UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MICHAEL SIMPSON, Petitioner, v. ANDRE MATEVOUSIAN, Respondent.	)	Case No.: 1:15-cv-01310-JLT FINDINGS AND RECOMMENDATIONS GRANTING RESPONDENT'S MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS (Doc. 20) ORDER REQUIRING THAT OBJECTIONS BE FILED WITHIN TWENTY-ONE DAYS

In this action, Petitioner raises several challenges. First, he challenges the 360-month sentence imposed by the United States District Court for the Southern District of California as a result of Petitioner's 1998 conviction for armed bank robbery and possession of a firearm. He also challenges the trial court's treatment of him as a "career offender" under the Armed Career Criminal Act. The ACCA imposes significantly longer mandatory sentences than would otherwise have been permitted under the relevant sentencing guidelines. Petitioner contends that the U.S. Supreme Court's decision in Johnson v. United States, __U.S.__, 135 S.Ct. 2551 (2015), which ruled illegal the so-called "residual clause" of the ACCA, is retroactive to his case and requires that this Court grant him habeas relief. [1]

[1] In Johnson v. United States, 135 S. Ct. 2551, 2555-56, 192 L. Ed. 2d 569 (2015), the Court explained the ACCA and the residual clause as follows:

1 Because the Court has determined that, as the petition itself acknowledges, Petitioner's claim
2 challenges his original sentence, it should have been brought in the trial court as a motion pursuant to
3 28 U.S.C. § 2255. Accordingly, the Court will recommend that the instant petition be **DISMISSED**.

4 **I. DISCUSSION**

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

15 Title 28 U.S.C. § 2255(e) provides as follows:

16 An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for
17 relief by motion pursuant to this section, shall not be entertained if it appears that the applicant
has failed to apply for relief, by motion, to the court which sentenced him, or that such court
18 has denied him relief, unless it also appears that the remedy by motion is inadequate or
ineffective to test the legality of his detention.

19

---

20 Under the Armed Career Criminal Act of 1984, a defendant convicted of being a felon in possession of a firearm faces more severe punishment if he has three or more previous convictions for a "violent felony," a term defined
21 to include any felony that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). We must decide whether this part of the definition of a violent felony survives the
22 Constitution's prohibition of vague criminal laws.

23 Federal law forbids certain people—such as convicted felons, persons committed to mental institutions, and drug users—to ship, possess, and receive firearms. § 922(g). In general, the law punishes violation of this ban by up to
24 10 years' imprisonment. § 924(a)(2). But if the violator has three or more earlier convictions for a "serious drug offense" or a "violent felony," the Armed Career Criminal Act increases his prison term to a minimum of 15 years
25 and a maximum of life. § 924(e)(1); Johnson v. United States, 559 U.S. 133, 136, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010). The Act defines "violent felony" as follows:

26 "any crime punishable by imprisonment for a term exceeding one year ... that—

"(i) has as an element the use, attempted use, or threatened use of physical force against the person of
27 another; or

"(ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a*
28 *serious potential risk of physical injury to another*." § 924(e)(2)(B) (emphasis added).

The closing words of this definition, italicized above, have come to be known as the Act's residual clause.

28 U.S.C. § 2255(e).

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

Petitioner's allegations are a direct challenge to the sentence imposed, not to the administration of that sentence. Thus, the proper vehicle for challenging such a mistake is a motion to vacate, set aside, or correct the sentence pursuant to 28 U.S.C. § 2255, not a habeas corpus petition, unless Petitioner is entitled to proceed under the so-called "savings clause."

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

petition will be dismissed for lack of jurisdiction. Ivy v. Pontesso, 328 F.3d 1057, 1061 (9th Cir. 2003),

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

"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 v. Ollison, 519 F.3d 952, 960 (9th Cir. 2008), cert. denied __ U.S. __, 129 S.Ct. 254 (2008). "In other words, we 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 way relevant' to petitioner's claim after that first § 2255 motion." Id., citing Ivy, 328 F.3d at 1060-61. In explaining that standard, the Ninth Circuit stated:

> In other words, it is not enough that the petitioner is presently barred from raising his claim of innocence by motion under 2255. He *must never have had* the opportunity to raise it by motion.

Id. at 1060 (emphasis supplied). Applying that standard, the Court rejected Ivy's claims, holding that the law regarding continuing criminal enterprises had not changed subsequent to his conviction and that he had indeed had an opportunity to raise such a claim in the past. Id. at 1061.

As mentioned, the burden is on the petitioner to show that the remedy is inadequate or ineffective. Redfield, 315 F.2d at 83. This Petitioner has failed to do. First, Petitioner asserts that Johnson is retroactive to his case, thus barring the 360-month mandatory sentence imposed by the Southern District of California. Contrary to Petitioner's contentions, however, the Ninth Circuit has not ruled upon Johnson's retroactivity.

Since Johnson was decided by the Supreme Court on June 26, 2015, two circuit courts have addressed whether Johnson should be applied retroactively. They arrived at different results. See Price v. United States, 795 F.3d 731 (7th Cir.2015) (Johnson decision, holding that imposition of enhanced

sentence under residual clause of ACCA violates due process, announced new rule of constitutional law and is thus categorically retroactive to cases on collateral review); but see In re Rivero, 2015 U.S.App. LEXIS 14202, 2015 WL 4747749 (11th Cir.2015) (While Johnson announced new rule of constitutional law, the rule in Johnson is not retroactive to Career Offender challenges on collateral review).

However, no court in Petitioner's district of conviction, i.e., the Southern District of California, or district of confinement, i.e., the Eastern District of California, has addressed the issue of retroactivity of Johnson, nor has the issue been addressed by the Ninth Circuit. Retroactivity therefore remains an open question as of the date of issuance of these Findings and Recommendations. As Respondent correctly surmises, the correct legal avenue for seeking a determination whether Johnson is retroactive would be to raise the issue via a § 2255 petition in the sentencing court, and then pursue any appeal, if necessary, to the Ninth Circuit. This Court, however, cannot pass on the retroactivity of a Supreme Court decision to a petition over which it has no jurisdiction. As discussed above, it is Petitioner's burden to show entitlement to the savings clause. Because Johnson's retroactivity is an open question that Petitioner has not chosen to pursue via a § 2255 petition, he has not met his burden here.

Second, Petitioner has failed to show he is actually innocent of the charges against him. "To establish actual innocence, 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, 327-328 (1995)); Stephens v. Herrera, 464 F.3d 895, 898 (9th cir. 2008). "[A]ctual innocence means factual innocence, not mere legal insufficiency," and "in cases where the Government has forgone more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges." Bousley, 523 U.S. at 623-624. However, a petitioner's obligation to demonstrate actual innocence is limited to crimes actually charged or consciously forgone by the Government in the course of plea bargaining. See, e.g., id. at 624 (rejecting government's argument that defendant had to demonstrate actual innocence of both "using" and "carrying" a firearm where the indictment only charged using a firearm).

1 Although the United States Supreme Court has provided little guidance regarding the nature of
2 an "actual innocence" claim, the standards announced by the various circuit courts contain two basic
3 features: actual innocence and retroactivity. *See* Reyes-Requena v. United States, 243 F.3d 893, 903
4 (5th Cir. 2001); In re Jones, 226 F.3d 328 (4th Cir. 2000); In re Davenport, 147 F.3d 605 (7th Cir.
5 1998); Triestman v. United States, 124 F.3d 361 (2nd Cir. 1997); In re Hanserd, 123 F.3d 922 (6th Cir.
6 1997); In re Dorsainvil, 119 F.3d 245 (3d Cir. 1997).

7 The "core idea" expressed in these cases is that the petitioner may have been imprisoned for
8 conduct that was not prohibited by law. Reyes-Requena, 243 F.3d at 903. Such a situation is most
9 likely to occur in a case that relies on a Supreme Court decision interpreting the reach of a federal
10 statute, where that decision is announced after the petitioner has already filed a § 2255 motion. This is
11 so because a second or successive § 2255 motion is available only when newly discovered evidence is
12 shown or a "new rule of *constitutional* law, made retroactive to cases on collateral review by the
13 Supreme Court, that was previously unavailable." Id. (emphasis supplied). Because § 2255 limits a
14 second or successive petition to Supreme Court cases announcing a new rule of constitutional law, it
15 provides no avenue through which a petitioner could rely on an intervening Court decision based on
16 the substantive reach of a federal statute under which he has been convicted. Id.; see Lorentsen, 223
17 F.3d at 953 ("Congress has determined that second or successive [§ 2255] motions may not contain
18 statutory claims."); Sustache-Rivera v. United States, 221 F.3d 8, 16 (1st Cir. 2000)("The savings
19 clause has most often been used as a vehicle to present an argument that, under a Supreme Court
20 decision overruling the circuit courts as to the meaning of a statute, a prisoner is not guilty…The
21 savings clause has to be resorted to for [statutory claims] because Congress restricted second or
22 successive petitions to constitutional claims."). Obviously, "decisions of [the Supreme Court] holding
23 that a substantive federal criminal statute does not reach certain conduct…necessarily carry a
24 significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'"
25 Bousley, 523 U.S. at 620. To incarcerate one whose conduct is not criminal "inherently results in a
26 complete miscarriage of justice." Davis v. United States, 417 U.S. 333, 346, 94 S.Ct. 2298 (1974).

27 Petitioner's attempt to seek redress by way of a petition for writ of habeas corpus under § 2241
28 is fatally flawed based on his failure to show that he is actually innocent of the crime of conviction.

The first condition for applying the § 2255 savings clause is to make a showing of "actual innocence." In the Ninth Circuit, as discussed above, a claim of actual innocence for purposes of the § 2255 savings clause is tested by the standard articulated by the United States Supreme Court in Bousley v. United States, 523 U.S. 614. In Bousley, the Supreme Court explained that, "[t]o establish actual innocence, 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, 523 U.S. at 623. Petitioner bears the burden of proof on 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. Lorentsen v. Hood, 223 F.3d 950, 954 (9th Cir.2000). "[S]uch a claim requires 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 v. Delo, 513 U.S. 298 at 324. Nowhere in the petition does Petitioner argue that he did not actually commit the crimes for which he was convicted, i.e., armed bank robbery, or that his criminal record did not include the felony convictions used at sentencing to enhance his sentence.

In this regard, the Ninth Circuit has never extended to 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 therefore 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 v. Ives, 682 F.3d 1190, 1193 (9th Cir.2012)(emphasis supplied).

Here, Petitioner challenges his mandatory 360-month sentence under the residual clause of the ACCA, and contends that, applying Johnson, he should have received a sentence in the 120- to 150-month range. (Doc. 1, p. 4). Because Petitioner asserts a sentencing claim, and because the savings clause of § 2255 extends only to petitioners asserting claims of actual innocence regarding their convictions, not their sentences, Petitioner has not set forth a valid actual innocence claim that is cognizable under § 2241.

Accordingly, he has failed to establish that § 2255 is either inadequate or ineffective for purposes of invoking the savings clause, and the fact that he may now be procedurally barred by the AEDPA from obtaining relief does not alter that conclusion. Ivy, 328 F.3d 1059-1061 (§ 2255 not inadequate or ineffective because Petitioner misses statute of limitations); Aronson v. May, 85 S.Ct. 3, 5 (1964) (a court's denial of a prior § 2255 motion is insufficient to render § 2255 inadequate.); Lorentsen v. Hood, 223 F.3d 950, 953 (9th Cir. 2000) (same); Tripati, 843 F.2d at 1162-63 (9th Cir.1988) (a petitioner's fears of bias or unequal treatment do not render a § 2255 petition inadequate); Williams v. Heritage, 250 F.2d 390 (9th Cir.1957); Hildebrandt v. Swope, 229 F.2d 582 (9th Cir.1956); see United States v. Valdez-Pacheco, 237 F.3d 1077 (9th Cir. 2001) (procedural requirements of § 2255 may not be circumvented by invoking the All Writs Act, 28 U.S.C. § 1651). This conclusion is consistent with other cases decided by this Court involving federal petitioners raising a claim of entitlement to the savings clause based upon Johnson. See, e.g., Pam v. Matevousian, 2015 WL 5915438, at *2-4 (E.D. Cal. Oct. 7, 2015); Bartelho v. Matevousian, 2015 WL 5544502, at *2-4 (E.D. Cal. Sept. 18, 2015).

In sum, § 2255 motions must be heard in the sentencing court. 28 U.S.C. § 2255(a); Hernandez, 204 F.3d at 864-865. Because this Court is only the custodial court and construes the petition as a § 2255 motion, this Court lacks jurisdiction over the petition. Hernandez, 204 F.3d at 864-865. Should Petitioner wish to pursue his claims in federal court, he must do so by way of a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 filed in the sentencing court.

RECOMMENDATION

Accordingly, the Court **RECOMMENDS** that Respondent's motion to dismiss (Doc. 20), be granted, and that the Petition for Writ of Habeas Corpus be **DISMISSED** for lack of jurisdiction.

This Findings and Recommendation is submitted to the United States District Court Judge assigned to the case pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 72-304 of the Local Rules of Practice for the United States District Court, Eastern District of California**. Within 21 days** after being served with a copy of this Findings and Recommendation, any party may file written objections with the Court and serve a copy on all parties. Such a document should be captioned

"Objections to Magistrate Judge's Findings and Recommendation." Replies to the Objections shall be served and filed **within 10 days** (plus three days if served by mail) after service of the Objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file objections within the specified time may waive the right to appeal the Order of the District Court. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: **January 15, 2016**

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE