

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1604
Summary Calendar

ALFREDO A. VIVES,

Petitioner-Appellant,

VERSUS

MICHAEL FITZPATRICK, Warden,
FCI Big Spring, Texas, et al.,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(1:92-CV-118)

(April 5, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Alfredo Vives appeals the dismissal, for failure to exhaust administrative remedies, of his federal prisoner's habeas corpus petition brought pursuant to 28 U.S.C. § 2241. Concluding that there are no habeas remedies to exhaust, we vacate and remand.

* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

In March 1988, Vives was convicted in federal court in Florida of possession with intent to distribute cocaine and conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1). He received two eight-year sentences, which were to be served concurrently. Only one of the sentences was parolable.

On August 12, 1991, the United States Parole Commission granted Vives a parole date of September 5, 1991. Because the remaining portion of his sentence was not subject to parole, however, he was not released.

Vives filed requests for administrative relief with Michael Fitzpatrick, the warden of the Federal Correctional Institution at Big Spring, Texas ("FCI, Big Spring"), and with the appropriate Bureau of Prisons ("BOP") regional office. Both requests were denied. Vives then appealed to the BOP General Counsel's office, but his appeal was rejected as untimely because it was received approximately three months after the date it was due.

On September 23, 1992, utilizing a form complaint for a civil rights action under 42 U.S.C. § 1983, Vives proceeded IFP with a complaint against Fitzpatrick, the regional director of the BOP, and the Inmate Systems Manager, FCI, Big Spring. On February 18, 1993, the magistrate judge determined that because Vives's pending complaint did not challenge the conditions of his confinement, but sought only release from custody, it should be construed as a petition for writ of habeas corpus pursuant to § 2241. The magistrate judge then recommended that the petition be dismissed

without prejudice for failure to exhaust administrative remedies.

On March 15, 1993, Vives filed a supplemental complaint seeking damages from the named federal officials in a Bivens action, see Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). On March 18, 1993, the magistrate judge entered an amended report in which he determined that Vives's entire petition was subject to dismissal for his failure to exhaust administrative remedies with the BOP. The magistrate judge thus recommended that the Bivens complaint and habeas petition be dismissed without prejudice. The district court adopted the findings of fact, conclusions of law, and recommendation of the magistrate judge.

At the time of the district court's denial of habeas relief on April 2, 1993, Vives apparently had already been released on parole. In response to his request for administrative remedy in February 1992, the BOP informed him that his mandatory release date was March 2, 1993. On the docket sheet of the district court record, the May 3, 1993, entry shows that Vives left FCI, Big Spring, with no forwarding address. This court's docket sheet and the cover page of the district court record show Vives's address as Colombia, South America, indicating that he has notified the clerks of his changed address and status.

II.

Vives appeals the denial of his habeas petition, arguing that he did exhaust his administrative remedies with the BOP. He contends that he should have been released from custody on

September 5, 1991, and that he is entitled to compensation for the period of unlawful incarceration.

Whether an appeal is moot is a jurisdictional matter, as it implicates the Article III requirement that there be a live case or controversy. Bailey v. Southerland, 921 F.2d 277, 278 (5th Cir. 1987). In the absence of its being raised by a party, this court must raise the subject of mootness sua sponte.

Vives cannot be granted parole from a sentence from which he has already been released. As in Bailey, the "main thrust" of Vives's petition was "to be released from his confinement." Because he was released, the federal courts can no longer provide him with that relief. Inasmuch as Vives challenges only the date on which he should have been paroled and has served his sentence to its expiration, his habeas action is moot.

Thus, although the district court may not have been aware that Vives had been released, it erred in dismissing his Bivens complaint without prejudice. Because there are no habeas remedies to exhaust, Vives's Bivens action can proceed as a claim for damages. See Spina v. Aaron, 821 F.2d 1126, 1127-28 (5th Cir. 1987). We express no view on the merits of the Bivens action.

The judgment of dismissal is VACATED and REMANDED for further appropriate proceedings.