APPENDIX

Report and Recommendation of Magistrate Judge
District Court Order Accepting Findings and Recommendation of Magistrate Judge
Hays v. Tews, 771 Fed. App'x 769 (9th Cir. 2019)
Ninth Circuit Order Denying Petition for Rehearing

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARK LINNEAR HAYS, Petitioner, vs. RANDY L. TEWS, Warden, Respondent.	Case No. CV 14-5081-DMG (RNB) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Dolly M. Gee, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

PROCEEDINGS

Petitioner currently is incarcerated in this District pursuant to a conviction sustained in 1996 in the Northern District of Texas. On June 30, 2014, he filed a Petition for Writ of Habeas Corpus by a Person in Federal Custody herein ostensibly pursuant to 28 U.S.C. § 2241.

As best the Court could glean from the Petition and petitioner's accompanying memorandum in support of the Petition ("Pet. Mem."), petitioner was claiming that he was actually innocent of being either a career criminal offender or subject to

sentencing under the federal three-strikes law because his prior burglary conviction under California Penal Code Ann. § 459 did not qualify as a "serious violent felony" under the Supreme Court's 2013 decision in Descamps v. United States, - U.S. -, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013); that his trial counsel rendered ineffective assistance when he failed to consult with a serologist or trace evidence expert to counter the prosecution's forensic evidence; that his conviction resulted from tainted out-of-court identifications and the prosecution's use of perjured testimony; that he was actually innocent of the charged offenses, as shown by the affidavits of three alibi witnesses whom defense counsel failed to present at trial[1]; that his trial counsel rendered ineffective assistance when he failed to call a medical expert to testify regarding petitioner's physical capacity/limitations; and that he was denied counsel on direct appeal, in violation of his Sixth Amendment rights. Petitioner maintained that the Court had jurisdiction to entertain his § 2241 petition pursuant to the "savings clause" of § 2255.

In accordance with the Court's Order Requiring Response to Petition, respondent filed a Motion to Dismiss on August 29, 2014 on the following grounds: (1) The abuse of the writ and comity doctrines require dismissal of the Petition; (2) although styled as a § 2241 Petition, the Petition is actually a disguised successive § 2255 Petition which, therefore, should be dismissed; and (3) the Petition is time-barred under § 2255. Concurrently, respondent lodged various exhibits that had been referenced in the Motion to Dismiss.

After extensive briefing and supplemental briefing (and the lodging of additional exhibits by both sides), this matter now is ready for decision. As discussed hereafter, the Court concurs with respondent that it lacks subject matter jurisdiction

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[1] Of the three affidavits, only two (the affidavits of petitioner's son and daughter) actually purported to provide petitioner with an alibi for the day of the charged offense.

to entertain the Petition under § 2241. The Court therefore recommends that the action be dismissed on that basis.[2]

BACKGROUND

On June 20, 1996, following a four-day trial, a Northern District of Texas jury found petitioner guilty of conspiracy to commit robbery, robbery, use of a firearm during a crime of violence, and possession of a firearm by a convicted felon. (See Respondent's Exhibit ["Resp. Exh."] A at 16-17.) On October 21, 1996, the district court sentenced petitioner to two consecutive life terms as to counts two and three (robbery and the use of a firearm during a crime of violence) pursuant to 18 U.S.C. § 3559(c), the so-called federal "three strikes law"; and to 60-month and 120-month concurrent terms of imprisonment, respectively, as to counts one and five (conspiracy to commit robbery and felon in possession of a firearm). (See Resp. Exh. Q at 1-2, 5.) In imposing petitioner's sentence, the court adopted the factual findings and sentencing guidelines application set forth in the presentence report ("PSR"). (See id. at 5.) As set forth in the PSR, petitioner was determined to be a career offender under U.S.S.G. § 4B1.1. (See Resp. Exh. W (lodged under seal) at 7, 17-18.)

Petitioner appealed, claiming (1) that the Hobbs Act was unconstitutional as applied to the robbery in his case; (2) that the indictment was defective; (3) that the arrest warrant was defective; (4) that identification evidence was tainted by an impermissibly suggestive photographic array; (5) that evidence seized from his hotel room and truck should have been suppressed; (6) that he received ineffective assistance of trial counsel in numerous respects; (7) that the Government knowingly presented perjured testimony; (8) that the district court admitted extraneous prejudicial evidence; (9) that the district court committed instructional error; (10) that

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[2] Based on the lack of subject matter jurisdiction finding, the Court does not reach either of the other grounds for dismissal raised by respondent.

the jury was tainted by exposure to pretrial and midtrial publicity; and (11) that his sentence should not have been enhanced pursuant to 18 U.S.C. § 3559(c). (See Resp. Exh. X.) On April 16, 1999, the Fifth Circuit affirmed after finding no error. See United States v. Hays, 180 F.3d 261 (5th Cir. 1999) (per curiam), cert. denied, 531 U.S. 915 (2000).

Thereafter, petitioner filed two motions for post-conviction relief under 28 U.S.C. § 2255, as well as other motions including a Rule 60(b) motion, a new trial motion, and a motion to amend or alter the judgment. In his first § 2255 motion, petitioner advanced the following grounds for relief: (1) that the Hobbs Act is unconstitutional; (2) that the indictment was defective; (3) that evidence seized from his hotel room and truck should have been suppressed; (4) that identification evidence was tainted by an impermissibly suggestive photographic array; (5) that the government knowingly presented perjured testimony; (6) that his sentence was illegally enhanced; and (7) that he received ineffective assistance of counsel. (See Exh. R.) That first § 2255 motion was denied on the merits on September 21, 2000. (See Petitioner's Exhibit ("Pet. Exh."] II; Resp. Exhs. A at 23-24, C.) His motion for reconsideration, motion for a new trial, and motion to amend or alter the judgment were denied in orders filed respectively on October 12, 2000, October 20, 2000, and December 17, 2002. (See Resp. Exh. A at 24-27; Resp. Exhs. N, O, P.) Petitioner's second § 2255 motion was dismissed as successive on April 20, 2004. (See Resp. Exh. A at 28; Resp. Exhs. D, S.)

On February 9, 2006, the Fifth Circuit denied petitioner leave to file a successive § 2255 motion. (See Resp. Exh. E.)

Petitioner then moved in the district court to revisit an "erroneous ruling" dismissing one of the claims raised in his first § 2255 motion. (See Resp. Exh. F.) Construing the motion as a Rule 60(b) motion for relief from judgment, the district court denied it on April 18, 2006, warning petitioner that "if he file[d] any future frivolous motions, the court [would] impose sanctions, including entering an order

prohibiting him from filing any pleadings without prior authorization from a district or magistrate judge of [the] court." (See Resp. Exh. G.) That ruling subsequently was affirmed by the Fifth Circuit. See United States v. Hays, 271 F. App'x 390 (5th Cir. 2008) (per curiam), cert. denied, 556 U.S. 1111 (2009).

Undeterred, on October 30, 2008, petitioner filed another Rule 60(b) motion. (See Resp. Exh. H.) Construing this motion as a successive § 2255 motion, the district court denied it on November 6, 2008. Furthermore, given its prior warning, the court found that sanctions were warranted and entered an order "prohibit[ing] [petitioner] from filing any pleadings, motions, or other papers . . . without moving for and obtaining explicit authorization from a district or magistrate judge." (See Resp. Exh. I.)

Petitioner then sought and obtained leave to file a motion for resentencing on the grounds that a 1993 California first-degree robbery conviction used to enhance his 1996 federal sentence had subsequently been dismissed in 1998. (See Resp. Exh. J.) The district court denied the motion on October 13, 2009, finding that petitioner's arguments failed to satisfy the statutory requirements for resentencing under 18 U.S.C. § 3559(c)(7). To the extent that the motion could be construed as one challenging the admissibility of his 1993 California robbery conviction for sentencing purposes, the court noted that those arguments had already been considered and rejected on direct appeal. (See Resp. Exh. K.) Petitioner appealed from the denial of his resentencing motion, but the appeal was dismissed. See United States v. Hays, 399 F. App'x 4 (5th Cir. 2010).

On June 20, 2012, after petitioner appealed from the district court's denial of his motions for leave to file a recusal motion, an 18 U.S.C. § 3582(c) motion for a sentence reduction, and a motion pursuant to Federal Rule of Civil Procedure 60(b) to challenge his sentence based on newly discovered evidence and fraud on the sentencing court, the Fifth Circuit dismissed the appeal as frivolous, sanctioned petitioner $100, and further ordered that petitioner be "BARRED from filing in the

district court or in this court any challenge to his 1996 convictions or sentences or the disposition of any prior pleading filing in relation to these convictions or sentences . . . unless he first obtains leave of the court in which he seeks to file such challenge." See United States v. Hays, 471 Fed. Appx. 388 (5th Cir. 2012) (per curiam) (emphasis in original).

DISCUSSION

A. The Court lacks jurisdiction to entertain the Petition.

Challenges to the legality of a conviction or sentence generally must be made in a motion to vacate sentence filed under 28 U.S.C. § 2255 in the sentencing court, while challenges to the manner, location, or conditions of a sentence's execution must be filed under 28 U.S.C. § 2241 in the custodial court. See Hernandez v. Campbell, 204 F.3d 861, 864 (9th Cir. 2000); Doganiere v. United States, 914 F.2d 165, 169-70 (9th Cir. 1990), cert. denied, 499 U.S. 940 (1991). Here, petitioner does not purport to be challenging "the manner, location, or conditions" of the execution of his sentence.

As the Supreme Court observed in United States v. Addonizio, 442 U.S. 178, 185, 99 S. Ct. 2235, 60 L. Ed. 2d 805 (1979), § 2255 "was intended to alleviate the burden of habeas corpus petitions filed by federal prisoners in the district of confinement, by providing an equally broad remedy in the more convenient jurisdiction of the sentencing court." Under § 2255, "[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 this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, **unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention**." Thus, a person challenging the legality of a sentence may seek relief in a habeas petition brought under 28 U.S.C. § 2241 only when the requirements of § 2255's "savings clause"

have been satisfied. See Lorentsen v. Hood, 223 F.3d 950, 953 (9th Cir. 2000); United States v. Pirro, 104 F.3d 297, 299 (9th Cir. 1997).

The inability of a petitioner to meet the gate-keeping requirements for a second or successive § 2255 motion does not render § 2255 an inadequate or ineffective remedy.[3] See Stephens v. Herrera, 464 F.3d 895, 898 (9th Cir. 2006), cert. denied, 549 U.S. 1313 (2007); Lorentsen, 223 F.3d at 953; Moore v. Reno, 185 F.3d 1054, 1055 (9th Cir. 1999), cert. denied, 528 U.S. 1178 (2000). Nor is the remedy under § 2255 rendered inadequate or ineffective because the one-year statute of limitations of § 2255(f) may already have expired. See, e.g., United States v. Lurie, 207 F.3d 1075, 1077 (8th Cir. 2000); Charles v. Chandler, 180 F.3d 753, 758 (6th Cir. 1999); Caravalho v. Pugh, 177 F.3d 1177, 1178 (10th Cir. 1999). Nor is the remedy under § 2255 rendered inadequate or ineffective simply because it appears that the petitioner's claims directed to the legality of his conviction or sentence will not be successful. See Tripati v. Henman, 843 F.2d 1160, 1162 (9th Cir. 1988).

The Ninth Circuit has held that a § 2241 petition may be brought under the "savings clause" when a petitioner (1) makes a claim of actual innocence, and (2) has not had an "unobstructed procedural shot" at presenting that claim. See Harrison v. Ollison, 519 F.3d 952, 959 (9th Cir.), cert. denied, 129 S. Ct. 254 (2008); Stephens, 464 F.3d at 898.

With respect to the first requisite, the Ninth Circuit has held that a claim of actual innocence for purposes of the escape hatch of § 2255 is tested by the standard

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[3] Under 28 U.S.C. § 2255(h), before a second or successive § 2255 motion may be entertained, it must be certified by a panel of the appropriate Court of Appeals as containing "(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

articulated by the Supreme Court in Bousley v. United States, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998)–i.e., the petitioner "must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." See Stephens, 464 F.3d at 898 (citing Bousley, 523 U.S. at 623). In Bousley, 523 U.S. at 623, the Supreme Court incorporated the actual innocence standard established by it three years earlier in Schlup v. Delo, 513 U.S. 298, 327-28, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). Under Schlup, "[t]o be credible, such a claim [of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial." See id. at 324 (recognizing that such evidence "is obviously unavailable in the vast majority of cases").

In making the determination of whether the petitioner has not had an "unobstructed procedural shot" at presenting his actual innocence claim (i.e., the second requisite), the factors to be considered are "(1) whether the legal basis for petitioner's claim did not arise until after he had exhausted his direct appeal and first § 2255 motion; and (2) whether the law changed in any way relevant to petitioner's claim after that first § 2255 motion." See Alaimalo v. United States, 636 F.3d 1042, 1047 (9th Cir. 2011); Harrison, 519 F.3d at 960 (internal quotation marks omitted). An intervening court decision must "effect a material change in the applicable law" to establish that the claim was unavailable to the petitioner during his direct appeal and his first § 2255 motion. See id.

1. petitioner's claim that he is actually innocent of being either a career criminal offender or subject to sentencing under the federal three-strikes law

Marrero v. Ives, 682 F.3d 1190 (9th Cir. 2012) is dispositive of any contention by petitioner that the Petition may be brought under the "savings clause" because he

is actually innocent of being either a career criminal offender or subject to sentencing under the federal three-strikes law. There, the Ninth Circuit held "that the purely legal argument that a petitioner was wrongly classified as a career offender under the Sentencing Guidelines is not cognizable as a claim of actual innocence under the escape hatch." Id. at 1195; see also, e.g., In re Bradford, 660 F.3d 226, 230 (5th Cir. 2011) ("[A] claim of actual innocence of a career offender enhancement is not a claim of actual innocence of the crime of conviction and, thus, not the type of claim that warrants review under § 2241."); Gilbert v. United States, 640 F.3d 1293, 1323 (11th Cir. 2011) ("[T]he savings clause does not authorize a federal prisoner to bring in a § 2241 petition a claim, which would otherwise be barred by § 2255(h), that the sentencing guidelines were misapplied in a way that resulted in a longer sentence not exceeding the statutory maximum."); United States v. Pettiford, 612 F.3d 270, 284 (4th Cir. 2010) (Petitioner's "legal argument that [his] conviction should not have been classified as a 'violent felony' under the [Armed Career Criminal Act ("ACCA")] ... is not cognizable as a claim of actual innocence."); Poindexter v. Nash, 333 F.3d 372, 382 (2d Cir. 2003) ("[W]hatever the merit of the contention that the Guidelines were misapplied in the treatment of Poindexter's three undisputed prior convictions, his claim that the three crimes should have been treated as one crime [for career offender purposes] is not cognizable as a claim of actual innocence."); Vitrano v. Milusnic, 2013 WL 6850031, at *5 (C.D. Cal. Dec. 27, 2013) ("[A] claim that an offense should not be classified as a violent felony is a legal challenge to the manner in which a sentence was calculated, not a factual showing that the petitioner did not commit the underlying offense").

The Court also finds that petitioner has not satisfied the second requisite for bringing a § 2241 petition under the "savings clause" with respect to his claim that he is actually innocent of being either a career criminal offender or subject to sentencing under the federal three-strikes law. The Court notes in this regard that, according to petitioner, he did make the argument at sentencing that his prior burglary

conviction under California Penal Code Ann. § 459 was not a crime of violence and did not qualify as a prior "serious violent felony" conviction for purposes of the career offender guideline. (See Pet. Mem. at 2, 4.) Petitioner therefore could have raised that claim on direct appeal. Moreover, the Descamps decision upon which petitioner purports to now be relying did not "effect a material change in the applicable law." In the decision, the Supreme Court clearly communicated its belief that its ruling in the case was "dictated" by existing precedent, beginning with its 1990 decision in Taylor v. United States, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990). See Descamps, 133 S. Ct. at 2283 ("Our caselaw explaining the categorical approach and its 'modified' counterpart all but resolves this case."); id. at 2285 (describing the Court's prior applications of the modified categorical approach as "the only way we have ever allowed" that approach to be applied); id. at 2286 ("We know Descamps' crime of conviction, and it does not correspond to the relevant generic offense. Under our prior decisions, the inquiry is over."); id. at 2286 (describing Ninth Circuit's analysis as "[d]ismissing everything we have said on the subject"); id. at 2288 (describing Ninth Circuit's analysis as "flout[ing] our reasoning").

Further, the Court concurs with respondent that petitioner's reliance on James v. United States, 550 U.S. 192, 127 S. Ct. 1586, 167 L. Ed. 2d 532 (2007), Begay v. United States, 553 U.S. 137, 128 S. Ct. 1581, 170 L. Ed. 2d 490 (2008), and Chambers v. United States, 555 U.S. 122, 129 S. Ct. 687, 172 L. Ed. 2d 484 (2009), for the proposition that he has had not had an "unobstructed procedural shot" at presenting his "actual innocence" claim based on the Descamps ruling is misplaced. Although those cases do discuss whether certain types of offenses constitute a "violent felony" for purposes of the ACCA -- Begay (drunk driving under New Mexico law), Chambers (failure-to-report escape under Illinois law), and James (attempted burglary under Florida law) -- none of those offenses is implicated here. In United States v. Park, 649 F.3d 1175, 1177 (9th Cir. 2011), which post-dated all

three Supreme Court cases, the Ninth Circuit held that a first-degree burglary conviction under California Penal Code § 459 is a "crime of violence" under the "residual clause" of the career offender guideline, which covers statutes involving conduct that presents a serious potential risk of physical injury to another. Descamps did not override that holding because the Supreme Court there specifically declined to address "whether § 459 qualifies as a predicate offense under ACCA's 'residual clause,'" deeming that alternative argument to have been forfeited by the Government. See Descamps, 133 S. Ct. at 2293 n.6; see also United States v. Talmore, 585 F. App'x 567, 568 (9th Cir. 2014) ("By its own terms, therefore, Descamps leaves Park's holding undisturbed.") (now citable for its persuasive value per Ninth Circuit Rule 36-3). And, subsequent to Descamps, the Ninth Circuit has continued to follow Ninth Circuit precedent holding that first-degree burglary under § 459 is categorically a "crime of violence" under the residual clause. See United States v. Rodriguez-Frias, 571 F. App'x 536, 537 (9th Cir. 2014).

2. petitioner's claim that he is actually innocent of the underlying robbery offense

In support of his claim that he is actually innocent of the underlying robbery offense, petitioner is relying on the affidavits of his son and daughter. Both attest that petitioner was in Denver with them during the month of April 1995, including on the day the robbery was committed. (The Court will hereinafter refer to this actual innocence claim as petitioner's "Denver Alibi" claim.)

However, as detailed in the summary of the evidence presented at trial contained in the Appendix hereto, petitioner's conviction was predicated on overwhelming evidence of guilt, including: the testimony of his accomplice detailing the manner in which he and petitioner had planned and executed the crime; the corroborating testimony of the victim of the robbery; the testimony of petitioner's Dallas mistress detailing how she picked him up after he fled from the police at the

Holiday Inn and petitioner's confession to her; the testimony of the Holiday Inn employee who checked petitioner in as a guest and identified petitioner in a photographic array and in open court; the testimony of a fingerprint expert that petitioner's fingerprints were found on objects in the hotel room; and the testimony of a hair and fiber expert that petitioner's head and pubic hairs were microscopically similar to those found in the mask and coveralls worn by the assailant during the robbery.

All of this evidence placed petitioner in Dallas at the time of the robbery, contrary to his alibi evidence that he was in Colorado during the month of April 1995. Although petitioner's wife testified at trial that she had spent a wedding anniversary with petitioner in Denver that month, and identified the greeting card that she had given him for the occasion, that greeting card was recovered during law enforcement agents' search of the Dallas hotel room. The Court therefore finds that petitioner's Denver Alibi claim based on the affidavits of his son and daughter is simply not credible in light of the eyewitness testimony establishing his presence in Dallas, the cooperating witnesses' testimony establishing his presence in Dallas, and the forensic expert testimony also establishing his presence in Dallas. Accordingly, the Court finds that petitioner has not met his burden under Bousley of demonstrating that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him.

Further, the Court finds that petitioner also has not met his burden of demonstrating that his Denver Alibi claim was unavailable to him during his direct appeal and his first § 2255 motion. Petitioner has been advancing his claim of a Denver alibi since the trial itself, when his wife testified to his presence in Denver during the month of April 1995. Petitioner also has been aware all along of the prospective alibi testimony of his son and daughter. They are the same "alibi" witnesses that petitioner's trial counsel referenced when he moved for a continuance on the last day of the trial.

The Court further notes that, in his opening brief on direct appeal, petitioner argued that he was entitled at trial to a "specific instruction that 'on the issue of alibi, the government has to convince the jury beyond a reasonable doubt that the alibi was not true.'" Moreover, by attaching to his appellate briefs affidavits of uncalled witnesses (including his daughter) who attested in their affidavits that they had advised trial counsel of their availability to come to Dallas to testify but had not thereafter been contacted by trial counsel, petitioner also implicitly was contending that one of the respects in which his trial counsel had rendered ineffective assistance was failing to present the testimony of those witnesses.

Even if petitioner could not properly have raised his Denver Alibi claim on direct appeal, there has been no showing by him that he could not have presented the claim in his first § 2255 motion, either as part of his ineffective assistance of trial counsel claim, or as a standalone actual innocence claim.

B. Dismissal of the action, as opposed to transfer, is warranted in this instance.

Under 28 U.S.C. § 1631, when a court lacks subject matter jurisdiction to hear a case, it must, if it is in the interest of justice, "transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed." The fact that petitioner has not sought transfer is not dispositive. See In re McCauley, 814 F.2d 1350, 1352 (9th Cir. 1987) ("A motion to transfer is unnecessary because of the mandatory cast of section 1631's instructions."). Indeed, the failure of the Court to consider whether a transfer is in the interest of justice would amount to a per se abuse of discretion. See Miller v. Hambrick, 905 F.2d 259, 262 (9th Cir. 1990).

Here, the Petition could not have been filed in the Northern District of Texas at the time it was filed here because (a) the Court has found that it does not fall within the scope of § 2255's savings clause, and (b) petitioner has not obtained the requisite

advance leave from the Fifth Circuit to file a second or successive § 2255 motion. Accordingly, the Petition cannot be transferred to the Northern District of Texas. See Clark v. Busey, 959 F.2d 808, 812 (9th Cir. 1992) ("Transfer [under § 1631] is improper where the transferee court lacks jurisdiction and thus could not have originally heard the suit.").

Moreover, in order to obtain the requisite leave to file a second or successive § 2255 motion, the Fifth Circuit would have to certify that the Petition contains "(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." See 28 U.S.C. § 2255(h). As noted in the Background section above, the Fifth Circuit already has previously denied petitioner leave to file a second or successive § 2255 motion based on his failure to make either of the requisite showings. Moreover, he has not made either of the requisite showings for obtaining leave to file a second or successive § 2255 motion in his filings before this Court. The alibi witness evidence on which he purports to be relying in support of his actual innocence claim does not qualify as newly discovered exculpatory evidence because petitioner has been aware of that evidence since the time of his trial. And, for the reasons discussed above, petitioner's alibi evidence, when viewed in light of the evidence as a whole, would not be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found him guilty of the offenses of conviction. Moreover, none of petitioner's claims alleged in the Petition relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. As discussed above, Descamps did not announce a new rule.

Therefore, the Court finds that, even if the Petition could be construed as a request for leave to file a second or successive § 2255 motion, this is not an instance

where transferring the Petition as so construed to the Fifth Circuit would be in the interest of justice. See Clark, 959 F.2d at 812 ("Transfer is also improper where the plaintiff fails to make a prima facie showing of a right to relief, because the interests of justice would not be served by transfer of such a case.").

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Judge issue an order (1) approving and accepting this Report and Recommendation; (2) granting respondent's Motion to Dismiss; and (3) directing that Judgment be entered summarily dismissing this action without prejudice for lack of subject matter jurisdiction.

DATED: May 21, 2015

ROBERT N. BLOCK
UNITED STATES MAGISTRATE JUDGE

Summary of the Evidence Presented at Trial[1]

1. The Government's Case

According to the testimony of Keith Walton, on April 23, 1995, he and Hays flew from Denver, Colorado to Dallas, Texas for the purpose of robbing an Eckerds Drug Store. (See 2 Reporter's Transcript ("RT"), 169-70.) Hays had planned the robbery after "casing" the particular Eckerds during previous trips to Dallas. (See id.) Hays knew what time the manager typically arrived at the store in the morning and what kind of car he drove. (See id. at 177.) Hays's plan was to cut a hole through the Eckerds roof. (See id.) Walton's role was as getaway driver. (See id.) He was supposed to drop Hays off at the Eckerds in the early morning so that Hays could cut a hole in the roof then return around 7:00 a.m. so he can see when the manager pulls up to the front of the store. (See id.)

According to Walton, Hays bought the pairs' airline tickets to Dallas and brought along a duffel bag filled with the tools Hays would need to commit the robbery. (See 2 RT at 169.) Hays owned a truck in Dallas, which he had left in long-term parking at the airport. (See id. at 171-72.) When he and Walton arrived in Dallas, they retrieved Hays's truck and then checked into a Holiday Inn hotel in downtown Dallas. (See id. at 172.) Hays checked the two in at the front desk using an alias. (See id.) After going to their room and unpacking their things, the two then drove to another location to pick up a stolen rental car that they intended to use during the robbery. (See id. at 174.) Hays phoned his girlfriend on the way, who lived in the Dallas area, and she told Hays where the keys to the rental car were located. (See id.)

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[1] This summary is derived from the reporter's transcript pages lodged by respondent. Although respondent's counsel was unable to compile a complete set of the Reporter's Transcripts, he was able to compile enough of the transcript pages to enable the Court to summarize the evidence presented at trial.

According to Walton, early the following morning of April 24, the two made their way to the Eckerds Drug Store. Walton dropped Hays off and watched him scale the side of the building and take his position on the roof. (See 2 RT at 182.) Hays was wearing a dark coverall jumpsuit and a knit cap pulled down over his face with cutouts for his eyes. (See id. at 187.) When the store manager arrived, Walton saw Hays shimmy down a rope into the store. (See id. at 186.) He then heard a gunshot and saw Hays slam the manager down to the ground at the manager's booth. (See id. at 192-93.)

The foregoing testimony was corroborated by the testimony of Lynn Thompson, the Eckerds manager. According to Thompson, as he was walking towards the front of the store that morning, he saw ceiling tiles dangling down, a rope coming down through the ceiling, and an individual standing there holding a gun, wearing a ski mask, dark gloves, dark shoes, and dark coveralls. (1 RT at 129, 131-32.) Thompson said "hey" and the individual replied "hey, motherfucker." Thompson started running toward the back of the store then heard a gunshot. (See id.) Ultimately, the individual caught Thompson, shook him around, and put a gun up to him. (See id. at 132, 153.)[2]

Walton further testified that he rendezvoused with Hays after the robbery, and Hays explained to him what happened inside the store. (See 2 RT 196, 199-200.) Hays told Walton "things did not go right in there," that the manager started running, so Hays fired a shot which made the manager run faster, that Hays "had to chase the guy to the back of the store and hit him once and then hit him with the gun," and that Hays brought the manager back to the front of the store. (See id. at 199-200.)

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[2] Several of the transcript pages containing Thompson's testimony are missing. The Court only has summarized the testimony provided by Thompson of the transcript pages lodged by respondent.

The two then returned to the Holiday Inn. (See 2 RT at 199-200.) As they were counting the money in the hotel room, however, they realized that a tracking device had been placed amongst the money Hays took from the store safe. (See id. at 201.) Shortly thereafter, the two began to hear the sounds of police sirens outside. (See id. at 203) The police had traced the tracking device to the Holiday Inn and were beginning to arrive on scene. (See id.) There was also a police helicopter circling above the hotel. (See id.)

According to Walton, Hays told him that he was going to step outside and do something to either destroy or get rid of the tracking device. (See 2 RT at 204.) However, after several minutes' absence, Hays never returned. (See id.) Walton then tried to flee, but was quickly apprehended in a creek behind the hotel. (See id. at 204-05, 208-10.) During his post-arrest interview, Walton initially maintained his innocence, but ultimately confessed that he and Hays had, in fact, robbed the Eckerds drug store. (See id. at 232.)

Meanwhile, Hays called his Dallas mistress, Michelle Darwin, to pick him up. (See 2 RT at 82.) Darwin testified at trial during the prosecution's case-in-chief. (See id.) She explained that she picked up a barefoot Hays and drove him to the Holiday Inn to see if the police had gotten his truck and then to a Western Union so that Hays could call his mother and have her wire him some money. (See id. at 82-84.) Hays received two $1,000 wires from his mother, sent to Darwin's name and attention (both admitted into evidence). (See id. at 84-85.) Darwin and Hays drove by the Holiday Inn again and then went buy some shoes for Hays. (See id. at 83-85.) Darwin testified at trial that Hays told her that he had to rough up the store manager (see id. at 98); that he "had money and a gun or something in the truck" (see id. at 84); and that he destroyed a tracking device that he discovered amongst the money (see id. at 88). Darwin also testified that, at Hays's request, she went to visit Walton in jail days later to gauge whether Walton had been talking to the police about Hays's involvement. (See id. at 91-94.)

Four Dallas police officers testified during the trial regarding tracing the tracking device to the Holiday Inn, apprehending Walton, and taking his post-arrest statement. They also testified about the physical evidence they discovered that corroborated Walton's confession, as well as a Holiday Inn employee's identification of Hays.

Officer John Westphalen, the lead detective, testified that Walton directed officers to Hays's truck as well as the rental car the pair drove to the robbery. (See 3 RT at 12-19.) In the truck, officers found a stack of Eckerds checks, a torn knit ski mask, and a pair of leather gloves (all admitted into evidence). (See id. at 19-23.) The truck was registered in Georgia under the name "Malcolm Fox," which Darwin testified was an alias that Hays often used. (See id. at 47-49; 2 RT at 101.) Christopher Bunch, the Atlanta police officer who ultimately arrested Hays in November 1995 also testified at trial. He explained that, at the time of his arrest, Hays had in his possession a fake driver's license in the name of "Malcolm Fox" but bearing Hays's photograph. (See 3 RT at 40, 49.)

Victor Esparza, the manager on duty at the Holiday Inn Market Center on April 23, testified at trial and identified Hays as the person who checked into the hotel the day before the robbery. (See 2 RT at 150-52.) Esparza explained that Hays paid in cash and registered the room under the name "James Johnson." (See id. at 148.) Esparza had previously identified Hays from a photographic array shown to him by Dallas police officers, and then identified Hays again in open court. (See id. at 150-52; 3 RT at 180-82.)

Dallas police officers also recovered Hays's bag of tools from the Eckerds roof, as well as a nine millimeter live cartridge from the floor at the rear of the store (both admitted into evidence). (See 1 RT at 244-47.) Dallas police detectives, along with an FBI Special Agent, also recovered several items from the Holiday Inn hotel room, including: a loaded nine millimeter semi-automatic handgun, found in a green duffel bag under the nightstand; a box of nine millimeter ammunition; a book entitled

"Betrayal"; and a newspaper entitled "Final Call" (all admitted into evidence). (See 2 RT at 22-23; 3 RT at 167, 168-72.) Darwin testified at trial that she had purchased the particular handgun and that Hays had taken it from her after she wrecked his truck in 1994. (See 2 RT at 78-81.)

FBI Special Agent McCrary, the lead federal law enforcement officer, testified regarding the myriad other items recovered from the hotel room, including: a police scanner; a police call manual; personal photographs of Hays in a photo album; and a cellular phone which had last dialed 291-0922, the phone number of Michelle Darwin (all admitted into evidence). (See 3 RT at 168-72.) Special Agent McCrary also explained that, several days after the robbery, he recovered a spent shell casing that was lodged in a display case at the Eckerds drug store. (See id. at 172-74.) Lynn Thompson had found the spent casing after walking back down the aisle where he was chased and fired upon by Hays. (See id.) A firearms expert testified at trial that he determined that the gun found in the hotel room had, in fact, fired the shell casing recovered from the Eckerds display case. (See id. at 59-61.)

Prosecutors also called serology and DNA experts to testify at trial, who explained that a swab of blood taken off the gun was determined in DNA testing to be of the same type as that of Lynn Thompson, the Eckerds manager. (See 3 RT at 122-23.) The DNA expert also testified that blood stains on the green duffel bag found in the hotel room were likewise a DNA match to Thompson. (See id. at 127-28.)

A hair and fiber expert also testified during the trial that scientific testing revealed that hair microscopically similar to that of Hays was found on the blue knit cap that Thompson identified as the ski mask worn by the robber (admitted into evidence) and which was recovered from Hays's pickup truck. (See 3 RT at 143.) Scientific testing further revealed pubic hair microscopically similar to that of Hays was discovered inside the coveralls that were identified by Thompson as having been worn by the robber (admitted into evidence) and which were found in the hotel room.

(See id.) Furthermore, an expert in fingerprint analysis testified that Hays's fingerprints were on the book "Betrayal" and "Final Call" newspaper that were found in the hotel room (both admitted into evidence). (See 2 RT at 22-23, 51-57.)

2. The Defense Case

Only one witness testified on Hays's behalf at trial: his wife, Lawana Hays. At the time, she was in jail on unrelated credit card fraud charges, and so, appeared in court in her prisoner's jumpsuit. (See 4 RT at 13-14.) Mrs. Hays testified that her husband was with her in Denver during the months of April and May 1995, recalling that the two had celebrated a wedding anniversary for which she had given him a greeting card. (See 4 RT at 20-51, 58-60.) However, the government's lone rebuttal witness, Special Agent McCrary, subsequently testified that the greeting card that Mrs. Hays identified during her direct examination as the one she had given her husband for her anniversary that year was the same greeting card found in Hays's Dallas hotel room. (See id. at 58-60.)

3. The Defendant's Motion for a Continuance

On the last day of trial, Hays moved the court for a continuance. According to defense counsel, there were three alibi witnesses who he was having difficulty bringing to court: (1) Mark Hays, Jr., Hays's son; (2) Khadija Hays, Hays's minor daughter; and (3) an individual named Lamont Williams. (See 4 RT at 2-13, 18.)

Defense counsel contended that, despite his best efforts, he had only spoken to Hays Jr. for the first time that previous night. As regards Williams and Khadija Hays, defense counsel advised the court that, although he had previously been in touch with both of them and issued subpoenas for their appearance, he could no longer get in contact with them. (See 4 RT at 2-13, 18.)

The Court denied Hays's motion for a continuance. As regards Hays Jr., the court found that defendant had not exercised due diligence in facilitating his

appearance at trial – particularly given that the witness was the defendant's own son. (See 4 RT at 2-13, 18.) As regards Williams and Khadija Hays, the court found that the witnesses were either not available or not willing to testify, or alternatively, that defendant had failed to demonstrate the converse. (See id.) The court also found that, alternatively, the defendant had failed to show that substantial favorable evidence would be tendered by these witnesses. (See id.)

4. The Defendant's Disability Defense

Along with the motion for a continuance, defense counsel also raised the issue of the admission of some of Hays's medical records from the U.S. Department of Veterans Affairs ("VA"). (See 4 RT at 51-56.) Defense counsel wanted to offer a portion of Hays's VA medical file that purportedly indicated that Hays had undergone knee surgeries and suffered degenerative disc disease -- ostensibly, to make the argument that Hays's "medical disabilities" would have precluded him from committing the robbery in the manner in which it was executed. (See id.) Defense counsel also requested that Hays be able to show the jury a scar on his leg and walk in front of them, such that the jury could observe Hays's gait and manner of ambulating. (See id.) Over the government's objection, the court granted both of Hays's requests. (See id.) Thus, he was permitted to show his scar to the jury and demonstrate his gait, and a portion of his VA medical file was, in fact, entered into evidence. (See id.)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARK LINNEAR HAYS, Petitioner, v. RANDY L. TEWS, Warden, Respondent.	NO. CV 14-5081-DMG (AGR) ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, the other records on file herein, and the Report and Recommendation of the United States Magistrate Judge. Further, the Court has engaged in a *de novo* review of those portions of the Report and Recommendation to which objections have been made. The Court accepts the findings and recommendation of the Magistrate Judge.

IT THEREFORE IS ORDERED that judgment be entered summarily dismissing this action without prejudice for lack of subject mater jurisdiction.

DATED: September 28, 2015

DOLLY M. GEE
United States District Judge

771 Fed.Appx. 769 (Mem)
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

Mark Linnear HAYS, Petitioner-Appellant,
v.
Randy L. TEWS, Respondent-Appellee.

No. 15-56593
|
Filed June 10, 2019
|
Submitted November 6, 2018 * Pasadena, California

Attorneys and Law Firms

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Appeal from the United States District Court for the Central District of California, Hon. Dolly M. Gee, District Judge, Presiding, D.C. No. 2:14-cv-05081-DMG-AGR

Before: RAWLINSON and HURWITZ, Circuit Judges, and BOUGH, ** District Judge.

MEMORANDUM ***

Mark Hays (Hays) appeals the district court decision dismissing for lack of jurisdiction his habeas petition filed under 28 U.S.C. § 2241 (§ 2241). "We review de novo the dismissal of a habeas petition." *Marrero v. Ives*, 682 F.3d 1190, 1192 (9th Cir. 2012) (citation omitted).

"[I]n order to determine whether jurisdiction is proper, a court must first determine whether a habeas petition is filed pursuant to § 2241 or [28 U.S.C.] § 2255 [(§ 2255)] before proceeding to any other issu...." *Hernandez v. Campbell*, 204 F.3d 861, 865 (9th Cir. 2000). Challenges to the legality of a sentence must be filed under § 2255 in the court where the defendant was sentenced. *See id.* at 864. On the other hand, challenges to the "conditions of a sentence's execution must be brought pursuant to § 2241 in the custodial court." *Id.* (citations and footnote reference omitted).

It is undisputed that Hays challenges the legality of his sentence. Specifically, Hays asserts that: (1) his two robbery convictions under California Penal Code § 211 were not "serious violent felonies" under 18 U.S.C. § 3559 (§ 3559); (2) his robbery conviction under 18 U.S.C. § 1951 (§ 1951) was not a "serious violent felony" under § 3559 after *Johnson v. United States*, —— U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015); and (3) he is actually innocent of the 18 U.S.C. § 924(c)(3) conviction because § 1951 robbery is not a "crime of violence."

Ordinarily, Hays would be precluded from bringing this § 2255 challenge outside the Texas sentencing court. *See Hernandez*, 204 F.3d at 864. However, Hays seeks to avail himself of the "escape hatch" that permits a habeas petitioner to challenge the legality of his sentence under § 2241 if § 2255 "is inadequate or ineffective to test the legality of his detention." *Harrison v. Ollison*, 519 F.3d 952, 956 (9th Cir. 2008) (citation omitted). A petitioner "meets the escape hatch criteria" only if he has not had "an unobstructed procedural shot" to present his claims. *Id.* at 959 (citation omitted). Absent such a showing, this court lacks jurisdiction to consider the habeas petition. *See id.* at 962.

While this appeal was pending, Hays presented his claims to the Fifth Circuit, and they were denied. Hays does not "qualify for the escape hatch" because he had this "unobstructed procedural shot" to present his claims. *Id.* at 956, 959 (citation omitted). Accordingly, we AFFIRM the judgment of the district court dismissing the habeas petition for lack of jurisdiction.

All Citations

771 Fed.Appx. 769 (Mem)

Footnotes

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

** The Honorable Stephen R. Bough, United States District Judge for the Western District of Missouri, sitting by designation.

*** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

FILED

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK LINNEAR HAYS, Petitioner-Appellant, v. RANDY L. TEWS, Respondent-Appellee.	No. 15-56593 D.C. No. 2:14-cv-05081-DMG-AGR Central District of California, Los Angeles ORDER

Before: RAWLINSON and HURWITZ, Circuit Judges, and BOUGH,* District Judge.

The panel has voted to deny the Petition for Rehearing. Judges Rawlinson and Hurwitz voted, and Judge Bough recommended, to deny the Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc, and no judge of the court has requested a vote.

Petitioner-Appellant's Petition for Panel Rehearing and Request for Rehearing En Banc, filed August 2, 2019, is DENIED.

* The Honorable Stephen R. Bough, United States District Judge for the Western District of Missouri, sitting by designation.