

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

WILLIAM J.R. EMBREY,

Petitioner,

v.

R. MARTINEZ, Warden,
F.C.I. Oxford, Wi,¹

Respondent.

ORDER

06-C-698-C

This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2241. Petitioner William J.R. Embrey is an inmate at the Federal Correctional Institution in Oxford, Wisconsin, serving a sentence imposed by the District Court for the Western District of Missouri. Petitioner contends that he is in custody in violation of the laws and

¹Petitioner also named The Hon. John C. Shabaz, a district court judge, as a respondent in this action. However, the appropriate respondent in a habeas corpus action is “the person having custody of the person detained.” 28 U.S.C. § 2243. Therefore, I have removed Judge Shabaz from the caption of this case. If petitioner wants to sue Judge Shabaz for some alleged violation of his constitutional rights, he is free to do so in a separate civil action so long as he pays the full \$350 filing fee at the time of filing. This court is aware that petitioner has earned three strikes under 28 U.S.C. § 1915(g) in the District Court for the Western District of Missouri. Therefore, he would be ineligible to proceed in forma pauperis unless his complaint were to qualify for the exception to § 1915(g).

Constitution of the United States. Although petitioner has paid the \$5.00 filing fee, his petition will be dismissed 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 has given no reason why his claim should not be construed as a motion brought under 28 U.S.C. § 2255. He is alleging that his conviction was obtained in the absence of jurisdiction because the offense occurred “entirely within and under the jurisdiction and sovereignty of the State of Missouri.” In addition, he argues that his conviction for being a felon in possession of a firearm is illegal under the Second Amendment, which grants him the inalienable right to possess a legal firearm.

It is not simply a matter of preference that petitioner raise his claims in a motion brought pursuant to § 2255. A § 2255 motion is the only avenue available to petitioner for attacking his federal conviction and sentence. See 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 his conviction in the Missouri district court, his claims must be presented in a § 2255 motion directed to the court that imposed his sentence. There is a narrow safety valve that permits federal sentences to be attacked collaterally under § 2241 when a motion under § 2255 is “inadequate or ineffective to test the legality of his detention.” In re Davenport, 147 F.3d 605, 608 (7th Cir. 1998).

However, petitioner submits nothing in his petition or supporting papers suggesting 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 court that imposed his sentence. Id. at 609-10. The fact that he lost his § 2255 motion does not mean that the motion was not an adequate or effective means of testing the legality of his detention.

One further matter warrants discussion. The U.S. Party/Case Index reveals that petitioner Embrey has filed 79 actions in the United States District Courts. Four of those actions were filed in the Western District of Wisconsin court and assigned to Judge Shabaz. At least one of those actions challenged the validity of petitioner's sentence for felon in possession of a firearm. Embrey v. U.S. Parole Comm'n, 06-C-29-S. In that case, Judge Shabaz told petitioner in an order dated March 9, 2006 that he could not hear his challenge to his conviction and sentence because the matter had to be raised in a § 2255 motion in the court that sentenced him. In Embrey v. Johnson, Case. No. 01-3515-CV-S-SOW-P, (slip op. Nov. 2, 2001), the United States District Court for the Western District of Missouri counted no fewer than eight instances in which petitioner had filed abusive § 2255 litigation. In Embrey v. Hershberger, 131 F.3d 739, 740 (8th Cir. 1997), the court of appeals noted that with respect to challenges petitioner was raising pertaining to another of his convictions, the court had "several times previously dismissed [Embrey's] petitions as successive." Most recently, petitioner attempted to bring a successive § 2255 motion

disguised as a § 2241 action in the District Court for the District of Columbia. See Embrey v. Bush, 2006 WL 2466809 (D.D.C. August 24, 2006). In that case, the court noted that petitioner’s “mandamus action” was in fact a § 2255 motion challenging his conviction and sentence for possession of a firearm, that petitioner had filed a § 2255 motion in the District Court for the Western District of Missouri challenging that conviction and sentence, that his motion had been denied on March 5, 2006 and that petitioner’s appeal from that denial had been dismissed as untimely filed in the court of appeals. The court noted also that on June 9, 2004, petitioner had filed a second § 2255 motion in the Western District of Missouri, which was denied because it was successive and that, subsequently, on October 18, 2004, the Court of Appeals for the Eighth Circuit had denied petitioner’s petition for authorization to file a successive motion. The District Court for the District of Columbia concluded that it lacked jurisdiction over petitioner’s action and transferred the case to the Court of Appeals for the Eighth Circuit for a new decision on allowing a successive § 2255 motion. The Eighth Circuit’s website does not provide case information detailing the status of the case following transfer. Nevertheless, it appears clear that petitioner is determined not to take “no” for an answer.

In Alexander v. United States, 121 F.3d 312 (7th Cir. 1997), the Court of Appeals for the Seventh Circuit posed the question, “What should a court do with a prisoner who refuses to take no for an answer and files [a request for leave to file a successive § 2255

motion] over and over again?” It noted that the AEDPA is designed to bring successive petitions to a halt and that judicial resources are limited and should be used to provide initial hearings rather than being diverted to repetitious claims. It noted also that it had explained clearly to Alexander in an earlier order that the AEDPA applied to his claims and that “any further effort [by Alexander] to begin a collateral attack without satisfying the standard of the new law will lead to sanctions.” It then imposed a sanction of \$500 on Alexander and entered a modified order under Support Systems International Inc. v. Mack, 45 F.3d 185 (7th Cir. 1995), requiring that any further applications for leave to file a successive collateral attack would be deemed denied on the 30th day after filing unless the court otherwise ordered.

Petitioner Embrey may not agree with the several courts who have declined to find his current confinement unlawful, but his recourse is not to submit his arguments to as many courts across the country as he can as fast as he can. Both judges in this district have now determined that petitioner’s purported § 2241 petition challenging his conviction for possession of a firearm is nothing more than a § 2255 motion improperly titled, filed in the wrong court and filed in any event without the permission of the Court of Appeals for the Eighth Circuit. It would be a disservice to the other litigants in this district to allow petitioner to usurp the attention their cases deserve. Accordingly, the clerk of court will be directed to forward to chambers for review any future habeas corpus actions petitioner

submits to this court. Such lawsuits will be deemed rejected, without the need for judicial action, on the 30th day following receipt, unless the court orders otherwise.

ORDER

IT IS ORDERED that petitioner William J.R. Embrey's petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2241 is DISMISSED for lack of jurisdiction.

Further, IT IS ORDERED that the clerk of court forward to chambers for review any future habeas corpus actions petitioner submits to this court. Such lawsuits will be deemed rejected, without the need for judicial action, on the 30th day following receipt, unless the court orders otherwise.

Entered this 11th day of December, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge