IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TYSON EUGENE MARSHEK,

ORDER

Petitioner,

04-C-261-C

v.

JOSEPH SCIBANA, Warden,
Federal Correctional Institution, Oxford, WI,

Respondent.

- -

This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2241. Petitioner Tyson Eugene Marshek is an inmate at the Federal Correctional Institution in Oxford, Wisconsin, serving a sentence imposed by the United States District Court for the Southern District of Georgia. The current balance of petitioner's trust fund account is $.10; his statement reveals that he has had no source of income since early March 2004. Accordingly, I conclude that petitioner has no means to pay an initial partial payment. He may proceed in forma pauperis.

Petitioner raises two claims. First, he alleges that prison officials confiscated legal materials that he was using in the appeal of his conviction and sentence, in violation of his

constitutional right to gain access to the courts. Petitioner's second claim is much more convoluted, taking up 17 pages of his petition. However, the gist of his claim appears to be that the federal government was without authority to prosecute him in the absence of a constitutional amendment authorizing federal prosecutions for his crime, bank robbery.

The first and last issue that I must decide is whether this court has jurisdiction to consider petitioner's claims under § 2241. A prisoner's claims challenging his ability to gain access to the courts is a challenge to his conditions of confinement and therefore should be brought as a civil rights action under 42 U.S.C. § 1983 or Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), rather than a petition for a writ of habeas corpus. E.g., Lewis v. Casey, 518 U.S. 343 (1996); Lehn v. Holmes, 364 F.3d 862 (7th Cir. 2004); Ortloff v. United States, 335 F.3d 652 (7th Cir. 2003). I recognize that, in this case, petitioner is contending that he is entitled to release because he would have successfully challenged his conviction but for the confiscation of his materials. However, a conditions of confinement claim cannot be transformed into a petition for a writ of habeas corpus simply because the inmate requests release as a remedy. See Clayton-El v. Fisher, 96 F.3d 236, 242 (7th Cir. 1996) (nature of injury and not relief sought determines whether claim is cognizable in habeas corpus). Even if petitioner could prove that he was denied access to the courts, this would not immediately call into question the validity of his confinement. At most, it would allow him to recover money damages and to reassert the arguments

challenging his sentence and conviction. A finding in his favor on his access to courts claim would not, as petitioner argues, require a court to "assume that [he] would have prevailed on these claims [challenging his conviction and sentence]."

Further, even if petitioner could challenge his conviction or sentence through a claim for denial of the right to gain access to the courts, he would have to bring this claim under 28 U.S.C. § 2255 rather than § 2241. 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."). Petitions under § 2255 must be filed before the court that imposed the petitioner's sentence, which in this case was the United States District Court for the Southern District of Georgia.

This same defect prevents me from considering petitioner's second claim as well. Because petitioner's claim that the government was without authority to prosecute him is a challenge to his conviction, he must bring that claim in the Southern District of Georgia. However, I would not recommend this course of action to petitioner. Petitioner is incorrect that the federal government needs a constitutional amendment before it may prosecute him for bank robbery under 18 U.S.C. § 2113. It is true that Congress's powers are limited to those enumerated in the Constitution. U.S. Const. art. 1, § 8; City of Boerne v. Flores, 521 U.S. 507, 516 (1997). Among those powers is the regulation of interstate commerce. U.S. Const., art. I, § 8, cl. 2. As the Court of Appeals for the Seventh Circuit has explained,

Congress has authority under the commerce clause to prohibit the robbing of banks insured by the Federal Deposit Insurance Corporation because those banks

> are fundamental to the conduct of interstate commerce. Congress created the FDIC to "keep open the channels of trade and commercial exchange." Weir v. United States, 92 F.2d 634, 636 (7th Cir.1937). As a result, "[t]he activities of an FDIC-insured institution ... affect interstate commerce more than property insured by a private carrier.... [T]he government insurance is federally administered, federal officials periodically examine the accounts, and the reports sent to the FDIC deal with money that has been deposited from many sources, including those outside the state." United States v. Peay, 972 F.2d 71, 75 (4th Cir.1992).

United States v. Watts, 256 F.3d 630, 633 (7th Cir. 2001). Thus, any argument that the United States was powerless to arrest, prosecute and convict petitioner would be without merit.

ORDER

IT IS ORDERED that petitioner Tyson Eugene Marshek's petition for a writ of habeas corpus is DISMISSED for lack of jurisdiction.

Entered this 1st day of June, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge