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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA — WESTERN DIVISION

JOHN G. WESTINE,

Petitioner,

v.

JOSEPH NORWOOD, Warden,

Respondent.

Case No. CV 08-4766-R (JWJ)

MEMORANDUM AND ORDER
DISMISSING ACTION WITHOUT
PREJUDICE

## I. BACKGROUND

On July 21, 2008, Petitioner John G. Westine, proceeding <u>prose</u>, filed a "Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (c) (3) by a Person in Federal Custody Under [5] Section § 2255 Known as the "Escape Hatch" (hereinafter "Petition"). The Court has screened the Petition pursuant to 28 U.S.C. § 2243, the Federal Rules of Civil Procedure and the Local Rules of the Central District of California.

<sup>&</sup>lt;sup>1</sup> Petitioner attached an unnumbered series of pages labeled "Emergency Motion" (hereinafter "Attachment"). For clarity, this Court has numbered the Attachment pages as "1" through "4." On August 4, 2008, petitioner filed a document titled "Request for a Court Order Immediate Release Of Prisoner 28 USC § 2243." On September 4, 2008, petitioner made an additional filing labeled "Issue Never Denied On Merits 'Immediate Release Prisoner.'" These documents purport to set forth his arguments in more detail.

Petitioner was sentenced in the United States District Court for the Southern District of Ohio. (Petition, p. 2.) He is currently incarcerated at U.S.P. Victorville in Adelanto, California. (Petition, p. 2.) Petitioner previously filed a motion under 28 U.S.C. § 2255 in the United States District Court for the Southern District of Ohio, wherein Petitioner argued the following: "(1) counsel rendered ineffective assistance; (2) the prosecution failed to disclose evidence favorable to the defense; (3) the forfeiture of his property in addition to his criminal conviction subjected him to double jeopardy; and (4) erroneous information in his presentence investigation report (PSI) was improperly used to enhance his sentence." Westine v. United States, 94 F.3d 645 (6th Cir. 1996). The district court denied Petitioner's § 2255 motion, and the Sixth Circuit affirmed in an opinion from which the foregoing facts have been derived. Id.

Petitioner's § 2241 Petition presently before this Court presents two grounds for relief, to wit: (1) his indictment fails to state a federal offense; and (2) an opinion of the United States Supreme Court, <u>United States v. Santos</u>, 76 U.S.L.W. 4341, 128 S. Ct. 2020, 170 L. Ed. 2d 912 (2008), demonstrates that petitioner is actually and factually innocent of money laundering under 18 U.S.C. § 1956. (Petition, p. 3.) As discussed below, the Petition is dismissed without prejudice.

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## II. DISCUSSION

Federal courts are always under an independent obligation to examine their own jurisdiction, and a federal court may not entertain an action over which it has no jurisdiction. <u>Hernandez v. Campbell</u>, 204 F.3d 861, 865 (9<sup>th</sup> Cir. 2000).

Generally, motions to contest the legality of a sentence must be filed under § 2255 in the sentencing court, while petitions that challenge the

manner, location or conditions of a sentence's execution must be brought pursuant to § 2241 in the custodial court. See Doganiere v. United States, 914 F.2d 165, 169-70 (9th Cir. 1990); Brown v. United States, 610 F.2d 672, 677 (9th Cir. 1990). However, under the savings clause of § 2255, a federal prisoner may 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." 28 U.S.C. § 2255; see Moore v. Reno, 185 F.3d 1054, 1055 (9th Cir. 1999). An inquiry into whether a § 2241 petition is proper under these circumstances is critical to the determination of district court jurisdiction because the proper district for filing a habeas petition depends upon whether the petition is filed pursuant to § 2241 or § 2255.

Hernandez, 204 F.3d at 865. Where a petitioner claims that § 2255 provides an ineffective remedy, the district court in which the petition is brought is required initially to rule whether a § 2241 remedy is available under the savings clause. Id. at 866.

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Here, petitioner is clearly challenging the validity of his sentence, since he claims that: 1) his indictment fails to state a federal offense; and 2) he is actually and factually innocent of money laundering under 18 U.S.C. § 1956. (Petition, p. 3.) Thus, petitioner's claims must be addressed in a motion under § 2255 unless he can show that the remedy under § 2255 is "inadequate or ineffective" and therefore, the saving clause would apply in his case. Although the Ninth Circuit has not fully defined when the remedy under § 2255 is "inadequate or ineffective," the exception is very narrow. See Ivy v. Pontesso, 328 F.3d 1057, 1059 (9th Cir. 2003).

Petitioner argues that the Sixth Circuit of the United States Court of Appeals has barred petitioner from any judicial remedy, and thus his only remedy is under the savings clause of § 2255. (Attachment, p. 3.) However, this argument is insufficient to meet the narrow savings clause exception. The

savings clause is not invoked merely because petitioner has previously filed a § 2255 motion: AEDPA's filing limitations on successive § 2255 motions do not render § 2255 inadequate or ineffective. See Moore, 185 F.3d at 1055; Lorentsen v. Hood, 223 F.3d 950, 953 (9th Cir. 2000). It follows that because courts of the Sixth Circuit have determined to limit petitioner's vexatious filings in those courts, such limitation does not render a § 2255 motion ineffective or inadequate.

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Section 2255 provides an "inadequate or ineffective" remedy when the petitioner claims to be factually innocent of the crime for which he has been convicted and has never had an unobstructed procedural shot at presenting this claim. See Ivy v. Pontesso, 328 F.3d at 1060 ("[I]t 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." (emphasis added)).

Petitioner alleges that his indictment fails to state a federal offense. (Petition, p. 3.) Petitioner does not indicate whether he raised this claim in his sentencing court, and if not, why he never had an "unobstructed procedural shot at presenting" it. See Ivy, 328 F.3d at 1060. Thus, petitioner has failed to meet the requisite standards for proceeding under the savings clause of § 2255 on his § 2241 Petition with respect to this claim.

Petitioner also asserts that the Supreme Court's decision in <u>United States v. Santos</u> makes him factually innocent of money laundering. (Petition, p. 3.) The <u>Santos</u> court clarified the meaning of the term "proceeds" in the federal money laundering statute, 18 U.S.C. § 1956. <u>United States v. Santos</u>, 128 S. Ct. at 2025. The Supreme Court held that criminal "proceeds" refer only to criminal profits, not criminal receipts. <u>Id.</u> This Court has carefully reviewed petitioner's filings and cannot discern a factual basis for his alleged innocence. Though <u>Santos</u> makes a distinction between criminal profits and criminal

receipts, petitioner's filings do not explain with any clarity how this distinction makes him factually innocent of the money laundering crime. The relevant evidence which could shed more light on the factual basis for petitioner's conviction was adduced in the Southern District of Ohio, where his trial took place. Furthermore, this Court is in a substantially inferior position to the Southern District of Ohio to evaluate testimony evidence underlying petitioner's conviction as it is impacted by the <u>Santos</u> opinion.

The instant petition is devoid of any indication whether petitioner raised an objection at trial based on the <u>Santos</u> distinction between criminal profits and criminal receipts during his direct appeal of the case, and why he might have been foreclosed from doing so. Petitioner thus has not alleged why he did not have an "unobstructed procedural shot" at raising this claim. <u>See Ivy</u>, 328 F.3d at 1060. For the foregoing reasons, petitioner has failed to meet the requisite standards for bringing this claim, pursuant the savings clause of § 2255, under § 2241.

Accordingly, this Court construes petitioner's habeas corpus petition, brought pursuant to 28 U.S.C. § 2241, as a motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255.<sup>2</sup> This Court lacks jurisdiction in this matter because a § 2255 petition must be filed in the sentencing court. See Hernandez, 204 F.3d at 864. It is further noted that because petitioner has filed multiple § 2255 motions, the Court is not required to provide petitioner with notice and an opportunity to respond prior to

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<sup>2</sup> It is further noted that petitioner has filed over 100 petitions, motions, or

appeals contesting his confinement on similar grounds, none of which have been

meritorious. It is clear that petitioner is placing an undue burden on the court. In

August 13, 2008, this Court filed a Report and Recommendation that petitioner is a vexatious litigant and has abused the Court's process pursuant to Local Rules 83-8.3 and

applicable federal law. (Case No. CV 08-3254-R (JWJ).) Petitioner filed Objections to the Report and Recommendation on August 27, 2008. (<u>Id.</u>)

recharacterizing his pro se petition as a § 2255 motion. See Castro v. United States, 540 U.S. 375, 377, 124 S.Ct. 786, 157 L.Ed.2d 778 (2003) (holding that "the court cannot so recharacterize a pro se litigant's motion as the litigant's first §2255 motion unless the court informs the litigant of its intent to recharacterize, warns the litigant that the recharacterization will subject subsequent § 2255 motions to the law's 'second or successive' restrictions, and provides the litigant with an opportunity to withdraw, or to amend, the filing") (emphasis added).

Therefore, the Petition is dismissed without prejudice.

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## **ORDER**

For all the foregoing reasons,

## IT IS HEREBY ORDERED AS FOLLOWS:

1. The Court finds that this claim is not properly presented as a 28 U.S.C. § 2241 petition pursuant to the savings clause of 28 U.S.C. § 2255;

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1	2. The Petition for Writ of Habeas Corpus by a Person in Federa
2	Custody (28 U.S.C. § 2241) shall be construed as a motion
3	pursuant to 28 U.S.C. § 2255 and;
4	3. This action is hereby dismissed without prejudice.
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6	DATED:_October 7, 2008
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9	MANUEL L. REAL United States District Judge
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11	Presented by:
12	DATED: October 2, 2008
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14	/s/
15	JEFFREY W. JOHNSON United States Magistrate Judge
16	Officed States Magistrate Judge
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