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

JEROME CAPELTON,

Petitioner,

v.

SHINN,

Respondent.

Case No. CV 18-04777-DOC (AFM)

ORDER TO SHOW CAUSE

BACKGROUND

In 2001, petitioner was convicted in the United States District Court for the District of Massachusetts of conspiracy to distribute 50 grams or more of cocaine base and distribution of cocaine base. Case No. 00-CR-30027-MAP.¹ Petitioner was sentenced to federal prison for a term of 360 months. Petitioner's conviction was affirmed on appeal. *United States v. Capelton*, 350 F.3d 231, 235 (1st Cir. 2003). The United States Supreme Court denied petitioner's petition for a writ of certiorari. *Capelton v. United States*, 543 U.S. 890 (2004).

¹ The Court takes judicial notice of petitioner's prior court proceedings. *See* Fed. R. Evid. 201; *Lee v. City of Los Angeles*, 250 F.3d 668, 688–689 (9th Cir. 2001).

1 On September 28, 2005, petitioner filed a motion to vacate, set aside, or
2 correct his sentence pursuant to 28 U.S.C. § 2255. The motion was denied on
3 July 1, 2008. (Case No. 00-CR-30027-MAP, ECF No. 372.)

4 On October 5, 2015, petitioner sought leave to file a successive § 2255
5 motion in the District of Massachusetts, raising a claim under *Johnson v. United*
6 *States*, 135 S. Ct. 2551 (2015). The First Circuit denied petitioner’s application.
7 *Capelton v. United States*, No. 15-2163 (1st Cir. Nov. 30, 2015). Petitioner filed
8 additional requests for authorization to file a second or successive petition, but each
9 were denied. (See Case No. 00-CR-30027-MAP, ECF Nos. 449, 462, 465.)

10 On May 30, 2018, petitioner filed this petition for a writ of habeas corpus
11 pursuant to 28 U.S.C. § 2241. The petition challenges petitioner’s 2001 conviction.
12 For the following reasons, petitioner is ordered to show cause why the petition
13 should not be dismissed for lack of jurisdiction.

14 DISCUSSION

15 Generally, a federal prisoner seeking to test the legality of his detention must
16 do so by filing a motion pursuant to 28 U.S.C. § 2255. *Marrero v. Ives*, 682 F.3d
17 1190, 1192 (9th Cir. 2012); *Harrison v. Ollison*, 519 F.3d 952, 955 (9th Cir. 2008).
18 In addition, challenges to the legality of a conviction or sentence must be brought in
19 the sentencing court, while challenges to the manner, location, or conditions of a
20 sentence’s execution must be brought pursuant to § 2241 in the custodial court.
21 *Muth v. Fondren*, 676 F.3d 815, 818 (9th Cir. 2012); *Hernandez v. Campbell*, 204
22 F.3d 861, 864 (9th Cir. 2000).

23 There is a narrow exception allowing a federal prisoner to seek relief under
24 § 2241 if the prisoner’s remedy under § 2255 is “inadequate or ineffective to test
25 the legality of his detention.” 28 U.S.C. § 2255(e); see *Harrison*, 519 F.3d at 956.
26 This exception is referred to as the “savings clause” or the “escape hatch.”
27 *Hernandez*, 204 F.3d at 864 n.2; see *Stephens v. Herrera*, 464 F.3d 895, 897 (9th
28 Cir. 2006). The exception to § 2255 is “narrow” and does not apply “merely

1 because § 2255’s gatekeeping provisions,” such as the statute of limitation or the
2 limitation on successive petitions, prevent the courts from considering a § 2255
3 motion. *Ivy v. Pontesso*, 328 F.3d 1057, 1059 (9th Cir. 2003). The Ninth Circuit has
4 held that a motion meets the savings clause criteria of § 2255 “when a petitioner
5 (1) makes a claim of actual innocence, and (2) has not had an unobstructed
6 procedural shot at presenting that claim.” *Harrison*, 519 F.3d at 959 (quoting
7 *Stephens*, 464 F.3d at 898).

8 A claim of actual innocence for purposes of the savings clause requires
9 petitioner to demonstrate that “in light of all the evidence, it is more likely than not
10 that no reasonable juror would have convicted him.” *Stephens*, 464 F.3d at 898
11 (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)). Further, a claim of
12 actual innocence requires that the petitioner show factual innocence — mere legal
13 insufficiency of the evidence against him is not enough. *Muth*, 676 F.3d at 822
14 (citing *Bousley*, 523 U.S. at 623).

15 Here, petitioner has not alleged any new facts or presented any evidence to
16 establish that he is actually innocent of the charges, or shown that “in light of all the
17 evidence, it is more likely than not that no reasonable juror would have found him
18 guilty beyond a reasonable doubt.” Instead, petitioner alleges that he is actually
19 innocent under the Supreme Court’s decision in *Rosemond v. United States*, 134
20 S. Ct. 1240, 1249 (2014). In *Rosemond*, the Supreme Court held, as a matter of
21 statutory interpretation, that to prove a defendant guilty of using or carrying a
22 firearm during a crime of violence or a drug trafficking offense within the meaning
23 of 18 U.S.C. § 924(c) on an aiding or abetting theory, the Government is required
24 to show that the defendant actively participated in the underlying crime with
25 advance knowledge that a confederate would use or carry a gun during the crime’s
26 commission. *Rosemond*, 134 S. Ct. at 1243. Assuming without deciding that an
27 error under *Rosemond* would demonstrate factual innocence as opposed to legal
28 innocence, petitioner does not allege, and it does not appear from the record, that he

1 was convicted of 18 U.S.C § 924(c) or that he was convicted under a theory of
2 aiding and abetting. Thus, petitioner has not explained how the holding of
3 *Rosemond* might apply to him.

4 Petitioner has not demonstrated that the savings clause applies to his claim,
5 and therefore, he may not bring challenge his conviction in a § 2241 petition in this
6 Court, but must raise it in a § 2255 motion.² Because a § 2255 motion must be filed
7 before the sentencing court – that is, the United States District Court for the District
8 of Massachusetts – this Court lacks jurisdiction over petitioner’s claims.

9 **ORDER**

10 Petitioner is ordered to show cause **on or before July 5, 2018** why this
11 action should not be dismissed without prejudice for lack of jurisdiction.
12 Specifically, petitioner must set forth clearly the basis for his claim that he is
13 actually innocent and otherwise demonstrate that he is entitled to rely upon the
14 savings clause.

15 Finally, petitioner is cautioned that failure to timely file a response to this
16 order may result in dismissal of this action without prejudice for lack of
17 jurisdiction, for failure to comply with court orders, or for failure to prosecute. *See*
18 *Fed. R. Civ. P. 41(b)*.

19
20 DATED: 6/7/2018

21 

22 _____
23 ALEXANDER F. MacKINNON
24 UNITED STATES MAGISTRATE JUDGE

25
26 _____
27 ² Petitioner previously filed a § 2255 motion, so a new motion may be barred as successive.
28 However, as discussed, § 2255 is not inadequate merely because a new motion might be
dismissed as successive. *See Ivy*, 328 F.3d at 1059.