

## UNITED STATES DISTRICT COURT

## EASTERN DISTRICT OF CALIFORNIA

10	JUAN AMEZCUA ALEJO,	)	1:08-cv-01827-TAG HC
11	Petitioner,	)	
12	v.	)	ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS (Doc. 1)
13	J. SUGRUE, Warden,	)	ORDER DIRECTING CLERK OF COURT TO ENTER JUDGMENT AND CLOSE FILE
14	Respondent.	)	

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Petitioner is a federal prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Pursuant to 28 U.S.C. § 636(c), Petitioner and Respondent consented to the jurisdiction of the United State Magistrate Judge. (Docs. 3, 5).

Petitioner filed the instant federal petition on November 21, 2008. (Doc. 1). The petition alleges that in September 2005, Petitioner was convicted in federal court of 18 U.S.C. § 841(a)(1) and § 846. (Doc. 1, p. 2). Petitioner does not indicate the specific court in which he was convicted and sentenced nor does Petitioner indicate the length of his sentence.

Petitioner, a native of Mexico, claims that his trial counsel was ineffective in failing to raise as a mitigating factor at sentencing that Petitioner's convictions would subject him to removal from the United States. (Id.). Petitioner also maintains that the sentencing court should have departed downward from the sentencing guidelines because Petitioner's ineligibility for pre-release and minimum security confinement as a result of his status as a removable alien was not taken into account as a mitigating circumstance. (Id.). Petitioner also contends that the disparate

1 treatment of aliens such as Petitioner, in terms of the availability of sentence-reducing programs  
2 such as participation in drug programs, is unconstitutional. (Id. at p. 1). Petitioner seeks relief in  
3 the form of a reduced sentence. (Id. at p. 6).

4 **DISCUSSION**

5 A federal prisoner who wishes to challenge the validity or constitutionality of his  
6 conviction or sentence must do so by way of a motion to vacate, set aside, or correct the sentence  
7 under 28 U.S.C. § 2255. Tripati v. Henman, 843 F.2d 1160, 1162 (9<sup>th</sup> Cir.1988); Thompson v.  
8 Smith, 719 F.2d 938, 940 (8<sup>th</sup> Cir.1983); In re Dorsainvil, 119 F.3d 245, 249 (3<sup>rd</sup> 1997);  
9 Broussard v. Lippman, 643 F.2d 1131, 1134 (5<sup>th</sup> Cir.1981). In such cases, only the sentencing  
10 court has jurisdiction. Tripati, 843 F.2d at 1163. A prisoner may not collaterally attack a  
11 federal conviction or sentence by way of a petition for a writ of habeas corpus pursuant to 28  
12 U.S.C. § 2241. Grady v. United States, 929 F.2d 468, 470 (9<sup>th</sup> Cir.1991); Tripati, 843 F.2d at  
13 1162; see also United States v. Flores, 616 F.2d 840, 842 (5<sup>th</sup> Cir.1980).

14 In contrast, a federal prisoner challenging the manner, location, or conditions of that  
15 sentence's execution must bring a petition for writ of habeas corpus under 28 U.S.C. § 2241.  
16 Capaldi v. Pontesso, 135 F.3d 1122, 1123 (6<sup>th</sup> Cir. 1998); United States v. Tubwell, 37 F.3d 175,  
17 177 (5<sup>th</sup> Cir. 1994); Kingsley v. Bureau of Prisons, 937 F.2d 26, 30 n.5 (2<sup>nd</sup> Cir. 1991); United  
18 States v. Jalili, 925 F.2d 889, 893-94 (6<sup>th</sup> Cir. 1991); Barden v. Keohane, 921 F.2d 476, 478-79  
19 (3<sup>rd</sup> Cir. 1991); United States v. Hutchings, 835 F.2d 185, 186-87 (8<sup>th</sup> Cir. 1987); Brown v.  
20 United States, 610 F.2d 672, 677 (9<sup>th</sup> Cir. 1990).

21 Petitioner's allegations that his trial counsel was ineffective, that the sentencing court  
22 should have considered mitigating factors, i.e., his removal status, and that the disparate  
23 treatment of removable aliens in the federal sentencing laws is unconstitutional are all challenges  
24 to the validity or constitutionality of the sentence itself, and thus must be raised in a motion to  
25 vacate, set aside, or correct the sentence under 28 U.S.C. § 2255. Because Petitioner is  
26 challenging his sentence, not its execution, he is precluded from bringing such a collateral attack  
27 in a petition filed pursuant to § 2241. Grady, 929 F.2d at 470; Tripati, 843 F.2d at 1162;

28 Nevertheless, a federal prisoner authorized to seek relief under § 2255 may seek relief

1 under § 2241 *if* he can show that the remedy available under § 2255 is "inadequate or ineffective  
2 to test the validity of his detention." Hernandez v. Campbell, 204 F.3d 861, 864-5 (9<sup>th</sup> Cir.2000);  
3 United States v. Pirro, 104 F.3d 297, 299 (9<sup>th</sup> Cir.1997) (*quoting* § 2255). The Ninth Circuit has  
4 recognized that this is a very narrow exception. Id; Ivy v. Pontesso, 328 F.3d 1057 (9th Cir.  
5 2003) (a petitioner must show actual innocence *and* that he never had the opportunity to raise it  
6 by motion to demonstrate that § 2255 is inadequate or ineffective); Holland v. Pontesso, 234 F.3d  
7 1277 (9<sup>th</sup> Cir. 2000) (§ 2255 not inadequate or ineffective because Petitioner misses statute of  
8 limitations); Aronson v. May, 85 S.Ct. 3, 5 (1964) (a court's denial of a prior § 2255 motion is  
9 insufficient to render § 2255 inadequate.); Lorentsen v. Hood, 223 F.3d 950, 953 (9<sup>th</sup> Cir. 2000)  
10 (same); Tripati, 843 F.2d at 1162-63 (9<sup>th</sup> Cir.1988) (a petitioner's fears of bias or unequal  
11 treatment do not render a § 2255 petition inadequate); Williams v. Heritage, 250 F.2d 390 (9<sup>th</sup>  
12 Cir.1957); Hildebrandt v. Swope, 229 F.2d 582 (9<sup>th</sup> Cir.1956); see United States v. Valdez-  
13 Pacheco, 237 F.3d 1077 (9<sup>th</sup> Cir. 2001) (procedural requirements of § 2255 may not be  
14 circumvented by invoking the All Writs Act, 28 U.S.C. § 1651). The burden is on the petitioner  
15 to show that the remedy is inadequate or ineffective. Redfield v. United States, 315 F.2d 76, 83  
16 (9<sup>th</sup> Cir. 1963).

17 In this case, Petitioner does not allege that he has ever brought a § 2255 motion in the  
18 sentencing court, let alone that such a procedure would be inadequate or ineffective. Should  
19 Petitioner wish to pursue this claim in federal court, he must do so in the original sentencing  
20 court by way of a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C.  
21 § 2255.<sup>1</sup>

22 **ORDER**

23 Accordingly, the Court HEREBY ORDERS as follows:

24 1. The Petition for Writ of Habeas Corpus (Doc. 1), is DISMISSED; and

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27 <sup>1</sup>A petition for writ of habeas corpus pursuant to § 2255 *must be filed in the court where petitioner was*  
28 *originally sentenced.* In this case, Petitioner does not indicate in which court he was originally convicted and  
sentenced. However, whatever court originally sentenced Petitioner is the proper venue for filing a motion to vacate,  
set aside, or correct the sentence pursuant to § 2255.

2. The Clerk of the Court is DIRECTED to enter judgment for Respondent and close the file.

IT IS SO ORDERED.

Dated: April 1, 2009

/s/ Theresa A. Goldner  
UNITED STATES MAGISTRATE JUDGE