IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14315-GG

MICHAEL DELANCY,

Petitioner-Appellant,

versus

WARDEN, FCC COLEMAN - MEDIUM,

Respondent-Appellee.

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

Before: TJOFLAT, MARTIN and JILL PRYOR, Circuit Judges.

BY THE COURT:

Michael Delancy, 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 Delancy'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).

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).

We review *de novo* the availability of habeas relief under § 2241. *Dohrmann v. United States*, 442 F.3d 1279, 1280 (11th Cir. 2006). We have jurisdiction to review a district court's decision regarding whether it had jurisdiction in a given case. *Screven Cnty v. Brier Creek Hunting & Fishing Club, Inc.*, 202 F.2d 369, 371 (5th Cir. 1953).

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) (*en banc*). 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 prisoner's petition 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. In doing so, we overruled prior panel precedent to the contrary. *Id.* at 1080.

The Due Process Clause, rather than the Ex Post Facto Clause, prohibits courts from "retroactively applying unforeseeable judicial construction of a criminal statute." *United States v. McQueen*, 86 F.3d 180, 183 (11th Cir. 1996). A new judicial doctrine meets this standard if it presents an "unexpected and indefensible break from existing case law," or "marks a significant departure from prior case law, *i.e.*, it announces a judicial construction that imposes criminal liability for conduct not punishable under previous case law." *Id.* at 183-84. In *McCarthan*, we stated that our decision was "faithful to the text of the saving clause," and therefore, "simple, predictable, and sensible." 851 F.3d at 1099.

Here, as an initial matter, we have jurisdiction to review a district court's decision regarding whether it had jurisdiction over a given action, *see Screven Cnty*, 202 F.2d at 371, and therefore, to the extent that the government seeks to dismiss this appeal for lack of jurisdiction, its motion is denied. However, we grant its alternative request for summary affirmance.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

MICHAEL DELANCY,

Petitioner,

v. Case No. 5:16-cv-17-Oc-10PRL

WARDEN, FCC COLEMAN – MEDIUM

Respondent.
_____/

ORDER

Petitioner, acting *pro se,* initiated this case by filing a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. (Doc. 1). Petitioner argues that he is actually, factually, and legally innocent of the section 851 enhancement to his sentence because his prior drug conviction is invalid. (Doc. 1.) Respondent requests dismissal of the petition for lack of jurisdiction. (Doc. 4.) Petitioner has filed a reply. (Doc. 5.)

In an Order dated June 5, 2017, the Court directed the Petitioner to show cause why this case should not be dismissed for lack of jurisdiction in light of McCarthan v. Director of Goodwill Industries-Suncoast, Inc., 851 F. 3d 1076, 1079 (11th Cir. 2017). (Doc. 6.) Petitioner was warned that the failure to respond "will result in the dismissal of this case without further notice." Id. at 3. Petitioner failed to timely respond and the case was dismissed. (Doc. 7).

On July 17, 2017, after the case had been dismissed, a Response to the Court's Order to Show Cause was received by the Clerk. See Doc. 9. In his Response, Petitioner argues that this Court has jurisdiction, despite McCarthan, because his sentence is actually, factually, and legally innocent of his sentence. See Doc. 9 at 6. He further claims that his sentence is "a fundamental defect in violation of the Petitioner's Fifth, Sixth and Eighth Amendment Rights under the United States Constitution." Id.

Pending before the Court is Petitioner's Motion for Reconsideration of the Judge's Order to Dismiss Movant's Case. (Doc. 10). Petitioner claims that the prison has been on "constant lockdowns" which prevented him from complying with the Court's deadline. Id. Accordingly, Petitioner's Motion (Doc. 10) is **GRANTED** to the limited extent that his Response to the Order to Show Cause will be considered. The **Clerk** is directed to reopen this case and to vacate the July 18, 2017 judgment.

Rule 12(h)(3) of the Federal Rules of Civil Procedure provides that "[i]f the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action." See also Rule 12, Rules Governing Section 2255 Proceedings. Recently, sitting en banc the Eleventh Circuit overruled prior precedent and held that 28 U.S.C. § 2241 is not available to challenge the validity of a sentence except upon very narrow grounds not present in this case. McCarthan, 851 F.3d at 1079 (quoting 28 U.S.C. § 2255(e)); Bernard v. FCC Coleman Warden, No. 15-13344 (11th Cir. April 24, 2017) (citing McCarthan, 851 F.3d at 1092-93).

Thus, pursuant to Rule 4(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts (directing *sua sponte* dismissal if the petition and records show that the moving party is not entitled to relief), this case is **DISMISSED** without prejudice for lack of jurisdiction. See also 28 U.S.C. § 2255(b). The **Clerk** is directed to enter judgment accordingly, terminate any pending motions and reclose the file.

IT IS SO ORDERED.

DONE AND ORDERED at Ocala, Florida this 21st day of August, 2017.

UNITED STATES DISTRICT JUDGE

Copies: *Pro Se* Parties, Counsel of Record