

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 31 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MARTIN R. VANDEMERWE,

Petitioner-Appellant,

v.

STEVE LANGFORD,

Respondent-Appellee.

No. 18-55019

D.C. No.

2:17-cv-04743-RGK-KS

Central District of California,
Los Angeles

ORDER

Before: W. FLETCHER and WATFORD, Circuit Judges.

The “amended and restated appeal” (Docket Entry No. 4) is construed as a request for a certificate of appealability. So construed, the request is denied because appellant has not shown that “jurists of reason would find it debatable whether the [disguised section 2255 motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Porter v. Adams*, 244 F.3d 1006, 1007 (9th Cir. 2001) (order).

Any pending motions are denied as moot.

DENIED.

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARTIN R. VANDEMERWE,) NO. CV 17-4743-RGK (KS)
Petitioner,)
v.) JUDGMENT
STEVEN LANGFORD, Warden,)
Respondent.)

Pursuant to the Court's Order Accepting Findings and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that this action is dismissed without prejudice.

DATED: December 11, 2017

Jay Klaesner

R. GARY KLAUSNER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARTIN R. VANDEMERWE,) NO. CV 17-4743-RGK (KS)
Petitioner,)
v.) ORDER ACCEPTING FINDINGS AND
STEVEN LANGFORD, Warden,) RECOMMENDATIONS OF UNITED
Respondent.) STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition for Writ of Habeas Corpus (“Petition”), all of the records herein, the Report and Recommendation of United States Magistrate Judge (“Report”), and Petitioner’s Objections to the Magistrate Judge’s Report and Recommendation (“Objections”). Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), the Court has conducted a *de novo* review of those portions of the Report to which objections have been stated.

11

11

11

11

11

1 Having completed its review, the Court accepts the findings and recommendations set
2 forth in the Report. Accordingly, IT IS ORDERED that: (1) the Petition is DENIED; and (2)
3 Judgment shall be entered dismissing this action without prejudice.

4
5 DATED: December 11, 2017
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



R. GARY KLAUSNER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARTIN R. VANDEMERWE,) NO. CV 17-4743-RGK (KS)
Petitioner,)
v.) REPORT AND RECOMMENDATION OF
STEVEN LANGFORD, Warden,) UNITED STATES MAGISTRATE JUDGE
Respondent.)
_____)

This Report and Recommendation is submitted to the Honorable R. Gary Klausner, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

INTRODUCTION

On June 27, 2017, Martin R. Vandemerwe (“Petitioner”), a federal prisoner incarcerated at the Federal Prison Camp – North in Lompoc, California, proceeding *pro se*, filed a Petition for Writ of Habeas Corpus by a Person in Federal Custody (the “Petition”) under 28 U.S.C. § 2241. (Dkt. No. 1.) The Petition seeks habeas relief with respect to

1 Petitioner's sentence stemming from his conviction sustained in the United States District
2 Court for the District of Utah (the "Sentencing Court") in Case No. 2:07-cr-00111-DB (the
3 "Conviction" and/or "Sentence").¹ On August 14, 2017, Respondent filed a Motion to
4 Dismiss (the "Motion") the Petition on the grounds that it is an improper successive 28
5 U.S.C. § 2255 petition. (Dkt. No. 12.) On September 7, 2017, Petitioner filed an opposition
6 (the "Opposition") to the Motion. (Dkt. No. 13.) Respondent did not file a Reply. The
7 Motion is now fully briefed and under submission to the Court.

8

9 **BACKGROUND**

10

11 On October 28, 2008, Petitioner was convicted after jury trial in the District of Utah
12 of one count of possession of a controlled substance with intent to distribute. (Conviction
13 Dkt. Nos. 77, 81.) The government had previously notified Petitioner that he could be
14 subject to sentencing enhancement based on his two prior state felony convictions for illegal
15 possession/use of a controlled substance. (See Conviction Dkt. No. 25; *see also* Conviction
16 Dkt. No. 110 at 1-2.) On September 23, 2009, the Sentencing Court sentenced Petitioner to
17 a 20 year federal prison term with 60 months of supervised release. (Conviction Dkt. Nos.
18 121, 125.) Petitioner appealed his conviction, and the United States Court of Appeals for the
19 Tenth Circuit affirmed. *See United States v. Vandemerwe*, 405 Fed. Appx. 344 (10th Cir.
20 2010).

21

22 On December 19, 2011, Petitioner filed a Motion to Vacate pursuant to 28 U.S.C. §
23 2255. (Conviction Dkt. No. 157.) The district court denied the motion, and the Tenth
24 Circuit subsequently denied Petitioner request for a certificate of appealability. *See United*
25

26 ¹ The information regarding the Conviction, the Sentence, and the procedural background set forth herein is based
27 on information publicly available through WESTLAW and the PACER system. Specifically, pursuant to Rule 201 of
28 the Federal Rules of Evidence, the Court takes judicial notice of the electronic records, dockets, and case decisions
available through the PACER system and/or WESTLAW for this Court and various United States Courts of Appeals and
United States District Courts.

States v. VanDeMerwe, 527 Fed. Appx. 745 (10th Cir. 2013). The United States Supreme Court denied Petitioner's petition for writ of certiorari. No. 13-6294, 134 S. Ct. 4646 (2013).

PETITIONER'S CLAIM

The Petition contends that, under an unspecified Ninth Circuit case, the sentencing enhancement should be vacated because the Ninth Circuit “recently” determined that crimes defined similarly to Petitioner’s predicate state convictions do not satisfy the definition of a “controlled substance offense.” (See Petition at 1-2.) The Petition does not cite the Ninth Circuit case on which Petitioner relies. However, in January 2017, the Ninth Circuit determined, in the context of immigration removal proceedings, that a lawful permanent resident’s conviction under Oregon law for delivery of heroin, OR. REV. STAT. § 475.992(1)(a), did not qualify as an “aggravated felony” for the purposes of 8 U.S.C. § 1227(a)(2)(A)(iii), (B)(i). *Sandoval v. Yates*, 847 F.3d 697, 698-99, 705 (9th Cir. 2017), *amended and superseded on denial of rehearing by Sandoval v. Sessions*, 866 F.3d 986 (9th Cir. 2017).² Further, in the Opposition, Petitioner relies heavily on *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017), for the proposition that he is allowed to raise his claim in a second or successive 2255 motion.³ (Opposition at 1-2.)

² As Respondent points out in the Motion, the *Sandoval* decision did not address the career offender guidelines, and previous Ninth Circuit precedent has found that a conviction under that same Oregon provision can justify a career offender enhancement. (Motion at 6 n.4) (citing, *inter alia*, *United States v. Shumate*, 329 F.3d 1026 (9th Cir. 2003)).

³ Petitioner characterizes his claim as “identical” to the one raised in *Geozos*. (Opposition at 2.) However, the prisoner in *Geozos*, unlike Petitioner, sought and received leave from the appropriate United States Court of Appeals before filing his successive 2255 motion in district court. *Geozos*, 870 F.3d at 894. Further, the claim in *Geozos* concerned a sentencing enhancement that might have been imposed under the residual clause of the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e)(2)(B)(ii), which the Supreme Court invalidated in *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551 (2015). Unlike *Geozos*, however, there is no chance that Petitioner was sentenced pursuant to the ACCA’s unconstitutional residual clause, because the government did not allege that Petitioner had prior convictions involving “conduct that presents a serious potential risk of physical injury to another” – only prior drug convictions. Accordingly, Petitioner’s claim is not, as he contends, “identical” to the claim in *Geozos*.

DISCUSSION

I. Threshold Jurisdictional Issue

5 A motion under 28 U.S.C. § 2255 (“Section 2255”) generally is the exclusive post-
6 appeal mechanism by which a federal prisoner may challenge the legality of his conviction
7 or sentence. *See Muth v. Fondren*, 676 F.3d 815, 818 (9th Cir.), *cert. denied*, 133 S. Ct. 292
8 (2012); *Harrison v. Ollison*, 519 F.3d 952, 955 (9th Cir. 2008). A 28 U.S.C. § 2241
9 (“Section 2241”) habeas petition may be filed by a federal prisoner to attack the “execution
10 of his sentence,” but not to attack its validity. *Hernandez v. Campbell*, 204 F.3d 861, 864
11 (9th Cir. 2000); *see also Porter v. Adams*, 244 F.3d 1006, 1007 (9th Cir. 2001) (noting that
12 Section 2241 is available only to challenge the manner of execution of a prisoner’s federal
13 sentence, not its legality).

15 There is “one exception” to the generally exclusive nature of the Section 2255 remedy
16 for federal prisoners who wish to challenge the validity of their convictions and/or sentences.
17 *Stephens v. Herrera*, 464 F.3d 895, 897 (9th Cir. 2006). Section 2255 contains a “savings
18 clause” or “escape hatch,” which allows a federal prisoner to seek Section 2241 relief when a
19 Section 2255 motion is “inadequate or ineffective to test the legality of his detention.” *See*
20 *id.*; *see also Muth*, 676 F.3d at 818; *Harrison*, 519 F.3d at 956. A finding that Section 2255
21 is an inadequate or ineffective remedy constitutes “a narrow exception” to the rule that
22 Section 2255 provides a federal prisoner’s exclusive remedy for challenging a conviction
23 and/or sentence. *United States v. Pirro*, 104 F.3d 297, 299 (9th Cir. 1997); *see also Ivy v.*
24 *Pontesso*, 328 F.3d 1057, 1069 (9th Cir. 2003). The petitioner bears the burden of proving
25 the inadequacy or ineffectiveness of the Section 2255 remedy. *See Redfield v. United States*,
26 315 F.2d 76, 83 (9th Cir. 1963).

1 As the Ninth Circuit observed in *Muth*, the question of whether a petition is properly
2 brought under Section 2241, rather than Section 2255, has “important implications” due to
3 differing procedural requirements for these two remedies. *Muth*, 676 F.3d at 818 (discussing
4 the procedural limitations applicable to Section 2255 motions and from which Section 2241
5 petitions are exempt). The distinction between Section 2255 motions and Section 2241
6 petitions impacts not only the type of relief available and the applicable procedural
7 limitations but also carries a jurisdictional component. Section 2255 motions must be heard
8 in the federal district in which the prisoner was convicted and sentenced, while Section 2241
9 petitions must be heard in the federal district in which the prisoner is confined. *See id.*;
10 *Hernandez*, 204 F.3d at 864-65. As a result, a district court faced with a federal prisoner’s
11 Section 2241 challenge to the legality of his conviction and/or sentence must first decide,
12 “before proceeding to any other issue,” whether the relief requested may be sought under
13 Section 2241. *Hernandez*, 204 F.3d at 865; *see also Muth*, 676 F.3d at 818 (“Before
14 proceeding to the merits of a § 2241 petition ostensibly brought pursuant to the ‘escape
15 hatch’ of § 2255, a district court must resolve the threshold question whether a petition was
16 properly brought under § 2241 or whether the filing should instead be construed as a § 2255
17 motion.”).

18

19 **II. Section 2241 Jurisdiction Is Lacking**

20

21 The claim alleged in the Petition directly challenges the validity of Petitioner’s
22 sentence imposed in the District of Utah. As a result, Section 2241 jurisdiction does not
23 exist in this case unless Petitioner has met his burden of showing that Section 2255’s savings
24 clause applies and/or that Section 2241 somehow otherwise applies. He has not done so and,
25 more importantly, cannot do so.

26 \\

27 \\

28 \\

1 **A. The Petition Is A Disguised, Successive Section 2255 Motion, And The**
2 **Section 2255 “Escape Hatch” Is Inapplicable.**

3
4 Section 2255 provides that:

5
6 An application for a writ of habeas corpus on behalf of a prisoner who is
7 authorized to apply for relief by motion pursuant to this section, shall not be
8 entertained if it appears that the applicant has failed to apply for relief, by
9 motion, to the court which sentenced him, or that such court has denied him
10 relief, unless it also appears that the remedy by motion is *inadequate or*
11 *ineffective to test the legality of his detention.*

12
13 28 U.S.C. § 2255(e) (emphasis added).

14
15 The Ninth Circuit has construed the “inadequate or ineffective” language narrowly
16 and made clear that it does not serve as a mechanism for either circumventing the procedural
17 limitations on Section 2255 motions or obtaining a second chance to present a claim already
18 denied on the merits. *See, e.g., Ivy*, 328 F.3d at 1059; *Lorentzen v. Hood*, 223 F.3d 950, 953
19 (9th Cir. 2000). The Ninth Circuit has concluded that the Section 2255 remedy qualifies as
20 inadequate or ineffective only “when a petitioner (1) makes a claim of actual innocence, and
21 (2) has not had an unobstructed procedural shot at presenting that claim.” *Harrison*, 519
22 F.3d at 959 (citation omitted); *see also Muth*, 676 F.3d at 819.

23
24 Although Petitioner focuses much of his Opposition on element (2) of the Ninth
25 Circuit’s governing test (*see* Opposition at 3-4), the Court need not address element (2)
26 because Petitioner cannot satisfy element (1). To establish actual innocence within the
27 meaning of the Section 2255 savings clause, a petitioner must show, by a preponderance of
28 the evidence, “that, in light of all the evidence, it is more likely than not that no reasonable

1 juror would have convicted him.”” *Stephens*, 464 F.3d at 898 (citation omitted); *Ivy*, 328
2 F.3d at 1060; *Lorentsen*, 223 F.3d at 954. Factual innocence, not legal insufficiency, is
3 required. *Id.* Petitioner does not allege he is innocent of the crime of which he was
4 convicted. Rather, he asserts that there is a defect in his Sentence, based upon Ninth Circuit
5 case law decided after he was sentenced.

6
7 Moreover, Petitioner does not, and could not truthfully, allege that he has “never had
8 the opportunity to raise” his claim in a Section 2255 motion. *Ivy*, 328 F.3d at 1060 (“it is not
9 enough that the petitioner is presently barred from raising his claim of innocence by motion
10 under § 2255. He must never have had the opportunity to raise it by motion.”). Petitioner
11 has not attempted to raise his claim in the Sentencing Court through a Section 2255 motion.
12 Whether or not such a motion would be cognizable or barred is beside the point; the fact is
13 that he has never attempted to pursue Section 2255 relief on this particular claim, and thus,
14 there is no basis for finding such relief to be inadequate and ineffective under these
15 circumstances. Accordingly, Section 2241 jurisdiction does not exist in this district based on
16 the Section 2255 escape hatch.

17
18 **B. No Independent Basis For Section 2241 Jurisdiction Exists.**

19
20 The central purpose of the writ of habeas corpus is to provide a remedy to prisoners
21 challenging the fact or duration of their physical confinement and seeking immediate release
22 or an earlier release. *Preiser v. Rodriguez*, 411 U.S. 475 (1973) (“the essence of habeas
23 corpus is an attack by a person in custody upon the legality of that custody, and . . . the
24 traditional function of the writ is to secure release from illegal custody”). Section 2241
25 confers a general grant of habeas jurisdiction when a federal or state prisoner contends that
26 he “is in custody in violation of the Constitution or laws or treaties of the United States.” 28
27 U.S.C. §§ 2241(a), (c)(3). As noted earlier, the federal courts have construed this general
28

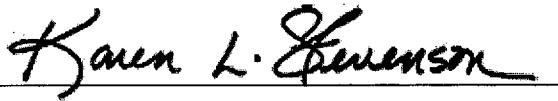
1 grant to encompass a federal prisoner's right to attack the "execution of his sentence," but
2 not its validity. *Id.* at 1009; *Hernandez*, 204 F.3d at 864; *see also Porter*, 244 F.3d at 1007.

3
4 The Petition does not challenge the manner of the execution of Petitioner's Sentence.
5 Instead, Petitioner challenges the validity of the Sentence through a claim that is not
6 cognizable under Section 2241. Because Section 2241 jurisdiction is lacking in this Court, it
7 is clear that the Petition must be dismissed.

8
9 **RECOMMENDATION**
10

11 For all of the foregoing reasons, IT IS RECOMMENDED that the District Judge issue
12 an Order: (1) accepting the Report and Recommendation; (2) granting the Motion; and (3)
13 directing that Judgment be entered dismissing this action without prejudice for lack of
14 jurisdiction. If Petitioner receives leave from the Tenth Circuit to raise his claim(s) in a
15 second or successive Section 2255 petition, he may file a habeas petition in the appropriate
16 forum at that time.

17
18 DATED: November 6, 2017


19
20 Karen L. Stevenson
21
22
23
24
25
26
27
28

KAREN L. STEVENSON
UNITED STATES MAGISTRATE JUDGE

NOTICE

25 Reports and Recommendations are not appealable to the Court of Appeals, but may be
26 subject to the right of any party to file objections as provided in the Local Rules Governing
27 the Duties of Magistrate Judges and review by the District Judge whose initials appear in
28

1 the docket number. No notice of appeal pursuant to the Federal Rules of Appellate
2 Procedure should be filed until entry of the judgment of the District Court.
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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