

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-10337

Non-Argument Calendar

JOSEPH R. DICKEY,

Petitioner-Appellant,

versus

FCI MARIANNA WARDEN,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 5:22-cv-00084-TKW-ZCB

APPENDIX A

Before WILSON, JORDAN, and BLACK, Circuit Judges.

PER CURIAM:

Joseph Reuben Dickey appeals following the district court's dismissal of his *pro se* petition¹ for habeas relief, filed pursuant to 28 U.S.C. § 2241, and the denial of his post-judgment motion for reconsideration. FCI Marianna Warden (the Government), in turn, moves for summary affirmance and to stay briefing. After review, we grant the Government's motion for summary affirmance.

Under 28 U.S.C. § 2241, a prisoner may receive habeas relief if he is "in custody in violation of the Constitution or law or treaties of the United States." 28 U.S.C. § 2241(c)(3). A federal prisoner may attack his convictions and sentences through § 2241 under the "savings" clause of 28 U.S.C. § 2255 if a remedy under § 2255 is inadequate or ineffective. 28 U.S.C. § 2255(e). However, procedural bars, such as the restriction on successive § 2255 motions,² do not make § 2255 inadequate or ineffective. *See Wofford v. Scott*, 177 F.3d 1236, 1245 (11th Cir. 1999), *overruled on other grounds by*

¹ We liberally construe *pro se* pleadings. *See United States v. Cordero*, 7 F.4th 1058, 1068 n.11 (11th Cir. 2021).

² Ordinarily, a federal prisoner who wishes to file a second or successive motion to vacate, set aside, or correct sentence is required to move the court of appeals for an order authorizing the district court to consider such a motion. *See* 28 U.S.C. § 2255(h), cross-referencing 28 U.S.C. § 2244. A claim presented in a second or successive post-conviction proceeding that was presented in a prior application, however, "shall be dismissed." 28 U.S.C. § 2244(b)(1).

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McCarthan v. Dir. Of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076, 1100 (11th Cir. 2017) (*en banc*).

Summary affirmance is warranted. *See Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969)³ (explaining summary disposition is appropriate where “the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more frequently the case, the appeal is frivolous”). First, Dickey’s requested relief—that § 2244(b)(1) be declared as unconstitutional “as applied” to him—falls outside the scope of a § 2241 petition. The purpose of § 2241 is to allow a prisoner to challenge the execution of his sentence, and as the district court acknowledged, even if it granted Dickey the declaratory relief that he sought, his total sentence would remain unchanged. *See Antonelli v. Warden, U.S.P. Atlanta*, 542 F.3d 1348, 1351 n.1, 1352 (11th Cir. 2008) (stating § 2241 provides a limited basis for habeas actions for federal prisoners in that it allows prisoners to attack the execution of a sentence rather than the sentence or conviction themselves).

Moreover, Dickey provided no explanation as to why he was eligible for § 2241 relief under § 2255’s “savings” clause. Dickey failed to argue or show that a remedy under § 2255 was inadequate or ineffective. 28 U.S.C. § 2255(e). The primary justification that Dickey asserted for bringing a § 2241 petition, as opposed to a

³ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

§ 2255 motion, was based on § 2244(b)(1)'s bar on previously brought claims in successive applications. Specifically, in his petition, he asserted he was "without any realistic access to habeas corpus based on new evidence," and he had "new evidence of innocence and constitutional violations which can never be addressed because of the erroneous unconstitutional application of [§] 2244(b)(1)." This Court, however, has held that § 2244(b)(1)'s bar on successive applications does not make pursuit of relief under § 2255 inadequate or ineffective. *Wofford*, 177 F.3d at 1245. Dickey, therefore, also failed to demonstrate he was eligible for § 2241 relief under § 2255's "savings" clause. *See McGhee v. Hanberry*, 604 F.2d 9, 10 (5th Cir. 1979) (stating a petitioner bears the burden of demonstrating eligibility under the "savings" clause of § 2255).

Even if Dickey's claim fell within the scope of § 2241, binding precedent foreclosed both of his underlying arguments. Although he contended that § 2244(b)(1)'s bar did not apply to § 2255, this Court is bound to its prior panel decision where we held that the bar does apply to § 2255 motions. *See In re Bradford*, 830 F.3d 1273, 1277-78 (11th Cir. 2016) (clarifying that § 2244(b)(1)'s requirement is jurisdictional and holding § 2244(b)(1) applies to § 2255 motions); *In re Baptiste*, 828 F.3d 1337, 1339-40 (11th Cir. 2016) (holding § 2244(b)(1)'s mandate applies to applications for leave to file a second or successive § 2255 motion); *United States v. Steele*, 147 F.3d 1316, 1317-18 (11th Cir. 1998) (stating under our prior panel precedent rule, a prior panel's holding is binding unless it has been overruled or abrogated by the Supreme Court or by this Court sitting *en banc*).

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Similarly, the Supreme Court has held that § 2244(b)(1) does not violate the Suspension Clause.⁴ *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) (holding § 2244(b)(1)'s "restrictions . . . do not amount to a 'suspension' of the writ contrary to [the Suspension Clause]"). Despite Dickey's classification of his claim as an "as applied" challenge, such a classification does not change *Felker*'s application to his case when *Felker*'s rule is equally applicable across all habeas cases. *See id.* Therefore, his underlying arguments are foreclosed by binding precedent.⁵

Accordingly, because the Government's position is clearly correct as a matter of law, we GRANT the Government's motion for summary affirmance and DENY as moot its motion to stay the briefing schedule. *Groendyke Transp., Inc.*, 406 F.2d at 1162.

AFFIRMED.

⁴ The Constitution's Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2.

⁵ Although Dickey also appealed the district court's denial of his motion for reconsideration, he does not address the motion on appeal, and any related argument is accordingly abandoned. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014). He also mentions that § 2244(b)(1) violates the separation of powers, but he failed to preserve such an argument for appellate review by not raising it before the district court. *See United States v. Edwards*, 728 F.3d 1286, 1295 (11th Cir. 2013).

JOSEPH R. DICKEY, Reg. No. 25345-001, Petitioner, v. WARDEN, FCI MARIANNA, Respondent.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, PANAMA CITY
DIVISION
2022 U.S. Dist. LEXIS 231572
Case No. 5:22-cv-84/TKW/ZCB
December 8, 2022, Decided
December 8, 2022, Filed

Editorial Information: Subsequent History

Adopted by, Motion denied by, As moot, Writ of habeas corpus denied, Dismissed by Dickey v. Pistro, 2022 U.S. Dist. LEXIS 231554 (N.D. Fla., Dec. 27, 2022)

Editorial Information: Prior History

United States v. Dickey, 2007 U.S. Dist. LEXIS 105263 (N.D. Ala., Mar. 30, 2007)

Counsel {2022 U.S. Dist. LEXIS 1}JOSEPH R DICKEY, Petitioner, Pro se, MARIANNA, FL.

For WARDEN FCI MARIANNA, Respondent: LENNARD B REGISTER, III, US ATTORNEY - PENSACOLA FL, NORTHERN DISTRICT OF FLORIDA, PENSACOLA, FL.

Judges: Zachary C. Bolitho, United States Magistrate Judge.

Opinion

Opinion by: Zachary C. Bolitho

Opinion

REPORT AND RECOMMENDATION

This is a *pro se* habeas corpus case under 28 U.S.C. § 2241. Petitioner, Joseph R. Dickey, is a federal inmate housed at the Federal Correctional Institution in Marianna, Florida. Petitioner has tried repeatedly to challenge his conviction and sentence under 28 U.S.C. § 2255. Following the denial of his first § 2255 motion, Petitioner's attempts to file additional § 2255 motions have been rejected as impermissible second or successive motions. The decisions rejecting Petitioner's second or successive motions have relied on 28 U.S.C. § 2244(b)(1), which prohibits raising in a second or successive motion arguments that were raised and rejected in the initial motion. In the current § 2241 action, Petitioner asks this Court to declare 28 U.S.C. § 2244(b)(1) unconstitutional. For the reasons below, Petitioner's request for relief under § 2241 should be denied and this matter dismissed.

I. Background

Petitioner pleaded guilty to numerous child sex offenses and was sentenced to 1,620 months' imprisonment by the U.S. District{2022 U.S. Dist. LEXIS 2} Court for the Northern District of Alabama. (N.D. Ala. Case 7:05cr321, Docs. 23, 35). He filed a direct appeal, which the Eleventh Circuit dismissed because of an appellate waiver in Petitioner's plea agreement. (N.D. Ala. Case

7:05cr321, Doc. 58). Petitioner filed his first 28 U.S.C. § 2255 motion to vacate on February 20, 2007. (N.D. Ala. Case 7:05cr321, Doc. 59). That motion was denied, Petitioner appealed, and the Eleventh Circuit affirmed. (N.D. Ala. Case 7:07cv8006, Docs. 67, 83, 91).

Petitioner then filed a second § 2255 motion on January 15, 2016. (N.D. Ala. Case 7:05cr321, Doc. 62). The district court denied the motion as an unauthorized second or successive § 2255 motion (N.D. Ala. Case 7:05cr321, Doc. 63). Petitioner then sought the Eleventh Circuit's permission to file a second or successive § 2255 motion, which was denied. (N.D. Ala. Case 7:05cr321, Doc. 64). In doing so, the Eleventh Circuit explained that under 28 U.S.C. § 2244(b)(1) and *In re Baptiste*, 828 F.3d 1337 (11th Cir. 2016), Petitioner was prohibited from "raising a claim that already has been presented in a prior application" for relief under § 2255. (*Id.* at 3-4). Petitioner later returned to the Eleventh Circuit, again seeking permission to file a second or successive § 2255 motion. (N.D. Ala. Case 7:05cr321, Doc. 67). {2022 U.S. Dist. LEXIS 3} He met the same fate-the Eleventh Circuit denied his request because his argument "only relates to his previous applications to file second or successive § 2255 motions and requests that we reconsider our prior precedent and our previous orders denying him relief." (*Id.* at 3).

Having little success in the Northern District of Alabama and the Eleventh Circuit, Petitioner decided to try something different-he filed the current § 2241 petition in this Court on May 5, 2022. {1} In his petition, he argues that 28 U.S.C. § 2244(b)(1)-the statutory provision that has been applied to reject his second or successive § 2255 motions-does not apply to motions filed under § 2255 by federal inmates. (Doc. 1-1 at 2). He further argues that if § 2241(b)(1) does apply to § 2255 motions, then it is an unconstitutional suspension of the writ of habeas corpus. (Doc. 1 at 3; Doc. 1-1 at 2). As relief, Petitioner asks this Court to "[d]eclare 28 U.S.C. § 2244(b)(1) unconstitutional as applied." (Doc. 1 at 6).

Respondent has moved to dismiss the petition, arguing that this Court-the district of confinement-lacks jurisdiction because the claims raised are improper for a § 2241 petition and constitute attempts to avoid § 2255's bar on second or successive motions to vacate. (Doc. 8). Petitioner {2022 U.S. Dist. LEXIS 4} has responded, urging this Court "to adjudicate the Constitutional questions [he is] trying to present concerning the application of 2244(b)(1)." (Doc. 9 at 2).

II. Discussion

A. A habeas corpus petition under 28 U.S.C. § 2241 is not the appropriate vehicle to obtain a declaration regarding the constitutionality of 28 U.S.C. § 2244(b)(1).

A petition filed under 28 U.S.C. § 2241 is one seeking a writ of habeas corpus. *Samak v. Warden, FCC Coleman-Medium*, 766 F.3d 1271, 1273-74 (11th Cir. 2014). A § 2241 petition is the vehicle for challenging "the execution of a sentence, rather than the validity of the sentence itself." *Antonelli v. Warden, U.S.P. Atlanta*, 542 F.3d 1348, 1351-52 (11th Cir. 2008). The appropriate venue for a § 2241 is the district where the prisoner is incarcerated. *Rumsfeld v. Padilla*, 542 U.S. 426, 443, 124 S. Ct. 2711, 159 L. Ed. 2d 513 (2004). On the other hand, a motion to vacate under 28 U.S.C. § 2255 is the vehicle for a prisoner to challenge the lawfulness of his conviction and sentence. *United States v. Jordan*, 915 F.2d 622, 629 (11th Cir. 1990). A § 2255 motion must be filed in the district "which imposed the sentence." 28 U.S.C. § 2255(a).

Relief under § 2241 is available to a prisoner who is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). Because a § 2241 petition is a habeas corpus petition, "the sole remedy that is available is the immediate or expedited release of a prisoner." *Santiago-Lebron v. Fla. Parole Comm'n*, 767 F. Supp. 2d 1340, 1347 (S.D. Fla. 2011); see

also *Preiser v. Rodriguez*, 411 U.S. 475, 484, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973) ("[T]he traditional function of the writ is to secure release from illegal custody."); *Wilkinson v. Dotson*, 544 U.S. 74, 79, 125 S. Ct. 1242, 161 L. Ed. 2d 253 (2005) (stating that "the writ's history makes clear that it{2022 U.S. Dist. LEXIS 5} traditionally has been accepted as the specific instrument to obtain release from unlawful confinement") (internal quotations omitted). A § 2241 habeas corpus petition is not the appropriate vehicle for obtaining a declaratory judgment regarding the constitutionality of a federal statute, unless release from custody or an alteration of the petitioner's sentence would automatically follow from the declaratory judgment. See *Wilkinson*, 544 U.S. at 78-80 (explaining the differences between habeas relief and relief under 42 U.S.C. § 1983); see also *Ruiz v. Campos*, 547 F. Supp. 2d 682, 685 (W.D. Tex. 2008) (holding that the petitioner "fail[ed] to establish cognizable claims under § 2241" because a "decision in Petitioner's favor would not automatically entitle him to accelerated release"); see also *Fox v. Ortiz*, No. 18-13887 (RBK), 2019 U.S. Dist. LEXIS 21620, 2019 WL 519567, at *2 (D.N.J. Feb. 11, 2019) (dismissing a § 2241 habeas petition because the petitioner did not "attack the duration of his incarceration nor does he seek release from prison").

Here, Petitioner is not asking this Court for an order releasing him from custody or altering his sentence because he is being held in violation of federal law. Instead, Petitioner is asking this Court to declare a statute-28 U.S.C. § 2244(b)(1)-unconstitutional. Petitioner has made it very clear that is all he seeks. (Doc. 1 at 6; Doc. 1-1 at 3; Doc. 9 at 2). If this Court were to give{2022 U.S. Dist. LEXIS 6} Petitioner what he asks for, he would not be released from custody, nor would his sentence be altered by this Court's order. As such, this case is not properly brought under 28 U.S.C. § 2241, and it is subject to dismissal on that basis. See *Waters v. Rios*, No. 17-cv-1367 (SRN/DTS), 2017 U.S. Dist. LEXIS 135016, 2017 WL 3668761, at *3 (D. Minn. Aug. 23, 2017) (dismissing § 2241 petition because a "§ 2241 petition was an inappropriate vehicle to present" the claims in question); see also *Eskridge v. Edmonds*, No. 2:19-cv-69, 2019 U.S. Dist. LEXIS 200016, 2019 WL 6138882, at *3 (E.D. Tenn. Nov. 19, 2019) (stating that "the impropriety of § 2241 as the vehicle for [the petitioner's claims] is sufficient to warrant dismissal of the petition").

B. Even if Petitioner's claim was properly raised in a 28 U.S.C. § 2241 habeas corpus petition, it would lack merit.

Assuming *arguendo* that Petitioner had properly raised his claim via this § 2241 petition, the petition would be denied because it lacks merit. Petitioner raises two separate arguments regarding 28 U.S.C. § 2244(b)(1). First, he says that § 2244(b)(1) does not apply to him because he is a federal inmate pursuing relief under § 2255 and § 2244(b)(1) applies to state inmates pursuing relief under § 2254. (Doc. 1-1 at 2). Second, he says that if § 2244(b)(1) does apply to him, then it is an unconstitutional suspension of the writ of habeas corpus. (*Id.* at 2-3). Unfortunately for Petitioner, both arguments contradict binding precedent.

Section 2244(b)(1) states "[a] claim presented in a second or successive habeas{2022 U.S. Dist. LEXIS 7} corpus application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1). Petitioner argues that this provision does not apply to him because he is a federal prisoner who filed a motion to vacate under § 2255, as opposed to a state prisoner who filed a habeas corpus petition under § 2254. The Eleventh Circuit, however, has clearly held that "§ 2244(b)(1)'s mandate applies to applications for leave to file a second or successive § 2255 motion presenting the same claims we have similarly rejected on their merits in a previous application." *In re Baptiste*, 828 F.3d 1337, 1340 (11th Cir. 2016); see also *In re Colley*, No. 22-12006, 2022 WL 2951938, at *2 (11th Cir. June 28, 2022) (citing *In re Baptiste* for the proposition that "[w]e must dismiss a claim presented in an application to file a second or successive § 2255 motion that was presented in a prior application for leave to file a second or successive § 2255 motion that was adjudicated with prejudice"). This Court is bound by *In re Baptiste* because it has not

been overruled by the Eleventh Circuit sitting en banc or the U.S. Supreme Court.² Thus, there is no merit to Petitioner's claim that § 2244(b)(1) does not apply to second or successive § 2255 motions like those he has filed.

There is similarly no merit to Petitioner's claim that § 2244(b)(1) violates the Constitution because it is a suspension^{2022 U.S. Dist. LEXIS 8} of the writ of habeas corpus. That argument cannot be reconciled with the Supreme Court's decision in *Felker v. Turpin*, 518 U.S. 651, 664, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996), which held that restrictions on successive habeas petitions imposed by the Anti-Terrorism and Effective Death Penalty Act (AEDPA)-such as those found in § 2244(b)(1)-"do not amount to suspension of the writ." The Eleventh Circuit has similarly held that "the writ has not been suspended whenever a prisoner cannot file a successive collateral attack." *McCarthan v. Dir. of Goodwill Indus.-Suncoast Inc.*, 851 F.3d 1076, 1095 (11th Cir. 2017). Other circuit courts have said the same thing. See, e.g., *Bannister v. Bowersox*, 128 F.3d 621, 623 (8th Cir. 1997) (rejecting argument that § 2244(b)(1) is an "unconstitutional suspension of the writ of habeas corpus"); *Chades v. Hill*, 976 F.3d 1055, 1056-57 (9th Cir. 2020) (same); *In re Richardson*, 802 F. App'x 750, 759 (4th Cir. 2020) (same). Thus, there is no merit to Petitioner's argument that § 2244(b)(1)'s restriction on second or successive § 2255 motions is an unconstitutional suspension of the writ of habeas corpus.

III. Conclusion

For the reasons above, it is respectfully **RECOMMENDED** that:

1. Respondent's Motion to Dismiss Mischaracterized, Unauthorized Third § 2255 Petition for Lack of Jurisdiction (Doc. 8) be **GRANTED**.
2. The petition for writ of habeas corpus filed under 28 U.S.C. § 2241 (Doc. 1) be **DENIED and DISMISSED**.
3. Petitioner's Motion for an Evidentiary Hearing or Oral Conference (Doc. 10) be **DENIED** as moot.
4. The Clerk of Court be directed^{2022 U.S. Dist. LEXIS 9} to close the file.

At Pensacola, Florida, this 8th day of December 2022.

/s/ Zachary C. Bolitho

Zachary C. Bolitho

United States Magistrate Judge

Footnotes

1

Petitioner later filed yet another second or successive § 2255 request with the Eleventh Circuit. The Eleventh Circuit denied his request on November 21, 2022, explaining once again that under 28 U.S.C. § 2244(b)(1) and *In re Baptiste*, Petitioner could not raise claims that were previously presented in the initial § 2255 motion. (N.D. Ala. Case 7:05cr321, Doc. 74 at 5).

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Petitioner cites an opinion written by Justice Kavanaugh in *Avery v. United States*, 140 S. Ct. 1080, 206 L. Ed. 2d 488 (2020), as support for his argument. (Doc. 1-1 at 2). The opinion, however, was not one for the Supreme Court. Rather, it was a separate opinion by Justice Kavanaugh commenting

on the Supreme Court's decision to deny certiorari in a case. It is, therefore, not authoritative and does not disturb *In re Baptiste*'s status as controlling precedent that this Court must follow. The same is true for the dissenting opinions relied on by Petitioner. (Doc. 1-1 at 2).

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR
REHEARING EN BANC

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Order of the Court

23-10337

Before WILSON, JORDAN, and BLACK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. FRAP 35, IOP 2.