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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TONY EDWARD POWELL,	1:07-cv-01849 OWW DLB (HC)
Petitioner,	FINDINGS AND RECOMMENDATION
v.	REGARDING PETITION FOR WRIT OF
	HABEAS CORPUS
	[Doc. 1]
D. SMITH,	
Respondent.	

Petitioner is a federal prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241.

Petitioner filed the instant petition for writ of habeas corpus on December 19, 2007. Petitioner is currently incarcerated at the United States Penitentiary in Atwater, California, serving a conviction and life sentence imposed by the United States District Court for Western District of Texas, Waco Division. (Petition, at 2.) Petitioner states that he appealed the judgment to the United States Court of Appeals for the Fifth Circuit. (Id.)

In the instant petition, Petitioner contends that the pre-sentence report contains inaccurate information regarding his conviction resulting in a three point increase in his sentence under 4A1.1(a), and his trial counsel was ineffective for failing to object to such inaccurate information. (Petition, attached Memorandum, at 2-3.)

JURISDICTION

1
2 A federal prisoner who wishes to challenge the validity or constitutionality of his
3 conviction or sentence must do so by way of a motion to vacate, set aside, or correct the sentence
4 under 28 U.S.C. § 2255. Tripati v. Henman, 843 F.2d 1160, 1162 (9th Cir.1988); Thompson v.
5 Smith, 719 F.2d 938, 940 (8th Cir.1983); In re Dorsainvil, 119 F.3d 245, 249 (3rd 1997);
6 Broussard v. Lippman, 643 F.2d 1131, 1134 (5th Cir.1981). In such cases, *only the sentencing*
7 *court has jurisdiction.* Tripati, 843 F.2d at 1163. A prisoner may not collaterally attack a federal
8 conviction or sentence by way of a petition for a writ of habeas corpus pursuant to 28 U.S.C. §
9 2241. Grady v. United States, 929 F.2d 468, 470 (9th Cir.1991); Tripati, 843 F.2d at 1162; see
10 also United States v. Flores, 616 F.2d 840, 842 (5th Cir.1980).

11 In contrast, a federal prisoner challenging the manner, location, or conditions of that
12 sentence's execution must bring a petition for writ of habeas corpus under 28 U.S.C. § 2241.
13 Capaldi v. Pontesso, 135 F.3d 1122, 1123 (6th Cir. 1998); United States v. Tubwell, 37 F.3d
14 175, 177 (5th Cir. 1994); Kingsley v. Bureau of Prisons, 937 F.2d 26, 30 n.5 (2nd Cir. 1991);
15 United States v. Jalili, 925 F.2d 889, 893-94 (6th Cir. 1991); Barden v. Keohane, 921 F.2d 476,
16 478-79 (3rd Cir. 1991); United States v. Hutchings, 835 F.2d 185, 186-87 (8th Cir. 1987);
17 Brown v. United States, 610 F.2d 672, 677 (9th Cir. 1990).

18 In this case, Petitioner is challenging the validity and constitutionality of his sentence
19 rather than an error in the administration of his sentence. Therefore, the appropriate procedure
20 would be to file a motion pursuant to § 2255 and not a habeas petition pursuant to § 2241.

21 In rare situations, a federal prisoner authorized to seek relief under § 2255 may seek relief
22 under § 2241 *if* he can show the remedy available under § 2255 to be "inadequate or ineffective
23 to test the validity of his detention." United States v. Pirro, 104 F.3d 297, 299 (9th Cir.1997)
24 (quoting § 2255). Although there is little guidance from any court on when § 2255 is an
25 inadequate or ineffective remedy, the Ninth Circuit has recognized that it is a very narrow
26 exception. Id; Aronson v. May, 85 S.Ct. 3, 5 (1964) (a court's denial of a prior § 2255 motion is
27 insufficient to render § 2255 inadequate.); Tripati, 843 F.2d at 1162-63 (9th Cir.1988) (a
28 petitioner's fears of bias or unequal treatment do not render a § 2255 petition inadequate);

1 Williams v. Heritage, 250 F.2d 390 (9th Cir.1957); Hildebrandt v. Swope, 229 F.2d 582 (9th
2 Cir.1956). The burden is on the petitioner to show that the remedy is inadequate or ineffective.
3 Redfield v. United States, 315 F.2d 76, 83 (9th Cir. 1963).

4 Petitioner states that § 2255 “does not provide provisions for inaccurate information 28
5 U.S.C. § 2241 has the provision for one that has subject an illegal incarceration [sic].” (Petition,
6 at 4.) However, a petition contending Petitioner's sentence is invalid is still a § 2255 petition
7 regardless of what Petitioner calls the petition. See Brown, 610 F.2d at 677. On the form
8 petition, Petitioner does not indicate whether he has sought relief by way of § 2255, and it is
9 therefore possible that the motion would be granted. However, a letter attached to his petition
10 written by an Assistant United States Attorney indicates that Petitioner filed a § 2255 motion.
11 (Unenumerated Exhibits, attached to Petition.) If this is so, Petitioner has not stated whether he
12 has sought permission to file a successive § 2255 motion. It is possible that the motion would be
13 granted in which case Petitioner would have another opportunity to present his claim in the
14 proper forum. Thus, Petitioner has not shown that he did not have an “unobstructed procedural
15 shot” at presenting his challenges to the sentencing court. Accordingly, the petition should be
16 dismissed.

17 RECOMMENDATION

18 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 19 1. The petition for writ of habeas corpus be DISMISSED; and
- 20 2. The Clerk of Court be directed to enter judgment, terminating this action.

21 These Findings and Recommendations are submitted to the assigned United States
22 District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 72-
23 304 of the Local Rules of Practice for the United States District Court, Eastern District of
24 California. Within thirty (30) days after being served with a copy, any party may file written
25 objections with the court and serve a copy on all parties. Such a document should be captioned
26 “Objections to Magistrate Judge’s Findings and Recommendations.” Replies to the objections
27 shall be served and filed within ten (10) court days (plus three days if served by mail) after
28 service of the objections. The Court will then review the Magistrate Judge’s ruling pursuant to

1 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file objections within the
2 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
3 F.2d 1153 (9th Cir. 1991).

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6 IT IS SO ORDERED.

7 **Dated: December 26, 2007**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

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