

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

February 18, 2009

Charles R. Fulbruge III
Clerk

No. 07-51452
Conference Calendar

FERNANDO SPENCER

Petitioner-Appellant

v.

WARDEN M THOMAS BRAGG

Respondent-Appellee

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:07-CV-160

Before HIGGINBOTHAM, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:*

Fernando Spencer, federal prisoner # 10714-180, appeals the district court's dismissal of his 28 U.S.C. § 2241 petition without prejudice for lack of jurisdiction. The district court held that Spencer's claims, which relate to his alleged exposure to asbestos, lack of proper medical treatment, retaliation, and the loss of legal notes, related to the conditions of his confinement. Because

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

success on these claims would not result in Spencer's accelerated release from prison, the district court held that they were not cognizable under § 2241.

Spencer argues that his application is proper under § 2241 because he is challenging the execution of his sentence and he seeks accelerated release from prison. He contends that the loss of his legal notes negatively impacted his 28 U.S.C. § 2255 proceeding, which he asserts could have resulted in his release from prison. Therefore, he argues that accelerated release is appropriate relief in this proceeding.

Where "a prisoner challenges an unconstitutional condition of confinement or prison procedure that affects the timing of his release from custody," the proper vehicle is a civil rights action if a determination in the prisoner's favor will not automatically result in his accelerated release. *Carson v. Johnson*, 112 F.3d 818, 820-21 (5th Cir. 1997). Even if Spencer could prove the claims he seeks to present, he has not shown a legal basis for obtaining accelerated release. Accordingly, we AFFIRM the district court's judgment dismissing the § 2241 petition without prejudice for lack of jurisdiction.

Spencer's motion for release pending appeal is DENIED.