

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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In re:

KENNY TAYLOR,  
  
Movant.

No. 07-6189  
(D.C. No. CR-93-175-R)

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ORDER  
Filed September 17, 2007

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Before **HENRY, EBEL**, and **TYMKOVICH**, Circuit Judges.

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Kenny Taylor, a pro se federal prisoner, filed a motion in the district court entitled, “Petitioner’s Ex Parte Motion for Equity Relief.” The court construed the motion as a successive petition for relief under 28 U.S.C. § 2255, but because Taylor had not obtained prior authorization from this court as required by § 2255 paragraph 8, transferred it here pursuant to 28 U.S.C. § 1631, *see Coleman v. United States*, 106 F.3d 339, 341 (10th Cir. 1997) (per curiam). Taylor now argues that the court improperly transferred the motion and therefore asks that we remand the matter to the district court for its consideration. We deny this request.

Taylor was convicted on four counts of drug-related offenses and was sentenced to 262 months in prison. His convictions were affirmed on appeal, and the Supreme Court denied his petition for writ of certiorari. Taylor has since

collaterally attacked his sentence five times with four motions pursuant to § 2255, and one under 28 U.S.C. § 2241. Each attempt failed. Taylor lodged his most recent challenge in a motion for equitable relief asking the district court to recall its mandate (presumably its sentencing mandate). Citing a recent Ninth Circuit opinion, *Carrington v. United States*, 470 F.3d 920 (9th Cir. 2006), Taylor argued that the mandate ought to be recalled because his sentence was improperly enhanced. Construing the motion as a successive § 2255 petition without prior authorization, the district court transferred the cause to us. Taylor now moves to remand the matter to the district court.

The motion Taylor filed in district court seeks relief from his underlying sentence. Consequently, the district court was correct to construe his motion as a successive § 2255 petition. *See Gonzalez v. Crosby*, 545 U.S. 524, 531-32 (2005) (holding that motions seeking relief from an underlying conviction or sentence should be treated as successive habeas petitions); *United States v. Nelson*, 465 F.3d 1145, 1149 (10th Cir. 2006) (“It is the relief sought, not [the] pleading’s title, that determines whether the pleading is a § 2255 motion.”). Moreover, Taylor concedes “that the relief he seeks is foreclosed by the Antiterrorism and Effective Death Penalty Act of 1996.” Motion for Equity Relief at 6 (internal quotation marks omitted). Still, Taylor argues that remand is proper because he

never agreed to recharacterize his motion as a § 2255 petition and the district court never provided him an opportunity to withdraw or amend his pleading.

Taylor is correct that a motion may only be recharacterized “as a § 2255 petition where (1) the petitioner, having been made aware of the risks associated with recharacterization, assents, or (2) the district court concludes that the petitioner’s motion can only be considered under § 2255 and offers the movant an opportunity to withdraw the motion rather than have it so recharacterized.”

*United States v. Torres*, 282 F.3d 1241, 1245 (10th Cir. 2002) (internal quotation marks omitted). But we have explained that these requirements are only necessary where the recharacterized motion would be “the petitioner’s *first* § 2255 petition.” *Id.* at 1246. The rationale is that a petitioner who has had his first § 2255 petition recharacterized could later be barred from bringing a valid claim. *Id.* This logic clearly does not apply in situations such as this, where Taylor has previously filed several § 2255 petitions. Accordingly, the motion for remand is DENIED and the matter is terminated.

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker". The signature is written in black ink and includes a long, sweeping horizontal flourish at the end.

ELISABETH A. SHUMAKER, Clerk

