

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 02-14020-CR-MOORE/GARBER

UNITED STATES OF AMERICA,

vs.

MARCELLUS M. MASON, Jr.,

Petitioner.

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**GOVERNMENT’S RESPONSE IN OPPOSITION TO PETITION
FOR WRIT OF ERROR CORAM NOBIS (DE 150),
MOTION FOR CLARIFICATION AND RECONSIDERATION (DE 151),
AND MOTION FOR RECONSIDERATION (DE 152)**

The United States, by its undersigned Assistant United States Attorney, files this Response in Opposition to Petition for Writ of Error Coram Nobis (D.E. 150), Motion for Clarification and Reconsideration (D.E. 151), and Motion for Reconsideration (D.E. 152), in the above captioned case.

For the reasons set forth below, the Court should deny Petitioner’s motions.

BACKGROUND HISTORY OF THE UNDERLYING ACTIONS

This series of litigations began when Defendant-Petitioner, Marcellus Mason, filed a pro se civil action in the United States District Court for the Southern District of Florida, *Mason v. Heartland Liberty*, No. 99-CV-14027-Graham (the “Civil case”). In the course of that civil action, Judge Graham entered orders restricting Mason’s conduct toward parties and witnesses in discovery. Mason’s conduct ultimately led Judge Graham to enter an order barring Mason from filing any new civil actions in the District Court without prior judicial approval. Mason disregarded Judge Graham’s injunctive order and filed new actions without seeking the requisite approval. The United

States Attorney's Office charged Mason by information with contempt of court, in violation of Title 18, United States Code, § 401, in a criminal action entitled *United States v. Marcellus M. Mason, Jr.*, No. 02-CR -14020-Moore (the "Criminal case") (As this Response is filed in the Criminal Case, docket entries hereinafter cited without description refer to the Criminal Case). This Court convicted Mason on the contempt of court charge, and sentenced him to supervised release. The Court ended Mason's period of supervision on November 30, 2007. (D.E. 128)

ANALYSIS

Petitioner challenges the judicial actions taken against him in both the Civil and Criminal cases on jurisdictional grounds. First, he contends that Judge Graham had no jurisdiction or authority in the Civil case to enter an injunctive order barring Petitioner from filing further actions. Petitioner also contends that there was no jurisdictional basis for the Criminal case, because the criminal case rested on Petitioner's purported violation of the Civil case injunction, which he contends was void from the start. It is unclear from Petitioner's motions whether he argues the Court lacked subject matter jurisdiction or personal jurisdiction. However, the Court clearly possessed both.

Petitioner was the plaintiff in the Civil case, therefore, it was Petitioner who invoked the Court's jurisdiction (D.E. 1, Civil case) and proceeded to litigate the matter exhaustively (See D.E. 1 - D.E. 944, Civil case). Petitioner filed his complaint in the forum of his choosing and voluntarily submitted to the Court's jurisdiction, waiving his right to object on those grounds. Nine hundred forty-four docket entries later, with the civil proceeding now closed, Petitioner cannot claim that the Civil case Court lacked jurisdiction over him.

It is well established that when a civil litigant substantially participates in the litigation without actively objecting to the court's personal jurisdiction over him, he has waived his right to such an objection and consented to the personal jurisdiction of the court. *Rates Tech. Inc. v. Nortel Networks Corp.*, 399 F.3d 1302, 1309 (Fed. Cir. 2005) (holding "party may consent to personal jurisdiction by extensively participating in the litigation without timely seeking dismissal."); *Paine Webber Inc. v. Chase Manhattan Private Bank (Swtz.)*, 260 F.3d 453, 459 (5th Cir. 2001) (holding that it is a "well established rule that parties who choose to litigate actively on the merits thereby *surrender any jurisdictional objections.*") (emphasis added). Petitioner's extensive litigation of the Civil case, coupled with the fact that he filed the initial action, plainly illustrates that the Court had personal jurisdiction over Petitioner in the Civil case. The Court's jurisdiction included the power to regulate and supervise Petitioner's conduct as a party litigant before the District Court. This Court, by extension, had personal jurisdiction over Petitioner in the subsequent Criminal case arising from Petitioner's failure to comply with the Court's Omnibus Order (D.E. 878, Civil case).

The Court in both proceedings also had subject matter jurisdiction. Federal Courts have an "inherent power and constitutional obligation to protect their jurisdiction from conduct which impairs their ability to carry out Article III functions." *In re McDonald*, 489 U.S. 180, 184 n.8 (1989). As noted by the District Court in the Civil case, the Eleventh Circuit has consistently upheld district court injunctions against abusive litigants, including pre-filing screening restrictions. (D.E. 895, Civil case) (citing *Martin Trigona v. Shaw*, 986 F.2d 1384, 1387 (11th Cir. 1993); *Copeland v. Green*, 949 F.2d 390 (11th Cir. 1991)). Thus, the Court in the Civil case was well within its authority when it enjoined Petitioner from filing any further proceedings without first seeking the Court's permission. When Petitioner repeatedly violated the injunction, the Court was equally

within its power to refer the matter to the United States Attorney for prosecution of Petitioner in criminal contempt, pursuant to Title 18, United States Code, § 401(3). *See Alikhani v. United States*, 200 F.3d 732, 734-735 (11th Cir. 2000) (holding that “Congress has provided the district courts with jurisdiction ... of all offenses against the laws of the United States.”).

Furthermore, “an indictment charging that a defendant violated a law of the United States gives the district court jurisdiction over the case and empowers it to rule on the sufficiency of the indictment.” *McCoy v. United States*, 266 F.3d 1245, 1252 (11th Cir. 2001). Failure to comply with a court order violates 18 U.S.C. § 401(3) and is therefore a clear violation of a United States federal law, granting the Criminal case court jurisdiction over Petitioner.

Petitioner next appears to repeat his prior argument that, pursuant to Federal Rule of Civil Procedure 60(b), his conviction in the criminal case should be vacated. As noted by the Court in denying the initial Rule 60(b) argument, this argument is as also without merit. Petitioner “cannot use the rules of civil procedure to challenge [his] criminal conviction.” *United States v. Moon*, 151 Fed. Appx. 807, 809 n.2 (11th Cir. 2005); *See Fed. R. Civ. P. 1*. Petitioner further contends that, in the alternative, his motion should be construed as a motion for habeas corpus pursuant to Title 28, United States Code § 2255, and thus as a civil proceeding governed by the Federal Rules of Civil Procedure. Though Petitioner is correct that a 28 U.S.C. § 2255 Habeas Petition is a civil proceeding, his motion still fails.

Petitioner lacks standing to contest his conviction through a 28 U.S.C. § 2255 habeas petition. 28 U.S.C. The statute provides that a petitioner may challenge his conviction while *in custody*. *See Maleng v. Cook*, 490 U.S. 488, 492 (1989) (per curiam). Since Petitioner was not “in custody” at the time this motion was filed and is not in custody now, he lacks standing to file a §

2255 motion. Petitioner adverts as much in his motion. (D.E. 150 at 4). Therefore, Petitioner's motion requesting habeas relief is without merit and must be denied.

In addition, Petitioner seeks relief from his conviction in the form of a Writ of Error Coram Nobis. However, a writ of coram nobis is "an extraordinary remedy of last resort available only in compelling circumstances where necessary to achieve justice." *United States v. Denalli*, 179 Fed. Appx. 605, 607 (11th Cir. 2006) (citing *United States v. Mills*, 221 F.3d 1201, 1203 (11th Cir. 2000)). As such, the bar for obtaining coram nobis relief is set very high. *Alikhani*, 200 F.3d at 734. In particular, "the writ may issue 'only when the error involves a matter of fact of the most fundamental character which has not been put in issue or passed upon and which renders the proceeding itself irregular and invalid.'" *Id.* (quoting *United States v. Moody*, 874 F.2d 1575, 1567-77 (11th Cir. 1989)).

The Criminal case, initiated by Information filed by the United States Attorney, rested upon probable cause shown that the Defendant violated Judge Graham's order and thereby committed criminal contempt of court. This Court satisfied itself beyond a reasonable doubt that the predicate injunctive order in the Civil case was in fact a valid exercise of judicial authority by the Civil case's presiding District Judge. This Court was entitled to rely on the presumptive validity of the injunctive order, which has remained in effect absent reconsideration or review and reversal of said order. Accordingly, the Court also found a factual basis supporting a finding of guilt as to the sole misdemeanor contempt charge, and adjudicated Petitioner guilty as charged. Although Petitioner is correct that "jurisdictional error has historically been recognized as fundamental, and for which collateral relief has accordingly been available," *United States v. Peter*, 310 F.3d 709, 712 (11th Cir. 2002), as established above, the Civil case Court had jurisdiction and authority over Petitioner's

proceedings. Petitioner is not entitled to coram nobis relief, and his motion should be denied.

Finally, the time for appeal of the criminal conviction and sentence has lapsed. The Court retained jurisdiction of the criminal case and Defendant-Petitioner so long as Petitioner remained sentenced to supervised release and subject to the supervision of the Court through its Probation Office. The Court now having released Petitioner from supervision, there no longer is an active criminal case to support jurisdiction in the United States District Court.

The federal courts are courts of limited jurisdiction, and every filing therein must be supported by an independent basis of federal jurisdiction. The Civil case was filed and pleaded on federal question jurisdiction, but has since been dismissed, raised on appeal, and dismissed by the Court of Appeals for want of prosecution. Petitioner's avenue to challenge or overturn the order restricting his filings should have been by motion to reconsider within the Civil case, or on appeal from the civil case to the Court of Appeals. Petitioner failed to do so, however, and the civil case is now closed and final, with all opportunity for appeal lapsed. The interests of repose and finality in the civil judgment now supersede Petitioner's putative concerns. *See United States v. Frady*, 465 U.S. 152 (1982); *see also Travelers Indemnity Co. v. Gore*, 761 F.2d 1549, 1551 (11th Cir. 1985) (holding there is a "deep-rooted federal policy in the finality of judgments..."). Furthermore, the Civil case can no longer provide an independent basis for jurisdiction in this Court for motions or actions brought by Petitioner. Accordingly, Petitioner's motions should be denied.

CONCLUSION

For the reasons set forth above, the Government respectfully submits that the Court should deny the Petitioner's Motion for Writ of Error Coram Nobis (DE 150), Motion for Clarification and Reconsideration(DE 151), and Motion for Reconsideration (DE 152).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was uploaded onto the Court's CM/ECF system on July 11, 2008.

/s/ Theodore Cooperstein
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