

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MIKHAEL CHARLES DORISE,

Petitioner,

v.

ANDRE MATEVOUSIAN, Warden,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 6 2017

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

MIKHAEL CHARLES DORISE,

Petitioner-Appellant,

v.

ANDRE MATEVOUSIAN, AKA Andre
Mantevousian,

Respondent-Appellee.

No. 16-15822

D.C. No.

1:15-cv-01197-DAD-SKO
Eastern District of California,
Fresno

ORDER

Before: THOMAS and MURGUIA, Circuit Judges, and MCCALLA,* District Judge.

The panel has voted to deny the petition for panel rehearing. Judges Thomas and Murguia voted to deny the petition for rehearing en banc, and Judge McCalla recommended denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc.

Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied (Doc. 39).

* The Honorable Jon P. McCalla, United States District Judge for the Western District of Tennessee, sitting by designation.

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUN 28 2017

FOR THE NINTH CIRCUIT

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

MIKHAEL CHARLES DORISE,

No. 16-15822

Petitioner-Appellant,

D.C. No.

1:15-cv-01197-DAD-SKO

v.

ANDRE MATEVOUSIAN, AKA Andre
Mantevousian,

MEMORANDUM*

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of California
Dale A. Drozd, District Judge, Presiding

Argued and Submitted May 17, 2017
San Francisco, California

Before: THOMAS, Chief Judge, MURGUIA, Circuit Judge, and MCCALLA,**
District Judge.

Appellant Mikhael C. Dorise is a federal prisoner appealing from the district court's judgment dismissing his 28 U.S.C. § 2241 habeas petition. Dorise specifically argues that he properly evoked the "escape hatch" provision under

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

** The Honorable Jon P. McCalla, United States District Judge for the Western District of Tennessee, sitting by designation.

§ 2255(e) in his § 2241 petition because his prior convictions for robbery under Texas Penal Code § 29.02 were not “crimes of violence” for the purposes of the career offender guideline, U.S.S.G. § 4B1.2. The district court concluded that Dorise failed to demonstrate actual innocence of a sentencing enhancement, and denied the petition. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253, and we affirm.

When § 2255 is “inadequate or ineffective to test the legality of [a prisoner’s] detention,” a petitioner may file a § 2241 petition. 28 U.S.C. § 2255(e). “[A] § 2241 petition is available under the ‘escape hatch’ of § 2255 when a petitioner (1) makes a claim of actual innocence, and (2) has not had an ‘unobstructed procedural shot’ at presenting that claim.” *Stephens v. Herrera*, 464 F.3d 895, 898 (9th Cir. 2006) (quoting *Ivy v. Pontesso*, 328 F.3d 1057, 1060 (9th Cir. 2003)). The first element is dispositive here.

Dorise argues he is “actually innocent” of his career offender status because his two predicate robbery offenses constituted “crimes of violence” under the Guidelines’ residual clause in § 4B1.2(a)(2), which he alleges is unconstitutionally vague. Dorise relies on the Supreme Court’s decisions in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016), which retroactively invalidated the residual clause of the Armed Career Criminal Act as unconstitutionally vague. Dorise also relies on the Supreme Court’s recent holding

in *Beckles v. United States*, 137 S. Ct. 886, 897(2017), that an advisory sentencing enhancement under the residual clause in § 4B1.2(a)(2) is not void for vagueness.

Although this court found “a petitioner generally cannot assert a cognizable claim of actual innocence of a noncapital sentencing enhancement[,]” it left open “the question whether a petitioner may ever be actually innocent of a noncapital sentence for the purpose of qualifying for the escape hatch.” *Marrero v. Ives*, 682 F.3d 1190, 1193 (9th Cir. 2012); *see also Ezell v. United States*, 778 F.3d 762, 765 n.3 (9th Cir. 2015).

Even if we decided that the actual innocence exception applies to noncapital sentencing cases, Dorise’s claim is not cognizable for the purpose of qualifying to bring a § 2241 petition under the escape hatch. Although presented as an actual innocence claim, Dorise’s real argument is that he was incorrectly categorized as a career offender under U.S.S.G. § 4B1.1. As in *Marrero*, this claim is purely legal and “has nothing to do with factual innocence.” 682 F.3d at 1193. Dorise has not raised a constitutional claim, *see, e.g., Gilbert v. United States*, 640 F.3d 1293, 1321 (11th Cir. 2011) (“Gilbert’s claim that a sentencing guidelines was misapplied to him is not a constitutional claim.”), and even without the career offender enhancement, he was statutorily eligible for the sentence he received. *See* 18 U.S.C. §§ 922(g), 924(a)(2), 924(c)(1)(A)(i)–(ii) (2004); 18 U.S.C. § 2113 (a), (d) (2002). Therefore, Dorise cannot bring his claim in a § 2241 petition.

We agree with the district court that Dorise has not established actual innocence of a sentencing enhancement.

AFFIRMED.¹

¹ The Court GRANTS Dorise's motion for judicial notice of federal court records in *United States v. Dorise*, including his criminal and related appellate records.

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

JUDGMENT IN A CIVIL CASE

MIKHAEL CHARLES DORISE,

CASE NO: 1:15-CV-01197-DAD-SKO

v.

MATEVOUSIAN,

XX -- Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

**THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE
COURT'S ORDER FILED ON 3/31/16**

Marianne Matherly
Clerk of Court

ENTERED: **March 31, 2016**

by: /s/ M. Verduzco
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MIKHAEL CHARLES DORISE,

Petitioner,

v.

ANDRE MATEVOUSIAN, Warden,

Respondent.

No. 1:15-cv-01197-DAD-SKO HC

**ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS
RECOMMENDING THAT THE COURT
DISMISS THE PETITION
FOR LACK OF JURISDICTION**

(Doc. Nos. 18 and 23)

Petitioner, a federal prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 and currently confined at the Atwater U.S. Penitentiary, seeks to have his sentence set aside as excessive in light of the United States Supreme Court’s recent holding in *Johnson (Samuel) v. United States*, ___U.S.___, 135 S. Ct. 2551 (2015). Respondent contends that petitioner should have filed his challenge by way of motion brought under 28 U.S.C. § 2255 in the sentencing district and moves to dismiss the petition for lack of jurisdiction. The court referred the matter to the magistrate judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 and 304.

On January 28, 2016, the assigned magistrate judge issued findings and recommendations in which the magistrate judge concluded that the court did not have jurisdiction because the “escape hatch” of 28 U.S.C. § 2241 applied only to petitioners challenging the legality of their convictions, not to petitioners challenging the legality of their sentences. (Doc. No. 23.) Accordingly, the magistrate judge recommended that the court deny the § 2241 petition, enter judgment for respondent, and decline to issue a certificate of appealability.

The findings and recommendations, which were served on all parties on the same date, provided that objections could be served within thirty days and replies within fourteen days after the filing of any objections. On February 16, 2016, petitioner filed objections. (Doc. No. 24.) On February 23, 2016, petitioner filed a supplemental brief. (Doc. No. 25.) Although over fourteen days have passed since petitioner filed objections, respondent has filed no reply.

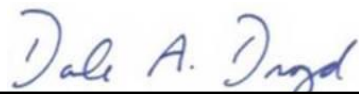
In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), having carefully reviewed the entire file *de novo* and considered petitioner's objections. The court finds petitioner's objections, which focus on his claim of actual innocence with respect to his sentence, to be unpersuasive. Accordingly, the court will adopt the findings and recommendations.¹

For the reasons set forth above:

1. The findings and recommendations filed January 28, 2016, be adopted;
2. The court declines to issue a certificate of appealability; and
3. The court directs the clerk of court to enter judgment for respondent in this action.

IT IS SO ORDERED.

Dated: March 30, 2016


UNITED STATES DISTRICT JUDGE

¹ The court notes that petitioner's reliance on the decision in *Johnson* would appear to be unwarranted in any event. The Supreme Court in *Johnson* struck down the residual clause of the Armed Career Criminal Act, codified at 18 U.S.C. § 924(e)(2)(B). 135 S. Ct. at 2563 ("We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process."). However, that decision in no way abrogated the ACCA's other prongs defining a "violent felony." Thus, crimes that "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another" are still considered "violent felonies" for the purpose of imposing sentence enhancements under the ACCA, as well as for purposes of applying those sections of the U.S. Sentencing Guidelines that mimic the Act's language. *See id.* ("Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony."). Having been convicted of committing robbery pursuant to Texas Penal Code § 29.02—an essential element of which is "intentionally, knowingly, or recklessly caus[ing] bodily injury to another; or intentionally or knowingly threat[ing] or plac[ing] another in fear of imminent bodily injury or death"—petitioner can be deemed a violent felon without reference to the residual clause set out in § 4B1.2 of the Federal Sentencing Guidelines, rendering the holding *Johnson* inapplicable to his situation.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MIKHAEL CHARLES DORISE,

Petitioner,

v.

ANDRE MATEVOUSIAN, Warden,

Respondent.

No. 1:15-cv-01197-DAD-SKO HC

**FINDINGS AND RECOMMENDATIONS
RECOMMENDING THAT THE COURT
DISMISS THE PETITION
FOR LACK OF JURISDICTION**

Petitioner is a federal prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. He seeks to have his sentence set aside as excessive following the U.S. Supreme Court's recent holding in *Johnson (Samuel) v. United States*, 135 S.Ct. 2551 (2015). Respondent contends that Petitioner should have filed his action under 28 U.S.C. § 2255 in the sentencing district and moves to dismiss the petition for lack of jurisdiction. The undersigned has reviewed the parties' submissions and applicable law and recommends that the Court grant Respondent's motion to dismiss.

I. Procedural and Factual Background

In an unpublished report and recommendation, a magistrate judge in the Western District of Louisiana set forth the factual and procedural background of the underlying crime:

[Petitioner] is currently serving three consecutive sentences, totaling 411 months, for robbery, use of a firearm during the commission of a crime of violence and possession of a firearm by a felon. [3:02-cr-19 S.D. Tex.; Doc. 265] On May 24, 2002, [Petitioner], armed with a pistol, forced his way into the Guaranty Bank in LaMarque, Texas, just prior to its opening, threatened three bank employees at gunpoint, forced them to give him approximately \$180,000.00, locked them in the bank's vault, and then fled in a truck belonging to one of the employees. [Petitioner] was captured shortly after the robbery. [*Id.*]

[Petitioner] represented himself at trial after rejecting three separate court-appointed attorneys. He was convicted by a jury of the three crimes alleged against him on May 28, 2004. At sentencing, stand-by counsel represented him. He was sentenced to 411 months of imprisonment, pursuant to the Armed Career Criminal Act (ACCA). On appeal, he accepted the representation of appointed counsel. His sole issue on appeal was whether he was competent to waive his right to counsel. On January 16, 2006, his convictions were affirmed by the United States Court of Appeals for the Fifth Circuit, which found that the judge did not err in finding that [Petitioner] knowingly and willingly waived his right to counsel. *U.S. v. Dorise*, 163 Fed.Appx. 305 (2006).^[1]

More than 2 years later, on November 4, 2008, [Petitioner] filed a motion under § 2255 to vacate, set aside or correct [the] sentence. [3:02-cr-10, S.D. Tex., Doc. # 265] Petitioner was denied the benefit of equitable tolling, and his § 2255 motion was denied as time-barred. [3:02-cr-10, S.D. Tex., Doc. # 268, 269] Alternatively, the court determined that [Petitioner's] claims were either procedurally barred, not cognizable in a § 2255 proceeding, or unavailing. [*Id.*] Petitioner sought a certificate of appealability, which was denied by the district court as well as the Fifth Circuit Court of Appeals. [3:02-cr-10, S.D. Tex., Docs. # 277, 291]

Dorise v. Medina, 2011 WL 5024639 at *1 (W.D. La. Sept. 19, 2011) (No. 11-cv-928).

The District Court adopted the findings and recommendations, and dismissed the case on October 20, 2011. *See Dorise v. Medina*, 2011 WL 5024624 (W.D. La. Oct. 20, 2011) (No. 11-cv-928).

In a later unpublished opinion, the U.S. District Court for the Western District of Virginia continued the procedural narrative:

Since filing his § 2255 motion, [Petitioner] has sought permission from the Fifth Circuit to file a second or successive § 2255 motion on three occasions, all of which the Fifth Circuit has denied. *In re: Mikhail Dorise*, No. 10-40605 (5th Cir. 2011 [*sic*]) (slip op. of Aug.

¹ "On October 6, 2006, the Supreme Court of the United States denied [Petitioner's] petitioner for writ of certiorari." *Dorise v. Zych*, 2012 WL 843779 at *1 (W.D. Va. Mar. 12, 2012) (No. 7:12-cv-00029).

31, 2010); *In re: Mikhael Dorise*, No. 10-41020 (5th Cir. 2011[sic]) (slip op. of Dec. 14, 2010); *In re: Mikhael Dorise*, No. 11-40099 (5th Cir. 2011) (slip op. of Mar. 14, 2011). [Petitioner] has also filed two § 2241 petitions in two separate district courts, the Eastern District of Kentucky and the Western District of Louisiana, both of which were also denied. In his two prior § 2241 petitions, [Petitioner] raised substantially the same claim and both district courts found that [Petitioner's] claim was not cognizable in a § 2241 petition.

In the instant § 2241 petition, [Petitioner] contends that he is actually innocent of his career offender status because his 1992 conviction for a robbery in Galveston, Texas does not qualify as a prior "crime of violence" for purposes of a sentencing enhancement under U.S.S.G. § 4B1.1 in light of the Supreme Court's recent decisions in *Johnson [(Curtis)] v. United States*, 130 S.Ct. 1265 (2010), and *Begay v. United States*, 553 U.S. 137 (2008).²

Dorise v. Zych, 2012 WL 843779 at *1 (W.D. Va. Mar. 12, 2012) (No. 7:12-cv-00029).

On March 12, 2012, the U.S. District Court for the Western District of Virginia dismissed Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. *Dorise v. Zych*, 2012 WL 843779 (W.D. Va. Mar. 12, 2012) (No. 7:12-cv-00029). (The Virginia district court applied Fourth Circuit precedent holding that the savings clause (28 U.S.C. § 2255(e)) did not apply to petitions that only challenge the petitioner's sentence. *Id.* at *2.)

On August 3, 2015, Petitioner filed the above-captioned petition for writ of habeas corpus in this Court. Respondent moved to dismiss the petition on December 1, 2015.

II. This Court Does Not Have Section 2241 Jurisdiction

A. In General

A federal court may not consider an action over which it has no jurisdiction. *Hernandez v. Campbell*, 204 F.3d 861, 865 (9th Cir. 2000). Respondent contends that because Petitioner cannot prove the elements necessary to bring an action challenging his conviction under § 2241, the District Court has no jurisdiction over the petition and must dismiss it.

"[T]o determine whether jurisdiction is proper, a court must first determine whether a habeas petition is filed pursuant to § 2241 or § 2255 before proceeding to any other issue." *Id.* A

² [Petitioner's] sentence was enhanced under U.S.S.G. § 4B1.1 because he had committed two prior "crimes of violence." The definition of that term in U.S.S.G. § 4B1.2(a) is identical to the term "violent felony" in the ACCA, 18 U.S.C. § 924(e)(2)(B), the provision at issue in *Begay* and *Johnson [(Curtis)]*.

prisoner must challenge the manner, location, or conditions of a sentence's execution by filing a petition pursuant to § 2241 in the "custodial court," that is, the court of the district in which he is incarcerated. *Id.* at 864. If the prisoner challenges the legality of his conviction or sentence, however, he must bring a § 2255 motion in the district of conviction. *Stephens v. Herrera*, 464 F.3d 895, 897 (9th Cir. 2006). The prisoner cannot avoid the restrictions of a § 2255 motion by attempting to challenge his conviction or sentence by means of a § 2241 petition in the custodial court. *Id.* If this general rule applies, a petitioner cannot seek modification of his sentence by filing a § 2241 petition.

B. The "Escape Hatch"

An exception to the § 2241 limitations, commonly referred to as the "escape hatch" or the "savings clause," "permits a federal prisoner to file a habeas corpus petition pursuant to § 2241 to contest the legality of a sentence where his remedy under § 2255 is inadequate or ineffective to test the legality of his detention." *Id.* (citations and internal quotations omitted). "[A] prisoner may file a § 2241 petition under the escape hatch when the prisoner (1) makes a claim of actual innocence, and (2) has not had an unobstructed procedural shot at presenting that claim." *Marrero v. Ives*, 682 F.3d 1190, 1192 (9th Cir. 2012) (internal quotations omitted). "If the prisoner's claims qualify for the escape hatch of § 2255, the prisoner may challenge the legality of a sentence through a § 2241 petition in the custodial court." *Harrison v. Ollison*, 519 F.3d 952, 956 (9th Cir. 2008).

C. Unavailability of Adequate or Effective Remedy

The petitioner bears the burden of proving that the remedy available under § 2255 is inadequate or ineffective. *Redfield v. United States*, 315 F.2d 76, 83 (9th Cir. 1963). "In determining whether a petitioner had an unobstructed procedural shot to pursue his claim, we ask whether petitioner's claim 'did not become available' until after a federal court decision." *Harrison*, 519 F.3d at 960 (quoting *Stephens*, 464 F.3d at 898). To answer this question, a court must consider "(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

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way relevant” to petitioner’s claim after that first § 2255 motion.” *Harrison*, 519 F.3d at 960 (quoting *Ivy v. Pontesso*, 328 F.3d at 1060-61).

“An intervening court decision must ‘effect a material change in the application of applicable law’ to establish unavailability.” *Alaimalo v. United States*, 645 F.3d 1042, 1047 (9th Cir. 2011) (quoting *Harrison*, 519 F.3d at 960). “[A] decision that simply ‘provides further clarification’ of the statute of conviction without ‘materially vary[ing] from the statutory construction set forth’ in previous case law does not effect such a change.” *Alaimalo*, 645 F.3d at 1048 (quoting *Harrison*, 519 F.3d at 960).

In *Johnson (Samuel)*, the Supreme Court held that imposing an increased sentence under the residual clause of the Armed Career Criminal Act (18 U.S.C. § 924(e)(2)(B)) violated due process because it was unconstitutionally vague. Petitioner contends that *Johnson (Samuel)* provides him with a previously unavailable argument, rendering his § 2255 remedy inadequate or ineffective.

In this case, before filing this § 2241 petition in the Eastern District of California, where he is presently incarcerated, Petitioner has attempted to bring multiple § 2255 motions as well as § 2241 petitions challenging his sentence. When a petitioner seeks authorization to bring a second or successive § 2255 petition based on a change in applicable law, “a court of appeals may authorize a second or successive § 2255 motion only if the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” *Stephens*, 464 F.3d at 897. The Fifth Circuit, in which Petitioner was convicted and sentenced, has held that *Johnson (Samuel)* established a new rule of constitutional law but that it does not apply retroactively on collateral review. *In re Williams*, 806 F.3d 322 (5th Cir. 2015). Accordingly, Petitioner could not successfully pursue relief under *Johnson (Samuel)* by filing a motion in the Fifth Circuit seeking authorization to file a second or successive petition.

D. Actual Innocence

Despite the unavailability of an adequate or effective remedy to the alleged violation of Petitioner’s due process rights through his sentencing under 18 U.S.C. § 924(e)(2)(B), Petitioner

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cannot rely on the escape clause because he cannot prove that he is actually innocent of the charges against him.

“To establish actual innocence, [a] petitioner must demonstrate that, ‘in light of all the evidence,’ ‘it is more likely than not that no reasonable juror would have convicted him.’” *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327-28 (1995)). See also *Alaimalo*, 645 F.3d at 1047. Petitioner has the burden of proving this issue by a preponderance of the evidence. He must not only show that the evidence against him was weak, but that it was so weak that “no reasonable juror” would have convicted him. *Loretsen v. Hood*, 223 F.3d 950, 954 (9th Cir. 2000). “[S]uch a claim requires [a] 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.” *Schlup*, 513 U.S. at 324.

The Ninth Circuit has never extended the savings clause to a § 2241 petitioner who challenges only the enhancement of his sentence:

We have 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. It is clear, however, that Petitioner’s claim that two of his prior offenses should no longer be considered “related,” and that he was incorrectly treated as a career offender, is a purely legal claim that has nothing to do with factual innocence. Accordingly, it is not a cognizable claim of “actual innocence” for the purposes of qualifying to bring a § 2241 petition under the escape hatch.

Our sister circuits are in accord that petitioner generally cannot assert a cognizable claim of actual innocence of a noncapital sentencing enhancement.

Marrero, 682 F.3d at 1193.

Because Petitioner asserts a sentencing claim and because the escape hatch of § 2255 extends only to petitioners asserting claims of actual innocence regarding their convictions. Petitioner has not alleged a cognizable claim of actual innocence. As a result, the Court lacks jurisdiction to consider this § 2241 petition under the § 2255 escape hatch.

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III. Certificate of Appealability

A petitioner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition, but may only appeal in certain circumstances. *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). The controlling statute in determining whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issues or issues satisfy the showing required by paragraph (2).

If a court denies a habeas petition, the court may only issue a certificate of appealability when the prisoner shows “that reasonable jurists could debate whether . . . 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, 484 (2000) (internal quotation omitted). Although the petitioner is not required to prove the merits of his case, he must demonstrate “something more than the absence of frivolity or the existence of mere good faith on his . . . part.” *Miller-El*, 537 U.S. at 338.

1 In the present case, the Court finds that reasonable jurists would not find the Court's
 2 determination that it lacks jurisdiction to hear the § 2241 petition to be debatable, wrong, or
 3 deserving of encouragement to proceed further. Accordingly, the undersigned recommends that
 4 the Court decline to issue a certificate of appealability.

5
 6 **IV. Conclusion and Recommendation**

7 Because Petitioner cannot establish actual innocence, this Court lacks jurisdiction to
 8 consider his petition for writ of habeas corpus under 28 U.S.C. § 2241. Accordingly, the
 9 undersigned recommends that the Court dismiss the petition for lack of jurisdiction and decline to
 10 issue a certificate of appealability.

11 These Findings and Recommendations will be submitted to the United States District
 12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C § 636(b)(1). Within **thirty**
 13 **(30) days** after being served with these Findings and Recommendations, either party may file
 14 written objections with the Court. The document should be captioned "Objections to Magistrate
 15 Judge's Findings and Recommendations." Replies to the objections, if any, shall be served and
 16 filed within **fourteen (14) days** after service of the objections. The parties are advised that failure
 17 to file objections within the specified time may constitute waiver of the right to appeal the District
 18 Court's order. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 ((9th Cir. 2014) (citing *Baxter v.*
 19 *Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

22
 23 IT IS SO ORDERED.

24 Dated: **January 27, 2016**

/s/ Sheila K. Oberto
 UNITED STATES MAGISTRATE JUDGE