

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RONALD JEROME FISHER,)	Case No. CV 17-4746-DOC (JPR)
)	
Petitioner,)	
)	ORDER SUMMARILY DISMISSING ACTION
v.)	
)	
HERIBERTO H. TELLEZ,)	
Acting Warden,)	
)	
Respondent.)	

On June 27, 2017, Petitioner, who is housed at the Federal Correctional Institution in Victorville, filed a Petition for Writ of Habeas Corpus by a Person in Federal Custody, ostensibly under 28 U.S.C. § 2241. He challenges his life-plus-five-years sentence for his 1992 conviction in the Northern District of Texas of conspiracy to distribute cocaine base, possession of cocaine with intent to distribute, and money laundering. Petitioner argues that in Mathis v. United States, 136 S. Ct. 2243 (2016), the Supreme Court cast "doubt" on "the validity of . . . graduated penalty provisions and [his] prior convictions under California Health and Safety Code §§ 11350 and 11351.5." (Pet., Mem. at 3.) Because those prior state convictions were

1 used to enhance his federal sentence, Petitioner contends, his
2 federal sentence cannot stand. (Id.)

3 This is Petitioner's fifth attempt to file a § 2241 petition
4 in this Court challenging the same conviction and sentence; each
5 time the Court has found the filing to be a disguised § 2255
6 motion over which it had no jurisdiction. See Fisher v. Herrera,
7 No. 2:01-cv-2686-SH (C.D. Cal. filed Mar. 22, 2001) (Petitioner's
8 § 2241 petition transferred to N.D. Tex. as improperly filed
9 § 2255 motion over which C.D. Cal. had no jurisdiction), appeal
10 dismissed, No. 01-56218 (9th Cir. Nov. 8, 2001); Fisher v.
11 Guterrez, No. 2:12-cv-4867-DOC-SH (C.D. Cal. filed June 4, 2012)
12 (same), appeal dismissed, No. 12-56244 (9th Cir. July 30, 2012);
13 Fisher v. Tews, No. 2:14-cv-4290-DOC-SH (C.D. Cal. filed June 4,
14 2014) (same), appeal dismissed, No. 14-56562 (9th Cir. Dec. 23,
15 2014); Fisher v. Tews, No. 2:15-cv-9596-DOC-DTB (C.D. Cal. filed
16 Dec. 14, 2015) (same).

17 Petitioner has also unsuccessfully – and repeatedly –
18 attempted to challenge his conviction and sentence in the
19 Northern District of Texas and Fifth Circuit Court of Appeals, to
20 no avail. See Tews, No. 2:15-cv-9596-DOC-DTB (May 25, 2016 R. &
21 R. describing Petitioner's unsuccessful § 2255 motions in N.D.
22 Tex. (in Jan. 1998, June 2001, Oct. 2001, Apr. 2003, Jan. 2004,
23 Sept. 2005, Jan. 2007, Nov. 2009) and unsuccessful attempts to
24 receive authorization from Fifth Circuit to file second or
25 successive § 2255 motion (in Dec. 2000, Dec. 2003, Mar. 2010)).

26 Generally, after a conviction and sentence are final, the
27 only mechanism for a federal prisoner to seek relief from
28 judgment is through § 2255. Tripati v. Henman, 843 F.2d 1160,

1 1162 (9th Cir. 1988). Prisoners may generally file only one
2 § 2255 motion, and only within certain strict time limits. See
3 § 2255(f), (h). Under the "savings clause" of § 2255, however, a
4 prisoner may file a federal habeas petition when it "appears that
5 the remedy by motion is inadequate or ineffective to test the
6 legality of his detention." § 2255(e). To qualify under that
7 clause, a petitioner must (1) claim that he is actually innocent
8 and (2) show that he has not had an "unobstructed procedural
9 shot" at presenting the claim. Harrison v. Ollison, 519 F.3d
10 952, 959 (9th Cir. 2008) (citation omitted). When determining
11 whether a petitioner has had an unobstructed procedural shot at
12 raising a claim, courts consider "(1) whether the legal basis for
13 petitioner's claim did not arise until after he had exhausted his
14 direct appeal and first section 2255 motion; and (2) whether the
15 law changed in any way relevant to petitioner's claim after that
16 first § 2255 motion." Powell v. Langford, No. CV 16-7619 RSWL
17 (FFM), 2016 WL 6951934, at *3 (C.D. Cal. Nov. 28, 2016) (citing
18 Harrison, 519 F.3d at 960). When a federal prisoner files a
19 § 2241 petition, a district court must answer the "threshold
20 jurisdictional question" of whether the petition is properly
21 brought under § 2241 or "is, instead, a disguised § 2255 motion."
22 Marrero v. Ives, 682 F.3d 1190, 1194 (9th Cir. 2012).

23 As an initial matter, Petitioner fails to make a cognizable
24 claim of "actual innocence" qualifying him to bring a § 2241
25 petition. Liberally construed, the Petition claims actual
26 innocence in that Petitioner's prior convictions were improperly
27 considered for purposes of enhancing his sentence. That is not
28 sufficient. See id. at 1193 (federal prisoner challenging prior

1 convictions for purposes of attacking sentence raised "purely
2 legal claim that has nothing to do with factual innocence . . .
3 [and] is not a cognizable claim of 'actual innocence' for the
4 purposes of qualifying to bring a § 2241 petition under the
5 escape hatch"). As this Court found in adjudicating Petitioner's
6 2015 § 2241 petition, he has alleged no new facts nor presented
7 any evidence to establish that he is "actually innocent" of his
8 federal charges or that "in light of all the evidence it is more
9 likely than not that no reasonable juror would have found him
10 guilty beyond a reasonable doubt." See Tews, No. 2:15-cv-9596-
11 DOC-DTB (May 25, 2016 R. & R. at 7).

12 Petitioner argues that § 2255 is inadequate or ineffective
13 to test the legality of his detention because he is relying on
14 new case law that was "not a constitutional rule made retroactive
15 under 28 U.S.C. § 2255(h)" and "[t]herefore [a § 2241 petition]
16 is his only vehicle to seek relief from his sentence of life
17 imprisonment." (Pet. at 5.) Thus, he argues, he could not have
18 raised the claims in his Petition earlier because "they were not
19 ripe at the time of his initial motion under § 2255." It appears
20 Petitioner is arguing that he has not had an "unobstructed
21 procedural shot" at raising his claims because of "new" law.

22 (Id.)

23 But Mathis does not announce a change of law relevant to
24 Petitioner's claims. In Mathis, the Supreme Court reiterated its
25 longstanding holding that a defendant's prior crime qualifies as
26 a predicate offense under the Armed Career Criminal Act (ACCA),
27 18 U.S.C. § 924(e), "only if[] its elements are the same as, or
28 narrower than, those of the generic offense." 136 S. Ct. at

1 2247; see Taylor v. United States, 495 U.S. 575, 599-600 (1990).
2 The Court identified three categories of criminal statutes: (1)
3 those that set out "a single (or 'indivisible') set of elements
4 to define a single crime," such as a burglary statute that
5 criminalizes entering a structure with intent to steal, id. at
6 2248; (2) those that "have a more complicated (sometimes called
7 'divisible') structure," such as a burglary statute that
8 criminalizes "the lawful entry or the unlawful entry" of a
9 structure with intent to steal, thus listing "alternative
10 elements" that define "multiple crimes," id. at 2249; and (3)
11 those that "enumerate[] various factual means of committing a
12 single element" of a crime, such as a burglary statute that
13 prohibits unlawful entry of "'any building, structure, [or] land,
14 water, or air vehicle'" with intent to steal, thus listing
15 "alternative ways of satisfying a single locational element," id.
16 at 2249-50.

17 The Supreme Court confirmed its earlier holdings that
18 "indivisible" statutes should be analyzed according to the
19 "categorical approach" and that "divisible" statutes require use
20 of the "modified categorical approach." Id. at 2248-49. The
21 question in Mathis was whether the modified categorical approach
22 should be applied to the third category of statutes; the Court
23 held that it should not. Id. at 2251.

24 Petitioner argues that various statutes affecting his
25 federal sentence are "indivisible." (See Pet., Mem. at 4
26 (arguing that Cal. Health & Safety Code §§ 11350 and 11351.5 are
27 indivisible), 8 ("Petitioner's statute of conviction is also
28 indivisible as to conduct"), 9 ("Title 21 U.S.C. § 841 Was an

1 Indivisible Statute that Prohibited Application of the Modified
2 Categorical Approach"), 13 ("§ 841 was not considered a divisible
3 statute with alternative elements"), 14 ("§ 841 Was
4 Indivisible".) Mathis did not change the law as it relates to
5 indivisible statutes, however. Indeed, the Court reaffirmed that
6 "[f]or more than 25 years" its decisions have demanded use of the
7 categorical approach in assessing whether such statutes can
8 support a prior conviction under the ACCA. 136 S. Ct. at 2247;
9 see also Powell, 2016 WL 6951934, at *4 ("The categorical and
10 modified categorical approaches were first enunciated over two
11 decades before Mathis[;] . . . the Mathis Court merely reaffirmed
12 [an] established principle and declined to extend it to a subset
13 of laws that Petitioner acknowledges do not apply to him.").
14 Even if the statutes Petitioner cites in fact "swe[pt] more
15 broadly" than the underlying generic drug offenses (see Pet.,
16 Mem. at 4) or allowed "alternative" means of committing the crime
17 (see id. at 7), Petitioner could have raised those issues, and
18 law supporting his position, when he filed his first § 2255
19 motion, in 1998 (see id. at 2). Moreover, Petitioner does not
20 appear to argue that the sentencing court inappropriately applied
21 the modified categorical approach in his case. Because Mathis
22 did not change the law "in any way relevant" to Petitioner's
23 claims, he cannot rely on it to show that he did not have an
24 "unobstructed procedural shot" at presenting those claims
25 earlier. Harrison, 519 F.3d at 960.

26 Indeed, Petitioner recognizes that his claims are
27 appropriately raised in a § 2255 motion; he filed one on June 23,
28 2017, in the Northern District of Texas, making identical

1 arguments. See Fisher v. United States, No. 4:92-cr-010-Y (N.D.
2 Tex., § 2255 motion filed June 23, 2017). In that motion he
3 acknowledges that "every court will agree that [his] claim is
4 properly brought under § 2255(a)," in part because "§ 2241 does
5 not provide a vehicle for a clarification of the law since the
6 Supreme Court explicitly stated in Mathis that it was not
7 announcing a new rule of constitutional law for Teague v. Lane,
8 489 U.S. 288 (1989) purposes." Fisher, No. 4:92-cr-010-Y (Mot.,
9 Mem. at 4). That motion remains pending. See id. (Docket No.
10 225).

11 Petitioner thus has not shown that § 2255 is inadequate or
12 ineffective as a means of challenging his judgment. His
13 § 2241 "petition" is therefore nothing but a disguised § 2255
14 motion, which was not only filed in the wrong court but is
15 impermissibly successive as well. See § 2255(e), (h); Moore v.
16 Reno, 185 F.3d 1054, 1055 (9th Cir. 1999) (per curiam). His
17 Petition must therefore be summarily dismissed under Local Rule
18 72-3.2 for lack of jurisdiction.¹ ACCORDINGLY, IT IS ORDERED
19
20
21
22
23
24
25

26 ¹ Local Rule 72-3.2 provides that "if it plainly appears
27 from the face of the petition and any exhibits annexed to it that
28 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."

1 that this action is dismissed and judgment be entered to that
2 effect.

3
4 DATED: July 5, 2017

David O. Carter

DAVID O. CARTER
U.S. DISTRICT JUDGE

5
6 Presented by:

7 **JEAN ROSENBLUTH**
8 Jean Rosenbluth
9 U.S. Magistrate Judge

10
11 cc: Senior District Judge Terry R. Means
12 Northern District of Texas

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28