

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-13750-J

TRACY GARRETT,

Petitioner-Appellant,

versus

WARDEN, FCC COLEMAN - USP II,

Respondent-Appellee.

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

ORDER:

Tracy Garrett, a federal prisoner serving a 480-month sentence for carjacking, bank robbery, and using or carrying a firearm during the commission of a crime of violence, seeks leave to proceed *in forma pauperis* (“IFP”) in his appeal from the district court’s dismissal of his 28 U.S.C. § 2241 petition for lack of jurisdiction. In the petition, Garrett asserted that he was actually innocent of the offenses and that the government had withheld exculpatory evidence. He also asserted that his sentence should be reduced, under 18 U.S.C. § 3582(c)(1)(A).

Because Garrett seeks leave to proceed on appeal IFP, his appeal is subject to a frivolity determination. *See* 28 U.S.C. § 1915(e)(2)(B)(i); *Napier v. Preslicka*, 314 F.3d 528, 531 (11th Cir. 2002) (quotation omitted), *overruled on other grounds by* *Hoever v. Marks*, 993 F.3d 1353 (11th Cir. 2021) (en banc). “[A]n action is frivolous if it is without arguable merit in law or fact.” *Napier*, 314 F.3d at 531.

A 28 U.S.C. § 2255 motion is the exclusive mechanism for a federal prisoner to seek collateral relief, unless he can satisfy the “saving clause” at the end of § 2255(e). *McCarthan v. Dir. of Goodwill Indus. Suncoast, Inc.*, 851 F.3d 1076, 1081 (11th Cir. 2017) (en banc). “A district court can exercise jurisdiction over a federal prisoner’s § 2241 petition only if the saving clause of § 2255(e) applies.” *Amodeo v. FCC Coleman-Low Warden*, 984 F.3d 992, 997 (11th Cir. 2021) (citation omitted).

To determine whether a prisoner satisfies the saving clause, this Court asks whether a § 2255 motion is an adequate procedure to test the prisoner’s claim, considering whether the prisoner could have brought that claim in a § 2255 motion. *McCarthan*, 851 F.3d at 1086-87. The saving clause permits a federal prisoner to proceed under § 2241 when: (1) challenging the execution of his sentence; (2) the sentencing court was unavailable; or (3) “practical considerations (such as multiple sentencing courts) might prevent a petitioner from filing a motion to vacate.” *Id.* at 1092-93. Where the prisoner’s petition attacked his sentence based on a claim that could have been brought in a § 2255 motion, § 2255 is an adequate and effective mechanism to test his claim, even if a procedural bar would have foreclosed it. *Id.* at 1085-86, 1099-10; *see also Amodeo*, 984 F.3d at 1003 (holding that an actual-innocence claim “is not one of the rare ones for which a § 2255 motion is an inadequate or ineffective remedy”).

In 2018, Congress enacted the First Step Act, which, in part, amended § 3582(c)(1)(A) to increase the use and transparency of compassionate release of federal prisoners. *See* First Step Act § 603. The statute provides that “[t]he court may not modify a term of imprisonment once it has been imposed” except under certain circumstances. 18 U.S.C. § 3582(c). This Court has held that a post-judgment motion to reduce a sentence under § 3582(c)(2) is criminal in nature. *United*

States v. Fair, 326 F.3d 1317, 1318 (11th Cir. 2003) (determining that a § 3582(c)(2) motion is not a civil, post-conviction action, “but rather a continuation of a criminal case.”).

Here, there are no nonfrivolous issues on appeal. *See Napier*, 314 F.3d at 531. First, the district court properly dismissed Garrett’s § 2241 petition for lack of jurisdiction. Because he collaterally attacked his convictions and sentences, he could not proceed under § 2241 unless he satisfied § 2255(e)’s “saving clause.” *See* 28 U.S.C. § 2255(e); *McCarthan*, 851 F.3d at 1081. Garrett, however, could not show that § 2255 was inadequate or ineffective to test his claims that he was actually innocent, and that the government had withheld exculpatory evidence, given that his claims could have been raised in a § 2255 motion. *See McCarthan*, 851 F.3d at 1085-87, 1099-10; *see also Amodeo*, 984 F.3d at 994, 1003. Thus, Garrett did not satisfy the “saving clause,” and the district court lacked jurisdiction to consider his claims. *See Amodeo*, 984 F.3d at 997.

Moreover, to the extent that Garret sought compassionate release under § 3582, he was required to bring that motion in his criminal case. *See* 18 U.S.C. § 3582(c)(1)(A); *Fair*, 326 F.3d at 1318. The district court therefore did not err in denying the motion and requiring Garrett to file it in the criminal case. Accordingly, Garrett’s motion for leave to proceed IFP on appeal is DENIED.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

May 02, 2022

Clerk - Middle District of Florida
U.S. District Court
207 NW 2ND ST
OCALA, FL 34475

Appeal Number: 21-13750-J
Case Style: Tracy Garrett v. Warden, FCC Coleman -USP II
District Court Docket No: 5:21-cv-00457-RBD-PRL

The enclosed copy of the Clerk's Order of Dismissal for failure to prosecute in the above referenced appeal is issued as the mandate of this court. See 11th Cir. R. 41-4.

Any pending motions are now rendered moot in light of the attached order.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Davina C Burney-Smith, J
Phone #: (404) 335-6183

Enclosure(s)

DIS-2 Letter and Entry of Dismissal

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-13750-J

TRACY GARRETT,

Petitioner - Appellant,

versus

WARDEN, FCC COLEMAN - USP II,

Respondent - Appellee.

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

ORDER: Pursuant to the 11th Cir. R. 42-1(b), this appeal is DISMISSED for want of prosecution because the appellant Tracy Garrett has failed to pay the filing and docketing fees to the district court within the time fixed by the rules.

Effective May 02, 2022.

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

FOR THE COURT - BY DIRECTION

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

TRACY GARRETT,

Petitioner,

v.

Case No. 5:21-cv-457-RBD-PRL

WARDEN, FCC COLEMAN II,

Respondent.

ORDER

THIS CAUSE is before the Court on Tracy Garrett's Petition for Writ of Habeas Corpus ("Petition," Doc. 1) filed under 28 U.S.C. § 2241.

I. BACKGROUND

Garrett is a federal inmate incarcerated at the Coleman Federal Correctional Complex within this District and Division. Garrett pled guilty to Bank Robbery (Counts 1 and 2); and was found guilty of Carjacking (Counts 1 and 3) and Using/Carrying a Firearm during the commission of a Crime of Violence (Counts 5 and 6). *See* Criminal Case 6:08-cr-21-GAP-GJK. The Court sentenced Garrett to a total term of 480 months of imprisonment to be served in the custody of the Bureau of Prisons.

As a brief factual background, Garrett was originally convicted in 2009. At trial, evidence showed, among other things, that an individual named Tiffany Reed consented to a search of his residence.

In 2010, Garrett filed his original § 2255 motion and argued that defense counsel was ineffective by not challenging Reed's standing to consent to the search. But the district court denied his motion with prejudice in 2012. He filed several later motions to vacate, which the district court also denied.

Between 2014 and 2020, Garrett also filed several applications for leave to file second or successive § 2255 motions, which were denied. For example, in 2014, he filed a successive application in which he argued that his Fourth Amendment rights were violated because Detective Sams, a government witness at the motion to suppress hearing, lied about seeing Reed's driver's license showing his address. He asserted that Reed's driver's license history was newly discovered evidence which revealed that her license never listed his address. He thus argued that Reed did not have standing to consent to the search of his home. The Eleventh Circuit denied his application, reasoning that Reed's driver's license history was not "newly discovered" for purposes of 28 U.S.C. § 2255(h)(1) because it was available at the time of his trial.

In 2015, Garrett filed a successive application arguing that his counsel was ineffective for refusing to investigate and move to suppress the evidence that

resulted from law enforcement's allegedly illegal entry into his home. He asserted that his claim was based on newly discovered evidence, which consisted of a sworn declaration by Reed stating that she never showed Detective Sams her driver's license. The Eleventh Circuit denied his application after concluding that, even assuming Garrett could not have obtained the sworn declaration earlier, such evidence did not establish that, had it been introduced at trial, no reasonable factfinder would have found him guilty of the offenses.

In 2016, Garrett filed another successive application arguing that his counsel was ineffective for refusing to investigate and move to suppress. He asserted that his claim was based on newly discovered evidence consisting of Reed's driver's license history, which he attached to his application. The Eleventh Circuit denied his application after concluding that, even if the evidence were new, it did not establish that no reasonable factfinder would have found him guilty had it been introduced.

In 2017, Garrett filed a successive application in which he argued that the government violated *Brady v. Maryland*, 373 U.S. 83 (1963). He asserted that his claim was based on newly discovered evidence, namely Reed's address history, which he attached to his application. He argued that Detective Sams suppressed this favorable evidence and, had it been disclosed to the defense, there was a reasonable probability that the outcome of the proceedings would have been

different. He argued that Detective Sams knowingly lied about having consent from Reed to search his home and checking her driver's license, which allowed the government to overcome the motion to suppress, resulting in a *Brady* violation. The Eleventh Circuit denied Garrett's application after concluding that his claim was barred because the basic gist of his claim was the same as the claims he had presented in previous applications that the appellate court had denied on the merits.

In February 2020, Garrett filed another successive application arguing that the government committed a *Brady* violation by withholding exculpatory material from him that would have put his case in a different light. He asserted that his claim was based on newly discovered evidence consisting of Reed's address history, which he attached to his application. The Eleventh Circuit dismissed his application for lack of jurisdiction after concluding that he had submitted the same *Brady* claim in a previous successive application, which was also substantively the same as the claims he asserted in other previous applications.

In June 2020, Garrett filed a successive application arguing that the Eleventh Circuit committed an error under *United States v. Booker*, 543 U.S. 220 (2005), during his direct appeal by not addressing his motion for a mistrial, which was based on an alleged Fourth Amendment violation that occurred in the search of his home during his arrest. The Eleventh Circuit denied his application, reasoning

that his claim was based neither on a new rule of constitutional law nor newly discovered evidence, given that *Booker* does not apply retroactively in § 2255 motions.

In January 2021, Garrett filed another successive application, arguing he tried to challenge the district court's denial of his motion for a mistrial during his direct appeal but that the Eleventh Circuit declined to address the issue. Thus, he asserted that his trial counsel was ineffective for failing to properly raise a suppression issue in the motion for a mistrial, resulting in a waiver for our review. The Eleventh Circuit dismissed Garrett's application after concluding that the basic gravamen of his claim was the same as the one in his June 2020 application.

In April 2021, Garrett filed another successive application, arguing he is actually innocent. He argued that his Sixth and Fourteenth Amendment rights to due process have been violated because the Eleventh Circuit declined to consider the Fourth Amendment issue during his direct appeal, framing it as a claim of newly discovered evidence, and that his trial counsel was ineffective for failing to preserve the Fourth Amendment issue during trial. The Eleventh Circuit dismissed Garrett's application after concluding that the basic core of his claim was the same as the claims he presented in his previous applications and that the evidence had been presented to the appellate court via three previous applications, which were denied on the merits.

In his pending § 2241 petition, Petitioner raises the same issues that the Eleventh Circuit has rejected. (Doc. 1 at 6-9). Petitioner seeks to challenge the trial court's denial of his motion for a mistrial based on the 4th Amendment and suppression issue, claims he is actually innocent and there was a *Brady* violation related to the witness's driver's license history. *Id.* Petitioner also seeks a reduction in his sentence under 18 U.S.C. § 3582(c)(1)(A)(i). *Id.* at 10-14.

II. ANALYSIS

Collateral attacks on the legality of a sentence must be brought under 28 U.S.C. § 2255. The text of the "savings clause" of section 2255(e) permits a federal prisoner to challenge his sentence under section 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 must prove that a section 2255 motion is "inadequate or ineffective." *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1081 (11th Cir. 2017) (*en banc*). In *McCarthan*, the Eleventh Circuit held that a prisoner has a "meaningful opportunity" to test his claim in a § 2255 motion even if that claim is foreclosed by binding precedent or barred by a procedural rule. *Id.* at 1086-87.

Absent narrow exceptions, the Eleventh Circuit has held that section 2241 is unavailable to challenge the validity of a sentence. *McCarthan*, 851 F.3d at 1079. The Eleventh Circuit recently provided examples in which, post-*McCarthan*, a

motion to vacate would be an inadequate mechanism to test a prisoner's claim and thus a section 2241 would be an appropriate vehicle to test that prisoner's claim:

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, such as multiple sentencing courts, prevent a petitioner from filing a motion to vacate.

Williams v. Warden, FCC Coleman, 803 F. App'x 324, 326 (11th Cir. 2020) (internal citations omitted).

Although the examples provided by the *McCarthan* court are not exhaustive, if a prisoner's claim fits within those categories identified in *McCarthan*, he may file a section 2241 habeas petition under section 2255(e)'s saving clause. But again, the focus is whether the "prisoner's claim merely challenges 'the validity of his sentence.'" *Id.* (internal citations omitted). If that is the focus of the claim, the prisoner "cannot proceed under § 2241 because he could raise this claim in a § 2255 motion." *Id.* (internal citations omitted). Also, Federal Rule of Civil Procedure 12(h)(3) 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.

Here, the Petitioner has failed to demonstrate that a motion to vacate filed under section 2255 is "inadequate or ineffective." *McCarthan*, 851 F.3d at 1081.

Even construing his *pro se* petition liberally, as the Court must, none of his claims are cognizable under section 2241 because he challenges the validity of his underlying sentence, not the execution of his sentence. Petitioner has failed to show the applicability of section 2255(e)'s savings clause, and this Court therefore lacks jurisdiction to adjudicate this section 2241 petition. *See* Rule 4(b) of the Rules Governing Section 2255 Proceedings (directing *sua sponte* dismissal if the petition and records show that the moving party is not entitled to relief to address the validity of his sentence).

Finally, the Court lacks jurisdiction to reduce Petitioner's sentence under the First Step Act. The First Step Act went into effect on December 21, 2018. *See* FSA of 2018, Pub. L. No. 115-391, 132 Stat. 5194. Before the passage of the First Step Act, only the Director of the Bureau of Prisons could move for compassionate release. Section 603(b) of the Act modified 18 U.S.C. § 3582(c)(1)(A), however, with the intent of "increasing the use and transparency of compassionate release." Pub. L. No. 115-391, 132 Stat. 5194, at *5239 (capitalization omitted). That section now provides that a sentencing court may modify a sentence either on a motion of the Director of the BOP "or upon motion of the defendant after [he] has fully exhausted all administrative rights to appeal a failure of the [BOP] to bring a motion on [his] behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility." 18 U.S.C. § 3582(c)(1)(A) (emphasis added).

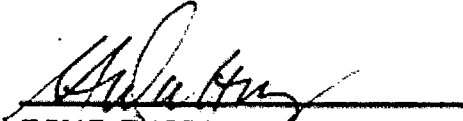
III. CONCLUSION

Accordingly, it is **ORDERED** and **ADJUDGED**:

1. The Petition for Writ of Habeas Corpus (Doc. 1) is **DENIED**, and this case is **DISMISSED with prejudice**. To the extent Petitioner seeks a reduction in his sentence or compassionate release, he must file a motion in his criminal case.
2. The Clerk of Court shall enter judgment accordingly and is directed to close this case.

DONE and **ORDERED** in Orlando, Florida on October 13, 2021.




ROY B. DALTON JR.
United States District Judge

Copies furnished to:

Unrepresented Party