

November 23, 2010

UNITED STATES COURT OF APPEALS

Elisabeth A. Shumaker
Clerk of Court

TENTH CIRCUIT

JOHN J. McCARTHY,

Petitioner-Appellant,

v.

WARDEN, USP FLORENCE,

Respondent-Appellee.

No. 10-1255
(D.C. No. 1:08-CV-961-REB)
(D. Colo.)

JOHN J. McCARTHY,

Petitioner-Appellant,

v.

WARDEN, USP FLORENCE,

Respondent-Appellee.

No. 10-1319
(D.C. No. 1:10-CV-1533-ZLW)
(D. Colo.)

JOHN J. McCARTHY,

Petitioner-Appellant,

v.

WARDEN, USP FLORENCE,

Respondent-Appellee.

No. 10-1347
(D.C. No. 1:08-CV-961-REB)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MURPHY, GORSUCH, and HOLMES**, Circuit Judges.

John McCarthy is currently serving a federal sentence for two counts of possession of a firearm. Seeking to appeal a decision of the Bureau of Prisons (“BOP”) related to that sentence, Mr. McCarthy filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. He also later sought to challenge the legality of his firearm conviction by filing a separate § 2241 petition and seeking either a writ of *coram nobis* or a writ of *audita querela*. The District Court for the District of Colorado dismissed both cases, and Mr. McCarthy now seeks to appeal those dismissals.

We turn first to Mr. McCarthy’s § 2241 petition challenging a decision of the BOP, the subject of appeals Nos. 10-1255 and 10-1347.¹ Mr. McCarthy seeks

* After examining appellant’s brief and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2) and 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent except under the doctrines of law of the case, *res judicata* and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

¹ On appeal, the government asks us to dismiss this petition as an abuse of the writ. *See Stanko v. Davis*, 617 F.3d 1262, 1269-70 (10th Cir. 2010). But the government did not plead abuse of the writ in the district court, and although this petition is successive, the court chose to address its merits. We need not decide, then, whether abuse of the writ provided an additional basis for denying Mr.

(continued...)

to appeal the BOP's refusal to credit his time served in a state prison to the time he must now serve in federal prison. Specifically, Mr. McCarthy asked the BOP to designate the state facility where he'd previously been confined as the location for serving his federal sentence, so that his state and federal sentences would run concurrently. This court has already once affirmed the BOP's denial of a request Mr. McCarthy previously made for such a designation. *See McCarthy v. Warden, USP Leavenworth*, 168 F. App'x 276 (10th Cir. 2006) (unpublished). We now again hold, for substantially the same reasons given by the district court, that the BOP did not abuse its discretion in denying Mr. McCarthy's most recent designation request. We also affirm the district court's denial of Mr. McCarthy's motion for reconsideration, as he did not show either (1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error or prevent manifest injustice. *See Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).

Turning next to Mr. McCarthy's challenges to his firearm conviction, the subject of appeal No. 10-1319, the district court held that Mr. McCarthy's attack on the legality of his conviction must be brought under 28 U.S.C. § 2255 and in the district court that convicted him. The court therefore dismissed Mr. McCarthy's petitions for a writ of habeas corpus, a writ of *coram nobis* and a writ

¹(...continued)
McCarthy's petition.

of *audita querela*, all of which were filed in the district where he was incarcerated. We now affirm the district court's order for substantially the same reasons given in its thoughtful opinion.

* * *

We deny Mr. McCarthy's petitions, dismiss his appeals, and deny his motions to proceed *in forma pauperis*.

ENTERED FOR THE COURT

Neil M. Gorsuch
Circuit Judge