United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted January 16, 2024
Decided January 26, 2024

Before

DIANE S. SYKES, *Chief Judge*

JOEL M. FLAUM, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

No. 24-1062

FAIRLY W. EARLS,
Applicant,

v.

LIZZIE TEGELS,
Respondent.

On Motion for an Order Authorizing the District Court to Entertain a Second or Successive Petition for Collateral Review.

O R D E R

Under 28 U.S.C. § 2244(b), Fairly Earls applies for leave to file a successive collateral attack on his Wisconsin conviction and 60-year sentence for ten counts of bail jumping. We deny the request and sanction Earls for his repeated frivolous filings.

In his first petition under 28 U.S.C. § 2254, Earls asserted that his conviction violated the Double Jeopardy Clause. The district court denied the petition, No. 15-cv-637-pp (E.D. Wis. July 10, 2015), and we declined to certify an appeal, No. 15-2595 (7th Cir. Apr. 26, 2016). Earls then asked us—twice—for leave to file another petition, each time arguing that our decision in *Boyd v. Boughton*, 798 F.3d 490 (7th Cir. 2015) (denying habeas relief to another petitioner), somehow required the state and federal courts to revisit their double-jeopardy analysis in Earls's case. We denied both requests.

No. 17-2894 (7th Cir. Oct. 13, 2017); No. 21-3090 (7th Cir. Nov. 8, 2021). The second time, we warned Earls that submitting further frivolous papers could incur sanctions. *See Alexander v. United States*, 121 F.3d 312, 315–16 (7th Cir. 1997).

Afterwards, in 2022, Earls filed another motion for state postconviction relief, again pressing a double-jeopardy claim. The state trial court denied the motion, the appellate court affirmed, 2023 WL 2784208, at *1 (Wis. Ct. App. Apr. 5, 2023), and the state supreme court denied review, No. 2022AP1261 (Wis. Aug. 17, 2023).

Now, Earls again asks for our leave to pursue a double-jeopardy claim based on *Boyd*. But as we explained in denying Earls's last application, he cannot reassert a claim presented in a prior § 2244(b) application. *See Alexander*, 121 F.3d at 314–15. And § 2244(b)(2) would bar a successive application even if Earls had not pursued his *Boyd* theory before. Section 2244(b)(2)(A) permits successive petitions that rely on a new constitutional rule that the Supreme Court has made retroactive on collateral review. *Boyd* does not suffice because, among other things, it is a decision of this court, not the Supreme Court. And although § 2244(b)(2)(B) allows a successive petition if the applicant has decisive new evidence of innocence, Earls has none.

Earls also argues that his proposed petition would not be successive because it would challenge the state supreme court's denial of review of his 2022 motion rather than his underlying conviction. True, a second-in-time petition that attacks a different criminal judgment than the first one need not satisfy § 2244(b). *See Magwood v. Patterson*, 561 U.S. 320, 331 (2010). But any cognizable habeas petition would necessarily assert that his custody is unlawful, *see* 28 U.S.C. § 2254(a), and thus would depend on invalidating the bail-jumping conviction or sentence for which he is imprisoned.

We therefore **DENY** authorization and **DISMISS** Earls's application. Further, in keeping with our prior warning, we impose the following sanction for Earls's repetitive and frivolous litigation:

> Earls is fined $500. Until he pays that sum in full to the clerk of this court, any collateral attack on his Wisconsin conviction or sentence for bail jumping that he submits to any federal court of this circuit will be returned unfiled. Any applications for leave to file successive collateral attacks on this conviction or sentence will be deemed denied 30 days after filing unless the court orders otherwise. *See Alexander v. United States*, 121 F.3d 312 (7th Cir. 1997).