SUPREME COURT
OF THE UNITED STATES

No. 18A551

Brandon Erwin,

Appellant,

vs.

Warden, FCC Coleman Low,

Appellee.

On Appeal from the United States Court of Appeals
for the Eleventh Circuit
Appeal No.: 17-15080-HH

MR. ERWIN'S MOTION REQUESTING 60 ADDITIONAL DAYS TO FILE HIS PETITION FOR WRIT OF CERTIORARI

Mr. Erwin received the Eleventh Circuit Court of Appeal's denial of his appeal dated August 22, 2018. Mr. Erwin has 90 days to file for writ of certiorari with the Supreme Court. Mr. Erwin is proceeding as an incarcerated and pro se litigant and must overcome the obstacles associated with prison life when preparing his filing, and requests 60 additional days in order to overcome them and properly file with the Supreme Court.

Mr. Erwin is incarcerated at FCI Coleman Low federal prison in Coleman, Florida. This prison is subject to numerous daily lock downs and recalls due to situations such as staff shortages, staff training, staff parties, staff retirements, weather, census counts, institutional counts, cutting of the grass, shakedowns to ensure inmates only have 2 blankets and 2 sheets, fights,

and other situations in which inmates are never informed about the reasons why. All of these combine to limit Mr. Erwin's access to the Education department where the 1 copy machine (currenty broken and often out of paper) the 8 non-memory typewriters, and the 12 law library computers that are shared by the over 2,000 inmates housed here.

Therefore, Mr. Erwin requests an extension of time of an additional 60 days to overcome these known and unknown obstacles that hinder an otherwise earlier filing with this Court.

Respectfully submitted on this 3rd day of November, 2018 by

Brandon Erwin

Brandon Erwin
Reg.No.: 48424-018
FCI Coleman Low
P.O. Box 1031
Coleman, FL 33521-1031

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have mailed, via U.S. Mail, this motion to:

United States Supreme Court
Office of the Clerk
1 First Street, NE
Washington, D.C. 20543

United States Solicitor General
Department of Justice
950 Pennsylvania Ave., NW, Room 5616
Washington, D.C. 20530-001

on this 3rd day of November, 2018.

Brandon Erwin

VERIFICATION

Under the penalty of perjury pursuant to 28 U.S.C. § 1746, I declare that the factual statements contained in this motion are true and correct to the best of my knowledge.

Brandon Erwin

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15080-HH

BRANDON ERWIN,

Petitioner-Appellant,

versus

WARDEN, FCC COLEMAN - LOW,

Respondent-Appellee.

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

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

BY THE COURT:

Brandon Erwin appeals the district court's dismissal of his *pro se* habeas corpus petition, filed pursuant to 28 U.S.C. § 2241, in which he challenged his conviction and sentence for distribution of cocaine and methadone, the use of which resulted in the death of another, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). Erwin argued that he was erroneously convicted at trial of the offense on the basis that he was found to have merely contributed to the death, relying on the Supreme Court's subsequent decision in *Burrage v. United States*, 571 U.S. 204 (2014) (holding that, if the drug that the defendant distributed was not an independently sufficient cause of the victim's death or serious bodily injury, the penalty enhancement under § 841(b)(1)(C) was inapplicable unless the use of the drug was a "but-for" cause of the death or injury). The district court dismissed Erwin's § 2241 petition on the ground that Erwin failed to

show that he could proceed on his § 2241 petition through § 2255(e)'s savings clause, in light of our decision in *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1092-93 (11th Cir.) (*en banc*), *cert. denied sub nom McCarthan v. Collins*, 138 S. Ct. 502 (2017). On appeal, Erwin argues that the court erroneously dismissed his § 2241 petition because his challenge to his conviction and sentence was not cognizable under § 2255. The government has moved for summary affirmance and to stay the briefing schedule, arguing that the district court lacked jurisdiction to entertain the § 2241 petition.

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).

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, a provision of § 2255, known as the "savings clause," permits a federal prisoner, under limited circumstances, to file a habeas petition pursuant to § 2241. *See* 28 U.S.C. §§ 2241(a), 2255(e). We have stated 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. The applicability of the savings clause is a threshold jurisdictional issue, and we cannot reach questions that the district court never had jurisdiction to entertain. *Williams v. Warden, Fed. Bureau of Prisons*, 713 F.3d 1332, 1337 (11th Cir. 2013).

Under the savings 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 an *en banc* decision, we held that the savings clause permits federal prisoners to proceed under § 2241 only when: (1) he is challenging "the execution of his sentence, such as the deprivation of good-time credits or parole determinations"; (2) "the sentencing court is unavailable," such as where the "sentencing court has been dissolved"; or (3) "practical considerations (such as multiple sentencing courts) . . . prevent [him] from filing a motion to vacate." *McCarthan*, 851 F.3d at 1092-93. We further held that, where the petitioner'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 *Burrage*, the Supreme Court addressed a provision in 21 U.S.C. § 841(b)(1)(C)—which provides for a 20-year mandatory minimum sentence if a defendant is convicted of unlawfully distributing a Schedule I or II drug and death or serious bodily injury results from the use of the drug—and held that, at least where the drug distributed by the defendant was not an independently sufficient cause of the victim's death or serious bodily injury, the defendant could not be liable under the penalty enhancement provision unless the use of the drug was a but-for cause of the death or injury. *Burrage*, 571 U.S. at 206, 218-19.

The government's motion for summary affirmance is due to be granted, as the government's position—that the court lacked jurisdiction to entertain Erwin's § 2241 petition—is clearly right as a matter of law under our binding precedent. *See Groendyke Transp.*, 406 F.2d at 1162. Erwin's challenge to his conviction under *Burrage* is a challenge to his underlying conviction and sentence, rather than the execution of his sentence. *See Antonelli*, 542 F.3d at 1352. Thus, his challenge could only have been brought under § 2255. *See Sawyer*, 326 F.3d at 1365. Further, none of the three circumstances identified in *McCarthan* apply to Erwin's situation, as he is not challenging the execution of his sentence, the sentencing court is not unavailable, and no practical considerations (such as multiple sentencing courts) prevent Erwin from filing a § 2255 motion. *See McCarthan*, 851 F.3d at 1092-93. Even if a procedural bar, such as a bar on impermissible second or successive § 2255 motions, would have foreclosed his claim, that does not render § 2255 inadequate or ineffective. *See id.* at 1089-90, 1099. Finally, although Erwin argued that he could not have brought his challenge under § 2255 prior to *Burrage* because it was foreclosed by our precedent, the § 2255 remedial vehicle is not rendered inadequate or ineffective merely because a claim is foreclosed by circuit precedent. *See id.* at 1089.

As such, the district court lacked jurisdiction to consider Erwin's § 2241 petition. *Williams*, 713 F.3d at 1337. Consequently, there is no substantial question as to the outcome of the case, and the government's position is correct as a matter of law. *See Groendyke Transp.*, 406 F.2d at 1162. Accordingly, the government's motion for summary affirmance is GRANTED and its motion to stay the briefing schedule is DENIED as moot.