A P P E N D I X "A"

Appx "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-14393-J

ANTWAN R. CRAY,

Petitioner - Appellant,

versus

WARDEN, FCC COLEMAN - MEDIUM,

Respondent - Appellee.

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

ENTRY OF DISMISSAL: Pursuant to the 11th Cir.R.42-1(b), this appeal is DISMISSED for want of prosecution because the appellant Antwan R. Cray has failed to pay the filing and docketing fees to the district court within the time fixed by the rules., effective April 14, 2020.

DAVID J. SMITH
Clerk of Court of the United States Court
of Appeals for the Eleventh Circuit

by: Davina C Burney-Smith, J, Deputy Clerk

FOR THE COURT - BY DIRECTION

A P P E N D I X "B"

Appx. "B"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14393-J

ANTWAN R. CRAY,

Petitioner-Appellant,

versus

WARDEN, FCC COLEMAN - MEDIUM,

Respondent-Appellee.

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

ORDER:

Antwan Cray is a federal prisoner serving a 180-month sentence for being a felon in possession of a firearm. He filed a 28 U.S.C. § 2255 motion, which was denied in 2016. Cray subsequently filed this 28 U.S.C. § 2241 petition, claiming that he was actually innocent, and his sentence was unconstitutional, in light of *Rehaif v. United States*, 139 S.Ct. 2191, 2200 (2019) (holding that a conviction for being a felon in possession of a firearm requires that the individual know that he possessed the firearm and was in a category of persons barred from possessing it).

The district court dismissed Cray's § 2241 petition because he failed to satisfy the requirements of the saving clause of § 2255(e), as it was clear that his claim fell within the realm of § 2255. Cray appealed, and the district court denied him *in forma pauperis* ("IFP") status on appeal, which he now seeks in this Court.

As an initial matter, because Cray is a federal prisoner, he does not need a certificate of

appealability to appeal the district court's dismissal of his § 2241 petition. *See Sawyer v. Holder*, 326 F.3d 1363, 1364 n.3 (11th Cir. 2003). However, because he seeks IFP status, his appeal is subject to a frivolity determination. *See* 28 U.S.C. § 1915(e)(2)(B). "[A]n action is frivolous if it is without arguable merit either in law or fact." *Napier v. Preslicka*, 314 F.3d 528, 531 (11th Cir. 2002) (quotation omitted).

Generally, a federal prisoner collaterally attacks the validity of his federal conviction and sentence by filing a motion to vacate under § 2255. *See Sawyer*, 326 F.3d at 1365. 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* 28 U.S.C. §§ 2241(a), 2255(e).

Under the saving clause of § 2255(e), a federal 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). This Court has concluded that the saving clause permits a federal prisoner 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 v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1092-93 (11th Cir. 2017) (*en banc*). This Court further held that, where the petitioner 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 1079-81, 1085-86.

Here, Cray challenged the validity of his sentence, rather than the execution of his sentence, and, thus, his claim should have been brought in a § 2255 motion. *See Sawyer*, 326 F.3d at 1365.

Moreover, § 2255(e)'s saving clause did not apply because Cray could not show that § 2255 was inadequate or ineffective to test the legality of his sentence. Even if the procedural bar against successive § 2255 motions would have foreclosed Cray's claim, it nevertheless could have been raised in a § 2255 motion, and, therefore, § 2255 was an adequate remedial vehicle. *See McCarthan*, 851 F.3d at 1079-81, 1085-86; *see also In re Palacios*, 931 F.3d 1314, 1315 (11th Cir. 2019) (denying application to file a successive § 2255 motion because *Rehaif* did not announce a new rule of constitutional law, and the decision is not retroactive in collateral proceedings). Accordingly, the district court properly dismissed Cray's § 2241 petition, any argument to the contrary would be frivolous, and his IFP motion is DENIED.

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

ANTWAN R. CRAY,

Petitioner,

v. **Case No: 5:19-cv-533-Oc-34PRL**

WARDEN, FCC COLEMAN - MEDIUM

Respondent.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Pursuant to the Court's order entered on October 22, 2019, the petition is dismissed for lack of jurisdiction and the case is dismissed with prejudice.

ELIZABETH M. WARREN, CLERK

s/H. Iovino, Deputy Clerk

CIVIL APPEALS JURISDICTION CHECKLIST

1. **Appealable Orders**: Courts of Appeals have jurisdiction conferred and strictly limited by statute:

   (a) **Appeals from final orders pursuant to 28 U.S.C. Section 1291**: Only final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C. Section 158, generally are appealable. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Pitney Bowes, Inc. V. Mestre, 701 F.2d 1365, 1368 (11th Cir. 1983). A magistrate judge's report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. Section 636(c).

   (b) **In cases involving multiple parties or multiple claims**, a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b), Williams v. Bishop, 732 F.2d 885, 885-86 (11th Cir. 1984). A judgment which resolves all issues except matters, such as attorneys' fees and costs, that are collateral to the merits, is immediately appealable. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 201, 108 S. Ct. 1717, 1721-22, 100 L.Ed.2d 178 (1988); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 837 (11th Cir. 1998).

   (c) **Appeals pursuant to 28 U.S.C. Section 1292(a)**: Appeals are permitted from orders "granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions..." and from "[i]nterlocutory decrees...determining the rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed." Interlocutory appeals from orders denying temporary restraining orders are not permitted.

   (d) **Appeals pursuant to 28 U.S.C. Section 1292(b) and Fed.R.App.P.5:** The certification specified in 28 U.S.C. Section 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court's denial of a motion for certification is not itself appealable.

   (e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including, but not limited to: Cohen V. Beneficial Indus. Loan Corp., 337 U.S. 541,546,69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949); Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc., 890 F. 2d 371, 376 (11th Cir. 1989); Gillespie v. United States Steel Corp., 379 U.S. 148, 157, 85 S. Ct. 308, 312, 13 L.Ed.2d 199 (1964).

2. **Time for Filing:** The timely filing of a notice of appeal is mandatory and jurisdictional. Rinaldo v. Corbett, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P.4(a) and (c) set the following time limits:

   (a) **Fed.R.App.P. 4(a)(1)**: A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the entry of the order or judgment appealed from. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD - no additional days are provided for mailing.** Special filing provisions for inmates are discussed below.

   (b) **Fed.R.App.P. 4(a)(3)**: "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."

   (c) **Fed.R.App.P.4(a)(4)**: If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.

   (d) **Fed.R.App.P.4(a)(5) and 4(a)(6)**: Under certain limited circumstances, the district court may extend the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time may be extended if the district court finds upon motion that a party did not timely receive notice of the entry of the judgment or order, and that no party would be prejudiced by an extension.

   (e) **Fed.R.App.P.4(c)**: If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. Section 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

3. **Format of the notice of appeal**: Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. See also Fed.R.App.P. 3(c). A pro se notice of appeal must be signed by the appellant.

4. **Effect of a notice of appeal**: A district court loses jurisdiction (authority) to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

ANTWAN R. CRAY,

Petitioner,

v. Case No. 5:19-cv-533-J-34PRL

WARDEN, FCC COLEMAN - MEDIUM,

Respondent.

ORDER DISMISSING CASE

Petitioner Antwan Cray, an inmate of the Federal penal system, initiated this action on October 1, 2019,[1] by filing a pro se Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241 (Petition; Doc. 1), with a supporting memorandum (Memorandum; Doc. 2), in the United States District Court for the Middle District of Florida, Jacksonville Division. On October 17, 2019, Cray's Petition was transferred to this Court. Doc. 3. The Petition is before the Court for preliminary review pursuant to the Rules Governing Section 2254 Cases in the United States District Courts (also applicable to petitions brought under 28 U.S.C. § 2241). Rule 4 requires the Court to "promptly examine" a petition, and "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition." For the reasons discussed below, the Petition is due to be dismissed because the Court lacks subject matter jurisdiction.

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[1] See Houston v. Lack, 487 U.S. 266, 276 (1988) (mailbox rule).

Background

Cray is a federal inmate currently incarcerated at Coleman Medium Federal Correctional Institution within this district and division. In 2011, following a bench trial, the district court found Cray guilty of possession of a firearm by a convicted felon. (Criminal Docket 31) United States v. Antwan R. Cray, 3:10-cr-204-J-34MCR (M.D. Fla.). The district court sentenced Cray to a term of incarceration of 180 months in prison. (C.R. Doc. 48). Cray appealed, and the Eleventh Circuit Court of Appeal per curiam affirmed Cray's conviction and sentence with a written opinion. (C.R. Doc. 59).

On October 10, 2013, Cray filed a pro se motion to vacate sentence pursuant to 28 U.S.C. § 2255 and a motion to amend that alleged: (1) trial counsel was ineffective for coercing him into a stipulated-facts bench trial; (2) trial counsel was ineffective for not arguing that Cray's juvenile convictions in adult court did not count as predicate offenses under the Armed Career Criminal Act (ACCA); and (3) Cray's prior convictions for the sale of cocaine did not meet the ACCA's definition of the term "serious drug offense." (2255 Docket 1; 6) Antwan R. Cray v. United States of America, 3:13-cv-1246-34MCR (M.D. Fla.). The district court denied the § 2255 motion on the merits on October 20, 2016. (2255 Doc. 19; C.R. Doc. 63).

In 2019, Cray filed the instant Petition, arguing that his Fifth and Sixth Amendment rights were violated where a jury allegedly did not find several elements of the offense beyond a reasonable doubt. Petition at 6. In his Memorandum, Cray elaborates by stating that he is actually innocent and is serving an unconstitutional sentence in light of the United States Supreme Court's decision in Rehaif v. United States, 139 S.Ct. 2191 (2019). Memorandum at 2-3. According to Cray, the Rehaif decision requires the

government to prove mens rea as to each element of his offense, but that was not done in his criminal case and the government provided improper jury instructions that did not use the term "knowingly" as to each element. Id. at 2.

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). Challenges to the execution of a sentence, rather than the validity of the sentence itself, are properly brought under 28 U.S.C. § 2241. Antonelli v. Warden, U.S.P. Atlanta, 542 F.3d 1348, 1352 (11th Cir. 2008). The claims raised in the instant Petition do not address the execution of Cray's sentence, but its legality, as he contends that he was unconstitutionally convicted and sentenced. Therefore, § 2255, not § 2241, is the appropriate statutory vehicle for Cray's claims. Because Cray has already filed and prosecuted a § 2255 motion attacking his conviction, which was denied on the merits, before pursuing the instant § 2255 motion to vacate, he must obtain authorization from the United States Court of Appeals for the Eleventh Circuit to file a second or successive motion. See 28 U.S.C. § 2244(b)(3)(A). Cray did not do this, and the Court cannot review his claims under § 2255 without such authorization. See, e.g., Benitez v. Warden, FCI Miami, 564 Fed. Appx. 497, 499 (11th Cir. 2014) (affirming dismissal of § 2241 petition alleging an illegal indictment, improper jury instructions, and prosecutorial misconduct). To the extent Cray relies on McQuiggin v. Perkins, 569 U.S. 383 (2013) for the proposition that he must file claims of actual innocence via § 2241, McQuiggin does not support this legal argument. The United States Supreme Court in McQuiggin held only that a claim of actual innocence can overcome the one-year statute of limitations for a state prisoner's

initial petition for writ of habeas corpus. Id. at 1928. As such, McQuiggin does not entitle Cray to challenge his conviction and sentences through a § 2241 petition.

Analyzing the Petition under § 2255(e), the "savings clause," which 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," the Court finds that it is without jurisdiction to review the merits of his claims. 28 U.S.C. § 2255(e). The savings clause imposes a subject matter jurisdictional limit on petitions filed pursuant to § 2241. Williams v. Warden, 713 F.3d 1332, 1338 (11th Cir. 2013). In explaining the meaning of the phrase "inadequate or ineffective," the Eleventh Circuit has explained that a motion under § 2255 "is inadequate or ineffective to test the legality of a prisoner's detention only when it cannot remedy a particular kind of claim." McCarthan v. Dir. Of Goodwill Industries-Suncoast, Inc., 851 F.3d 1076, 1099 (11th Cir. 2017). Here, Cray's claim concerning jury instructions and the principles later accepted by the Supreme Court in Rehaif were capable of adjudication in his § 2255 proceedings. See Benitez, 564 F. App'x at 499. Moreover, Rehaif did not announce a new rule of constitutional law such that it would apply retroactively on collateral review. See In re Palacios, 931 F.3d 1314, 1315 (11th Cir. 2019) (denying application to file successive 2255 raising Rehaif claims because Rehaif did not announce a new rule of constitutional law and the decision is not retroactive in collateral proceedings). Therefore, the savings clause does not apply. See McCarthan, 851 F.3d at 1099. Accordingly, the Petition is due to be dismissed for lack of jurisdiction.

ORDERED:

1. Cray's Petition (Doc. 1) is **DISMISSED for lack of jurisdiction** and this case is **DISMISSED with prejudice**.

2. The **Clerk** shall enter judgment dismissing this case with prejudice, close this case, and terminate any pending motions.

DONE AND ORDERED in chambers, this 22nd day of October, 2019.

MARCIA MORALES HOWARD
United States District Judge

Jax - 8
c:
Antwan R. Cray #53343018