

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-14292

Non-Argument Calendar

GIOVANNI DEPALMA,

Plaintiff-Appellant,

versus

STATE OF FLORIDA,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:22-cv-02745-CEH-CPT

Before NEWSOM, BRASHER, and BLACK, Circuit Judges.

PER CURIAM:

Giovanni DePalma, proceeding *pro se*, appeals the district court's dismissal of his 42 U.S.C. § 1981 civil complaint for failure to state a claim in light of *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and *Heck v. Humphrey*, 512 U.S. 477 (1994). DePalma asserts the district court erred by not addressing his arguments regarding the state criminal convictions challenged in his complaint, including that the state trial court lacked subject matter jurisdiction and violated the Double Jeopardy Clause. After review,¹ we affirm.

A court shall dismiss a prisoner's complaint if the court determines that the complaint "is frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915A(b)(1). "[W]hen a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." *Preiser*, 411 U.S. at 500.

A § 1983 action cannot be used to collaterally attack a conviction or sentence unless the underlying conviction or sentence "has been reversed on direct appeal, expunged by executive order,

¹ A district court's dismissal of a complaint for failure to state a claim is reviewed *de novo*, viewing the allegations in the complaint as true. *Mitchell v. Farcass*, 112 F.3d 1483, 1490 (11th Cir. 1997).

declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 486-87. Although *Heck* involved a prisoner seeking money damages, the Supreme Court later clarified that prisoners cannot use § 1983 to obtain relief where success would imply the invalidity of a conviction or sentence, even if the prisoner is seeking injunctive relief. *Wilkinson v. Dotson*, 544 U.S. 74, 81-82 (2005).

The district court did not err in dismissing DePalma's complaint as barred under *Preiser* and *Heck*. First, although DePalma presented his claim under § 1981 rather than § 1983, *Preiser* and *Heck* apply to his § 1981 complaint. Liberally construing his complaint, DePalma likely meant to challenge his conviction under § 1983, rather than § 1981, because he raises constitutional claims, not claims regarding racial discrimination in making or enforcing a contract. *See Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998) (stating *pro se* pleadings are liberally construed); *compare* 42 U.S.C. § 1983 with 42 U.S.C. § 1981. Moreover, *Preiser* and *Heck* apply to § 1981 claims as well as § 1983 claims. *See Cruz v. Skelton*, 502 F.2d 1101, 1102 (5th Cir. 1974)² (citing *Preiser* and holding that since relief sought by prisoner was injunctive relief requiring his release from confinement, his proper remedy was habeas corpus, not a suit under § 1981). DePalma's complaint challenges the

² 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.

validity of his convictions, and he requests “immediate discharge” from incarceration. These claims are precisely the type that are barred by *Preiser* because DePalma is seeking a determination he is entitled to an immediate release. *See Preiser*, 411 U.S. at 500. DePalma’s claims are also barred by *Heck* because a determination he is entitled to immediate release because the amended information leading to his conviction was void would necessarily undermine the validity of his convictions, and he has not demonstrated that his convictions have been overturned. *See Heck*, 512 U.S. at 486-87; *Wilkinson*, 544 U.S. at 81-82.

Additionally, even if the district court had liberally construed his complaint as a habeas petition, it would have been dismissed as an unauthorized second or successive petition because DePalma had already filed a habeas petition and had not received authorization from this Court to file a second or successive petition. *See* 28 U.S.C. § 2244(b)(3)(A) (providing to file a second or successive § 2254 petition, a petitioner must first get approval from this Court); *Hill v. Hopper*, 112 F.3d 1088, 1089 (11th Cir. 1997) (explaining without our authorization, the district court lacks jurisdiction to consider a second or successive petition). Accordingly, we affirm.

AFFIRMED.

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GIOVANNI DEPALMA,

Plaintiff-Appellant,

versus

STATE OF FLORIDA,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:22-cv-02745-CEH-CPT

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

2

Order of the Court

22-14292

Before NEWSOM, BRASHER, 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 Panel Rehearing also is DENIED. FRAP 40.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GIOVANNI DEPALMA,

Plaintiff,

v.

Case No. 8:22-cv-2745-CEH-CPT

STATE OF FLORIDA, *et al.*,

Defendants.

ORDER

Before the Court is Plaintiff's "Emergency Petition for Permanent Injunction," filed under 42 U.S.C. § 1981 (Doc. 1). Plaintiff, a Florida prisoner, alleges he was convicted of battery and two counts of lewd or lascivious molestation. He contends those convictions are "void" because the state trial court lacked subject matter jurisdiction when he was convicted and sentenced on an invalid Information. As relief, he seeks a permanent injunction directing his "immediate discharge" from incarceration (*Id.*, docket page 30). He moves for expedited consideration because he "will be transferred to I.C.E." for deportation "days prior to his release" on December 23, 2022 (*Id.*, docket p. 2). After reviewing the complaint as required by 28 U.S.C. § 1915A,¹ the Court concludes that the complaint must be dismissed.

¹ Section 1915A states in pertinent part that:

(a) Screening. The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in

Because Plaintiff challenges the fact of his confinement and seeks release and dismissal of criminal convictions, he must raise his claims in a habeas corpus petition, not a civil complaint. *See Heck v. Humphrey*, 512 U.S. 477, 481 (1994) (“[H]abeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release, even though such a claim may come within the literal terms of § 1983.” (citing *Preiser v. Rodriguez*, 411 U.S. 475 (1973))); *Cruz v. Skelton*, 502 F.2d 1101 (5th Cir. 1974) (since relief sought by prisoner was declaratory and injunctive relief requiring that he be granted parole and released from confinement, his proper federal remedy was habeas corpus, and he could not maintain a suit under 42 U.S.C. § 1981).²

which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) Grounds for dismissal. On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint:

- (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or
- (2) seeks monetary relief from a defendant who is immune from such relief.

² This Court cannot construe the complaint as a petition for the writ of habeas corpus challenging the Florida convictions because the petition would be an unauthorized “second or successive” habeas petition. *See* 28 U.S.C. § 2244(b)(3)(A) (“Before a second or successive [habeas corpus] application. . . is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.”). Plaintiff previously filed a habeas petition in this Court that was denied in 2019. *See Depalma v. Sec'y, Dep't. of Corr.*, Case No. 8:16-cv-1698-MSS-CPT (M.D.Fla.).

Accordingly, the complaint (Doc. 1) is **DISMISSED** under 28 U.S.C. § 1915A for failure to state a claim upon which relief may be granted. The **Clerk** is directed to close this case.

ORDERED in Tampa, Florida, on December 6, 2022.

Charlene Edwards Honeywell
Charlene Edwards Honeywell
United States District Judge

Copy to: Plaintiff, *pro se*

Supreme Court of Florida

MONDAY, NOVEMBER 14, 2022

CASE NO.: SC22-1510

Lower Tribunal No(s).:
292008CF013416000AHC

GIOVANNI DEPALMA

vs. RICKY D. DIXON, ETC.

Petitioner(s)

Respondent(s)

Petitioner has submitted an “Emergency Petition for Permanent Injunction,” which this Court has treated as a petition for writ of habeas corpus. The petition is hereby transferred to the Second District Court of Appeal for consideration in the context of Case Number 2D22-3229. The transfer of this case should not be construed as an adjudication or comment on the merits of the petition, nor as a determination that the transferee court has jurisdiction or that the petition has been properly denominated as a petition for writ of habeas corpus. The transferee court should not interpret the transfer of this case as an indication that it must or should reach the merits of the petition. Any determination concerning whether a filing fee shall be applicable to this case shall

CASE NO.: SC22-1510

Page Two

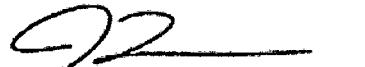
be made by the transferee court. Any and all pending motions in this case are hereby deferred to the transferee court.

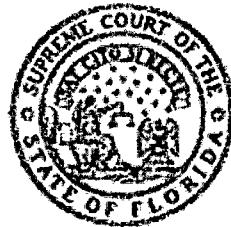
Any future pleadings filed regarding this case should be filed in the above mentioned district court at Post Office Box 327, Lakeland, Florida 33802.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

A True Copy

Test:


John A. Tomasino
Clerk, Supreme Court



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Served:

LANCE ERIC NEFF
GIOVANNI DEPALMA
C. SUZANNE BECHARD
HON. CINDY STUART, CLERK
HON. MARY BETH KUENZEL, CLERK