

1 and Effective Death Penalty Act of 1996 (AEDPA), the AEDPA applies to the petition. Lindh
2 v. Murphy, 521 U.S. 320, 327, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997); Jeffries v. Wood,
3 114 F.3d 1484, 1499 (9th Cir. 1997).

4 The Rules Governing Section 2254 Cases in the United States District Courts (Habeas
5 Rules) are appropriately applied to proceedings undertaken pursuant to 28 U.S.C. § 2241.
6 Habeas Rule 1(b). Habeas Rule 4 requires the Court to make a preliminary review of each
7 petition for writ of habeas corpus. The Court must summarily dismiss a petition "[i]f it plainly
8 appears from the petition and any attached exhibits that the petitioner is not entitled to relief
9 in the district court...." Habeas Rule 4; O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990);
10 see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir. 1990). Habeas Rule 2(c) requires that
11 a petition 1) specify all grounds of relief available to the Petitioner; 2) state the facts supporting
12 each ground; and 3) state the relief requested. Notice pleading is not sufficient; rather, the
13 petition must state facts that point to a real possibility of constitutional error. Rule 4, Advisory
14 Committee Notes, 1976 Adoption; O'Bremski v. Maass, 915 F.2d at 420 (quoting Blackledge
15 v. Allison, 431 U.S. 63, 75 n. 7, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977)). Allegations in a
16 petition that are vague, conclusory, or palpably incredible are subject to summary dismissal.
17 Hendricks v. Vasquez, 908 F.2d at 491.

18 Further, the Court may dismiss a petition for writ of habeas corpus either on its own
19 motion under Habeas Rule 4, pursuant to the respondent's motion to dismiss, or after an
20 answer to the petition has been filed. Advisory Committee Notes to Habeas Rule 8, 1976
21 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43 (9th Cir. 2001).

22 **II. JURISDICTION**

23 A federal prisoner who wishes to challenge the validity or constitutionality of his
24 conviction or sentence must do so by way of a motion to vacate, set aside, or correct the
25 sentence under 28 U.S.C. § 2255. Tripathi v. Henman, 843 F.2d 1160, 1162 (9th Cir. 1988). In
26 such cases, only the sentencing court has jurisdiction. Id. at 1163. A prisoner may not
27 collaterally attack a federal conviction or sentence by way of a petition for a writ of habeas
28 corpus pursuant to 28 U.S.C. § 2241. Hernandez v. Campbell, 204 F.3d 861, 865 (9th Cir.

1 2000) ("Generally, motions to contest the legality of a sentence must be filed under § 2255 in
2 the sentencing court, while petitions that challenge the manner, location, or conditions of a
3 sentence's execution must be brought pursuant to § 2241 in the custodial court."); Tripati, 843
4 F.2d at 1162.

5 In contrast, a federal prisoner challenging the manner, location, or conditions of that
6 sentence's execution must bring a petition for writ of habeas corpus under 28 U.S.C. § 2241.
7 Hernandez, 204 F.3d at 865.

8 Here, Petitioner is challenging the validity and constitutionality of his conviction.
9 Therefore, the appropriate procedure would be to file a motion pursuant to § 2255 and not a
10 habeas petition pursuant to § 2241.

11 The Ninth Circuit has recognized a narrow exception allowing a federal prisoner
12 authorized to seek relief under § 2255 to seek relief under § 2241 if the remedy by motion
13 under § 2255 is "inadequate or ineffective to test the validity of his detention." Alaimalo v.
14 United States, 636 F.3d 1092, 1096 (9th Cir. 2011), citing Harrison v. Ollison, 519 F.3d 952,
15 956 (9th Cir. 2008). "This is called the 'savings clause' or 'escape hatch' of § 2255." Id.
16 Furthermore, § 2255 petitions are rarely found to be inadequate or ineffective. Aronson v. May,
17 85 S.Ct. 3, 5, 13 L. Ed. 2d 6 (1964) (a court's denial of a prior § 2255 motion is insufficient to
18 render § 2255 inadequate.); Tripati, 843 F.2d at 1162-63 (9th Cir.1988) (a petitioner's fears
19 of bias or unequal treatment do not render a § 2255 petition inadequate); Williams v. Heritage,
20 250 F.2d 390 (9th Cir.1957); Hildebrandt v. Swope, 229 F.2d 582 (9th Cir.1956). The burden
21 is on the petitioner to show that the remedy is inadequate or ineffective. Redfield v. United
22 States, 315 F.2d 76, 83 (9th Cir. 1963).

23 Petitioner asserts that following his conviction, he filed a notice of appeal. Petitioner
24 states that he claimed in his appeal that the evidence was insufficient to support the
25 conviction, he challenged the jury instructions, he claimed a conflict of interest by counsel, and
26 he challenged his conviction of aiding and abetting. A review of the docket in the underlying
27 criminal case, United States v. Phipps, Case No. 2:95-cr-00066-GCS, reveals the disposition
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1 of the appeal and subsequent filings.¹ The appeal was denied on September 11, 1997. On
2 February 16, 1999, he filed a motion pursuant to 28 U.S.C. § 2255 to vacate judgment. On
3 October 19, 2000, the motion was denied. On October 31, 2001, the Court of Appeals denied
4 Petitioner's motion to file a second § 2255 petition.

5 Petitioner has not claimed that he did lacked an unobstructed opportunity to present
6 his claims in his § 2255 motion and he must now raise it by way of a § 2241 petition. Instead,
7 he states that he may be procedurally barred to proceed by way of a § 2255 petition.
8 Petitioner's argument is without merit. First, he concedes he did in fact raise the same
9 arguments in his criminal appeal. Further, Petitioner has filed a § 2255 motion, and has
10 requested to file a second § 2255 motion with the sentencing court. He has had numerous
11 opportunities to present the claims he now raises, and has in fact done so. Therefore,
12 Petitioner does not qualify under the savings clause.

13 In addition, Petitioner has failed to demonstrate that his claims qualify under the savings
14 clause of section 2255 because his claims are not proper claims of "actual innocence." In
15 Bousley v. United States, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998), the
16 Supreme Court explained that, "[t]o establish actual innocence, petitioner must demonstrate
17 that, in light of all the evidence, it is more likely than not that no reasonable juror would have
18 convicted him." *Id.* at 623 (internal quotation marks omitted). See also Ivy v. Pontesso, 328
19 F.3d 1057, 1060 (9th Cir. 2003). Petitioner bears the burden of proof on this issue by a
20 preponderance of the evidence, and he must show not just that the evidence against him was
21 weak, but that it was so weak that "no reasonable juror" would have convicted him. Lorensen
22 v. Hood, 223 F.3d 950, 954 (9th Cir. 2000). Petitioner fails to demonstrate by a preponderance
23 of evidence that he is factually innocent of use of a firearm. Petitioner states how other co-
24 defendants used firearms, but does not describe why he is innocent of the charge. Further,
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26 ¹Pursuant to Rule 201 of the Federal Rules of Evidence, this Court may take judicial notice of filings in
27 another case. See Biggs v. Terhune, 334 F.3d 910, 916 n.3 (9th Cir. 2003) (materials from a proceeding in
28 another tribunal are appropriate for judicial notice); Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001)
(noting that a court may take judicial notice of "matters of public record"); United States v. Camp, 723 F.2d 741,
744 n.1 (9th Cir. 1984) (citing examples of judicially noticed public records).

1 Petitioner does appropriately explain how he is factually innocent of principal or aider and
2 abettor liability. Petitioner lists actions taken by other co-defendants, but fails to present any
3 factual basis as to why he is innocent.

4 Based on the foregoing, the Court finds that Petitioner has not demonstrated Section
5 2255 constitutes an "inadequate or ineffective" remedy for raising his claims. Accordingly,
6 Section 2241 is not the proper avenue for raising Petitioner's claims, and the petition should
7 be dismissed for lack of jurisdiction.

8 **III. RECOMMENDATION**

9 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 10 1. The petition for writ of habeas corpus be DISMISSED; and
- 11 2. The Clerk of Court be directed to enter judgment, terminating this action.

12 These Findings and Recommendations are submitted to the assigned United States
13 District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule
14 304 of the Local Rules of Practice for the United States District Court, Eastern District of
15 California. Within thirty (30) days after being served with a copy, Petitioner may file written
16 objections with the Court. Such a document should be captioned "Objections to Magistrate
17 Judge's Findings and Recommendations. The Court will then review the Magistrate Judge's
18 ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). Petitioner is advised that failure to file objections
19 within the specified time may waive the right to appeal the District Court's order. Martinez v.
20 Ylst, 951 F.2d 1153 (9th Cir. 1991).

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23 IT IS SO ORDERED.

24 Dated: November 21, 2011

1st. Michael J. Seng
UNITED STATES MAGISTRATE JUDGE

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