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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Nolan McSwain,)	Case No. CV 13-5578 DDP
)	[CV 09-07606 DDP-CT]
Petitioner,)	[CV 06-01440 DDP]
)	[CR 92-00075 AAH]
v.)	
)	ORDER DENYING MOTION FOR RELIEF
R.P. Gutierrez,)	UNDER 28 U.S.C. § 2241
)	
Respondent.)	

Presently before the court is Petitioner Nolan McSwain ("Petitioner")'s Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241(c)(3). Having reviewed the materials submitted by the parties and considered the arguments advanced therein, the court adopts the following Order denying the Petition.

I. Background

On February 8, 1993, Petitioner was found guilty by a jury of conspiracy to distribute cocaine in violation of 21 U.S.C § 846 and possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a). (CR Dkt. No. 72.) Petitioner was sentenced to life imprisonment on December 6, 1993. (CR Dkt. No. 129) On July 18, 1995, the Ninth Circuit Court of Appeals

1 affirmed Petitioner's conviction and sentence, holding, in part,
2 that the trial court did not abuse its discretion in excusing two
3 jurors. United States v. McSwain, 65 F.3d 177 (9th Cir.
4 1995)(unpublished).

5 In 1997, Petitioner filed a habeas corpus petition pursuant
6 to 28 U.S.C. § 2255, which this court denied. (Return, Ex. A; CV
7 06-1440 DDP, Dkt. 10). Petitioner proceeded to file a request
8 for a certificate of appealability, which was denied by both the
9 district court and the Ninth Circuit. (Id.)

10 In 1999, Petitioner filed a habeas petition pursuant to 28
11 U.S.C. § 2241. Id. The court found that the petition, though
12 brought under 28 U.S.C. § 2241, was in fact a successive petition
13 under 28 U.S.C. § 2255, and dismissed the petition. Id.
14 Petitioner was denied a certificate of appealability. Id.

15 In 2002, Petitioner filed a motion under Federal Rule of
16 Civil Procedure 60(b). (CR Dkt. No. 168) The court determined
17 the motion to be a third successive § 2255 petition, and
18 dismissed the motion. (Order, Dkt. 182 p. 2)

19 In 2004, Petitioner filed another habeas petition under 28
20 U.S.C. § 2241, and the district court once again denied the
21 petition as a successive § 2255 petition. (Dkt. 173)

22 In 2006, Petitioner filed another petition under § 2241.
23 (Dkt. 181; CV 6-1440) This court issued an order dismissing the
24 motion for lack of jurisdiction, again finding the petition to be
25 a successive petition under § 2255. (Dkt. No. 182; CV 06-1440,
26 Dkt. 10.)

27 The instant petition, like several of Petitioner's other
28 motions, is styled as a petition pursuant to § 2241. As

1 discussed below, Petitioner contends that his right to a fair
2 trial was violated when the allegedly biased trial judge
3 dismissed a particular juror. (Pet. at 6.)

4 **II. Discussion**

5 Defendant argues that Petitioner's § 2241 petition is yet
6 another successive § 2255 petition in disguise. (Return at 1.)
7 Petitioner maintains that the instant petition is properly
8 brought pursuant to § 2241 through the savings clause of § 2255.
9 (Traverse at 7.)

10 Generally, § 2241 petitions challenge the manner of
11 execution of a sentence or conditions of confinement and § 2255
12 provides the exclusive mechanism by which a federal prisoner may
13 challenge the legality of his conviction or sentence. See
14 Harrison v. Ollison, 519 F.3d 952, 955 (9th Cir. 2008); Ivy v.
15 Pontesso, 328 F.3d 1057, 1059 (9th Cir. 2003); Porter v. Adams,
16 244 F.3d 1006, 1007 (9th Cir. 2001). However, under the "savings
17 clause" or "escape hatch" contained in § 2255, a federal prisoner
18 may challenge a sentence pursuant to § 2241 if he can show that §
19 2255 is "inadequate or ineffective to test the legality of his
20 detention." Ivy, 328 F.3d at 1059 (internal quotations omitted);
21 Loretsen v. Hood, 223 F.3d 950, 953 (9th Cir. 2000).

22 Here, Petitioner attacks the validity of his conviction
23 rather than the manner of execution of his sentence.
24 Specifically, Petitioner argues that the district court judge's
25 removal of two quarreling jurors, including the only black juror,
26 constituted judicial bias and violated Petitioner's
27 constitutional right to due process. (Pet. at 6, 9; Return at 9.)
28 This is not a challenge to the "manner, location, or conditions

1 of a sentence's execution," as generally required by § 2241. See
2 Hernandez v. Campbell, 204 F.3d 861, 864 (9th Cir. 2000) (per
3 curiam). Thus, unless the savings clause applies, § 2255, and not
4 § 2241, is the appropriate vehicle for review. See United States
5 v. Pirro, 104 F.3d 297, 299 (9th Cir. 1997) ("A federal prisoner
6 authorized to seek relief under § 2255 may not petition for
7 habeas corpus relief pursuant to § 2241.")

8 The Ninth Circuit has held that a petition meets the savings
9 clause criteria of § 2255 when the petitioner "(1) makes a claim
10 of actual innocence, and (2) has not had an unobstructed
11 procedural shot at presenting that claim." Stephens v. Herrera,
12 464 F.3d 895, 898 (9th Cir. 2006); see Alaimalo v. United States,
13 645 F.3d 1042 (9th Cir. 2011). The instant petition makes
14 neither claim, and Petitioner fails to allege any facts that
15 would satisfy § 2255's savings clause and permit him to bring his
16 claim pursuant to § 2241.¹ The petition is, therefore, properly
17 considered under § 2255 rather than § 2241.

18 As recounted above, Petitioner has filed five previous
19 petitions under § 2255. The instant petition is the sixth.
20 Federal courts may only entertain a second or successive § 2255
21 petition if the petitioner first obtains the permission of the
22 court of appeals to file the motion with the district court. See
23 28 U.S.C. §§ 2255; 2244 (3)(A); Barapind v. Reno, 225 F.3d 1100,
24 1110 (9th Cir. 2000). Here, Petitioner did not request, let
25

26 ¹ Even if he Plaintiff had so argued or alleged, the Ninth
27 Circuit has concluded that the escape hatch is unavailable to
28 Petitioners who assert that judicial bias renders § 2255 relief
inadequate or ineffective. See Tripathi v. Henman, 843 F.2d 1160,
1163 (9th Cir. 1988).

1 alone obtain, the requisite certification from the Ninth Circuit
2 prior to filing this successive § 2255 motion. Instead,
3 Petitioner filed the instant petition directly with this court.
4 Because Petitioner failed to comply with the procedural
5 requirements for filing a successive petition, this court lacks
6 jurisdiction to consider the merits of the claim, which must
7 therefore be dismissed. See United States v. Allen, 157 F.3d
8 661, 664 (9th Cir. 1998).

9 **III. CONCLUSION**

10 For the reasons stated above, Plaintiff's petition is
11 DISMISSED.

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13 IT IS SO ORDERED.

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16 Dated: September 13, 2016



17 DEAN D. PREGERSON
18 United States District Judge
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