

UNITED STATES COURT OF APPEALS February 11, 2008  
FOR THE TENTH CIRCUIT Elisabeth A. Shumaker  
Clerk of Court

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In re:  
  
BRIAN WILLIAM ADERHOLD,  
  
Movant.

Nos. 07-4253, 07-4257 & 08-4001  
  
(D.C. Nos. 2:05-CR-544-PGC,  
2:07-CV-789-TS, 2:07-CV-900-TS,  
2:07-CV-1005-TS)  
(D. Utah)

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ORDER

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Before **TACHA, LUCERO, and HOLMES**, Circuit Judges.

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Movant Brian William Aderhold, a Utah state prisoner proceeding pro se, filed three motions in district court that were all transferred to this court as unauthorized second or successive 28 U.S.C. § 2255 motions. In response, Aderhold has filed with this court three motions for remand. We grant one motion for remand, and deny the second and third.

*First Post-Conviction Motion; No. 07-4115.* Aderhold pleaded guilty in 2006 to using interstate facilities to transmit information about a minor. He did so pursuant to a plea agreement in which he waived his right to appeal or to challenge his sentence in any collateral review motion, writ or procedure, including a § 2255 motion. (Statement by Def. in Adv. of Plea, at 3-4, Docket No. 20 in Utah District Court No. 2:05-cr-544). He was sentenced to forty-six

months' imprisonment to be followed by sixty-months of supervised release. He did not file an appeal. Instead, more than one year after his judgment was entered, he filed a motion that he captioned as a 28 U.S.C. § 2241 motion in which he challenged his conviction and sentence on jurisdictional grounds.

The claims that Aderhold asserted in this § 2241 motion - constitutional challenges to the validity of his conviction and sentence - were not legally cognizable in a § 2241 motion, but were cognizable in a § 2255 motion. *See Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996) (stating that “[a] petition [filed] under 28 U.S.C. § 2241 attacks the execution of a sentence rather than its validity and must be filed in the district where the prisoner is confined,” while “[a] 28 U.S.C. § 2255 petition attacks the legality of detention, and must be filed in the district that imposed the sentence”) (citations omitted)). Pursuant to the liberal construction rule afforded to pro se litigants, whereby judges attempt to give effect to the substance, rather than the form or terminology, of a self-represented litigant's filings, *see Castro v. United States*, 540 U.S. 375, 381 (2003), the district court construed Aderhold's motion as a § 2255 motion. The district court denied the recharacterized motion, however, as both time-barred and as barred by Aderhold's plea-agreement waiver of his right to collaterally challenge his sentence.

Aderhold sought to appeal that dismissal, arguing that the district court erred in converting his motion to a § 2255 motion. His theory was that, since he

had waived his right to file a § 2255 motion in his plea agreement, his only remaining remedy was to file a § 2241 motion. This court denied him a certificate of appealability (COA). *Aderhold v. United States*, No. 07-4115 (10th Cir. Sept. 19, 2007) (unpublished). In denying COA, however, we noted that the district court had failed to give Aderhold certain required warnings before it converted his § 2241 motion to a § 2255 motion.

Important consequences attach to a first § 2255 motion: After a federal prisoner files a first § 2255 motion challenging his criminal judgment, he may not file any subsequent post-judgment motion that asserts or reasserts a substantive claim to set aside his criminal conviction or sentence – referred to as a second or successive motion – unless he first obtains authorization from a panel of the circuit court of appeals to file the motion in district court. 28 U.S.C. § 2255 para. 8; 28 U.S.C. § 2244 (b)(3); *see also Gonzalez v. Crosby*, 545 U.S. 524, 530-31 (2005) (describing nature of second or successive motions). Because of this, the Supreme Court has held that a district court may not recharacterize a pro se litigant’s motion as a first § 2255 motion unless it first notifies the litigant that “this recharacterization means that any subsequent § 2255 motion will be subject to the restrictions on second or successive motions, and provide[s t]he litigant an opportunity to withdraw the motion or to amend it so that it contains all the § 2255 claims he believes he has.” *Castro*, 540 U.S. at 383. The Court held that the appropriate remedy for a district court’s failure to provide such notice is that

the recharacterized “motion cannot be considered to have become a § 2255 motion for purposes of applying to later motions the law’s ‘second or successive’ restrictions.” *Id.* at 383.

In our order denying COA, we observed that, although the district court erred in failing to provide Aderhold with notice about its intent to recharacterize the motion, Aderhold’s remedy was not reversal of the dismissal, but rather that his converted motion would not count as a “first” § 2255 motion for second or successive purposes.

*Second Post-Conviction Motion; No. 07-4253.* In October 2007, Aderhold filed another motion in district court which he again characterized as a § 2241 habeas petition. He again challenged the trial court’s jurisdiction to convict and sentence him in his 2006 criminal judgment, and the district court again ruled the motion was only cognizable as a § 2255 motion. The district court further determined the motion constituted an unauthorized second and successive § 2255 motion, and transferred it to this court for authorization. *See Coleman v. United States*, 106 F.3d 339, 341 (10th Cir. 1997) (per curiam) (approving transfer procedure under 28 U.S.C. § 1631 for second or successive § 2255 motions).

Aderhold has filed a motion in this court asking us to remand the October motion back to the district court, arguing the district court erred in recharacterizing it as a § 2255 motion (Case No. 07-4253). In this regard, he is incorrect. He again argues that he is entitled to file a § 2241 petition because he

waived his right to bring a § 2255 motion in his plea agreement, and thus has no other effective habeas remedy. Contrary to Aderhold's premise, a § 2241 petition does not act as an additional, alternative, or supplemental remedy whenever a petitioner is unable to obtain relief under § 2255. *Bradshaw*, 86 F.3d at 166. The motion Aderhold filed in October 2007 challenged the validity of his conviction and sentence. The exclusive remedy for testing the validity of a judgment and sentence is that provided for in § 2255, unless that remedy is inadequate or ineffective. *Carvalho v. Pugh*, 177 F.3d 1177, 1178 (10th Cir. 1999). The fact that a petitioner is procedurally barred from filing a § 2255 motion does not make the § 2255 remedy inadequate or ineffective. *Id*; *see also Cradle v. United States ex rel. Miner*, 290 F.3d 536, 539 (3d Cir. 2002) ("The remedy afforded under § 2255 is not inadequate or ineffective merely because the one-year limitations period has expired or the petitioner is unable to meet [its] stringent gate-keeping requirements."). Similarly, the fact that Aderhold voluntarily waived his right to bring a § 2255 motion does not mean that the remedy itself is inadequate or ineffective. Rather, it simply means that Aderhold is personally unable to use that remedy. Thus, the district court correctly held that the claims asserted in the October 2007 motion are the province of a § 2255 motion, not a § 2241 motion.

The district court did err, however, in concluding that the October motion was a second or successive motion. As explained above, pursuant to *Castro*, 540 U.S. at 383-84, Aderhold's recharacterized first motion does not count for

purposes of the circuit court authorization requirements of § 2255 para. 8 and § 2244(b)(3). In short, the October 2007 motion was properly recharacterized as a § 2255 motion, but it was not a second or successive filing under *Castro*, and therefore, prior authorization from this court is not required for Aderhold to file it in district court. Accordingly, Aderhold's motion for remand in No. 07-4253 is granted.<sup>1</sup>

*Third Post-Conviction Motion; No. 07-4257.* In November 2007, while his October 2007 motion was pending, Aderhold filed yet another motion captioned as a § 2241 motion. The motion he filed appears to be incomplete, because it cuts off mid-sentence on page 5, at the point in which Aderhold is first setting forth his claim, though it appears he was about to assert some claim relating to the supervised release portion of his sentence. Pet. at 5 (Docket No. 1 in Utah District Court case No. 2:007-cv-900). Nonetheless, the district court construed the motion as a second or successive § 2255 motion and transferred it to this court for authorization as a second or successive motion. Aderhold has filed a motion to remand the matter, in case No. 07-4257.

In his remand motion, Aderhold states his November motion raises an entirely different claim than his prior motions, and seeks to challenge an "illegal

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<sup>1</sup> We recognize that the district court may again rule that Aderhold waived his right to file a § 2255 motion in his plea agreement. Nonetheless, we grant the motion for remand, because our role is simply to determine whether authorization to file the proposed motion is required and, if so, whether the standards for authorization have been met. See § 2244(b)(3).

portion of the future execution of my sentence”; thus, suggesting that he was filing a § 2241 motion in order to challenge the execution, rather than the validity, of his sentence. Mot. for Remand, at 2. This argument is negated by Aderhold’s later statement that his November motion seeks to present claims that the supervised release portion of his sentence violated his double jeopardy and due process rights and violated the Sentencing Reform Act. Clearly, these proposed claims challenge the validity of his sentence *as imposed*, not the execution of his sentence. Therefore, these claims may only be raised in a § 2255 motion. *See Bennett v. United States Parole Comm’n*, 83 F.3d 324, 327-28 (10th Cir. 1996). Based on Aderhold’s characterization of his claims in the remand motion, we conclude that the claims he seeks to present to the district court in his November 2007 motion are cognizable only in a § 2255 motion, and the district court properly so characterized his motion.

Furthermore, circuit court authorization is now required before Aderhold may file these proposed claims in district court, regardless of how he styles the motion in which he presents them. After a first § 2255 motion has been filed, *any* post-judgment claim that asserts or reasserts a substantive challenge to the conviction is subject to the pre-authorization requirements, no matter what title the prisoner puts on the caption. *See United States v. Torres*, 282 F.3d 1241, 1246 (10th Cir. 2002). Aderhold’s October 2007 motion *does* count as a § 2255 motion for purposes of the second or successive gatekeeping requirements. *See*

*id.* (holding court not required to give notice before recharacterizing a pleading as a § 2255 motion when it is not the first § 2255 motion); *see also Melton v. United States*, 359 F.3d 855, 857 (7th Cir. 2004 ) (explaining that after initial § 2255 motion, there is no risk to the prisoner in recharacterizing a subsequent motion, because the only issue is whether the prisoner made the prima facie showing to satisfy the authorization requirements). Although the October 2007 motion has not been ruled upon, the pre-authorization requirements may not be circumvented by presenting new claims even while the first habeas action is pending in district court. *See United States v. Espinoza-Saenz*, 235 F.3d 501, 505 (10th Cir. 2000); *see also Ochoa v. Sirmons*, 485 F.3d 538, 541 (10th Cir. 2007) (holding that § 2244(b) authorization is required whenever substantively new claims are raised, even when first habeas petition is still pending).

In summary, the November 2007 was a second or successive § 2255 motion requiring circuit court authorization to be filed. Without such authorization, the district court lacked jurisdiction to consider the claim. *See United States v. Nelson*, 465 F.3d 1145, 1148 (10th Cir. 2006) (“[A] second or successive § 2255 motion cannot be filed in district court without approval by a panel of this court. As a result, if the prisoner’s pleading must be treated as a second or successive § 2255 motion, the district court does not even have jurisdiction to deny the relief sought in the pleading.”) (internal citations omitted)). Thus, the district court properly transferred the proposed motion to enable Aderhold to seek such

authorization. Aderhold has not, however, sought authorization to file the November 2007 motion.<sup>2</sup> Accordingly, we deny the motion for remand in case No. 07-4257, and the matter is dismissed.

*Fourth Post-Conviction Motion; No. 08-4001.* In December 2007, Aderhold filed a § 2255 motion. In it, he claims that he recently discovered his constitutional rights were violated during his plea negotiations, conviction and sentencing; when he entered his plea agreement, he had not intended to waive his right to appeal or collaterally challenge these violations and had not understood what a § 2255 motion was; that he received ineffective assistance of counsel during the plea negotiations; and that he still wishes to raise constitutional challenges to the district court's imposition of supervised release as part of his sentence. The district court construed the motion as a second or successive § 2255 motion and transferred it to this court for authorization as a second or successive motion.

Aderhold has filed a motion for remand, arguing his December motion is the first § 2255 motion he has filed. It is, indeed, the first time Aderhold has captioned one of his post-judgment motions as a § 2255 motion, but, as we have explained above, it is not the first motion he has filed that was properly construed

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<sup>2</sup> We recognize that the district court may again rule that Aderhold waived his right to file a § 2255 motion in his plea agreement. Nonetheless, we grant the motion for remand, because our role is simply to determine whether authorization to file the proposed motion is required and, if so, whether the standards for authorization have been met. *See* § 2244(b)(3).

as a § 2255 motion. The district court properly transferred the proposed motion to this court to enable Aderhold to seek the circuit-court authorization required by § 2255 para. 8 and § 2244(b)(3). Aderhold has declined to seek such authorization, and nothing in his motion for remand or his proposed § 2255 motion suggests that his proposed claims meet the standards to obtain such authorization. Accordingly, we deny the motion for remand in case No. 08-4001, and the matter is dismissed.

To recap: Aderhold's motion for remand in No. 07-4253 is GRANTED, and the matter is remanded to the district court for resolution on the merits in the first instance. Aderhold's motions for remand in case No. 07-4257 and No. 08-4001 are DENIED, and both matters are DISMISSED.

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a horizontal flourish.

ELISABETH A. SHUMAKER, Clerk