

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION**

PAUL GARY ALLEN,

Petitioner,

v.

REBECCA CLAY,

Respondent.

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Case No.: 1:16-cv-01794-RDP-JHE

MEMORANDUM OPINION

This case is before the court on Petitioner’s Petition for Writ of Habeas Corpus (Doc. # 1) and Respondent’s Response to Show Cause Order (Doc. # 5). After careful review, and for the reasons explained below, the court concludes that Petitioner’s habeas petition is due to be dismissed for lack of subject matter jurisdiction.

I. Background and Procedural History

In 2011, Petitioner pled guilty in the Western District of Texas to conspiracy to distribute 50 grams or more of crack cocaine. (*See* W.D. Tex., Case No. 7:10-cr-00345-RAJ) (“Criminal Docket”), Docs. # 291, 352). Petitioner requested safety valve relief during sentencing, but the district court denied that request because it had applied an aggravating role enhancement to Petitioner’s offense level under the Sentencing Guidelines. (*See* Doc. # 5-1 at 17) (narrative of sentencing facts in the *Anders* brief filed by Petitioner’s appellate counsel). The district court sentenced Petitioner to 121 months’ imprisonment. (Criminal Docket, Docs. # 523, 524). Thereafter, in July 2015, the sentencing court reduced Petitioner’s sentence to 120 months, based on a motion filed pursuant to 18 U.S.C. § 3582. (Criminal Docket, Docs. # 721, 743).

Petitioner filed a direct appeal, which the Fifth Circuit dismissed as frivolous. (Criminal Docket, Docs. # 526, 633). A review of the sentencing court's electronic docket sheet indicates that Petitioner has not filed a 28 U.S.C. § 2255 motion to vacate with the sentencing court. Petitioner filed his current habeas petition pursuant to 28 U.S.C. § 2241 in October 2016. (Doc. # 1).

Respondent has sought dismissal of this habeas petition on the ground that this court lacks subject matter jurisdiction under the "saving clause" in 28 U.S.C. § 2255(e). (Doc. # 5 at 6-7). The Magistrate Judge has advised Petitioner to reply to Respondent's request for dismissal with affidavits or other materials. (Doc. # 6). Petitioner has submitted additional arguments for habeas relief. (Doc. # 9). In a supplemental brief, Respondent has argued that this habeas petition should be dismissed in light of the Eleventh Circuit's recent *en banc* opinion in *McCarthan v. Director of Goodwill Industries-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017). The Magistrate Judge has directed Petitioner to file any arguments or materials he has to respond to Respondent's invocation of *McCarthan*; no response has been filed. (Doc. # 12).

II. Analysis

Petitioner is a federal prisoner attempting to collaterally attack the legality of his sentence. The primary means for doing so is 28 U.S.C. § 2255. *See Sawyer v. Holder*, 326 F.3d 1363, 1365 (11th Cir. 2003), *abrogated on other grounds by McCarthan*, 851 F.3d 1076 (11th Cir. 2017) (*en banc*). As a general rule, a motion pursuant to § 2255 must be filed within one year of the final judgment. 28 U.S.C. § 2255(f). Because Petitioner did not file a petition seeking certiorari with the Supreme Court, his judgment of conviction became final on February 6, 2014, one year following the ninety-day period after the Fifth Circuit dismissed his direct

appeal. *See Jeffries v. United States*, 748 F.3d 1310, 1313-14 (11th Cir. 2014). Therefore, as Petitioner concedes, he is time-barred from filing a motion pursuant to § 2255. (Doc. # 1 at 5).

A convicted federal prisoner can seek habeas relief under § 2241, though, if his claims fall within the “saving clause” of § 2255(e). Pursuant to the saving clause of § 2255(e), a federal court may entertain “[a]n application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to [§ 2255]” if it “appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.” 28 U.S.C. § 2255(e). The applicability of the saving clause is a threshold jurisdictional issue. *Williams v. Warden, Fed. Bureau of Prisons*, 713 F.3d 1332, 1337 (11th Cir. 2013), *abrogated on other grounds by McCarthan*, 851 F.3d 1076 (11th Cir. 2017) (*en banc*). If the saving clause does not apply to a federal prisoner’s § 2241 claim, this court lacks jurisdiction to consider the claim. *Id.* at 1349-50.

The Eleventh Circuit recently readdressed and significantly limited the scope of habeas corpus jurisdiction under the saving clause in *McCarthan*. Overruling prior precedents, the Eleventh Circuit held:

A motion to vacate is inadequate or ineffective to test the legality of a prisoner’s detention only when it cannot remedy a particular kind of claim. Even if a prisoner’s claim fails under circuit precedent, a motion to vacate remains an adequate and effective remedy for a prisoner to raise the claim and attempt to persuade the court to change its precedent, and failing that, to seek certiorari in the Supreme Court.

McCarthan, 851 F.3d at 1099. The Eleventh Circuit concluded that the petitioner in *McCarthan* could not seek collateral review under § 2241 to contest his imprisonment sentence under the Armed Career Criminal Act (“ACCA”) in light of a change in Eleventh Circuit caselaw. *Id.* at 1079. As the *McCarthan* opinion explained, because the petitioner “was free to bring” his ACCA claim in his initial § 2255 motion to vacate, the remedy under § 2255 was an “adequate

and effective means for testing such an argument,” and he could not then use the saving clause to make that claim in a § 2241 habeas petition. *Id.* at 1099-1100 (quoting *Prost v. Anderson*, 636 F.3d 578, 580 (10th Cir. 2011)). But, a prisoner may utilize the saving clause to raise a habeas challenge to his detention “in ways that do not challenge the validity of his sentence.” *Id.* at 1089. “For example, a prisoner may concede the validity of his sentence but raise claims about the execution of his sentence” *Id.*

Under the Eleventh Circuit’s *McCarthan* ruling, this court lacks subject matter jurisdiction to consider Petitioner’s habeas petition. This habeas petition presents a Sixth Amendment challenge to the sentencing court’s consideration of facts not found by a jury when applying a Sentencing Guidelines enhancement and denying a safety-valve reduction. (Doc. # 1 at 6-7). This constitutional claim, ultimately premised on the Supreme Court’s decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is a challenge to the validity of Petitioner’s sentence and, thus, it falls squarely within the scope of the sentencing court’s jurisdiction under § 2255. *See* 28 U.S.C. § 2255(a) (allowing a federal prisoner to challenge a sentence “imposed in violation of the Constitution”). Petitioner was free to bring his *Apprendi* claim in a timely motion to vacate, and § 2255 afforded him an adequate and effective means to present the claim to the sentencing court. *McCarthan*, 851 F.3d at 1099-1100. As such, this court lacks subject matter jurisdiction over Petitioner’s § 2241 petition, and the petition is due to be dismissed.¹

¹ Of course, Petitioner’s habeas petition would have subject to dismissal under the Eleventh Circuit’s pre-*McCarthan* caselaw as well. *See, e.g., Jeanty v. Warden, FCI-Miami*, 757 F.3d 1283, 1285 (11th Cir. 2014) (affirming the dismissal of a § 2241 petition and explaining that the Eleventh Circuit has “repeatedly held that *Apprendi*’s rule does not apply retroactively on collateral review”), *abrogated on other grounds by McCarthan*, 851 F.3d 1076 (11th Cir. 2017) (*en banc*)

III. Conclusion

For the reasons explained above, Petitioner's Petition for Writ of Habeas Corpus (Doc. # 1) is due to be dismissed. An order consistent with this Memorandum Opinion will be entered.

DONE and **ORDERED** this June 6, 2017.



R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE