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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

THOMAS JERECKI,)	NO. CV 14-1642-FMO (E)
)	
Petitioner,)	
)	
v.)	REPORT AND RECOMMENDATION OF
)	
L.J. MILUSNIC, Warden,)	UNITED STATES MAGISTRATE JUDGE
)	
Respondent.)	
_____)	

This Report and Recommendation is submitted to the Honorable Fernando M. Olguin, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

BACKGROUND

On March 5, 2014, Petitioner filed a "Memorandum of Law in Support of Petitioner's Motion to Petition for a Writ of Habeas Corpus, Pursuant to 28 U.S.C. §2255 By a Person in Federal Custody" ("Petition"). The petition challenges Petitioner's 1998 career

1 offender sentence of 262 months. Petitioner received this sentence in
2 the United States District Court for the Southern District of West
3 Virginia upon pleading guilty to conspiracy to possess with intent to
4 distribute and to distribute methamphetamine. See United States v.
5 Thomas Jerecki, United States District Court for the Southern District
6 of West Virginia case number 6:98-CR-00111-1.¹ The Petition appears
7 to contend that: (1) Petitioner was not informed, prior to his plea,
8 that he would receive a career offender sentence; (2) the sentencing
9 court failed to impose a three point sentence reduction for acceptance
10 of responsibility; and (3) Petitioner's counsel allegedly rendered
11 ineffective assistance at sentencing by assertedly: (a) failing to
12 contest the career offender sentence; and (b) failing to seek a
13 sentence reduction for acceptance of responsibility. Petitioner also
14 requests an order holding the Petition in abeyance pending the hoped-
15 for passage of certain proposed federal legislation.

16
17 Petitioner previously challenged his sentence on direct appeal to
18 the United States Court of Appeals for the Fourth Circuit. See United
19 States v. Jerecki, 199 F.3d 1329, 1999 WL 982048 (4th Cir. 1999)
20 (unpublished disposition). In this appeal, Petitioner argued:
21 (1) Petitioner assertedly was not informed, prior to the plea, that he

22
23 ¹ The Court takes judicial notice of the records of
24 United States District Court for the Southern District of West
25 Virginia and the United States Court of Appeals for the Fourth
26 Circuit available on the PACER database. See Mir v. Little
27 Company of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988) (court
28 may take judicial notice of court records). The Court also takes
judicial notice of the docket of Petitioner's petition for writ
of certiorari to the United States Supreme Court, available on
the United States Supreme Court's website at
www.supremecourt.gov. Id.

1 faced a career offender sentence; and (2) Petitioner allegedly was
2 entitled to a three point reduction for acceptance of responsibility.
3 See Petition, p. 6; see also Brief of Appellant Thomas Jerecki filed
4 August 17, 1999, in United States Court of Appeals for the Fourth
5 Circuit case number 98-4917, reproduced at 1999 WL 33614323. The
6 Court of Appeals for the Fourth Circuit rejected Petitioner's
7 arguments and affirmed the sentence. See United States v. Jerecki,
8 199 F.3d 1329, 1999 WL 982048 at *1.

9
10 In 2000, Petitioner filed a motion to vacate his sentence
11 pursuant to 28 U.S.C. section 2255 in the United States District Court
12 for the Southern District of West Virginia.² On June 6, 2001, a
13 Magistrate Judge issued proposed findings and recommended the denial
14 of the motion. On September 21, 2001, the District Court issued an
15 Order adopting the Magistrate Judge's findings and denying the motion.
16 The United States Court of Appeals for the Fourth Circuit affirmed
17 this denial, and the United States Supreme Court denied certiorari.
18 See United States v. Jerecki, 30 Fed. App'x 97 (4th Cir.), cert.
19 denied, 537 U.S. 848 (2002).

20 21 **DISCUSSION**

22
23 A federal prisoner who contends that his or her conviction or
24 sentence is subject to collateral attack "may move the court which
25 imposed the sentence to vacate, set aside or correct the sentence."
26 28 U.S.C. § 2255. "Generally, motions to contest the legality of a

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28 ²

The docket does not reflect the content of this motion.

1 sentence must be filed under § 2255, while petitions that challenge
2 the manner, location, or conditions of a sentence's execution must be
3 brought pursuant to § 2241 in the custodial court." Hernandez v.
4 Campbell, 204 F.3d 861, 864 (9th Cir. 2000) (citations and footnote
5 omitted). A prisoner generally may not substitute a habeas petition
6 under 28 U.S.C. section 2241 for a section 2255 motion.

7
8 An application for a writ of habeas corpus in behalf of a
9 prisoner who is authorized to apply for relief by motion
10 pursuant to this section, shall not be entertained if it
11 appears that the applicant has failed to apply for relief,
12 by motion, to the court which sentenced him, or that such
13 court has denied him relief, unless it also appears that the
14 remedy by motion is inadequate or ineffective to test the
15 legality of his detention.

16
17 28 U.S.C. § 2255; see Stephens v. Herrera, 464 F.3d 895, 897-99 (9th
18 Cir. 2006), cert. denied, 549 U.S. 1313 (2007); Hernandez v. Campbell,
19 204 F.3d at 864. Here, it appears Petitioner has applied for, and has
20 been denied, section 2255 relief in the sentencing court.

21
22 "Under the savings clause of § 2255, however, a federal prisoner
23 may file a habeas corpus petition pursuant to § 2241 to contest the
24 legality of a sentence where his remedy under section 2255 is
25 'inadequate or ineffective to test the legality of his detention.'" Hernandez v. Campbell, 204 F.3d at 864-65; see also Stephens v.
26 Herrera, 464 F.3d at 897. This "savings clause" exception to section
27 2255 exclusivity is a "narrow" exception. Ivy v. Pontesso, 328 F.3d
28

1 1057, 1059-60 (9th Cir.), cert. denied, 540 U.S. 1051 (2003); United
2 States v. Pirro, 104 F.3d 297, 299 (9th Cir. 1997).

3
4 Mere lack of success in the sentencing court does not make the
5 section 2255 remedy "inadequate or ineffective." Boyden v. United
6 States, 463 F.2d 229, 230 (9th Cir. 1972), cert. denied, 410 U.S. 912
7 (1973); see Tripati v. Henman, 843 F.2d 1160, 1162-63 (9th Cir.),
8 cert. denied, 488 U.S. 982 (1988). If the rule were otherwise, every
9 disappointed prisoner/movant incarcerated in a district different from
10 the sentencing district could pursue a repetitive section 2241
11 petition in the district of incarceration.

12
13 Similarly, neither the enforcement of the statute of limitations
14 nor the enforcement of restrictions on successive 2255 motions renders
15 the section 2255 remedy "inadequate or ineffective" within the meaning
16 of the statute. See Moore v. Reno, 185 F.3d 1054, 1055 (9th Cir.
17 1999), cert. denied, 528 U.S. 1178 (2000) (dismissal of a prior
18 section 2255 motion as successive does not render the section 2255
19 remedy "inadequate or ineffective"); Gilbert v. United States, 640
20 F.3d 1293, 1308 (11th Cir. 2011) (en banc), cert. denied, 132 S. Ct.
21 1001 (2012) (dismissal of earlier section 2255 motion as successive
22 does not render the section 2255 remedy "inadequate or ineffective");
23 Hill v. Morrison, 349 F.3d 1089, 1092 (8th Cir. 2003) ("a § 2255
24 motion is not 'inadequate or ineffective' merely because: (1) § 2255
25 relief has already been denied, (2) the petitioner has been denied
26 permission to file a second or successive § 2255 motion, (3) a second
27 or successive § 2255 motion has been dismissed, or (4) the petitioner
28 has allowed the one year statute of limitations and/or grace period to

1 expire.") (citations, internal brackets and quotations omitted);
2 Cradle v. U.S. ex rel. Miner, 290 F.3d 536, 539 (3d Cir. 2002)
3 ("Section 2255 is not inadequate or ineffective merely because the
4 sentencing court does not grant relief, the one-year statute of
5 limitations has expired, or the petitioner is unable to meet the
6 stringent gatekeeping requirements of the amended § 2255") (citations
7 omitted); Robinson v. United States, 2011 WL 4852499, at *2 (C.D. Cal.
8 Oct. 12, 2011) (savings clause does not apply merely because the
9 statute of limitations "now prevents the courts from considering a
10 section 2255 motion"); cf. Ivy v. Pontesso, 328 F.3d at 1060 ("[I]t is
11 not enough that the petitioner is presently barred from raising his
12 claim . . . by motion under § 2255. He must never have had the
13 opportunity to raise it by motion.").

14
15 A federal prisoner may file a section 2241 petition under the
16 savings clause if the prisoner "(1) makes a claim of actual innocence,
17 and (2) has not had an unobstructed procedural shot at presenting that
18 claim." Marrero v. Ives, 682 F.3d 1190, 1192 (9th Cir. 2012), cert.
19 denied, 133 S. Ct. 1264 (2013) (citation and internal quotations
20 omitted). "[T]o establish actual innocence, petitioner must
21 demonstrate that, in light of all the evidence, it is more likely than
22 not that no reasonable juror would have convicted him." Bousley v.
23 United States, 523 U.S. 614, 623 (1998) (citation and quotations
24 omitted). "'Actual innocence means factual innocence, not mere legal
25 insufficiency.'" Id. at 1193 (quoting Bousley v. United States, 523
26 U.S. at 623) (internal brackets omitted).

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1 Petitioner pled guilty to the charged offense. The present
2 Petition challenges the sentence he received. Petitioner's purely
3 legal arguments that he assertedly was wrongly classified as a career
4 offender and denied an acceptance of responsibility reduction do not
5 demonstrate actual innocence. See Marrero v. Ives, 682 F.3d at 1193-
6 95 (claim that petitioner was wrongly classified as a career offender
7 did not entail a claim of actual innocence; noting cases in other
8 circuits holding that a petitioner generally cannot assert a
9 cognizable claim of actual innocence of a noncapital sentencing
10 enhancement); Chavez v. United States, 2013 WL 5924377, at *3 (N.D.
11 Ohio Oct. 31, 2013) (challenge to sentencing court's failure to award
12 a reduction for acceptance of responsibility did not show actual
13 innocence).

14
15 Petitioner also fails to satisfy the "unobstructed procedural
16 shot" prong of the savings clause analysis. "In determining whether a
17 petitioner had an unobstructed procedural shot to pursue his claim, we
18 ask whether petitioner's claim 'did not become available' until after
19 a federal court decision." Harrison v. Ollison, 519 F.3d at 960
20 (citation omitted). "In other words, we consider: (1) whether the
21 legal basis for petitioner's claim 'did not arise until after he had
22 exhausted his direct appeal and first § 2255 motion'; and (2) whether
23 the law changed 'in any way relevant' to petitioner's claim after that
24 first § 2255 motion." Id. (citation omitted). Here, nothing
25 prevented Petitioner from previously raising his present claims in his

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1 section 2255 motion in the Southern District of West Virginia,³ and it
2 does not appear that any aspect of the applicable law materially
3 changed thereafter.⁴

4
5 Petitioner contends that his previous efforts to seek relief
6 where hindered by the alleged failure of prison officials at
7 Petitioner's place of incarceration to give Petitioner an "important
8 motion" ("Document #24") assertedly filed in one of Petitioner's
9 cases. Petitioner does not provide or describe this document, and it
10 is unclear in what court the document supposedly was filed. The Court
11 has reviewed the online dockets of Petitioner's criminal case, his
12 appeal to the Fourth Circuit, his petition for certiorari in the
13 United States Supreme Court, his earlier section 2255 motion and his
14 appeal from the denial of that motion. With one exception, none of
15 these dockets reflects the existence of any "Document 24."⁵ The
16 exception is the criminal case docket, in which Document 24 is
17 Petitioner's executed guilty plea, filed September 1, 1998. In light
18 of the records of which this Court has taken judicial notice, it is

19
20 ³ Petitioner may have raised the claims asserted herein
21 in his earlier section 2255 motion; however, the Court lacks a
22 copy of that motion.

23 ⁴ Contrary to Petitioner's suggestion, nothing in Munaf
24 v. Green, 128 S. Ct. 2207 (2008) materially altered the law
25 applicable to Petitioner's circumstance.

26 ⁵ In his direct appeal in the Fourth Circuit, Document 23
27 is Petitioner's Joint Appendix. There are no Documents 24, 25 or
28 26. Document 27 is Petitioner's brief. The docket in the United
States Supreme Court lists only five entries.

In Petitioner's second appeal in the Fourth Circuit, entry
24 records the return of the appellate record to the District
Court following affirmance of the denial of Petitioner's earlier
section 2255 motion.

1 manifest that Petitioner previously had an “unobstructed procedural
2 shot” at asserting his claims, regardless of any alleged interference
3 by prison officials.
4

5 In sum, the savings clause does not apply in the present case.
6 Therefore, the Petition is a section 2255 motion over which this Court
7 lacks jurisdiction.⁶
8

9 A court lacking jurisdiction of a civil action may transfer the
10 action to a court in which the action could have been brought,
11 provided the transfer is “in the interest of justice.” 28 U.S.C. §
12 1631; see Cruz-Aguilera v. I.N.S., 245 F.3d 1070, 1074 (9th Cir.
13 2001). “Normally transfer will be in the interest of justice because
14 normally dismissal of an action that could be brought elsewhere is
15 time consuming and justice-defeating.” Id. at 1074 (citations and
16 quotations omitted).
17

18 In determining whether to transfer an action, the Court must
19 consider whether the action would have been timely had the action been
20 filed in the proper forum. See Taylor v. Soc. Sec. Admin., 842 F.2d
21 232, 233 (9th Cir. 1988). It may well be that the applicable one-year
22 statute of limitations bars the present action, given the fact that
23 Petitioner’s direct appeal concluded in 2002. In any event, the Court
24 should not transfer this action because, for a separate reason, a
25 transfer would be an idle act. As in Crosby v. United States, 2011 WL
26 6986789 (C.D. Cal. Dec. 15, 2011), adopted, 2012 WL 84768 (C.D. Cal.
27

28 ⁶ Hence, the Court must deny Petitioner’s request for
abeyance.

1 Jan. 11, 2012), and Scott v. Ives, 2010 WL 295786 (E.D. Cal. Jan. 13,
2 2010, a transfer to the district of conviction would not benefit the
3 petitioner because the district of conviction would be unable to
4 entertain the matter. The United States District Court for the
5 Southern District of West Virginia could not entertain this "second or
6 successive" section 2255 motion absent Fourth Circuit authorization.
7 See 28 U.S.C. § 2244, 2255(h).

8
9 Finally, Petitioner should be aware that his remedies, if any,
10 for errors allegedly committed by the United States District Court for
11 the Southern District of West Virginia lie with the Fourth Circuit and
12 the United States Supreme Court, not with this Court. See Application
13 of Pierce, 246 F.2d 902 (9th Cir. 1957); see also Wallace v.
14 Willingham, 351 F.2d 299, 300 (10th Cir. 1965) (remedy for error
15 committed in section 2255 proceeding "does not lie in this [sic]
16 habeas corpus proceedings. Habeas is not an additional, alternative
17 or supplemental remedy. Nor is it available to review judgments in
18 2255 proceedings"). As summarized above, Petitioner previously sought
19 and obtained review of his sentence in the Fourth Circuit. See United
20 States v. Jingles, 702 F.3d 494, 498 (9th Cir. 2012), cert. denied,
21 133 S. Ct. 1650 (2013) ("when a matter has been decided adversely on
22 appeal from a conviction, it cannot be litigated again on a section
23 2255 motion") (citation omitted); Feldman v. Henman, 815 F.2d 1318,
24 1322 (9th Cir. 1987) ("habeas corpus review in district court does not
25 extend to matters already decided by [the circuit court]."); see also
26 United States v. Dyess, 730 F.3d 354, 360 (4th Cir. 2013), pet. for
27 cert. filed (Feb. 4, 2014) (No. 13-8645) ("it is well settled that
28 Dyess cannot 'circumvent a proper ruling . . . on direct appeal by

1 **NOTICE**

2 Reports and Recommendations are not appealable to the Court of
3 Appeals, but may be subject to the right of any party to file
4 objections as provided in the Local Rules Governing the Duties of
5 Magistrate Judges and review by the District Judge whose initials
6 appear in the docket number. No notice of appeal pursuant to the
7 Federal Rules of Appellate Procedure should be filed until entry of
8 the judgment of the District Court.

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