

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JAN 22 2020

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

JARED D. HERRMANN,

Petitioner-Appellant,

v.

RYAN MCCARTHY, in his official
capacity as Secretary of the Army; UNITED
STATES DEPARTMENT OF THE ARMY,

Respondents-Appellees.

No. 19-16186

D.C. No.

2:18-cv-04194-DJH-MHB

District of Arizona,
Phoenix

ORDER

Before: PAEZ, M. SMITH, and N.R. SMITH, Circuit Judges.

Appellees' motion to dismiss this appeal for lack of jurisdiction (Docket Entry No. 13) is granted. *See* 28 U.S.C. § 2241; *Jones v. Cunningham*, 371 U.S. 236, 243 (1963).

DISMISSED.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Jared D. Herrmann,

Petitioner,

v.

Mark T. Esper, et al.,

Respondents.

No. CV-18-04194-PHX-DJH (MHB)

ORDER

Petitioner Jared D. Herrmann, who is not in custody, has filed, through counsel, a Petition Under 28 U.S.C. § 2241 for a Writ of Habeas Corpus (Doc. 1) and paid the filing fee. The Court will dismiss the Petition and this action.

I. Background

Petitioner was a Sergeant on active duty with the United States Army. On December 17, 2013, Petitioner was tried and convicted by a military judge of reckless endangerment and willful dereliction in the performance of his duties. The commanding general who convened the court-martial approved the trial sentence of a bad-conduct discharge from the Army, confinement for ten months, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. On direct review, the Army Court affirmed the military judge's findings and sentence. Petitioner timely filed a Petition for a Grant of Review to the United States Court of Appeals for the Armed Forces (CAAF). The CAAF granted discretionary review of one issue: whether the evidence was legally sufficient to find Petitioner committed reckless endangerment. The CAAF issued its decision on June 19, 2017 and

1 denied Petitioner's request for reconsideration on July 13, 2017. Petitioner filed a Petition
 2 for a Writ of Certiorari in the United States Supreme Court, which was denied on
 3 November 27, 2017. Petitioner completed his term of confinement prior to filing his
 4 § 2241 Petition.

5 **II. Petition**

6 In his Petition, Petitioner names Secretary of the Army Mark T. Esper and the
 7 United States Department of the Army as Respondents. Petitioner raises four grounds for
 8 relief: (1) the prosecution did not prove an element of the reckless endangerment offense
 9 beyond a reasonable doubt; (2) his convictions and sentence for reckless endangerment and
 10 dereliction of duty are unconstitutional; (3) he was deprived of the right to effective
 11 assistance of counsel at trial; and (4) the dereliction of duty conviction is unconstitutional.

12 **III. Discussion**

13 The power to grant habeas corpus "shall not extend to a prisoner unless . . . [h]e is
 14 in custody..." 28 U.S.C. § 2241(c). Although the Supreme Court has recognized that
 15 habeas actions pursuant to § 2241 may be appropriate "where members of the armed
 16 services ... have been unlawfully detained, restrained, or confined," habeas relief has not
 17 been extended to petitioners who are not "in custody." *Schlanger v. Seamans*, 401 U.S.
 18 487, 489 (1971); *see also Parisi v. Davidson*, 405 U.S. 34 (1972).

19 Petitioner was not in custody pursuant to his military conviction at the time he filed
 20 his Petition. *See* 28 U.S.C. § 2241(c). Accordingly, this Court does not have jurisdiction
 21 to consider Petitioner's Petition, and it will be dismissed.

22 **IT IS ORDERED:**

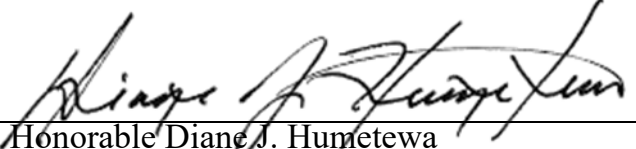
23 (1) Petitioner's Petition Under 28 U.S.C. § 2241 (Doc. 1) and this case are
 24 **dismissed.**

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

26 (3) Although Petitioner has brought his claims in a § 2241 petition, a certificate
 27 of appealability is required where a § 2241 petition attacks the petitioner's conviction or
 28 sentence. *See Porter v. Adams*, 244 F.3d 1006, 1007 (9th Cir. 2001). Pursuant to Rule

1 11(a) of the Rules Governing Section 2255 Cases, in the event Petitioner files an appeal,
2 the Court declines to issue a certificate of appealability because reasonable jurists would
3 not find the Court's procedural ruling debatable. *See Slack v. McDaniel*, 529 U.S. 473,
4 484 (2000).

5 Dated this 11th day of April, 2019.

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8 
9 Honorable Diane J. Humetewa
United States District Judge