

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 08-cv-02005-BNB

EUGENE H. MATHISON,

Applicant-Appellant,

v.

RON WILEY, Warden,

Respondent-Appellee.

OPPOSITION TO MOTION FOR RELEASE

Respondent-Appellee Warden Ron Wiley, through undersigned counsel, files this Opposition to Applicant-Appellant Eugene H. Mathison's *Motion for Release Pending Review*.

1. Mathison is a federal prisoner, Register Number 07835-073, currently incarcerated at the Federal Prison Camp in Florence, Colorado. As the district court noted, he was originally convicted and sentenced in 1997 by the United States District Court for the District of South Dakota, and it is that original conviction and sentence which he now challenges. Doc. 5. Mathison has previously sought relief in prior

ATTACHMENT 2

applications under 28 U.S.C. § 2255 in the District of South Dakota and the Eighth Circuit. *Id.*

2. Mathison commenced this action under 28 U.S.C. § 2241. As the court correctly observed, however, because this action challenges the validity of the original conviction and sentence, it is properly brought pursuant to § 2255 in the district in which the conviction and sentence were imposed. *Id.* Concluding that there was no showing that § 2255 was inadequate or ineffective, the district court dismissed the *Application* without ordering the government to respond. *Id.* Mathison now seeks release, pursuant to Fed.R.App.P. 23(b)(3), pending disposition of his appeal from the district court's dismissal.

3. The *Motion* does not address the applicability of Rule 23(b)(3) to this case, but instead focuses on the merits of the underlying appeal. While counsel could find little direct authority, and none in this Circuit, construing the application of Rule 23, a recent decision of the Ninth Circuit provides guidance. In *Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006), that court held that the proper standard for evaluating such a motion is:

the traditional standard for interim injunctive relief, according to which the moving party must show either (1) a probability of success on the merits and the possibility of irreparable harm, or (2) that serious legal questions are raised and the balance of hardships tips sharply in the moving party's favor. As we have explained, these two alternatives

represent extremes of a single continuum, rather than two separate tests. Under this analysis, the greater the relative hardship to the moving party, the less probability of success must be shown.

443 F.3d at 1083-84 (internal quotations, brackets, and citations omitted). *Accord Anthony v. Texaco, Inc.*, 803 F.2d 593, 599 (10th Cir. 1986).

4. Applying this standard to the instant case, there has been no showing, or even suggestion, of irreparable harm. Moreover, no serious legal questions are raised, as Mathison himself acknowledges that he made a “foolish” or “a poor choice” in deciding to fire his attorney pre-trial and proceeding pro se at trial. *Application*, doc. 2 at 6, 7. Each of his complaints, including those relating to alleged bias on the part of the judicial officers, and alleged ineffectiveness of his erstwhile counsel, have been previously litigated, either on direct appeal, *see United States v. Mathison*, 157 F.3d 541 (8th Cir. 1998), *cert. denied*, 525 U.S. 1089, *reh’g denied*, 526 U.S. 1060 (1999), or collaterally, *see, e.g., Mathison v. United States*, no. CIV 99-4208/96-cr-40122 (D. S.D. June 27, 2000), *aff’d*, no. 01-1072 (8th Cir. Jan. 30, 2001), *cert. denied*, 533 U.S. 911 (2001); *Mathison v. United States*, no. CIV 00-4055 (D. S.D. Dec. 19, 2000), *aff’d*, no. 01-1078 (8th Cir. Mar. 21, 2001), *cert. denied*, 534 U.S. 860 (2001); *Mathison v. United States*, no. CIV 01-4153 (D. S.D. June 3, 2001), *aff’d*, no. 01-3988 (8th Cir. Feb. 22, 2002), *cert. denied*, 536 U.S. 930 (2002); *Mathison v. Wiley*, no. 08-1075 (10th Cir. June 17, 2008)(unpublished).

5. Mathison has little or no probability of success, given there is neither a relevant change in law, nor any newly discovered evidence proffered which could provide the basis for relief. The balance of hardships is decidedly in the government's favor, as Mathison is not entitled to immediate release – according to the Inmate Locator at <http://bop.gov/iloc2/LocateInmate.jsp>, his projected release date is December 2, 2014 – and under a best-case scenario he might hope that a show cause order might issue necessitating a government response. But this would appear highly unlikely.

CONCLUSION

The Motion should be denied.

Respectfully submitted,

TROY A. EID
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s/Paul Farley

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October, 2008, a copy of the foregoing

Opposition to Motion for Release was mailed, postage prepaid, to:

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s/Dorothy Burwell

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