

App. No. 09-1851 (1st Cir. Nov. 23, 2010), concerned the same convictions that Ware seeks to challenge in this § 2241 action.

II. Discussion

The petition has not been served pending the Court's preliminary review of the action. A district court is not obligated to require a respondent to answer a habeas petition if "it appears from the application [for a writ of habeas corpus] that the applicant . . . is not entitled [to the writ]." 28 U.S.C. § 2243 para 1.

Here, the Court must deny the petition without prejudice because it is without jurisdiction to entertain this action.

Before "a second or successive application [under 28 U.S.C. § 2254] is filed in the district court, the applicant shall move in the in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A). Where a litigant bringing a successive § 2254 petition has not complied with the requirements of § 2244(b)(3)(A), the district court is without jurisdiction to entertain the merits of the petition. See Rodwell v. Pepe, 324 F.3d 66, 72-73 (1st Cir. 2003).

As noted above, Ware has already brought in this Court a § 2254 petition challenging the convictions at issue in this action. Although the Court recognizes that Ware has characterized the present petition as one brought under § 2241,

his choice of label does not permit him to avoid the limitations on successive § 2254 petitions. As the First Circuit has explained:

A state habeas petitioner in custody pursuant to the judgment of a state court may not evade the "second or successive" restrictions of § 2244 by bringing his petition under § 2241 rather than § 2254. See, e.g., Medberry v. Crosby, 351 F.3d 1049, 1060-61 (11th Cir. 2003), cert. denied, 541 U.S. 1032, 124 S. Ct. 2098, 158 L. Ed.2d 714 (2004) (No. 03-9165); Cook v. New York State Division of Parole, 321 F.3d 274, 278-79 & n. 4 (2d Cir. 2003); Coady v. Vaughn, 251 F.3d 480, 484-85 (3d Cir. 2001). As the Third Circuit explained, "both Sections 2241 and 2254 authorize [petitioner's] challenge to the legality of his continued state custody," but allowing him to file his "petition in federal court pursuant to Section 2241 without reliance on Section 2254 would . . . thwart Congressional intent." Coady, 251 F.3d at 484-85. Thus, a state prisoner in custody pursuant to the judgment of a state court may file a habeas corpus petition, as authorized by § 2241, but he is limited by § 2254. Cf. United States v. Barrett, 178 F.3d 34, 49-50 (1st Cir.1999), cert. denied, 528 U.S. 1176, 120 S. Ct. 1208, 145 L. Ed.2d 1110 (2000) (holding that federal prisoner could not evade restrictions on successive § 2255 petitions by resort to § 2241).

Brennan v. Wall, 100 Fed. Appx. 4-5 (1st Cir. 2004).

ORDER

Accordingly, the petition is denied without prejudice. If the petitioner wishes to pursue this petition, he must first obtain permission from the First Circuit to file a second or successive § 2254 petition. The motion for appointment of counsel is also denied, and this action shall be dismissed.

SO ORDERED.

/s/ William G. Young
WILLIAM G. YOUNG
UNITED STATES DISTRICT JUDGE