

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7252
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIE HENDERSON NASH,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Mississippi
(CR-J80-00019-01(R))

(October 13, 1993)

Before GARWOOD, JONES and EMILIO M. GARZA, Circuit Judges.*

GARWOOD, Circuit Judge:

Defendant-appellant Willie Henderson Nash (Nash) appeals the district court's denial of his "Motion for Order to Show Cause why Mississippi State Penitentiary should not be designated as Institution and Place for Service of Federal Sentence." We find Nash's claims both procedurally defective and substantively without

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

merit; accordingly, we affirm.

Facts and Proceedings Below

In October of 1980, Nash was convicted in the United States District Court for the Southern District of Mississippi for possession of stolen mail matter in violation of 18 U.S.C. § 1708. Nash was sentenced by the district court to a five year term of imprisonment. Nash appealed the conviction and was released on bail pending the outcome of his appeal. This Court affirmed his conviction in *United States v. Nash*, 649 F.2d 369 (5th Cir. 1981). After he was sentenced by the district court, but before his conviction was affirmed, Nash was convicted of armed robbery by a Mississippi state circuit court and sentenced to twenty-five years of imprisonment, thirteen years of which were suspended. The Mississippi court also sentenced Nash to a four year sentence for violation of his earlier state court probation, to be served consecutively to the unsuspended twelve year portion of his armed robbery sentence. Since 1981, Nash has been, and he presently is, incarcerated in the Mississippi State Penitentiary in Parchman, Mississippi, which is located within the geographical jurisdiction of the United States District Court for the Northern District of Mississippi. After Nash began serving his state sentence, the United States Marshal issued a federal detainer requesting that the Mississippi prison officials notify the Marshal of Nash's release date so that the Marshal may take him into custody when he has completed his state sentence.

In 1983, Nash wrote a letter to the federal district court that sentenced him for the section 1708 offense, requesting that

the court modify his federal sentence to run concurrent with his state sentence. The district court denied Nash's request. In 1988, Nash filed a motion in the same district court under 28 U.S.C. § 2255 seeking, *inter alia*, credit for time served in state custody. The district court denied the motion because Nash was not in federal custody and was not attacking his federal sentence. In 1989, Nash filed in the district court a Petition to Specify Sentencing, again requesting that his federal sentence run concurrently with his state sentence. The district court also denied this petition.

In October 1991, Nash filed in the United States District Court for the Southern District of Mississippi the present motion, entitled "Motion for Order to Show Cause why Mississippi State Penitentiary should not be Designated as Institution and Place for Service of Federal Sentence." This motion carries the style and cause number of the section 1708 criminal proceedings against Nash. In his motion, Nash argued that at the time his conviction for the federal offense was affirmed, the Attorney General of the United States had a statutorily prescribed duty to designate a place for Nash to serve his federal sentence. He further argued that, having failed to do so at the time, the government should be directed by the district court to designate the Mississippi State Penitentiary as the place for Nash's federal sentence. Nash argued that although the Attorney General had the "exclusive right to designate the institution where the sentence will be served, the Government, just as anyone else, can waive such a right by delaying a decision

and unduly prejudicing the defendant."¹ Nash stated in his rebuttal brief that he was not requesting the court to order that his federal and state sentences run concurrently; rather, "Defendant have [sic] only requested that this court direct the Government to show cause as to why it should not be required to perform it's [sic] duties required by law under the provisions of Title 18 USC § 4082(a)."

Despite Nash's characterization to the contrary, the district court construed Nash's pleading as a motion under Rule 35 of the Federal Rules of Criminal Procedure requesting that the court order his federal sentence to run concurrently with his state sentence. The court denied the motion. In its Memorandum Order the district court noted that in its orders denying Nash's prior post-trial motions, the court had stated that it had no power to order that the sentences run concurrently. The court concluded that only the Attorney General has the authority to designate the place for service of a federal sentence and that any duty the Attorney General has in this regard does not commence until a defendant is in federal custody. Because Nash has yet to be received into federal custody, the court denied his motion.

Nash subsequently filed a timely motion to reconsider, which

¹ See Defendant's Rebuttal to Government's Response to Defendant's Motion for Order to Show Cause, at 3. Later, in his motion to reconsider, Nash abandoned this "waiver" argument, instead asserting that the district court was empowered by the Supremacy Clause of the United States Constitution to direct the Attorney General to designate the Mississippi State Penitentiary as the place of service of his federal sentence. He sought to support both of his arguments by his assertion that the government's delay in designating a place of service of the sentence caused him undue prejudice.

the court also denied. Thereafter, Nash timely filed a notice of appeal.

Discussion

In his appeal, Nash makes two claims. First, Nash contends that at the time he was sentenced for the federal offense, the Attorney General of the United States had a duty under Title 18, section 4082(a) to designate a place for Nash to serve his federal sentence. Section 4082 provides, in relevant part,

"(a) A person convicted of an offense against the United States shall be committed, for such term of imprisonment as the court may direct, to the custody of the Attorney General of the United States, who shall designate the place of confinement where the sentence shall be served."
18 U.S.C. § 4082 (repealed effective Nov. 1, 1987).

Nash argues that the language of section 4082⁵⁰stating that a person convicted of a federal offense "*shall* be committed . . . to the custody of the Attorney General . . . who *shall* designate the place of confinement where the sentence shall be served"⁵¹created a nondiscretionary duty in the Attorney General to name a place of confinement at the time Nash's conviction was affirmed. Nash further contends that because "there is no statutory authority to delay such commitment and designation by the Attorney General for more than 10 years, Attorney General's actions of failing to timely designate such institution should be inferred as a waiver." Finally, Nash argues that the district court erred by refusing to order the Attorney General to "show cause why Mississippi State Penitentiary should not be inferred as the place of designation for service of the federal sentence."

Nash asserts that he is entitled to relief under 28 U.S.C. §

2255. Section 2255 provides the primary means of collateral attack on a federal sentence. *Cox v. Warden, Fed. Detention Ctr.*, 911 F.2d 1111, 1113 (5th Cir. 1990). Relief under this section is warranted only for errors that "occurred at or prior to sentencing." *United States v. Flores*, 616 F.2d 840, 842 (5th Cir. 1980) (citation omitted). Because Nash questions the execution, rather than the validity, of his federal sentence, his petition is not properly brought under section 2255. See *United States v. Cleto*, 956 F.2d 83, 84 (5th Cir. 1992); *United States v. Gabor*, 905 F.2d 76, 77 (5th Cir. 1990).²

The district court characterized Nash's request as a motion under Rule 35 of the Federal Rules of Criminal Procedure, seeking relief in the form of an order that the federal sentence run concurrently with the state sentence. Nash specifically denied that he requested the district court to order concurrent sentences. However, even assuming that the district court correctly construed Nash's motion as a Rule 35 motion, Nash is not entitled to relief.

The district court did not have the authority, at the time it sentenced Nash or anytime thereafter, to order that his federal sentence run concurrently with Nash's referenced state sentence.

² Nash's claim might have been properly brought as a petition for writ of habeas corpus under 28 U.S.C. § 2241. See *Cleto*, 956 F.2d at 84; *Gabor*, 905 F.2d at 77. A petition under section 2241, however, must be filed in the district where the claimant is incarcerated. If the claimant files in another district, that court has no jurisdiction to hear the petition. Nash is incarcerated in the Mississippi State Penitentiary, located in Sunflower County, Mississippi. Sunflower County lies in the Northern District of Mississippi; Nash brought his motion in the Southern District of Mississippi. Hence, the district court was without jurisdiction to adjudicate a section 2241 petition.

At most, district courts may recommend to the Attorney General that a federal sentence run concurrently with a state sentence, but the Attorney General has the sole authority to make such a decision. See *United States v. Holmes*, 816 F.2d 420, 421 (8th Cir. 1987) (citing 18 U.S.C. § 4082(a) and (b)).³ For offenses committed prior to November 1, 1987, Rule 35(b) allows a defendant to file a motion to reduce or modify a sentence within 120 days of the date of his conviction or the date the conviction is affirmed. Thus, under Rule 35(b), a district court may reconsider its recommendation to the Attorney General, and suggest that a sentence run concurrent to a state sentence; however, a motion under this rule must be made within 120 days after a conviction is affirmed. See *United States v. Dovalina*, 711 F.2d 737, 739 n.1 (5th Cir. 1983). Nash's conviction was affirmed in 1981, *Nash*, 649 F.2d 369; the motion *sub judice* was filed in 1991. Because Nash failed to file his motion within 120 days after affirmance, he cannot seek relief under Rule 35(b).

Because Nash requests that the district court order a federal officer to perform an act that Nash characterizes as a duty, such relief would have been most properly sought in an action for a writ of mandamus against the Attorney General of the United States. See *Lebosky v. Saxbe*, 508 F.2d 1047, 1048 (5th Cir. 1975). However, the superior officer of an agency is an indispensable party to an action if the decree granting the relief sought will require him to

³ In the case of offenses committed after November 1, 1987, the statute expressly authorizes the district court to order concurrent sentences. 18 U.S.C. § 3584(a).

take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him. *Williams v. Fanning*, 68 S.Ct. 188 (1947). Nash did not name the Attorney General as a party to his motion, which was merely filed in his criminal case, and process has not been sought for, issued, or served on the Attorney General; hence, Nash's motion may not be treated as a petition for mandamus because it fails to join an indispensable party. Even overlooking this fatal procedural defect, however, Nash is substantively not entitled to mandamus.

District courts have original jurisdiction "of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. The writ of mandamus is issued only in "extraordinary situations." *Allied Chemical Corp. v. Daiflon, Inc.*, 101 S.Ct. 188, 190 (1980); *McClain v. Panama Canal Comm'n*, 834 F.2d 452, 455 (5th Cir. 1988). Mandamus is an appropriate remedy only when "no other adequate remedy is available," *Green v. Heckler*, 742 F.2d 237, 241 (5th Cir. 1984) (citations omitted), and then "only when the plaintiff's 'claim is clear and certain and the duty of the officer is ministerial and so plainly prescribed as to be free from doubt.'" *Giddings v. Chandler*, 979 F.2d 1104, 1108 (5th Cir. 1992) (quoting *Nova Stylings, Inc. v. Ladd*, 695 F.2d 1179 (9th Cir. 1983)); see also *United States v. United States Dist. Court, S. Dist. of Texas*, 506 F.2d 383, 384 (5th Cir. 1974) (Plaintiff must show a " 'clear and indisputable' right to the extraordinary writ."). "Thus, mandamus is not available to review the discretionary acts of officials." *Id.* (citing *Green*, 742 F.2d

at 241).

For Nash to be entitled to relief under the Mandamus Act, he must establish that, at the time his conviction was affirmed, the Attorney General had a nondiscretionary duty to designate a place for Nash to serve his federal sentence.⁴ Nash argues that this duty arises out of 18 U.S.C § 4082(a). Neither section 4082 nor any other statute, however, require the Attorney General to designate a place of confinement *immediately* after sentencing. Such designation does not become necessary or practical until the defendant is prepared to begin serving his federal sentence. Under 18 U.S.C. § 3568, for offenses committed prior to November 1, 1987, a federal sentence does not begin to run until the defendant is delivered into federal custody.⁵ Accordingly, where the defendant

⁴ Nash would also have to show that the Attorney General owed this duty *to Nash*. Any duty owed to the Nash must arise from a statute or from the United States Constitution. When, as here, the right alleged stems from a statute, a duty is owed to the plaintiff for the purpose of the Mandamus Act only if the plaintiff falls within the "zone of interest" of the underlying statute. *Giddings*, 979 F.2d at 1108 (citing *Jarecki v. United States*, 590 F.2d 670, 675 (7th Cir.), *cert. denied*, 100 S.Ct. 55 (1979); *CBS Inc. v. Young*, 522 F.2d 234, 237-38 (6th Cir. 1975); *New York v. Heckler*, 578 F.Supp. 1109 (E.D.N.Y.), *aff'd*, 742 F.2d 729 (2d Cir.1984)). The "zone of interest" test requires that "the interest sought to be protected by the complainant . . . arguably [be] within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 90 S.Ct. 827, 830 (1970). However, because we find that Nash has failed to establish a nondiscretionary duty on the part of the Attorney General, we need not reach this issue.

⁵ Section 3568 provides in relevant part: "The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence."

It further provides:

is serving a state sentence at the time his conviction is affirmed, the Attorney General "will not be called upon to [designate the place of confinement] until the state sentence is completed and the defendant is delivered into federal custody." *United States v. Pungitore*, 910 F.2d 1084, 1119 (3rd Cir. 1990), *cert. denied*, 111 S.Ct. 2010 (1991). Nash submits in his brief that he was sentenced to at least sixteen years of imprisonment in the Mississippi State Penitentiary. He has served twelve years. Hence, assuming that Nash will be released from state custody in four years, the Attorney General will not be required to designate a place for Nash to serve his federal sentence until that time.

Finally, Nash makes a second argument in his brief to this court. Nash asserts that the federal detainer placed on him by the United States Marshal has negatively affected his treatment by the officials of the Mississippi State Penitentiary. Nash contends that "state prison authorities consider prisoners with detainers as more of a security/escape risk," and that "the absence of the detainer would [allow Nash] to serve out his state sentence in a more relaxed atmosphere." Nash does not ask this court to order that the detainer be removed. Although it is not clear from his brief, apparently Nash asks that he be given federal sentence

"If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.

No sentence shall prescribe any other method of computing the term." 18 U.S.C. § 3568 (repealed effective Nov. 1, 1987)

credits for time served in the state facility while the detainer was in effect. The government contends that we should not address this claim because it was not raised by Nash in the district court.⁶ However, regardless of whether the claim is properly brought on appeal, it is entirely without merit.

Federal detainers merely request that state prison officials notify the Marshal of a prisoner's release date so that the Marshal may take the prisoner into custody when he has completed his state sentence. *United States v. Dovalina*, 711 F.2d at 740. There is nothing about a federal detainer which has any legal effect whatever on decisions made by state authorities regarding the treatment of a prisoner while in state custody. *Id.* (citing *Tremarco v. United States*, 412 F.Supp. 550, 555 (D.N.J. 1976)). Thus, Nash's only complaint is with the conduct of state officials, and is not an attack on his federal sentence. Nash's second claim, therefore, is not cognizable under section 2255.

Conclusion

None of Nash's arguments on appeal demonstrate error in the district court's denial of his motion. We find appellant's claims both procedurally defective and substantively without merit.

⁶ Although Nash did not request the removal of the federal detainer in his brief to the district court, he did assert that the detainer had "hindered . . . his attempts to progress to trusty status, better job assignment, accessibility to school and rehabilitation programs, and the ability to advance to a classification status to receive earned time toward the reduction of the state sentence." Additionally, the relief requested from the district court, if granted, would have had the effect of removing the federal detainer. However, because Nash's underlying claim is meritless, we need not decide if Nash raised it before the district court.

Therefore, the district court's judgment is

AFFIRMED.