APPENDIX: A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11224-AA

TERRENCE DENMARK,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeals from the United States District Court
for the Middle District of Florida

Before: TJOFLAT, JULIE CARNES and NEWSOM, Circuit Judges.

BY THE COURT:

Terrence Denmark, proceeding *pro se*, appeals from the district court's dismissal for lack of jurisdiction of his petition for habeas corpus, filed under 28 U.S.C. § 2241. The government has moved to dismiss Denmark's appeal or for summary affirmance, arguing that his claims are foreclosed by our decision in *McCarthan v. Director of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076, 1092-93 (11th Cir. 2017) (*en banc*) (*cert. denied sub nom. McCarthan v. Collins*, No. 17-85 (U.S. Dec. 4, 2017)). The government has also moved to stay the briefing schedule.

Summary disposition is appropriate either where time is of the essence, such as "situations where important public policy issues are involved or those where rights delayed are rights denied," or where "the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more

frequently the case, the appeal is frivolous." *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969). A legal claim or argument that is not presented in an initial brief before us is deemed abandoned. *Holland v. Gee*, 677 F.3d 1047, 1066 (11th Cir. 2012). Abandonment of a claim or issue occurs when the appellant either makes only passing references to it or raises it in a perfunctory manner without supporting authority and arguments. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014).

We review *de novo* the availability of habeas relief under § 2241. *Dohrmann v. United States*, 442 F.3d 1279, 1280 (11th Cir. 2006). Generally, a federal prisoner collaterally attacks the validity of his federal conviction and sentence by filing a motion to vacate under § 2255. *Sawyer v. Holder*, 326 F.3d 1363, 1365 (11th Cir. 2003). However, a provision of § 2255, known as the "saving clause," permits a federal prisoner, under limited circumstances, to file a habeas petition pursuant to § 2241. *See id.*; 28 U.S.C. §§ 2241(a), 2255(e). We have held that "[a] prisoner in custody pursuant to a federal court judgment may proceed under § 2241 only when he raises claims outside the scope of § 2255(a)." *Antonelli v. Warden, U.S.P. Atlanta*, 542 F.3d 1348, 1351 n.1 (11th Cir. 2008). Thus, "challenges to the execution of a sentence, rather than the validity of the sentence itself, are properly brought under § 2241." *Id.* at 1352.

Under the saving clause of § 2255(e), a prisoner may bring a habeas petition under § 2241 if "the remedy by [§ 2255] motion is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). In *Gilbert*, we held that a prisoner could not use the saving clause to challenge his sentence, which did not exceed the statutory maximum, where § 2255's bar against second or successive motions prevented his challenge. *Gilbert v. United States*, 640 F.3d, 1293, 1295 (11th Cir. 2014). We expressly stated that we were not deciding

whether a prisoner could use the saving clause to challenge a sentence that did exceed the statutory maximum. *Id.* at 1306-07.

We recently held that the saving clause permits federal prisoners to proceed under § 2241 only when: (1) "challeng[ing] the execution of his sentence, such as the deprivation of good-time credits or parole determinations"; (2) "the sentencing court [was] unavailable," such as when the sentencing court itself has been dissolved; or (3) "practical considerations (such as multiple sentencing courts) might prevent a petitioner from filing a motion to vacate." *McCarthan*, 851 F.3d at 1092-93. We further held that, where the petitioner's motion attacked his sentence based on a cognizable claim that could have been brought in a § 2255 motion to vacate, the § 2255 remedial vehicle was adequate and effective to test his claim, even if circuit precedent or a procedural bar would have foreclosed it. *Id.* at 1089-90, 1099.

Here, as an initial matter, Denmark has abandoned his arguments that did not relate to the availability of § 2241 to bring his *Mathis* challenge by failing to brief them on appeal. *Holland*, 677 F.3d at 1066. He has also abandoned his *Descamps* claim by raising it only in a passing reference. *Sapuppo*, 739 F.3d at 681.

The district court properly dismissed Denmark's petition for lack of jurisdiction because, despite his arguments that § 2241 provides the appropriate vehicle for challenging his sentence based on *Mathis*, our decision in *McCarthan* forecloses his claims. Denmark's petition challenges the validity of his career offender sentence, rather than its execution, and he has not shown that his sentencing court was unavailable or that any practical considerations prevented him from testing the legality of his sentence in a § 2255 proceeding. *McCarthan*, 851 F.3d at 1092-93. Now that the Supreme Court has denied *certiorari* in *McCarthan*, the government is clearly right as a matter of law, and the district court's dismissal of Denmark's petition is

AFFIRMED. *Groendyke Transp., Inc.*, 406 F.2d at 1162. The government's motion to stay the briefing schedule is DENIED AS MOOT.

APPENDIX: B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

TERRENCE DENMARK,

Petitioner,

v. Case No. 5:14-cv-310-Oc-10PRL

WARDEN, FCC COLEMAN -MEDIUM,

Respondent.
_____/

ORDER DISMISSING CASE

Petitioner, proceeding *pro se*, initiated this case by filing a Petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. (Doc. 1). Respondent requests dismissal of the Petition. (Doc. 7). Petitioner has filed a Reply and notices of supplemental authority. (Docs. 8, 9, 13 and 15). For the reasons discussed in this Order, the Petition is due to be dismissed.

Background

Petitioner is a federal inmate currently incarcerated at the Coleman Correctional Complex within this District and Division. In 2006, Petitioner pled guilty in the Fort Myers Division of this Court to conspiracy to distribute 5 kilograms or more of cocaine and 50 grams or more of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 846. United States v. Denmark, 2:05-cr-71-FtM-33DNF. Respondent provides that the plea agreement included enhanced penalties brought pursuant to 21 U.S.C. § 841(b)(1)(A). (Doc. 7). Respondent also states that the United States had previously filed an information notifying Petitioner that it intended to seek enhanced penalties based on Petitioner's prior felony drug convictions. Id.

The Presentence Investigation Report reflects that the United States Probation Office recommended that Petitioner be designated as a career offender based on two prior drug

convictions for possession of cocaine with intent to sell, and conspiracy to possess with intent to distribute cocaine base. (Doc. 12, filed under seal). Petitioner was sentenced to 240 months imprisonment, and a term of 120 months supervised release. The Eleventh Circuit Court of Appeals affirmed the judgment on appeal. (Cr. Doc. 819). Petitioner then filed a motion pursuant to 28 U.S.C. § 2255, and argued that his counsel was ineffective and the United States breached the plea agreement. (Cr. Doc. 829). The sentencing court denied the motion. (Cr. Doc. 912).

In 2014, Petitioner filed his federal habeas Petition under 28 U.S.C. § 2241, which is pending before the Court. (Doc. 1). Petitioner argues that he is actually innocent of the crime of conviction because he entered an "unintelligent and involuntary guilty plea," and he is innocent. Id. Petitioner claims that he discussed his innocence regarding the conspiracy offense with his counsel, but was "informed to enter the guilty plea by his attorney, or be subjected to a life sentence without parole." Id. Petitioner contends that because of his attorney's erroneous information and the prosecutions conduct, he entered the plea "where he is actually innocent of the conspiracy to distribute 5 kilograms of cocaine." Id. Petitioner argues that he is innocent of the conspiracy charge under Alleyne v. United States, 133 S.Ct. 2151 (2013).

Petitioner also argues that he is entitled to relief because his counsel rendered ineffective assistance by failing to seek and obtain a favorable plea, and his prior convictions were nonqualifying for enhancement purposes. Id. In addition to Alleyne, Petitioner cites to Descamps v. United States, ___ U.S. ___133 S.Ct. 2276 (2013), Donawa v. U.S. Attorney General, 735 F.3d 1275 (11th Cir. 2013), Moncrieffe v. Holder, 569 U.S. ___ (2013), McQuiggin v. Perkins, 133 S.Ct. 1924 (2013), Carachuri-Rosendo v. Holder, 130 S.Ct. 2577 (2010), Persaud v. United States, ___U.S.___, 134 S. Ct. 1023 (2014), and Mathis v. United States, ___ U.S. ___, 136 S.Ct. 2243 (2016). (Docs. 8, 9, 13, 15).

Discussion

Typically, collateral attacks on the validity of a federal conviction or sentence must be brought under 28 U.S.C. § 2255. Sawyer v. Holder, 326 F.3d 1363, 1365 (11th Cir. 2003). However, § 2255(e), the "savings clause," permits a federal prisoner to file a petition pursuant to § 2241 if a § 2255 motion "is inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). The savings clause imposes a subject matter jurisdictional limit on petitions filed pursuant to § 2241. Willliams v. Warden, 713 F.3d 1332, 1338 (11th Cir. 2013).

The United States Court of Appeals for the Eleventh Circuit has established five requirements that a petitioner must satisfy in order to demonstrate that his prior § 2255 motion was inadequate or ineffective such that he can proceed with a § 2241 petition under the savings clause. Bryant v. Warden, 738 F.3d 1253 (11th Cir. 2013). Specifically, the petitioner must establish that: (1) throughout the petitioner's sentencing, direct appeal, and first § 2255 proceeding, Circuit precedent had specifically and squarely foreclosed the claim raised in the § 2241 petition; (2) after the petitioner's first § 2255 proceeding, the Supreme Court overturned that binding precedent; (3) that the Supreme Court decision applies retroactively on collateral review; (4) as a result of that the Supreme Court decision applying retroactively, the petitioner's current sentence exceeds the statutory maximum; and (5) the savings clause of § 2255(e) reaches his claim. Id. at 1274 (synthesizing the savings clauses tests discussed in Wofford v. Scott, 177 F.3d 1236 (11th Cir. 1999) and Williams, 713 F.3d at 1343).

Here, Petitioner has pointed to no pertinent Supreme Court or Eleventh Circuit decision that applies to his case retroactively on collateral review. The Supreme Court has not declared that Descamps, Donawa, Alleyne, McQuiggan or Carachuri-Rosendo apply retroactively. See In re:

Thomas, 2016 U.S. App. LEXIS 9610 (11th Cir. 2016) (finding that the petitioner's claim that Descamps is a new rule of constitutional law that the Supreme Court has made retroactive to cases on collateral review is unavailing.); see also, Fields v. FCC - Coleman, 2015 U.S. App. LEXIS 8022 (11th Cir. 2015)(finding that the petitioner had not shown that Carachuri-Rosendo was retroactive on collateral review.); ; In re: Garcia, 2014 U.S. App. LEXIS 24957 (11th Cir. 2014) (noting that the Supreme Court did not expressly hold that McQuiggin is retroactive on collateral review.); United States v. Chambers, 2015 Dist. LEXIS 13898 (M.D. Fla. 2015) (finding that Petitioner pursuing relief under 28 U.S.C. § 2255 could not avail on his argument that his career offender sentence was invalid under a retroactive application of Descamps and Donawa because he waived his right to challenge the calculation of sentence and neither Descamps nor Donawa applies retroactively.); and Jeanty v. Warden, 757 F.3d 1283, 1285 (11th Cir. 2014) (finding that Alleyne does not apply retroactively on collateral review.).

To the extent that Petitioner relies on Persaud, this is of no precedential value. The Supreme Court granted a petition for writ of certiorari, reversing a judgment of the Fourth Circuit and remanding the case to the Fourth Circuit for further consideration of the Solicitor General's position. Persaud does not assist Petitioner in satisfying the requirements of Bryant.

Moreover, there is no authority reflecting that Moncrieffe applies retroactively on collateral review, and Petitioner is not entitled to relief under Mathis.[1] Finally, Petitioner's ineffective

[1]The Supreme Court in Mathis held that Iowa's burglary statute "cover[ed] more conduct than generic burglary" because the Iowa statute reached a broader range of places beyond a "building or other structure." Thus, the Supreme Court concluded that the Iowa offense of burglary could not qualify as an ACCA predicate offense because its elements were broader than the elements of the generic offense.

assistan of counsel argument is not cognizable in a § 2241 petition; that is, Petitioner does not and cann t show that § 2255 was an ineffective remedy for that claim.

In um, the cited authority is not retroactive to cases on collateral review, and his sentence does not xceed the statutory maximum. Applying the Bryant factors, Petitioner is not entitled to relief unc r the savings clause.

Conclusion

Ac ordingly, the Petition (Doc. 1) is **DISMISSED** for lack of jurisdiction. The Clerk is directed enter judgment accordingly, terminate any pending motions and close the file.

IT S SO ORDERED.

DO NE AND ORDERED at Ocala, Florida, this 28th day of February 2017.

UNITED STATES DISTRICT JUDGE

Additional material from this filing is available in the Clerk's Office.