Appendix

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUSTIN KIRK GRAVES, Petitioner-Appellant, v. DAVID SHINN, Director, Warden, United States Penitentiary, Victorville, Respondent-Appellee.	No. 19-55317 D.C. No. 5:18-cv-01087-JVS-SP Central District of California, Riverside ORDER

Before: FERNANDEZ, SILVERMAN, and TALLMAN, Circuit Judges.

Appellant has filed a combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 21). The court has reviewed the motion, appellant's Fed. R. App. P. 28(j) letter, and appellee's response.

The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

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FOR THE NINTH CIRCUIT

JUSTIN KIRK GRAVES, Petitioner-Appellant, v. DAVID SHINN, Director, Warden, United States Penitentiary, Victorville, Respondent-Appellee.	No. 19-55317 D.C. No. 5:18-cv-01087-JVS-SP Central District of California, Riverside ORDER

Before: FERNANDEZ, SILVERMAN, and TALLMAN, Circuit Judges.

Appellee's motion for summary affirmance (Docket Entry No. 15) is granted. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard); *see also United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019) (en banc).

AFFIRMED.

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JUSTIN KIRK GRAVES, Petitioner, v. DAVID SHINN, Warden, Respondent.	Case No. ED CV 18-1087-JVS (SP) **JUDGMENT**

Pursuant to the Order Accepting Findings and Recommendation of United States Magistrate Judge With Modification,

IT IS HEREBY ADJUDGED that the Petition is denied, and this action is dismissed with prejudice.

Dated: March 15, 2019

HONORABLE JAMES V. SELNA
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JUSTIN KIRK GRAVES, Petitioner, v. DAVID SHINN, Warden, Respondent.	Case No. ED CV 18-1087-JVS (SP) **ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE, WITH MODIFICATION**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, records on file, 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 to which petitioner has objected. The Court accepts the findings and recommendations of the Magistrate Judge, except as follows.

The Report and Recommendation recommends the Petition be recharacterized as a 28 U.S.C. § 2255 motion and transferred to the United States District Court for the Northern District of Texas. The Magistrate Judge reasoned that although it appears any § 2255 motion would be time-barred, petitioner's Reply suggested he may seek a time waiver from the government; thus, the interest of justice weighed in favor of transfer.

In petitioner's objections, however, petitioner states the government has not indicated its willingness to waive the timeliness bar, so a transfer to the Northern District of Texas would be futile. Petitioner requests that, if the Court will not allow him to proceed with his Petition under 28 U.S.C. § 2255(e)'s saving clause, the court deny the Petition so he can pursue his claim on appeal. In light of these representations in the objections, the interest of justice no longer weighs in favor of transfer of the untimely § 2255 motion. But this Court continues to lack jurisdiction for the reasons stated in the Report and Recommendation.

IT IS THEREFORE ORDERED that respondent's Motion to Dismiss or Transfer (docket no. 13) is granted, and Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: March 15, 2019

HONORABLE JAMES V. SELNA
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JUSTIN KIRK GRAVES, Petitioner, v. DAVID SHINN, Warden, Respondent.	Case No. ED CV 18-1087-JVS (SP) ORDER GRANTING A CERTIFICATE OF APPEALABILITY

Rule 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts reads as follows:

> (a) **Certificate of Appealability.** The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, a party may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

> (b) **Time to Appeal.** Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability. These rules do not extend the time to appeal the original judgment of conviction.

Although petitioner styled this case as a petition for writ of habeas corpus under 28 U.S.C. § 2241, not as a 28 U.S.C. § 2255 motion, a Certificate of Appealability is nonetheless required for petitioner to appeal the denial of his Petition, because the Petition in fact attacked petitioner's underlying sentence, and the Court recharacterized it as a § 2255 motion. *See Porter v. Adams*, 244 F.3d 1006, 1007 (9th Cir. 2001).

Under 28 U.S.C. § 2253(c)(2), a Certificate of Appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." The Supreme Court has held that this standard means a showing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (internal quotation marks omitted, citation omitted).

Two showings are required "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim." *Slack*, 529 U.S. at 484. In addition to showing that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," the petitioner must also make a showing that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id*. As the Supreme Court further explained:

> Section 2253 mandates that both showings be made before the court of appeals may entertain the appeal. Each component of the § 2253(c)

> showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments.

Id. at 485.

Here, the Court has dismissed the Petition for lack of jurisdiction, finding the requirements of the savings clause in 28 U.S.C. § 2255(e) are not met. After duly considering petitioner's contentions in support of his argument that he meets the conditions for the savings clause, including in his objections to the Report and Recommendation, the Court finds and concludes that petitioner has made the requisite showing with respect to whether this Court is correct that petitioner does not meet the savings clause requirements to bring his Petition in this district under 28 U.S.C. § 2241, and also finds petitioner has made the requisite showing with respect to whether he states a valid claim for relief.

Therefore, pursuant to 28 U.S.C. § 2253(c)(2) and Rule 11 of the Rules Governing Section 2255 Proceedings, a Certificate of Appealability is GRANTED.

Dated: March 15, 2019

HONORABLE JAMES V. SELNA
UNITED STATES DISTRICT JUDGE

Presented by:

Sheri Pym
United States Magistrate Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JUSTIN KIRK GRAVES, Petitioner, v. DAVID SHINN, Warden, Respondent.	Case No. ED CV 18-1087-JVS (SP) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

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

I.

INTRODUCTION

On May 23, 2018, petitioner Justin Kirk Graves filed a corrected Petition for Writ of Habeas Corpus by a Person in Federal Custody under 28 U.S.C. § 2241 ("Petition"), challenging his 2011 sentence for his conviction for being a felon in possession of a firearm in the United States District Court for the Northern District

of Texas. Petitioner claims that he is actually innocent of his predicate offenses and is therefore serving an illegal sentence.

Respondent moved to dismiss or transfer the Petition, arguing that petitioner waived his right to collaterally attack his sentence and even if the right is not waived, the court should treat the Petition as a motion under 28 U.S.C. § 2255 and dismiss or transfer it for lack of jurisdiction. For the reasons discussed below, the court finds petitioner did not waive his right to collaterally attack his sentence in this instance, but agrees that this court lacks jurisdiction. It is therefore recommended that the Petition be construed as a § 2255 motion and transferred to the United States District Court for the Northern District of Texas.

II.

PROCEEDINGS

On or about August 17, 2011, in the United States District Court for the Northern District of Texas, petitioner pled guilty to being a convicted felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Petition, Exs. B-C. As part of his binding plea agreement, petitioner admitted he had been previously convicted of at least three violent felonies – escape and two burglaries[1] – in 2005, thereby making him subject to an enhanced sentence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). *Id.* Petitioner agreed to waive any right to appeal or to contest the judgment in a post-conviction proceeding, reserving only the right to appeal any punishment imposed in excess of the statutory maximum and any claim based on ineffective assistance of counsel. *Id.*, Ex. B, ¶ 11. In exchange, the prosecutor agreed the appropriate sentence was the

[1] Both petitioner and respondent acknowledge the Presentence Report ("PSR") does not reference a Texas penal code section. Petition at 2 n.3; MTD at 10 n.2. Petitioner contends the language in the PSR mirrors Texas Penal Code § 30.02(a)(1). Petition at 2 n.3.

statutory minimum under the ACCA, 180 months in prison. *Id.*, Ex. B at ¶ 4. Without the ACCA enhancement, the statutory maximum sentence would have been ten years. *See* Petition at 2; 18 U.S.C. § 924(a)(2).

On December 8, 2011, the district court accepted the plea agreement and imposed a sentence of 180 months. *Id.*, Ex. D. Petitioner did not appeal the conviction or sentence, and both became final on December 22, 2011. Petitioner did not file a post-conviction petition before the statute of limitations expired on December 22, 2012.

Petitioner filed the instant Petition on May 22, 2018. At the time he was housed in the United States Penitentiary at Victorville, California. On August 22, 2018, respondent filed a Motion to Dismiss or Transfer the Petition on the grounds that petitioner waived his right to collaterally attack his sentence and the court lacks jurisdiction over the matter. Petitioner filed a Reply to the Motion to Dismiss on September 14, 2018.

III.

DISCUSSION

Petitioner seeks to challenge his sentence with a § 2241 habeas petition. Petitioner contends he filed a proper § 2241 habeas petition because his case falls under 28 U.S.C. § 2255(e)'s narrow exception, the so-called escape hatch or savings clause. Specifically, petitioner argues that § 2255 is "'inadequate or ineffective to test the legality of his detention,'" and he qualifies to seek relief under the escape hatch because he has claims of actual innocence and has not had an unobstructed procedural shot at making those claims. Petition at 3.

At the time of the plea agreement, both burglary under Texas Penal Code § 30.02(a)(1) and escape were considered predicate offenses under ACCA. Fifth Circuit precedent dictated that burglary under Texas Penal Code § 30.02(a)(1) was generic burglary. *See U.S. v. Silva*, 957 F.2d 157, 162 (5th Cir. 1992). Several

months after the plea agreement was executed, the Fifth Circuit reaffirmed that holding in *United States v. Eddins*, 451 Fed. Appx. 395, 396-97 (5th Cir. 2011), and later further held that Texas Penal Code § 30.02(a) was a divisible statute.[2] *See U.S. v. Uribe*, 838 F.3d 667, 671 (5th Cir. 2016). In 2018, in light of *Mathis v. United States*, __ U.S. __, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016), the Fifth Circuit reversed its previous holdings. *Herrold*, 883 F.3d at 537. It held that burglary under § 30.02(a)(3) is broader than generic burglary and §§ 30.02(a)(1) and (a)(3) are indivisible. *Id*. Accordingly, petitioner's burglary convictions under § 30.02(a)(1) may no longer serve as predicate offenses for an ACCA enhancement. *Id*.

As for escape, at the time of the plea agreement, the Fifth Circuit held that a federal escape statute similar to the Texas escape statute was a crime of violence under the residual clause of ACCA. *See U.S. v. Hughes*, 602 F.3d 669, 676-77 (5th Cir. 2010); *compare* Texas Penal Code § 38.06. Subsequently, the Supreme Court issued *Johnson v. United States*, __ U.S. __, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), which held that the residual clause of ACCA was unconstitutional.

Petitioner contends that post-*Herrold* and *Johnson*, neither his two burglary convictions under Texas Penal Code § 30.02(a)(1) nor his escape conviction are predicate offenses under ACCA. Accordingly, petitioner contends he is actually innocent of his sentence enhancement because his current sentence, which exceeds the statutory maximum that applies without the ACCA enhancement, is illegal.

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[2] A divisible statute sets forth "separate elements, effectively defining distinct offenses," while an indivisible statute "sets forth alternative means of committing a single substantive crime." *U.S. v. Herrold*, 883 F.3d 517, 521 (5th Cir. 2018) (en banc).

A. Petitioner Did Not Waive His Right to Collaterally Attack His Sentence

Respondent argues the Petition should be dismissed because petitioner knowingly and voluntarily waived his right to collaterally attack his sentence in his plea agreement. MTD at 5-6. In the plea agreement, petitioner agreed not to appeal or "contest his conviction and/or sentence in any post-conviction proceeding, including, but not limited to, a proceeding under 28 U.S.C. §§ 2241 and 2255." Petition, Ex. B ¶ 11. Petitioner reserved only the right to appeal any punishment imposed in excess of the statutory maximum and any claim based on ineffective assistance of counsel. *Id.*

"Principles of contract law control [the] interpretation of a plea agreement," and a defendant's waiver of his rights to appeal or collaterally attack a plea agreement are generally enforced if the waiver was knowingly and voluntarily made. *Davies v. Benov*, 856 F.3d 1243, 1246-47 (9th Cir. 2017). Changes in subsequent law – e.g., change in guidelines – do not render a waiver invalid so long as the waiver was knowing when made. *See U.S. v. Eastwood*, 148 Fed. Appx. 589, 591 (9th Cir. 2005) (waiver is enforceable despite changes in sentencing law holding that guidelines were merely advisory). Nonetheless, the waiver does not apply if: (1) a defendant's guilty plea failed to comply with Rule 11 of the Federal Rules of Criminal Procedure; (2) the sentencing court informed the defendant he or she retained the right to appeal; (3) the sentence does not comport with the terms of the plea agreement; or (4) the sentence violates the law. *U.S. v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007). "A sentence is illegal if it exceeds the permissible statutory penalty for the crime or violates the Constitution." *Id.*

Here, petitioner does not contest that he knowingly and voluntarily entered into the plea agreement. Instead, petitioner argues the waiver is not valid because his sentence is illegal. Petitioner concedes that when he entered into the plea

agreement, his 15-year sentence was legal. *See* Petition at 1. Petitioner contends, however, that following *Herrold* and *Johnson*, his burglary and escape convictions are no longer predicates for an ACCA sentence enhancement, and without the ACCA enhancement the maximum sentence is ten years. *Id*. at 2, 4-7. Petitioner's 15-year sentence is in excess of the statutory maximum and is therefore illegal.[3] Reply at 3. Accordingly, petitioner contends, the waiver no longer applies. *See* Petition at 8; Reply at 3.

The question is whether an appeal waiver applies when there is an intervening change in law that renders a sentence that was legal when the plea agreement was executed now illegal. In *United States v. Torres*, 828 F.3d 1113 (9th Cir. 2016), the Ninth Circuit addressed this issue. The petitioner in *Torres*, with a limited exception, waived his rights to appeal and collaterally attack his sentence. *Id*. at 1124. Subsequently, the Supreme Court issued *Johnson*, 135 S. Ct. 2551, which held the residual clause of ACCA unconstitutional. The petitioner appealed his sentence, arguing that his sentence enhancement, which contained an identically worded residual clause, was likewise unconstitutional. *Torres*, 828 F.3d at 1123. Without the sentence enhancement, his sentencing range would be 33-41 months, as opposed to the 92-month sentence he received. *See id*. at 1124. Because the respondent conceded that *Johnson* would apply to the enhancement statute petitioner was sentenced under, the Ninth Circuit had only to determine whether the appeal was precluded by the waiver. *See id*. at 1124-25. The Ninth Circuit held the waiver did not bar the appeal because petitioner's sentence was illegal. *Id*. at 1125; *see also, e.g., U.S. v. Savage*, 231 F. Supp. 3d 542, 549 (C.D. Cal. 2017) (petitioner's waiver was not enforceable because the sentence subsequently became illegal); *but see Slusser v. U.S.*, 895 F.3d 437, 439-40 (6th

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[3] Respondent reserves the rights to respond to petitioner's substantive arguments. MTD at 10 n.2.

Cir. 2018) (cert. docketed) (because petitioner had waived his right to collaterally attack his sentence, the court declined to reach the merits of petitioner's claim that his sentence was illegal since his conviction was no longer an ACCA predicate offense after *Johnson*). District courts in this Circuit have held *Torres* applies equally to collateral attacks. *See U.S. v. Johnson*, 2016 WL 6681184, at *2 (N.D. Cal. Nov. 3, 2016) (*Torres* was not limited to the appellate setting); *Jennings v. U.S.*, 2016 WL 4376778, at *2 (W.D. Wash. Aug. 17, 2016) (applying *Bibler* and *Torres* to collateral attacks and finding waiver did not bar the § 2255 motion because petitioner, who was sentenced under a statute that was later to be found unconstitutionally vague, had a sentence that exceeded the statutory maximum and was illegal).

Accordingly, the waiver in the plea agreement does not bar petitioner from collaterally attacking his sentence because, with the changes in law effected by *Herrold* and *Johnson*, the sentence exceeds the statutory maximum and is therefore illegal.

B. <u>This Court Lacks Jurisdiction</u>

Respondent argues dismissal is also required for lack of subject matter jurisdiction. MTD at 6-7. Specifically, respondent contends the Petition is actually a disguised § 2255 motion, which this court does not have jurisdiction to evaluate, and the savings clause is not available to petitioner. *Id*. at 6-12.

Section 2255 allows a federal prisoner claiming that his sentence was imposed "in violation of the Constitution or laws of the United States" to "move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). "Generally, motions to contest the legality of a sentence must be filed under § 2255 in the sentencing court, while petitions that challenge the manner, location, or conditions of a sentence's execution must be brought pursuant to § 2241 in the custodial court." *Hernandez v. Campbell*, 204 F.3d 861, 864 (9th

Cir. 2000) (per curiam). A prisoner may not bring a second or successive § 2255 motion in district court without first seeking and obtaining certification from "a panel of the appropriate court of appeals." 28 U.S.C. § 2255(h); *Harrison v. Ollison*, 519 F.3d 952, 955 (9th Cir. 2008). Only the sentencing court has jurisdiction over a § 2255 motion. *Hernandez*, 204 F.3d at 865; *Tripati v. Henman*, 843 F.2d 1160, 1163 (9th Cir. 1988).

There is, however, an exception – a "savings clause" or "escape hatch" – to the general rule. *Harrison*, 519 F.3d at 956; *Hernandez*, 204 F.3d at 864 n.2; *Lorentsen v. Hood*, 223 F.3d 950, 953 (9th Cir. 2000). A federal prisoner may file a habeas petition under § 2241 to challenge the legality of a sentence "if, and only if, the remedy under § 2255 is 'inadequate or ineffective to test the legality of his detention.'" *Marrero v. Ives*, 682 F.3d 1190, 1192 (9th Cir. 2012) (citation omitted); *see* 28 U.S.C. § 2255(e).

The exception under § 2255(e) is "narrow" and will not apply "merely because § 2255's gatekeeping provisions," such as the statute of limitations or the limitation on successive petitions, now prevent the courts from considering a § 2255 motion. *Ivy v. Pontesso*, 328 F.3d 1057, 1059 (9th Cir. 2003); *see also Lorentsen*, 223 F.3d at 953 (ban on unauthorized successive petitions does not per se make § 2255 "inadequate or ineffective"); *Moore v. Reno*, 185 F.3d 1054, 1055 (9th Cir. 1999) (per curiam) ("[T]he dismissal of a successive § 2255 motion . . . does not render federal habeas relief an ineffective or inadequate remedy). A petition meets the "escape hatch" criteria of § 2255(e) "when a petitioner (1) makes a claim of actual innocence, and (2) has not had an unobstructed procedural shot at presenting that claim." *Harrison*, 519 F.3d at 959 (internal quotation marks and citation omitted); *accord Marrero*, 682 F.3d at 1192.

Here, petitioner is contesting the legality of his sentence. Accordingly, his challenge must be filed in a § 2255 motion in the sentencing court – the United

States District Court Northern District of Texas – unless he meets the criteria for the savings clause. Petitioner maintains he qualifies for the savings clause because he is actually innocent of the sentencing enhancement and has not had an unobstructed procedural shot at raising his claim. Petition at 3-8

1. Actual Innocence

"In this circuit, a claim of actual innocence for purposes of the escape hatch of § 2255 is tested by the standard articulated by the Supreme Court in *Bousley v. United States*, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998)." *Marrero*, 682 F.3d at 1193 (internal quotation marks, brackets, and citation omitted). There, the Supreme Court held that "'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623. The Ninth Circuit has "not yet resolved the question whether a petitioner may ever be actually innocent of a noncapital *sentence* for the purpose of qualifying for the escape hatch," but it has noted that other circuit courts agree that "a petitioner generally cannot assert a cognizable claim of actual innocence of a noncapital sentencing enhancement." *Marrero*, 682 F.3d at 1193 (citations omitted); *see McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017) ("a change in caselaw does not make a [§ 2255] motion . . . 'inadequate or ineffective to test the legality of his detention'"; instead a § 2255 motion is designed to remedy cases in which the sentences exceeded that statutory maximum) (citation omitted); *In re Bradford*, 660 F.3d 227, 230 (5th Cir. 2011) (a claim of actual innocence of a career offender enhancement is not the type of claim that warrants review under § 2241).

Even so, the Ninth Circuit has also recognized that some circuits have found exceptions to this general rule so as to "suggest[] that a petitioner may qualify for the escape hatch if he received a sentence for which he was statutorily ineligible." *Marrero*, 612 F.3d at 1194 (citations omitted); *see U.S. v. Wheeler*, 886 F.3d 415,

429 (4th Cir. 2018) ("§ 2255 is inadequate and ineffective to test the legality of a sentence when: (1) at the time of sentencing, settled law of this circuit or the Supreme Court established the legality of the sentence; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the aforementioned settled substantive law changed and was deemed to apply retroactively on collateral review; (3) the prisoner is unable to meet the gatekeeping provisions of § 2255(h)(2) for second or successive motions; and (4) due to this retroactive change, the sentence now presents an error sufficiently grave to be deemed a fundamental defect."); *Hill v. Masters*, 836 F.3d 591, 595 (6th Cir. 2016) (a petitioner can use a § 2241 petition to challenge his sentence enhancement if he can show "(1) a case of statutory interpretation, (2) that is retroactive and could not have been invoked in the initial § 2255 motion, and (3) that the misapplied sentence presents an error sufficiently grave to be deemed a miscarriage of justice or a fundamental defect"); *Brown v. Caraway*, 719 F.3d 583, 586 (7th Cir. 2013) (same).

Thus, it is possible that petitioner's sentencing error claim could be considered an actual innocence claim that would qualify for the escape hatch, but the matter is not yet settled in the Ninth Circuit. Subsequent to *Marrero*, the Ninth Circuit had several opportunities to address the open question but continued to decline to do so. *See Green v. Johnson*, 744 Fed. Appx. 413, 413 (9th Cir. 2018) (noting it had not previously held whether a petitioner "can sustain a claim of actual innocence of an enhanced sentence" and did not need to do so in this case); *Dorise v. Matevousian*, 692 Fed. Appx. 864, 865 (9th Cir. 2017) (recognizing that it was an open issue whether a petitioner may be actually innocent of a noncapital sentence for the purpose of qualifying for the escape hatch but declining to reach the question); *Ezell v.U.S.*, 778 F.3d 762, 765 n.3 (9th Cir. 2015) (court did not "consider or foreclose the possibility that someone who was sentenced under an

erroneous interpretation of the ACCA might obtain relief via 28 U.S.C. §§ 2241 and 2255(e)").

Here, this court need not determine whether petitioner's claim may be fairly characterized as an actual innocence claim because, in any event, petitioner does not meet the second prong of the requirements to fall within § 2255(e)'s savings clause.

2. Unobstructed Procedural Shot

Petitioner argues he did not have an unobstructed shot at presenting his claims. Petition at 4-7. Petitioner asserts that although, following the 2015 *Johnson* decision, he could have challenged the legality of his escape conviction operating as a predicate offense under ACCA, doing so would have been futile because the government would have argued that any error was harmless due to a third burglary conviction that could have substituted as a qualifying offense.[4] *Id*. at 5-6. And when *Herrold* was decided in 2018, the statute of limitations for raising a *Johnson* claim had already run. *Id*. Further, petitioner contends that because *Herrold* is a Fifth Circuit decision, it did not restart the statute of limitations and a § 2255 motion therefore would be time-barred. *Id*. at 6-7.

To demonstrate that he never had an "unobstructed procedural shot," a petitioner must show that he never had an opportunity to raise the claim of actual innocence on appeal or in a § 2255 motion. *See Harrison*, 519 F.3d at 960. In making this determination, the court considers "(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." *Id.* (internal quotation marks and citation omitted).

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[4] Petitioner did not admit to a third burglary conviction but the PSR documented such conviction. *See* PSR at 6-7.

Here, petitioner correctly asserts there have been changes in law relevant to petitioner's claims, but petitioner is unable to show the changes occurred *after* he had already filed a § 2255 motion. *See id.*; *Fishman v. Ponce*, 2017 WL 4119600, at *4 (C.D. Cal. Sept. 15, 2017) (the escape hatch "applies only to claims asserting factual innocence predicated upon a legal change that occurs *after* a petitioner files his or her first Section 2255 motion"); *Dye v. U.S.*, 2015 WL 4480339, at *2 (C.D. Cal. Jul. 20, 2015) ("Petitioner cannot seek relief under § 2255's savings clause unless he already filed a § 2255 motion that was denied."); *Blanche v. U.S.*, 2015 WL 391724, at *3 (C.D. Cal. Jan. 27, 2015) (same); *Garcia-Jacobo v. Ives*, 2016 WL 3965207 (D. Or. Jul. 22, 2016) ("[T]he Ninth Circuit has permitted use of the savings clause where the controlling [] law has changed years after a petitioner's conviction has become final," but, in those cases, "the petitioners had previously appealed their cases and filed § 2255 motions.").

Petitioner here has never filed a § 2255 motion. Although petitioner contends filing a § 2255 motion would be futile because the statute of limitations has run (Petition at 6-7), the mere fact that it may be time-barred is insufficient to invoke the savings clause. *See Reyes-Ponce v. Sanders*, 2012 WL 4208053 at *3 (C.D. Cal. Aug. 24, 2012) ("[T]he savings clause does not apply simply because a claim, which could have been brought in a § 2255 motion, is effectively precluded because [such] motion would be barred as untimely."); *Cabbagestalk v. Quintana*, 2011 WL 672534 at *2 (C.D. Cal. Jan. 12, 2011) (same); *Owens v. Sanders*, 2010 WL 97985 at *4, n.1 (C.D. Cal. Jan. 11, 2010) ("The mere fact that Petitioner may be barred from filing a successive or untimely § 2255 motion, taken alone, is not sufficient to invoke the savings clause."). In short, that "§ 2255's gatekeeping provisions" may now prevent consideration of a § 2255 motion does not mean petitioner never had an unobstructed procedural shot to raise his claim. *See Ivy*, 328 F.3d at 1059.

Petitioner's reliance on *Alaimalo v. U.S*, 645 F.3d 1042 (9th Cir. 2011), is unavailing. In *Alaimalo*, the Ninth Circuit stated that a claim was unavailable to the petitioner because controlling law in the circuit foreclosed the argument. *See id.* at 1048. And the mere possibility that the Ninth Circuit would overrule its previous holdings did not make the claim available to the petitioner for purposes of § 2241. *Id*. Petitioner contends he similarly did not have an obstructed procedural shot at raising his claim here because of the previous controlling Fifth Circuit precedent. Reply at 11-12. Petitioner, however, ignores a key distinction between his case and *Alaimalo*. In *Alaimalo*, the petitioner had first filed a § 2255 motion, as required by the savings clause. *See Alaimalo*, 645 F.3d at 1046. In contrast, petitioner here has not previously filed a § 2255 motion.

Accordingly, petitioner is not entitled to file a § 2241 petition under the § 2255(e) savings clause. He may raise his challenge only in a § 2255 motion, and only the sentencing court, the United States District Court for the Northern District of Texas, has jurisdiction to consider a § 2255 motion by petitioner.

C. The Interest of Justice Weighs in Favor of Recharacterization and Transfer

The Court must therefore determine whether to recharacterize the Petition as a § 2255 motion and transfer the action to the sentencing court, or simply dismiss it. *See* 28 U.S.C. § 1631. Transfer is appropriate if three conditions are met: "(1) the transferring court lacks jurisdiction; (2) the transferee could have exercised jurisdiction at the time the action was filed; and (3) the transfer is in the interest of justice." *Cruz-Aguilera v. I.N.S.*, 245 F.3d 1070, 1074 (9th Cir. 2001) (citing *Kolek v. Engen*, 869 F.2d 1281, 1284 (9th Cir. 1989)). The first condition is met here, as discussed above, as is the second. Because this would be petitioner's first attempt at seeking collateral relief in a § 2255 motion, it would not be subject to the restriction of a second or successive motion.

Whether the recharacterization and transfer of the Petition would be in the interest of justice is less clear. Although petitioner's claim appears to be facially meritorious, petitioner's time to file a § 2255 motion has already elapsed and thus any § 2255 motion would be time-barred. The court recognizes, however, the statute of limitations is not jurisdictional and may be waived by the government. Petitioner's Reply suggests that he may seek such a waiver from the government. *See* Reply at 12 n.3. On balance, therefore, the because the only other option is dismissal, the interest of justice weighs in favor of transfer.

IV.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Court issue an Order: (1) approving and accepting this Report and Recommendation; and (2) granting respondent's Motion to Dismiss or Transfer (docket no. 13) to the extent that (a) the Petition be recharacterized as a § 2255 motion, and (b) the case be transferred to the United States District Court for the Northern District of Texas.

DATED: February 12, 2019

SHERI PYM
United States Magistrate Judge

United States District Court

Northern District of Texas
Lubbock Division

UNITED STATES OF AMERICA

v.

Case Number 5:11-CR-042-01-C
USM No. 43234-177

JUSTIN KIRK GRAVES
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, JUSTIN KIRK GRAVES, was represented by Sherylynn A. Kime-Goodwin.

The defendant pleaded guilty to count 1 of the indictment filed on 06/01/2011. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

Title & Section	Nature of Offense	Date of Offense	Count Number
18 U.S.C. §§ 922(g)(1) & 924(e)	Convicted Felon in Possession of a Firearm	01/05/2011	1

As pronounced on 12/08/2011, the defendant is sentenced as provided in pages 1 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00, for count 1, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Signed this the 8th day of December, 2011.

DISTRICT JUDGE SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 180 months.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

- ☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.
- ☒ The defendant shall not possess a firearm, destructive device or any other dangerous weapon.
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer.
- ☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.
- ☐ the defendant shall participate in an approved program for domestic violence.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1. The defendant shall participate in a program (inpatient and/or outpatient) approved by the U.S. Probation Office for treatment of narcotic, drug, or alcohol dependency, which will include testing for the detection of substance use or abuse. The defendant shall abstain from the use of alcohol and/or all other intoxicants during and after completion of treatment. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least $30.00 per month.

2. The defendant shall participate in mental health treatment services as directed by the probation officer until successfully discharged. These services may include medications prescribed by a licensed physician. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least $30.00 per month.

3. The defendant agrees to forfeit all rights, title, and interest in all assets, specifically the Marlin, .22-caliber, semiautomatic rifle, bearing Serial No. 25317418.

4. The defendant shall abstain from the use of alcohol and all other intoxicants during the term of supervision.