

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MIGUEL GARCIA,

Petitioner,

v.

R.L. STIFF,

Respondent.

ORDER

03-C-0081-C

This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2241. Petitioner Miguel Garcia, an inmate at the Federal Correctional Institution in Oxford, Wisconsin, is serving a thirty-year sentence imposed on October 12, 1995, by the District Court for the Eastern District of Wisconsin. Petitioner contends that he is in custody in violation of the laws and Constitution of the United States. Petitioner has not paid the \$5.00 fee for filing his petition. Instead, he requests leave to proceed in forma pauperis. That request will be denied, because it is clear from petitioner's trust fund account statement that he does not qualify for pauper status.

In determining whether a petitioner is indigent for the purpose of filing a § 2241 petition, this court calculates the average monthly deposits and the average monthly balances

in the petitioner's prison account for the six-month period mentioned above. If 20% of the greater of these two figures is \$5 or more, then the petitioner is not eligible for indigent status and must prepay all of the \$5 filing fee. If 20% of the greater of these two figures is less than \$5, the petitioner must prepay whatever portion of \$5 the 20% calculation works out to be.

Petitioner's trust fund account statement covers the most recent four-month period. During that time, petitioner received deposits totaling \$272.00 to his prison account, which averages out monthly to \$68.00. It is unnecessary to calculate petitioner's monthly balance for the same period, because regardless which amount is greater, he does not qualify for indigent status. Twenty percent of \$68.00 is \$13.60, which is more than the \$5 filing fee. Therefore, petitioner does not qualify for indigent status.

Even if petitioner did qualify for indigent status, his petition would have to be dismissed immediately for lack of jurisdiction. Petitioner presents his claims in a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, but he is attacking his federal conviction and sentence. The only avenue available to him for attacking his federal conviction and sentence is a motion under 28 U.S.C. § 2255. Waletzki v. Keohane, 13 F.3d 1079, 1080 (7th Cir. 1994) (“prisoner who challenges his federal conviction or sentence cannot use [§ 2241] at all but instead must proceed under 28 U.S.C. § 2255.”).

Because petitioner is challenging the validity of a conviction giving rise to his

sentence, his claims must be presented in a § 2255 motion directed to the court that imposed his sentence. In rare circumstances, a federal sentence can be attacked collaterally under § 2241, see Cooper v. United States, 199 F.3d 898 (7th Cir. 1999); In re Davenport, 147 F.3d 605, 608 (7th Cir. 1998), but petitioner says nothing in his petition or supporting papers to suggest that his challenge fits within the exception. He cannot proceed under § 2241 in this court simply because he did not prevail on the § 2255 motion he filed in the District Court for the Eastern District of Wisconsin.

ORDER

Accordingly, IT IS ORDERED that petitioner's request for leave to proceed in forma pauperis in this habeas corpus action is DENIED.

Entered this 25th day of February, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge