

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-14018-B

BENJAMIN TILLMAN,

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 Benjamin Tillman has failed to pay the filing and docketing fees to the district court within the time fixed by the rules, effective March 14, 2018.

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

by: Melanie Gaddis, B, Deputy Clerk

FOR THE COURT - BY DIRECTION

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ORDER:

In order to appeal the district court's denial of his *pro se* 28 U.S.C. § 2241 petition, Benjamin Tillman moves for leave to proceed *in forma pauperis* ("IFP"). Tillman currently is serving a 480-month sentence in federal prison, after a jury convicted him, in 1997, of conspiracy to possess with intent to distribute cocaine base. In his § 2241 petition, Tillman argued that he was entitled to relief based on the Supreme Court's decisions in *McFadden v. United States*, 135 S. Ct. 2298 (2015), and *Depierre v. United States*, 564 U.S. 70 (2011). Specifically, he argued that, in light of these cases, he was entitled to relief because the government, at trial, failed to prove that Tillman knew that he alleged substance with which he was dealing was a controlled substance.

Tillman asserted that the district court had jurisdiction to entertain these claims via a § 2241 under § 2255(e)'s saving clause. He pointed to this Court's decisions in *Wofford v. Scott*,

177 F.3d 1236 (11th Cir. 1999), and *Bryant v. Warden*, 738 F.3d 1253 (11th Cir. 2013). The district court dismissed Tillman's petition, concluding that, in light of this Court's decision in *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1100 (11th Cir. 2017) (*en banc*), it lacked jurisdiction to consider it.

For Terrell to receive IFP status, his appeal must have arguable merit in either law or fact. See *Napier v. Preslicka*, 314 F.3d 528, 531 (11th Cir. 2002). 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). This Court has 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.

This Court recently issued an *en banc* decision in *McCarthan*, expressly overruling its entire line of saving-clause precedent, including *Bryant* and *Wofford*. 851 F.3d at 1100. This Court held that the saving clause permits federal prisoners to proceed under § 2241 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." *Id.* at 1092-93.

When a prisoner previously has filed a § 2255 motion to vacate, he must apply for and receive permission from the court of appeals before filing a second or successive § 2255 motion.

28 U.S.C. §§ 2244(b), 2255(h). The saving clause of § 2255(e) does not allow access to § 2241 whenever a claim is barred by the rule against second or successive § 2255 motions. *McCarthan*, 851 F.3d at 1091-92. Consequently a petitioner who has filed a previous § 2255 motion that has been denied may not circumvent the restriction on successive § 2255 motions simply by filing a petition under § 2241. *Id.*

Here, Tillman fails to show that he has a non-frivolous argument that the district court erred in dismissing his § 2241 petition. Tillman clearly challenged the validity of his sentence, rather than its execution, and, thus, his claim generally should have been brought in a § 2255 motion to vacate. *See Antonelli*, 542 F.3d at 1351. He argues that he should be entitled to pursue his claims via a § 2241 petition because § 2255 relief is unavailable to him, but this claim is unavailing. Tillman has previously unsuccessfully challenged his sentence in a § 2255 motion, and he has sought leave from this court to raise, in a second or successive § 2255 motion, the same claims he now seeks to raise via a § 2241 petition. He cannot now use § 2241 to circumvent § 2255(h)'s restrictions on second or successive motions. *See McCarthan*, 851 F.3d at 1091-92.

Accordingly, any appeal in this case would be frivolous, and Tillman's motion for leave to proceed on appeal IFP therefore is DENIED.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

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versus

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Respondent-Appellee.

Appeal from the United States District Court
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Before: WILLIAM PRYOR and JORDAN, Circuit Judges.

BY THE COURT:

Benjamin Tillman has filed a “motion for reconsideration of this Court’s order dated December 18, 2017, denying his motion for leave to proceed *in forma pauperis*. Because Tillman has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motions, his motion for reconsideration is DENIED.

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION**

BENJAMIN TILLMAN,

Petitioner,

v.

Case No: 5:16-cv-603-Oc-10PRL

**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

that pursuant to this Court's Order, entered August 23, 2017, this case is hereby
DISMISSED without prejudice for lack of jurisdiction.

Date: August 24, 2017

ELIZABETH M. WARREN,
CLERK

s/B. Davis

Deputy Clerk

Copy to:

Counsel of Record
Unrepresented Parties

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION**

BENJAMIN TILLMAN,

Petitioner,

v.

Case No: 5:16-cv-603-Oc-10PRL

**WARDEN, FCC COLEMAN –
MEDIUM**

Respondent.

ORDER

Petitioner, a federal prisoner acting *pro se*, initiated this case by filing a Petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241, and supporting memorandum. (Docs. 1, 2). Petitioner challenges the legality of his federal sentence. Petitioner argues that the Government did not “sustain its burden of proof,” and he is entitled to relief under Bryant v. Warden, 738 F.3d 1253 (11th Cir. 2013), DePierre v. United States, 131 S.Ct. 2225 (2011), and McFadden v. United States, 135 S.Ct. 2298 (2015). Respondent urges dismissal of the Petition for lack of jurisdiction. (Doc. 8). Petitioner has filed a Reply to the Response. (Doc. 9).

In an Order dated July 11, 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. 12). Petitioner responded that his claims are still

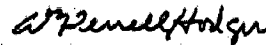
cognizable in a § 2241 petition. (Doc. 13).

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)). See also Bernard v. FCC Coleman Warden, ____ Fed. Appx. ____, 2017 WL 1430875 (11th Cir. Apr. 24, 2017) (citing McCarthan, 851 F.3d at 1092-93) (unpublished).

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 close the file.

IT IS SO ORDERED.

DONE AND ORDERED at Ocala, Florida, this 23rd day of August 2017.



UNITED STATES DISTRICT JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**