

A P P E N D I X A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-12625-E

NOLBERTO MARTINEZ,

Petitioner - Appellant,

versus

WARDEN, FCC COLEMAN - LOW,

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 Nolberto Martinez has failed to pay the filing and docketing fees to the district court within the time fixed by the rules., effective December 02, 2020.

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

by: Gloria M. Powell, E, Deputy Clerk

FOR THE COURT - BY DIRECTION

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Petitioner-Appellant,

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ORDER:

Nolberto Martinez is a federal prisoner serving a 360-month sentence for distribution of cocaine and conspiracy to possess with intent to distribute cocaine. In 2019, he filed the instant 28 U.S.C. § 2241 petition challenging the validity of his conviction and sentence. The district court *sua sponte* dismissed his petition, finding that it did not have jurisdiction over his claims because he was challenging the validity of his sentence, and therefore could not pursue relief under § 2241. The district court denied him leave to proceed *in forma pauperis* (“IFP”), and Martinez now seeks IFP status from this Court.

Because he seeks leave to proceed IFP from this Court, his appeal is subject to a frivolity determination. *See* 28 U.S.C. § 1915(e)(2)(B)(i). An action is frivolous if it is without arguable merit in either law or fact. *Napier v. Preslicka*, 314 F.3d 528, 531 (11th Cir. 2002).

“Section 2255(e) makes clear that a motion to vacate is the exclusive mechanism for a federal prisoner to seek collateral relief unless he can satisfy the ‘saving clause’ at the end of that subsection.” *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1081 (11th Cir. 2017) (*en banc*). The “saving clause” of § 2255(e) permits a federal prisoner to challenge his sentence without filing a § 2255 motion only where “the remedy by motion is inadequate or ineffective to test the legality of his detention.” 28 U.S.C. § 2255(e). In *McCarthan*, we determined that that, if a prisoner’s claim merely challenges “the validity of his sentence,” he cannot proceed under § 2241 because he could raise such a claim in a 28 U.S.C. § 2255 motion. *McCarthan*, 813 F.3d at 1089.

Here, because Martinez challenged the validity of his sentence, and he could have raised such a claim in a § 2255 motion, he has failed to show that a motion to vacate would be an inadequate or ineffective remedy. *See id.* at 1081, 1086-89. Accordingly, he cannot satisfy the saving clause, and any appeal would be meritless. *See* 28 U.S.C. § 2255(e); *Napier*, 314 F.3d at 531.

Martinez’s motion for leave to proceed IFP is DENIED.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE

A P P E N D I X B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

NOLBERTO MARTINEZ,

Petitioner,

v.

Case No: 5:19-cv-504-Oc-36PRL

WARDEN, FCC COLEMAN - LOW,

Respondent.

ORDER DISMISSING CASE

Petitioner, proceeding *pro se*, is a federal inmate who initiated this case by filing a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. (Doc. 1.) Petitioner alleges his sentence, imposed on January 22, 2015, was unconstitutionally enhanced. *Id.*

Collateral attacks on the legality of a sentence must be brought under 28 U.S.C. § 2255. The “savings clause” of § 2255(e) permits a federal prisoner to challenge his sentence pursuant to § 2241 only where “the remedy by motion is inadequate or ineffective to test the legality of his detention.” 28 U.S.C. § 2255(e). The petitioner bears the burden of demonstrating that a § 2255 motion is “inadequate or ineffective.” *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1081 (11th Cir. 2017) (*en banc*).

The United States Court of Appeals for the Eleventh Circuit has held that 28 U.S.C. § 2241 is not available to challenge the validity of a sentence except on very narrow grounds. *McCarthan*, 851 F.3d at 1079. “*McCarthan* gave three examples of when a motion to vacate would be an inadequate mechanism to test a prisoner’s claim: (1) if a federal prisoner challenges the execution of his sentence, e.g., the deprivation of good-time credits or parole determinations; (2) if the sentencing court is unavailable or has been dissolved; or (3) if practical considerations,

DONE AND ORDERED at Ocala, Florida, on June 30, 2020.

Charlene Edwards Honeywell

Charlene Edwards Honeywell

United States District Judge

Copies to: Nolberto Martinez, *pro se*