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APPENDIX A
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION

No. 4:23-cv-10027-MARTINEZ
(No. 4:13-cr-10034-MARTINEZ)

FRED DAVIS CLARK, JR.,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 4:23-cv-10027-JEM

Before MARTINEZ, District Judge. (Filed February 18, 2025.)

ORDER DENYING MOTION TO VACATE – 28
U.S.C. § 2255

THIS CAUSE came before this Court on Movant Fred Davis Clark Jr.’s Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, (ECF No. 1), (“Motion”). Movant claims three grounds for relief from the forfeiture and restitution orders, (ECF-

Cr Nos. 524 and 631), in his underlying criminal case¹: (1) the use of acquitted and other conduct to determine the amount of restitution and forfeiture violates his constitutional rights; (2) the restitution order violates his due process rights because it is vague and indefinite; and (3) the restitution and forfeiture orders violate the Constitution's prohibition against excessive fines. (*See Mot.*). Upon careful consideration of the Motion, the Government's Response, (ECF-Cr No. 751; ECF No. 4-6), Movant's Reply (ECF-Cr No. 754; ECF No. 4-9), and the record, the Court finds that Movant is not entitled to relief.

I. Background

On December 11, 2015, a jury convicted Movant on three counts of bank fraud in violation of 18 U.S.C. § 1344; three counts of making false statements in connection with federally insured loans in violation of 18 U.S.C. § 1014; and one count of obstructing an official proceeding in violation of 18 U.S.C. § 1512(c)(2). (ECF-Cr Nos. 468 and 631). The jury found Clark not guilty of conspiracy to commit bank fraud. (*Id.*).

At sentencing, Movant was held accountable for losses totaling \$169,267,355.08 (or, alternatively, a personal gain of between \$25,000,000 and \$49,000,000). (ECF-Cr No. 603 at 148, 153). On June 23, 2016, Movant was sentenced to 480 months' imprisonment, followed by five years of supervised release. (ECF-Cr No. 631). Following extensive briefing, (ECF-Cr Nos. 480; 495; 509), the Court also ordered forfeiture of money and property totaling between \$311,555,776 and \$311,655,776 (ECF-Cr No. 524). And later, following further briefing, (ECF-Cr Nos.

¹ Citations to Movant's underlying criminal case, 13-10034-CR-JEM, are referred to herein as "ECF-Cr."

574), and an evidentiary hearing (ECF-Cr Nos. 640 and 641), Magistrate Judge Lurana Snow issued a report recommending that the Court order restitution in the amount of \$179,076,941.89, less the amount of two Chase mortgages if the government later determined that Chase had assigned those mortgages to mortgage-backed securities, (ECF-Cr No. 613). After Movant filed objections, (ECF-Cr No. 625), the Court noted the objections and adopted the report and recommendation (ECF-Cr Nos. 630 and 631).

Movant filed notices of appeal from both the original judgment (ECF-Cr No. 523; 11th Cir. No. 16-10811), and the amended judgment, which incorporated the restitution order (ECF-Cr No. 632; 11th Cir. No. 16-14410). He then moved to consolidate the appeals (16-10811, ECF No. 32 (July 14, 2016)). The Eleventh Circuit granted the motion (*Id.*, ECF No. 34 (July 20, 2016)). Movant did not challenge the forfeiture or restitution orders on appeal.

On January 13, 2021, the President of the United States commuted Movant's prison sentence. The warrant of commutation states in relevant part:

WHEREAS it has been made to appear that the ends of justice do not require the said FRED DAVIS CLARK, JR. to remain confined until his currently projected release date of August 14, 2048, and the safety of the community will not be compromised if he is released;

NOW, THEREFORE, BE IT KNOWN that I, DONALD J. TRUMP, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby grant clemency to the said FRED DAVIS CLARK, JR.: I commute the prison sentence

imposed upon the said FRED DAVIS to time served. I leave intact and in effect the remaining unpaid balances, if any, of the \$179,076,941.89 restitution obligation, \$700 special assessment, and the entirety of the forfeiture obligation. I also leave intact and in effect the five-year term of supervised release with all its conditions, and all other components of the sentence.

(*Id.*, ECF No. 133 (Jan. 15, 2021)). Clark was released from Bureau of Prisons custody on January 13, 2021. Movant moved for leave to file a supplemental brief regarding the Court's restitution and forfeiture orders, (16-10811, ECF No. 141 (Apr. 19, 2021)). That motion was subsequently denied (*Id.*, ECF No. 145 (Apr. 28, 2021)). Movant then filed a motion requesting that his appeals be dismissed (*Id.*, ECF No. 146 (May 17, 2021)), which was granted (*Id.*, ECF No. 148 (May 18, 2021)).

On May 18, 2022, Movant filed the instant § 2255 Motion (ECF No. 1). On October 6, 2022, the Government filed its Response. (ECF No. 4-6). The Government concedes that the Motion is timely but argues that it should be denied on the merits and as procedurally barred. The Government also argues that Movant's challenge to the restitution and forfeiture orders are not cognizable under § 2255. On October 20, 2022, Movant filed a Reply. (ECF No. 4-9).

II. Legal Standard

Because collateral review is not a substitute for direct appeal, the grounds for collateral attack on a final judgment, pursuant to 28 U.S.C. § 2255, are extremely limited. *See Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004). A prisoner is entitled to relief under section 2255 if the court imposed a

sentence that: (1) violated the Constitution or laws of the United States; (2) exceeded its jurisdiction; (3) exceeded the maximum authorized by law; or (4) is otherwise subject to collateral attack. *See* 28 U.S.C. § 2255(a). Thus, relief under § 2255 “is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice.” *Lynn*, 365 F.3d at 1232 (citations omitted). If a court finds a claim under section 2255 valid, the court “shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence.” 28 U.S.C. § 2255(b). The burden of proof is on the movant—not the government—to establish that the sentence must be vacated. *Beeman v. United States*, 871 F.3d 1215, 1221–22 (11th Cir. 2017).

III. Discussion

The Eleventh Circuit has routinely held that “collateral” challenges to noncustodial punishment, such as challenges to restitution, cannot be addressed under § 2255. *See, e.g., Mamone v. United States*, 559 F.3d 1209, 1211 (11th Cir. 2009) (finding that § 2255 motion cannot be used to bring a collateral challenge addressed solely to noncustodial punishment, such as restitution, forfeiture, or fines); *Arnaiz v. Warden, Fed. Satellite Low*, 594 F.3d 1326, 1330 (11th Cir. 2010) (“habeas corpus cannot be used to challenge just the restitution part of a sentence when the custody supporting our jurisdiction is actual imprisonment”); *Blaik v. United States*, 161 F.3d 1341, 1342 (11th Cir. 1998) (“Here we are faced with the motion of a prisoner who does not request a release from custody but only a reduction in the amount of restitution he was

ordered to pay. If granted this request would require us to take an action that is not authorized by the plain language of the statute. A reduction in restitution is not a release from custody.”). While Movant cites to cases from other Circuits that discuss the possibility of raising an argument that restitution orders are not categorically excluded from § 2255, the Court sees no reason to disturb the well-set precedent of the Eleventh Circuit. Movant’s claim is not cognizable under § 2255.

IV. Evidentiary Hearing

Movant is not entitled to an evidentiary hearing because “the motion and the files and records of the case conclusively show that [Movant] is entitled to no relief.” 28 U.S.C. § 2255(b); *see also Schriro v. Landrigan*, 550 U.S. 465, 473–75 (2007) (holding that if the record refutes the factual allegations in the petition or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing).

V. Certificate of Appealability

A prisoner seeking to appeal a district court’s final order denying his section 2255 motion has no absolute entitlement to appeal, and to do so, must obtain a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1). A Court may issue certificate of appealability only if Movant makes “a substantial showing of the denial of a constitutional right.” *See* 28 U.S.C. § 2253(c)(2). Where a district court has rejected Movant’s constitutional claims on the merits, Movant must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Upon consideration of the record and for

the reasons explained above, this Court denies certificate of appealability.

VI. Conclusion

For the foregoing reasons, it is ORDERED AND ADJUDGED that:

1. The Motion, (ECF No. 1), is DENIED.
2. A certificate of appealability is DENIED.
3. This case is CLOSED, and all pending motions are DENIED AS MOOT.
4. A final judgment in Respondent's favor shall enter via separate order.

DONE AND ORDERED in Chambers at Miami, Florida, this 14 of February 2025.

APPENDIX B
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 25-10955

FRED DAVIS CLARK, JR.,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 4:23-cv-10027-JEM

Before BRANCH, Circuit Judge. (Filed October 28,
2025.)

ORDER:

Fred Davis Clark, Jr. moves for a certificate of appealability. To obtain a COA, Clark must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Clark's motion for a certificate of appealability is DENIED because he failed to make the requisite showing.

APPENDIX C

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

No. 25-10955

FRED DAVIS CLARK, JR.,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 4:23-cv-10027-JEM

Before BRANCH and LUCK, Circuit Judges. (Filed
December 17, 2025.)

BY THE COURT:

Fred Davis Clark, Jr., is a former prisoner seeking a certificate of appealability to appeal the district court's denial of his 28 U.S.C. § 2255 motion. He now moves this Court to reconsider its October 28, 2025, order denying a certificate of appealability. After careful review, Clark's motion for reconsideration is DENIED, as he has offered no new evidence or arguments of merit to warrant relief.