

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FILED

JUN 30 2020

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

PAUL W. MILLER,

No. 20-15479

Petitioner-Appellant,

D.C. No. 4:19-cv-00435-DCB-DTF  
District of Arizona,  
Tucson

v.

B. VON BLANKENSEE,

ORDER

Respondent-Appellee,

*Appendix  
B*

Before: WARDLAW and BENNETT, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 4) is denied because appellant has not shown that “jurists of reason would find it debatable whether the petition 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) (holding that a successive 28 U.S.C. § 2255 motion disguised as a 28 U.S.C. § 2241 petition requires a certificate of appealability).

Any pending motions are denied as moot.

**DENIED.**

Appendix A

KM

1

2

3

4

5

6

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

7

8

9 Paul W. Miller,

No. CV 19-00435-TUC-DCB (DTF)

10

Petitioner,

11

12 v.

**ORDER**

13

B. Von Blankensee, et al.,

14

Respondents.

15

On September 3, 2019, Petitioner Paul W. Miller, who is confined in the United States Penitentiary-Tucson, filed a pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 (Doc. 1) and a Motion to Appoint Counsel (Doc. 2). In an October 23, 2019 Order, the Court directed Petitioner to file an Application to Proceed In Forma Pauperis or pay the filing fee. On November 12, 2019, Petitioner paid the filing fee. The Court will dismiss the Petition and this case and will deny as moot the Motion to Appoint Counsel.

22

**I. Petition**

23

In his Petition, Petitioner names B. Von Blankensee as Respondent. Petitioner challenges his September 21, 2011 conviction in the United States District Court for the Middle District of Louisiana for two counts of sexual exploitation of a minor in violation of 18 U.S.C. § 2251(a), and one count of possession of child pornography in violation 18 U.S.C. § 2252(a)(4)(B). Petitioner was tried by a jury, convicted on all three counts, and sentenced to an 840-month term of imprisonment. Petitioner appealed and, on April 12,

28

1 2013, the Fifth Circuit Court of Appeals affirmed Petitioner's conviction. On November  
 2 10, 2014, Petitioner filed a Motion pursuant to 28 U.S.C. § 2255, which the sentencing  
 3 court denied. (Doc. 1-1 at 91.)

4 Petitioner raises six grounds for relief in his § 2241 Petition:

- 5 (1) "Section 2251(a) proscribes protected expression, specifically, a person who  
 6 non-criminally asks, employs, uses, persuades, induces, entices, or coerces a  
 7 minor to engage in non-criminal sexually explicit conduct for the non-  
 8 criminal purpose of producing a visual depiction of that non-criminal  
 9 sexually explicit conduct, in violation o the First Amendmen[t]'s prohibition  
 10 on such laws. Thus, it must be struck down. Because § 2252 is invalid[,]  
 Petitioner's conviction, custody or detention is and was in violation of the  
 constitution, . . . his conviction must be voided and he must be released from  
 the custody of the BOP."
- 11 (2) "Congress exceeded its Commerce Clause power when it enacted § 2251(a),  
 12 thus it is invalid . . . and [Petitioner] must be released from the custody of the  
 BOP."
- 13 (3) "Sections 2251(a) and 2252(a)(4)(B) violate[] the United States  
 14 Constitution's prohibition on the discrimination of the law or the unequal  
 15 protection of the laws. Because §§ 2251(a) and 2252(a)(4)(B) are invalid[,]  
 Petitioner's conviction . . . must be voided and he must be released[.]"
- 16 (4) "Sections 2251(a) and 2252(a)(4)(B) violate[] the First Amendment of the  
 17 United States, they suppress[] a substantial amount of protected speech  
 18 according to their plainly legitimate sweep . . . thus, [Petitioner's] conviction  
 must be voided and he must be released from custody[.]"
- 19 (5) "The evidence presented at Petitioner's trial was constitutionally insufficient  
 20 to support Petitioner's conviction . . . thus, his judgment of conviction must  
 be voided . . . [and] he must be released[.]"
- 21 (6) "Petitioner's conviction is invalid because the indictment is facially invalid,  
 22 it was issued in violation of Petitioner's Fifth Amendment right to due  
 23 process and . . . in violation of Petitioner's Sixth Amendment right to be  
 24 apprised of the nature and cause of the criminal accusation against him . . .  
 Because Petitioner's conviction is invalid, he must be released[.]"

25 **II. Discussion**

26 A motion to vacate sentence pursuant to 28 U.S.C. § 2255 is generally the  
 27 appropriate method for challenging a federally imposed conviction or sentence, including  
 28 a challenge that "the sentence was imposed in violation of the Constitution or laws of the

1 United States, or that the court was without jurisdiction to impose such sentence, or that  
2 the sentence was in excess of the maximum authorized by law.” 28 U.S.C. § 2255(a);  
3 *Tripathi v. Henman*, 843 F.2d 1160, 1162 (9th Cir. 1988). A § 2241 petition for writ of  
4 habeas corpus is not a substitute for a motion under § 2255. *McGhee v. Hanberry*, 604  
5 F.2d 9, 10 (5th Cir. 1979).

6 The Court will not consider a § 2241 petition by a prisoner authorized to apply for  
7 § 2255 relief “if it appears that the applicant has failed to apply for relief, by motion, to the  
8 court which sentenced him, or that such court has denied him relief, unless it also appears  
9 that the remedy by motion is inadequate or ineffective to test the legality of his detention.”  
10 28 U.S.C. § 2255(e); *United States v. Pirro*, 104 F.3d 297, 299 (9th Cir. 1997). This  
11 exception is narrow. *Ivy v. Pontesso*, 328 F.3d 1057, 1059 (9th Cir. 2003).

12 The § 2255 remedy **is not** inadequate or ineffective merely because the statute of  
13 limitations bars Petitioner from filing a motion under § 2255, the sentencing court has  
14 denied relief on the merits, or § 2255 prevents Petitioner from filing a second or successive  
15 petition. *See Ivy*, 328 F.3d at 1059; *Moore v. Reno*, 185 F.3d 1054, 1055 (9th Cir. 1999);  
16 *Charles v. Chandler*, 180 F.3d 753, 758 (6th Cir. 1999); *Tripathi*, 843 F.2d at 1162. The  
17 § 2255 remedy **is** inadequate or ineffective “when a petitioner (1) makes a claim of actual  
18 innocence, and (2) has not had an unobstructed procedural shot at presenting that claim.”  
19 *Harrison v. Ollison*, 519 F.3d 952, 959 (9th Cir. 2008) (quoting *Stephens v. Herrera*, 464  
20 F.3d 895, 898 (9th Cir. 2006)). In determining whether a petitioner has had an unobstructed  
21 procedural shot to pursue his claim, the court considers “(1) whether the legal basis for  
22 petitioner’s claim ‘did not arise until after he had exhausted his direct appeal and first §  
23 2255 motion;’ and (2) whether the law changed ‘in any way relevant’ to petitioner’s claim  
24 after that first § 2255 motion.” *Harrison*, 519 F.3d at 960 (quoting *Ivy*, 328 F.3d at 1060-  
25 61).

26 The burden of coming forward with evidence affirmatively showing the inadequacy  
27 or ineffectiveness of the § 2255 remedy rests with the petitioner. *McGhee*, 604 F.2d at 10;  
28 *Redfield v. United States*, 315 F.2d 76, 83 (9th Cir. 1963). Petitioner has failed to meet this

1 burden. Petitioner does not show that he has not had an unobstructed procedural shot at  
2 presenting his claims. Petitioner's claims were available to him at the time he filed both  
3 his direct appeal and § 2255 Motion; Petitioner's failure to raise his claims in those actions  
4 does not render the § 2255 remedy ineffective.

5 Moreover, to the extent Petitioner argues § 2255 only allows him to challenge his  
6 sentence, not his conviction, he is mistaken. Although the language of § 2255 uses the  
7 term "sentence," § 2255 motions are not strictly limited to attacks on sentences. A  
8 federally convicted prisoner may attack his *conviction* under § 2255. *See United States v.*  
9 *Hayman*, 342 U.S. 205, 219, 222 (1952) ("Nowhere in the history of Section 2255 do we  
10 find any purpose to impinge upon prisoners' rights of collateral attack upon  
11 their convictions"; "a proceeding under Section 2255 is an independent and collateral  
12 inquiry into the validity of the conviction"); *see also Hill v. United States*, 368 U.S. 424,  
13 427 (1962) (Section 2255 "was intended simply to provide in the sentencing court a  
14 remedy exactly commensurate with that which had previously been available by habeas  
15 corpus in the court of the district where the prisoner was confined"); *Alaimalo v. United*  
16 *States*, 645 F.3d 1042, 1054 (9th Cir. 2011) ("the normal, if not exclusive, procedure for a  
17 federal prisoner to challenge the validity of a judgment of conviction is by a motion  
18 pursuant to § 2255").

19 Accordingly, the Court will dismiss the § 2241 Petition and this case for lack of  
20 jurisdiction. *See* 28 U.S.C. § 2255(a); *Tripathi*, 843 F.2d at 1163.

21 **IT IS ORDERED:**

22 (1) Petitioner's Petition Under 28 U.S.C. § 2241 (Doc. 1) and this case are  
23 **dismissed.**

24 (2) The Clerk of Court must **enter judgment accordingly and close this case.**

25 (3) Petitioner's Motion to Appoint Counsel (Doc. 2) is **denied** as moot.

26 (4) Although Petitioner has brought his claims in a § 2241 petition, a certificate  
27 of appealability is required where a § 2241 petition attacks the petitioner's conviction or  
28 sentence. *See Porter v. Adams*, 244 F.3d 1006, 1007 (9th. Cir. 2001). Pursuant to Rule

1 11(a) of the Rules Governing Section 2255 Cases, in the event Movant files an appeal, the  
2 Court declines to issue a certificate of appealability because reasonable jurists would not  
3 find the Court's procedural ruling debatable. *See Slack v. McDaniel*, 529 U.S. 473,  
4 484 (2000).

5 Dated this 4th day of March, 2020.



6  
7  
8  
9 Honorable David C. Bury  
10 United States District Judge  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28