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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

PAUL ANTHONY DAVIS,	)	Case No. CV 09-1259-DSF(RC)
	)	
Petitioner,	)	
	)	OPINION AND ORDER
vs.	)	
	)	
LINDA SANDERS, WARDEN,	)	
	)	
Respondent.	)	
_____	)	

On February 17, 2009, petitioner Paul Anthony Davis, a federal inmate confined in this judicial district, filed a purported petition for writ of habeas corpus under 28 U.S.C. § 2241, challenging his sentence of 322 months imprisonment for being convicted of the offenses of felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e), and the use and carrying of a firearm during the commission of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1). Specifically, petitioner claims that "the use of juvenile priors to enhance [petitioner's sentence] is in violation of the Tenth Amendment and caused [petitioner] to be actually innocent of the sentence." Petition at 5. The petitioner, thus, claims, "the trial court applied an unconstitutional enhancement statute, see 18

1 U.S.C. § 924(e)(2)(C).” Id. at 6.  
2

3 **BACKGROUND**

4 On July 16, 1993, in United States District Court for the  
5 Southern District of California case no. CR 92-0687-R,<sup>1</sup> a jury  
6 convicted petitioner of being a felon in possession of a firearm, in  
7 violation of 18 U.S.C. §§ 922(g)(1) and 924(e), and the use and  
8 carrying of a firearm during the commission of a drug trafficking  
9 crime, in violation of 18 U.S.C. § 924(c)(1), and petitioner was  
10 subsequently sentenced to 322 months in prison. The Ninth Circuit  
11 Court of Appeals affirmed petitioner’s convictions and sentence in an  
12 unpublished decision filed January 10, 1997, and the Supreme Court  
13 denied certiorari on November 10, 1997. United States v. Davis, 106  
14 F.3d 409 (9th Cir.) (unpublished decision), cert. denied, 522 U.S. 976  
15 (1997).  
16

17 On or about June 23, 1998, petitioner filed a motion to vacate,  
18 set aside, or correct his sentence under 28 U.S.C. § 2255 in the  
19 District Court for the Southern District of California, and the  
20 district court dismissed the motion as untimely on September 14, 1999.  
21 The petitioner appealed the judgment to the Ninth Circuit, which, on  
22 July 25, 2000, vacated the judgment and remanded the motion to the  
23 district court for consideration of the merits. Following remand,  
24 petitioner filed a supplemental motion to vacate his conviction and  
25 sentence under Section 2255, claiming, among other things, that his  
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27 <sup>1</sup> The Court takes judicial notice, pursuant to Fed. R.  
28 Evid. 201, of the docket sheet and related documents in Southern  
District of California case no. CR 92-0687-R.

1 sentence violated the Fifth and Sixth Amendments under Apprendi v. New  
2 Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000),  
3 because the trial court enhanced his sentence under the Armed Career  
4 Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1), even though his prior  
5 crimes were not charged in the indictment and the jury was not  
6 instructed it must find the prior convictions were proven beyond a  
7 reasonable doubt. In his supplemental motion, petitioner claimed  
8 Apprendi undermined Almendarez-Torres v. United States, 523 U.S. 224,  
9 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), which, he argued, supported  
10 his claim. On June 21, 2001, the district court denied petitioner's  
11 Section 2255 motion on the merits.

12  
13 On January 16, 2003, the Ninth Circuit affirmed the trial court's  
14 denial of petitioner's Section 2255 motion, and the Supreme Court  
15 denied certiorari on May 19, 2003. United States v. Davis, 59  
16 Fed. Appx. 176 (9th Cir.) (unpublished decision), cert. denied, 538  
17 U.S. 1052 (2003). In denying petitioner's appeal, the Ninth Circuit  
18 held there were no Supreme Court cases "support[ing] [petitioner's]  
19 argument that the ACCA is a separate crime with elements that must be  
20 proven beyond a reasonable doubt rather than a sentencing enhancement  
21 that need not be presented to the jury." Id. at 178.

## 22 23 **DISCUSSION**

24 The Court, having reviewed the pending petition, has determined  
25 it is a second or successive motion to vacate, set aside or correct  
26 petitioner's sentence under 28 U.S.C. § 2255, rather than a habeas  
27 corpus petition under 28 U.S.C. § 2241. See Hernandez v. Campbell,  
28 204 F.3d 861, 865 (9th Cir. 2000) (per curiam) ("[A] court must first

1 determine whether a habeas petition is filed pursuant to § 2241 or  
2 § 2255 before proceeding to any other issue." ). In making this  
3 determination, the Court has considered whether the pending action  
4 comes within Section 2255's "savings clause," and, for the reasons  
5 discussed below, has determined it does not.

6  
7 "The general rule is that a motion under 28 U.S.C. § 2255 is the  
8 exclusive means by which a federal prisoner may test the legality of  
9 his detention, and that restrictions on the availability of a § 2255  
10 motion cannot be avoided through a petition under 28 U.S.C. § 2241."  
11 Stephens v. Herrera, 464 F.3d 895, 897 (9th Cir. 2006) (citations  
12 omitted), cert. denied, 549 U.S. 1313 (2007); Harrison v. Ollison,  
13 519 F.3d 952, 955-56 (9th Cir.), cert. denied, 129 S. Ct. 254 (2008).  
14 By contrast, a habeas corpus petition under 28 U.S.C. § 2241 is the  
15 appropriate mechanism by which a federal prisoner challenges the  
16 manner, location or conditions of the execution of his sentence.  
17 Hernandez, 204 F.3d at 864. The distinction between a motion to  
18 vacate, set aside or correct a sentence under Section 2255 and a  
19 habeas corpus petition under Section 2241 affects not only the type of  
20 relief generally available, but also whether a particular district  
21 court has jurisdiction to hear the request. Id. at 865. Section 2255  
22 motions must be heard in the district court in which the federal  
23 prisoner was convicted and sentenced, whereas habeas corpus petitions  
24 under Section 2241 may be heard in the district court in which the  
25 federal prisoner is confined. Id.

26  
27 Although petitioner is currently confined in the Central District  
28 of California, and this Court has jurisdiction to hear a habeas corpus

1 petition under Section 2241, the claim petitioner raises in this  
2 action directly challenges the legality of his sentence; thus,  
3 petitioner's claim is presumptively cognizable only in a Section 2255  
4 motion to vacate sentence, which must be filed in the District Court  
5 for the Southern District of California. Nevertheless, Section 2255  
6 has an "escape hatch" or "savings clause," which provides that "[a]  
7 federal prisoner may file a habeas petition under § 2241 to challenge  
8 the legality of a sentence when the prisoner's remedy under § 2255 is  
9 'inadequate or ineffective to test the legality of his detention.'"  
10 Harrison, 519 F.3d at 956; Stephens, 464 F.3d at 897. The petitioner  
11 has the burden of demonstrating Section 2255 is "inadequate or  
12 ineffective." Redfield v. United States, 315 F.2d 76, 83 (9th Cir.  
13 1963).

14  
15 The "inadequate or ineffective" exception is "narrow[.]" Ivy v.  
16 Pontesso, 328 F.3d 1057, 1059 (9th Cir.), cert. denied, 540 U.S. 1051  
17 (2003); United States v. Pirro, 104 F.3d 297, 299 (9th Cir. 1997), and  
18 "the general rule . . . is that the ban on unauthorized second or  
19 successive petitions does not per se make a § 2255 'inadequate or  
20 ineffective.'" Stephens, 464 F.3d at 898 (quoting Lorentsen v. Hood,  
21 223 F.3d 950, 953 (9th Cir. 2000) (quoting § 2255)); see also Ivy,  
22 328 F.3d at 1059 ("§ 2255's remedy is not 'inadequate or ineffective'  
23 merely because § 2255's gatekeeping provisions prevent the petitioner  
24 from filing a second or successive petition. . . ." (citation  
25 omitted)). However, "a motion meets the escape hatch criteria of  
26 § 2255 'when a petitioner (1) makes a claim of actual innocence, and  
27 (2) has not had an unobstructed procedural shot at presenting that  
28 claim.'" Harrison, 519 F.3d at 959 (citation omitted); Stephens,

1 464 F.3d at 898. "'To establish actual innocence, petitioner must  
2 demonstrate that, in light of all the evidence, it is more likely than  
3 not that no reasonable juror would have convicted him.'" Stephens,  
4 464 F.3d at 898 (citation omitted). To determine "whether a  
5 petitioner had an unobstructed procedural shot to pursue his claim,  
6 [the Court asks] whether petitioner's claim 'did not become available'  
7 until after a federal court decision." Harrison, 519 F.3d at 960  
8 (quoting Stephens, 464 F.3d at 898). That is, the Court must  
9 consider: "(1) whether the legal basis for petitioner's claim 'did not  
10 arise until after he had exhausted his direct appeal and first § 2255  
11 motion;' and (2) whether the law changed 'in any way relevant' to  
12 petitioner's claim after that first § 2255 motion." Harrison,  
13 519 F.3d at 960 (quoting Ivy, 328 F.3d at 1060-61).

14  
15 Here, petitioner's claim of "actual innocence" challenges his  
16 sentence, rather than the offenses of which petitioner was convicted,  
17 and is purportedly based on *Almendarez-Torres*. See Petition at 1-2.  
18 However, petitioner cannot show that he did not have an unobstructed  
19 procedural shot at presenting a claim under *Almendarez-Torres*. To the  
20 contrary, both petitioner and the Government extensively briefed the  
21 applicability of *Almendarez-Torres* in petitioner's Section 2255  
22 motion. Moreover, petitioner has not shown that the law has changed  
23 in any manner relevant to petitioner's claim since his Section 2255  
24 motion. Therefore, petitioner "cannot establish that he 'has not had  
25 an unobstructed procedural shot' at presenting his claim, and thus  
26 cannot qualify for the escape hatch." Harrison, 519 F.3d at 898  
27 (citation omitted).

28 //

1           Moreover, a claim of sentencing error "is not, by itself, a claim  
2 of actual innocence." Stephens, 464 F.3d at 899. Rather, since the  
3 claim challenges petitioner's sentence, rather than his conviction,  
4 petitioner cannot show "it is more likely than not that no reasonable  
5 juror would have convicted him.'" Id. at 898; see also Padilla v.  
6 United States, 416 F.3d 424, 427 (5th Cir. 2005) ("[B]ecause  
7 [petitioner] does not attack his conviction and his claim challenges  
8 only the validity of his sentence [petitioner's] § 2241 petition does  
9 not fall within the savings clause of § 2255. . . ."); Talbott v.  
10 Holencik, 2009 WL 322107, \*7-8 (C.D. Cal.) (federal habeas  
11 petitioner's claim of "actually innocent of being an 'armed career  
12 criminal'" fails to show Section 2255 was "inadequate or ineffective"  
13 since petitioner challenged only legality of his sentence, which does  
14 not show actual innocence); Coles v. United States, 177 F. Supp. 2d  
15 710, 713 (N.D. Ohio 2001) ("Petitioner's claim of innocence relates to  
16 a sentencing factor - the ACCA enhanced sentence penalty - as opposed  
17 to the underlying, substantive crime, for which Petitioner is serving  
18 his current sentence. Consequently, Petitioner's § 2241 claim of  
19 'actual innocence' does not fall within the meaning of the savings  
20 clause of § 2255. . . . Therefore, Petitioner has not demonstrated  
21 that the remedy afforded pursuant to § 2255 is inadequate or  
22 ineffective, and, hence, is not entitled to relief under § 2241."  
23 (citation omitted)).

24  
25           For all these reasons, this Court finds the pending action is a  
26 motion to vacate sentence under Section 2255, and not a habeas corpus  
27 petition under Section 2241, and, as such, this Court does not have  
28 jurisdiction to consider petitioner's Section 2255 motion. See 28

1 U.S.C. § 2255(a) ("A prisoner in custody under sentence of a court  
2 established by Act of Congress claiming the right to be released upon  
3 the ground that the sentence was imposed in violation of the  
4 Constitution or laws of the United States, or that the court was  
5 without jurisdiction to impose such sentence, or that the sentence was  
6 in excess of the maximum authorized by law, or is otherwise subject to  
7 collateral attack, may move **the court which imposed the sentence** to  
8 vacate, set aside or correct the sentence." (emphasis added)). Thus,  
9 this action should be summarily dismissed for lack of jurisdiction  
10 under Local Rule 72-3.2.<sup>2</sup>

11  
12 **ORDER**

13 **IT IS HEREBY ORDERED** that the pending action be construed as a  
14 motion to vacate, set aside or correct the sentence under 28 U.S.C.  
15 § 2255 and, as such, Judgment shall be entered summarily dismissing  
16 the motion for lack of jurisdiction.

17  
18 The Clerk of Court is ordered to serve this Opinion and Order and  
19 Judgment on petitioner.

20 DATE: March 6, 2009



DALE S. FISCHER  
UNITED STATES DISTRICT JUDGE

21 PRESENTED BY:

22 DATE: March 4, 2009

23 /S/ Rosalyn M. Chapman  
24 ROSALYN M. CHAPMAN  
UNITED STATES MAGISTRATE JUDGE

25  
26 <sup>2</sup> Local Rule 72-3.2 provides that "if it plainly appears  
27 from the face of the [habeas] petition and any exhibits annexed  
28 to it that the petitioner is not entitled to relief, the  
Magistrate Judge may prepare a proposed order for summary  
dismissal and submit it and a proposed judgment to the District  
Judge." Local Rule 72-3.2.