

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA : **CRIMINAL ACTION NO. 88-cr-278-6**
v. :
HEDMAR GOMEZ LORES : **CIVIL ACTION NO. 06-cv-0012**

MEMORANDUM AND ORDER

On February 21, 2006, petitioner filed the above-captioned petition in this court pursuant to 28 U.S.C. §2255, in which he seeks Habeas Corpus relief from his conviction and/or sentence in 88-cr-278-6. Petitioner has filed previous petitions in this court pursuant to 28 U.S.C. §2255, labeled 94-cv-6702 and 97-cv-2467, which attacked the same conviction and/or sentence, and which were considered and denied on the merits. In such circumstances, the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§2241- 2266, provides in relevant part that before such a second or successive petition is filed in the district court, the prisoner must first get permission to file in the district court from the circuit court, pursuant to 28 U.S.C. §2244(b)(3)(A), and that without such circuit permission, the district court lacks subject matter jurisdiction to consider such a habeas petition. Stewart v. Martinez-Villaeral, 523 U.S. 637 (1998); Felker v. Turpin, 518 U.S. 651 (1996); Benchoff v. Colleran, 404 F.3d 812 (3d Cir. 2005). This rule only applies where the relevant prior cases were considered, and denied, on the merits. Stewart v. Martinez-Villaeral, 523 U.S. 637 (1998); Villot v. Varner, 373 F.3d 327 (3d Cir. 2004); Holloway v. Horn, 355 F.3d 707 (3d Cir. 2004); Jones v. Morton, 195 F.3d 153 (3d Cir. 1999); Hull v. Kyler, 190 F.3d 88 (3d Cir. 1999); Christy v. Horn, 115 F.3d 201 (3d Cir. 1997). For purposes of determining whether the merits have been reached in a prior habeas, the key is the issue of whether the prior habeas case was

dismissed with prejudice or without prejudice. “(W)hen a complaint (or habeas petition) is dismissed without prejudice, that complaint or petition is treated as if it never existed... (a) habeas petition filed after a prior one was dismissed without prejudice is considered to be the petitioner’s first habeas.” Hull v. Kyler, 190 F.3d 88, 103-4 (3d Cir. 1999), citing, Christy v. Horn, 115 F.3d 201, 208 (3d Cir. 1997). See, also, Carpenter v. Vaughn, 296 F.3d 138 (E.D. Pa. 2002); Rauso v. Vaughn, 79 F.Supp. 2d 550 (E.D. Pa. 2000). In the instant case, the relevant prior cases were dismissed with prejudice, which is considered to be a merits consideration. Stewart v. Martinez-Villaeral, 523 U.S. 637 (1998); Villot v. Varner, 373 F.3d 327 (3d Cir. 2004); Holloway v. Horn, 355 F.3d 707 (3d Cir. 2004); Jones v. Morton, 195 F.3d 153 (3d Cir. 1999); Hull v. Kyler, 190 F.3d 88, 103-4 (3d Cir. 1999); Christy v. Horn, 115 F.3d 201 (3d Cir. 1997).

Accordingly, this Day of March, 2006, it is hereby **ORDERED** as follows:

1. That defendant’s application for leave to proceed in forma pauperis is **DENIED**.
2. That petitioner is formally notified that whereas there is no filing fee in 28 U.S.C. §2255 cases, that it is not necessary, in any way, for a petitioner to request leave to proceed in forma pauperis in such a 28 U.S.C. §2255 matter, although a grant of leave to proceed in forma pauperis can entitle a petitioner to free filing of a notice of appeal in such a matter, if appropriate.
3. That this civil action is **DISMISSED WITHOUT PREJUDICE** on the grounds that this court lacks subject matter jurisdiction over it.
4. That the Clerk of the United States District Court for the Eastern District of

Pennsylvania shall mark this matter as **CLOSED** in this court for all purposes, including statistics.

THOMAS N. O'NEILL, JR., U.S. District Judge