Respondents - Appellees: Jared S. Maag, Office of the United States Attorney, Topeka, KS.

Judges: Before BACHARACH, KELLY, and MORITZ, Circuit Judges.

Opinion

Opinion by: Nancy L. Moritz

Opinion

ORDER AND JUDGMENT**

David Rudometkin, a federal military prisoner proceeding pro se, appeals the district court's order dismissing his 28 U.S.C. § 2241 petition as moot.² Because Rudometkin has waived any challenge to the district court's mootness ruling, we affirm.

In 2018, a military judge sitting as a general court-martial tried and convicted Rudometkin of rape, aggravated sexual assault, assault consummated by battery, and conduct unbecoming of an officer. The military judge ultimately sentenced Rudometkin to 17 years' confinement. But on direct appeal, the U.S. Army Court of Criminal Appeals (ACCA) set aside the guilty findings and sentence. The U.S. Army Judge Advocate General then certified the case for review to the U.S. Court of Appeals for the Armed Forces (CAAF).

While the CAAF appeal was pending, Rudometkin filed the underlying § 2241 petition, challenging his continued confinement and seeking, {2023 U.S. App. LEXIS 2} in part, an order directing the Secretary of the Army to conduct a hearing on his continued confinement. In support, Rudometkin invoked a provision of the Uniform Code of Military Justice (UCMJ) allowing the Secretary to release a prisoner from confinement pending appeal. See 10 U.S.C. § 857(b)(5) ("In any case in which a court-martial sentences a person to confinement, but in which review of the case under [10 U.S.C. §

CIRHOT

867(a)(2)] is pending, the Secretary concerned may defer further service of the sentence to confinement while that review is pending."); *United States v. Katso*, 77 M.J. 247, 251 (C.A.A.F. 2018) (holding that this UCMJ language "is broad enough to permit [a continued-confinement] hearing so that the relevant secretary can determine whether to release the prisoner" pending appellate review). Additionally, in other filings, Rudometkin asked the district court to stay the CAAF proceedings until the Secretary held a continued-confinement hearing—a request the district court summarily denied.

In the meantime, the CAAF reversed the ACCA's decision and remanded the case for further review. See *United States v. Rudometkin*, 82 M.J. 396, 402 (C.A.A.F. 2022). Shortly thereafter, the district court dismissed the instant § 2241 petition, determining that Rudometkin's challenge to his continued confinement was now moot because the CAAF had reversed the decision that set aside the guilty{2023 U.S. App. LEXIS 3} findings and sentence. See, e.g., *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000) (noting that case becomes "moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome" (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S. Ct. 1379, 59 L. Ed. 2d 642 (1979))). The district court also noted that a challenge to the validity of Rudometkin's convictions would be premature because his convictions remained under review in the military courts.³

Rudometkin now appeals, arguing that the district court erred in refusing to require the Secretary to conduct a continued-confinement hearing and to stay the CAAF proceedings until the Secretary did so. But he does not address the district court's reason for dismissing his petition: that the challenge to continued confinement and the assertion of a right to a continued-confinement hearing became moot when the CAAF reversed the ACCA decision that set aside the guilty findings and sentence. In fact, Rudometkin seems to concede mootness, at least in part, when he acknowledges that "an injunction is no longer available as a remedy" because the CAAF decision "has since been published." *Aplt. Br.* 18. And although he vaguely contends that he nevertheless remains "entitled to a declaration of his legal rights," *id.*, he fails{2023 U.S. App. LEXIS 4} to explain—as he must to overcome the district court's mootness ruling—how such a declaration would settle "some dispute which affects the behavior of the defendant toward the plaintiff." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1109-10 (10th Cir. 2010) (quoting *Cox v. Phelps Dodge Corp.*, 43 F.3d 1345, 1348 (10th Cir. 1994)).

Because Rudometkin fails to address the district court's mootness ruling, he has waived any challenge to it. See *Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015) (noting that appellant must "explain what was wrong with the reasoning that the district court relied on in reaching its decision"); *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 841 (10th Cir. 2005) (explaining that even pro se litigants must present "more than a generalized assertion of error" to avoid waiver through inadequate briefing (quoting *Anderson v. Hardman*, 241 F.3d 544, 545 (7th Cir. 2001))). To be sure, "mootness is an issue of subject[-]matter jurisdiction" that "can be raised at any stage of the proceedings." *Ind v. Colo. Dep't of Corr.*, 801 F.3d 1209, 1213 (10th Cir. 2015). But the "duty to consider unargued obstacles to subject[-]matter jurisdiction does not affect our discretion to decline to consider waived arguments that might have supported such jurisdiction." *Tompkins v. U.S. Dep't of Veteran Affs.*, 16 F.4th 733, 735 n.1 (10th Cir. 2021) (quoting *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1518 n.2 (10th Cir. 1996)). So the jurisdictional nature of mootness does not require us to overlook Rudometkin's waiver.⁴

We therefore affirm the district court's order dismissing Rudometkin's petition as moot. As a final matter, we deny Rudometkin's motion to supplement his reply brief.{2023 U.S. App. LEXIS 5}

Entered for the Court

Nancy L. Moritz

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Footnotes

* Pursuant to Fed. R. App. P. 43(c)(2), Colonel Kevin Payne is substituted for Colonel Michael Johnston as the respondent in this appeal.

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After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. See Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

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We construe Rudometkin's pro se filings liberally, "but we will not act as his advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

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The district court also denied Rudometkin's motion seeking "[a] permanent injunction to void or reset [the] CAAF's decision." R. 207.

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Although Rudometkin's waiver means that we need not definitively opine on any of the arguments he does make, we briefly make two observations. First, federal courts must generally refrain from exercising their equitable powers to intervene in ongoing military-court proceedings. See *Schlesinger v. Councilman*, 420 U.S. 738, 756-58, 95 S. Ct. 1300, 43 L. Ed. 2d 591 (1975) (explaining that because of comity and the specialized nature of military tradition, federal courts should usually abstain from intervening in ongoing court-martial proceedings). Second, the overall point of Rudometkin's desire for a continued-confinement hearing seems to be his belief that such a hearing would have "not only afforded [him] an official venue to provide reasons why he should [not be] confined pending a review of his case by the CAAF" but also would have "opened an opportunity for [him] to supplement the court-martial record with new evidence that should have been considered by the CAAF." *Aplt. Br.* 5-6. But it seems doubtful that a continued-confinement hearing would have allowed Rudometkin to supplement the record because: (1) the CAAF's review was limited to the record developed below, see *Rudometkin*, 82 M.J. at 402; and (2) the only purpose of a continued-confinement hearing is for "the relevant secretary [to] determine whether to release [a] prisoner" pending appellate review, *Katso*, 77 M.J. at 251.

49

**DAVID J. RUDOMETKIN, Petitioner, v. MICHAEL JOHNSTON AND CHRISTINE WORMUTH,
Respondents**

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

2022 U.S. Dist. LEXIS 192728

Case No. 22-3094-JWL

October 21, 2022, Decided

October 21, 2022, Filed

Editorial Information: Subsequent History

Appeal filed, 11/08/2022

Counsel {2022 U.S. Dist. LEXIS 1}David J. Rudometkin, Petitioner, Pro se, Fort
Leavenworth, KS.

For Michael Johnston, Christine Wormuth, Respondents: Jared

S. Maag, LEAD ATTORNEY, Office of United States Attorney - Topeka, Topeka, KS.

Judges: JOHN W. LUNGSTRUM, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: JOHN W. LUNGSTRUM

Opinion

MEMORANDUM AND ORDER

This matter is a petition for habeas corpus filed under 28 U.S.C. § 2241. Petitioner, a prisoner held at the United States Disciplinary Barracks (USDB), commenced this action in May 2022, challenging his continued confinement. For the reasons that follow, the court dismisses this matter.

Background

Petitioner was convicted on February 2, 2018, by a general court-martial. By an order entered on November 9, 2021, the United States Army Court of Criminal Appeals set aside the findings of guilty and sentence and authorized a rehearing. *United States v. Rudometkin*, 2021 WL 5235100 (A.C.C.A. Nov. 9, 2021).

Petitioner filed the present action on May 10, 2022, seeking a continued confinement hearing, immediate release, and other relief.

On August 15, 2022, the United States Court of Appeals for the Armed Forces reversed the decision of the United States Army Court of Criminal Appeals and ordered the return of the trial record to the Judge Advocate General of the Army for remand to the Court of Criminal{2022 U.S. Dist. LEXIS 2} Appeals for review under Article 66, UCMJ, 10 U.S.C. § 866 (2018). *United States v. Rudometkin*, M.J. __, 2022 WL 3364139 (C.A.A.F. Aug. 15, 2022).

Discussion

"Habeas corpus review is available under § 2241 if an individual is 'in custody in violation of the

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Appendix B

Constitution or laws or treaties of the United States." *Palma-Salazar v. Davis*, 677 F.3d 1031, 1035 (10th Cir. 2012) (quoting 28 U.S.C. § 2241(c)(3)). "The fundamental purpose of a § 2241 habeas proceeding is to allow a person in custody to attack the legality of that custody, and the "traditional function of the writ is to secure release from illegal custody." *Id.*, (quoting *McIntosh v. U.S. Parole Comm'n*, 115 F.3d 809, 811 (10th Cir. 1997)).

In this case, due to the reversal of the decision that set aside the findings and sentence in his criminal case, petitioner's challenge to his confinement is moot. The petition no longer presents a case or controversy under Article III, § 2, of the Constitution. *Spencer v. Kemna*, 523 U.S. 1, 7-8, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate.... The parties must continue to have a 'personal stake in the outcome' of the lawsuit." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-478, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990).

Next, because petitioner's conviction remains under review in the military courts, a habeas corpus challenge to the validity of the conviction is premature. See *Schlesinger v. Councilman*, 420 U.S. 738, 758, 95 S. Ct. 1300, 43 L. Ed. 2d 591 (1975) (stating "federal courts normally will not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted.") (citing *Gusik v. Schilder*, 340 U.S. 128, 71 S. Ct. 149, 95 L. Ed. 146 (1950) and {2022 U.S. Dist. LEXIS 3} *Noyd v. Bond*, 395 U.S. 683, 89 S. Ct. 1876, 23 L. Ed. 2d 631 (1969)). Petitioner may commence a new petition under § 2241 at the close of military review.

Conclusion

For the reasons set forth, the court dismisses this matter and will deny petitioner's motion for injunctive relief. The challenge to his continued confinement presented in the petition is now moot, and petitioner must exhaust any claims concerning the validity of his conviction in the military courts before proceeding under § 2241.

THE COURT THEREFORE ORDERS that respondents' motion to dismiss (Doc. 11) is granted.

THE COURT FURTHER ORDERS that respondents' motion to stay (Doc. 6) is denied as moot.

THE COURT FURTHER ORDERS that petitioner's motion for injunctive relief (Doc. 14) is denied.

IT IS SO ORDERED.

Dated: October 21, 2022

/s/ John W. Lungstrum

JOHN W. LUNGSTRUM

UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

July 12, 2023

Christopher M. Wolpert
Clerk of Court

DAVID J. RUDOMETKIN,

Petitioner - Appellant,

v.

KEVIN PAYNE, et al.,

Respondents - Appellees.

No. 22-3250
(D.C. No. 5:22-CV-03094-JWL)
(D. Kan.)

ORDER

Before **BACHARACH, KELLY, and MORITZ**, Circuit Judges.

Appellant's *Motion for Reconsideration* has been construed as a petition for panel rehearing. The petition, as construed, is denied.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk

APPENDIX D

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