

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

JUN 30 2020

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

PAUL W. MILLER,

Petitioner-Appellant,

v.

B. VON BLANKENSEE,

Respondent-Appellee.

No. 20-15479

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

ORDER

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

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

Paul W. Miller,

Petitioner,

v.

B. Von Blankensee, et al.,

Respondents.

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

ORDER

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.

I. Petition

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,

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

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

- (1) "Section 2251(a) proscribes protected expression, specifically, a person who non-criminally asks, employs, uses, persuades, induces, entices, or coerces a minor to engage in non-criminal sexually explicit conduct for the non-criminal purpose of producing a visual depiction of that non-criminal sexually explicit conduct, in violation of the First Amendment's prohibition 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."
- (2) "Congress exceeded its Commerce Clause power when it enacted § 2251(a), thus it is invalid . . . and [Petitioner] must be released from the custody of the BOP."
- (3) "Sections 2251(a) and 2252(a)(4)(B) violate[] the United States Constitution's prohibition on the discrimination of the law or the unequal 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[.]"
- (4) "Sections 2251(a) and 2252(a)(4)(B) violate[] the First Amendment of the United States, they suppress[] a substantial amount of protected speech according to their plainly legitimate sweep . . . thus, [Petitioner's] conviction must be voided and he must be released from custody[.]"
- (5) "The evidence presented at Petitioner's trial was constitutionally insufficient to support Petitioner's conviction . . . thus, his judgment of conviction must be voided . . . [and] he must be released[.]"
- (6) "Petitioner's conviction is invalid because the indictment is facially invalid, it was issued in violation of Petitioner's Fifth Amendment right to due process and . . . in violation of Petitioner's Sixth Amendment right to be apprised of the nature and cause of the criminal accusation against him . . . Because Petitioner's conviction is invalid, he must be released[.]"

II. Discussion

A motion to vacate sentence pursuant to 28 U.S.C. § 2255 is generally the appropriate method for challenging a federally imposed conviction or sentence, including 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); *Tripati*, 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.

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A handwritten signature in black ink, appearing to read "David C. Bury", is written over a horizontal line.

Honorable David C. Bury
United States District Judge