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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARTIN MURILLO ORTEGA,)	1:11-cv-01040-JLT HC
)	
Petitioner,)	FINDINGS AND RECOMMENDATIONS TO
)	DISMISS PETITION FOR WRIT OF HABEAS
v.)	CORPUS (Doc. 1)
)	
)	ORDER REQUIRING OBJECTIONS TO BE
MICHAEL L. BENOVA, Warden,)	FILED WITHIN TWENTY DAYS
)	
Respondent.)	ORDER DIRECTING CLERK OF COURT TO
_____)	ASSIGN CASE TO A UNITED STATES
)	DISTRICT JUDGE

Petitioner is a federal prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241.

Petitioner filed the instant federal petition on June 23, 2011. (Doc. 1). The petition alleges that on March 19, 2003, Petitioner was convicted in the United States District Court for the Eastern District of California of conspiracy to possess methamphetamine with intent to distribute. (Doc. 1, p. 2). Petitioner alleges he was sentenced to a term of 240 months based on a prior conviction used to enhance his sentence. (Id.). Petitioner alleges that he is “actually innocent” of the ten-year enhancement because, pursuant to a subsequent court decision, his prior state court conviction does not qualify as a felony drug enhancement under federal law. (Id., p. 3).

Because the Court has determined that Petitioner’s claim challenges his original sentence,

1 and therefore should have been brought in the trial court as a motion pursuant to 28 U.S.C. §
2 2255, the Court will recommend that the instant petition be dismissed.

3 DISCUSSION

4 A federal court may not entertain an action over which it has no jurisdiction. Hernandez
5 v. Campbell, 204 F.3d 861, 865 (9th Cir. 2000). A federal prisoner who wishes to challenge the
6 validity or constitutionality of his conviction or sentence must do so by way of a motion to
7 vacate, set aside, or correct the sentence under 28 U.S.C. § 2255. Tripati v. Henman, 843 F.2d
8 1160, 1162 (9th Cir.1988); Thompson v. Smith, 719 F.2d 938, 940 (8th Cir.1983); In re
9 Dorsainvil, 119 F.3d 245, 249 (3rd 1997); Broussard v. Lippman, 643 F.2d 1131, 1134 (5th
10 Cir.1981). In such cases, only the sentencing court has jurisdiction. Tripati, 843 F.2d at 1163.
11 A prisoner may not collaterally attack a federal conviction or sentence by way of a petition for a
12 writ of habeas corpus pursuant to 28 U.S.C. § 2241. Grady v. United States, 929 F.2d 468, 470
13 (9th Cir.1991); Tripati, 843 F.2d at 1162; see also United States v. Flores, 616 F.2d 840, 842 (5th
14 Cir.1980).

15 In contrast, a federal prisoner challenging the manner, location, or conditions of that
16 sentence's execution must bring a petition for writ of habeas corpus under 28 U.S.C. § 2241.
17 Capaldi v. Pontesso, 135 F.3d 1122, 1123 (6th Cir. 1998); United States v. Tubwell, 37 F.3d 175,
18 177 (5th Cir. 1994); Kingsley v. Bureau of Prisons, 937 F.2d 26, 30 n.5 (2nd Cir. 1991); United
19 States v. Jalili, 925 F.2d 889, 893-94 (6th Cir. 1991); Barden v. Keohane, 921 F.2d 476, 478-79
20 (3rd Cir. 1991); United States v. Hutchings, 835 F.2d 185, 186-87 (8th Cir. 1987); Brown v.
21 United States, 610 F.2d 672, 677 (9th Cir. 1990).

22 Petitioner's allegation that his prior state drug conviction does not mandate the
23 enhancement given by the sentencing court is clearly a challenge to the underlying 2003
24 conviction or sentence. Petitioner does not deny this and, in fact, indicates on the form petition
25 that he is challenging his conviction and sentence. (Doc. 1, p. 1). Petitioner appears to
26 comprehend that such a challenge to his sentence must normally be brought through § 2255
27 proceedings; however, Petitioner contends that (1) he is claiming "actual innocence," and, (2) he
28 has never had an "unobstructed procedural shot" at raising this claim since the court decision he

1 bases his claim upon was issued in 2010, subsequent to 2003 sentencing hearing. (Doc. 1, p. 12).

2 The Court disagrees with Petitioner that § 2255 is inadequate or ineffective. A federal
3 prisoner authorized to seek relief under § 2255 may seek relief under § 2241 *if* he can show that
4 the remedy available under § 2255 is "inadequate or ineffective to test the validity of his
5 detention." Hernandez v. Campbell, 204 F.3d 861, 864-5 (9th Cir.2000); United States v. Pirro,
6 104 F.3d 297, 299 (9th Cir.1997) (*quoting* § 2255). The Ninth Circuit has recognized that this is
7 a very narrow exception. Id.; Ivy v. Pontesso, 328 F.3d 1057 (9th Cir. 2003) (a petitioner must
8 show actual innocence *and* that he never had the opportunity to raise it by motion to demonstrate
9 that § 2255 is inadequate or ineffective); Holland v. Pontesso, 234 F.3d 1277 (9th Cir. 2000) (§
10 2255 not inadequate or ineffective because Petitioner misses statute of limitations); Aronson v.
11 May, 85 S.Ct. 3, 5 (1964) (a court's denial of a prior § 2255 motion is insufficient to render §
12 2255 inadequate.); Lorentsen v. Hood, 223 F.3d 950, 953 (9th Cir. 2000) (same); Tripati, 843
13 F.2d at 1162-63 (9th Cir.1988) (a petitioner's fears of bias or unequal treatment do not render a §
14 2255 petition inadequate); Williams v. Heritage, 250 F.2d 390 (9th Cir.1957); Hildebrandt v.
15 Swope, 229 F.2d 582 (9th Cir.1956); see United States v. Valdez-Pacheco, 237 F.3d 1077 (9th Cir.
16 2001) (procedural requirements of § 2255 may not be circumvented by invoking the All Writs
17 Act, 28 U.S.C. § 1651). The burden is on the petitioner to show that the remedy is inadequate or
18 ineffective. Redfield v. United States, 315 F.2d 76, 83 (9th Cir. 1963).

19 In Ivy v. Pontesso, 328 F.3d 1057 (9th Cir. 2003), the Ninth Circuit held that the remedy
20 under a § 2255 motion would be "inadequate or ineffective" if a petitioner is actually innocent,
21 but procedurally barred from filing a second or successive motion under § 2255. Ivy, 328 F.3d at
22 1060-1061. That is, relief pursuant to § 2241 is available when the petitioner's claim satisfies
23 the following two-pronged test: "(1) [the petitioner is] factually innocent of the crime for which
24 he has been convicted and, (2) [the petitioner] has never had an 'unobstructed procedural shot' at
25 presenting this claim." Id. at 1060.

26 "In determining whether a petitioner had an unobstructed procedural shot to pursue his
27 claim, we ask whether petitioner's claim 'did not become available' until after a federal court
28 decision." Harrison v. Ollison, 519 F.3d 952, 960 (9th Cir. 2008), cert. denied ___ U.S. ___, 129

1 S.Ct. 254 (2008). “In other words, we consider: (1) whether the legal basis for petitioner’s claim
2 ‘did not arise until after he had exhausted his direct appeal and first § 2255 motion;’ and (2)
3 whether the law changed ‘in any way relevant’ to petitioner’s claim after that first § 2255
4 motion.” Id., citing Ivy, 328 F.3d at 1060-1061.

5 As mentioned, the burden is on Petitioner to show that the remedy is inadequate or
6 ineffective. Redfield v. United States, 315 F.2d 76, 83 (9th Cir. 1963). This Petitioner has failed
7 to do. Petitioner summarily concludes that he has never had an unobstructed procedural shot at
8 raising this claim in a § 2255 proceeding, while, at the same time, admitting that he has never
9 actually attempted to raise the issue in a § 2255 proceeding. Without having ever attempted to
10 file a § 2255 petition based on this “new” court decision, the Petitioner cannot seriously contend
11 that he has not had an opportunity to do so. Thus, he has failed to demonstrate the remedy
12 provided by § 2255 is inadequate or ineffective.

13 Moreover, the fact that Petitioner may now be procedurally barred by the AEDPA from
14 obtaining relief does not alter that conclusion. Ivy, 328 F.3d 1059-1061 (§ 2255 not inadequate
15 or ineffective because Petitioner misses statute of limitations); Aronson v. May, 85 S.Ct. 3, 5
16 (1964) (a court’s denial of a prior § 2255 motion is insufficient to render § 2255 inadequate.);
17 Loretsen v. Hood, 223 F.3d 950, 953 (9th Cir. 2000) (same); Tripathi, 843 F.2d at 1162-63 (9th
18 Cir.1988) (a petitioner's fears of bias or unequal treatment do not render a § 2255 petition
19 inadequate); Williams v. Heritage, 250 F.2d 390 (9th Cir.1957); Hildebrandt v. Swope, 229 F.2d
20 582 (9th Cir.1956); see United States v. Valdez-Pacheco, 237 F.3d 1077 (9th Cir. 2001)
21 (procedural requirements of § 2255 may not be circumvented by invoking the All Writs Act, 28
22 U.S.C. § 1651).

23 In sum, should Petitioner wish to pursue his claims in federal court, he must first do so by
24 way of a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.¹

25 ///

27 ¹A petition for writ of habeas corpus pursuant to § 2255 *must be filed in the court where petitioner was*
28 *originally sentenced*. In this case, Petitioner challenges a sentence adjudicated in the United States District Court for
the Eastern District of California. Thus, that court is the proper venue for filing a petition for writ of habeas corpus
pursuant to § 2255.

