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6 **UNITED STATES DISTRICT COURT**

## 7 EASTERN DISTRICT OF CALIFORNIA

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9 WADE KNIGHT, 1:09-cv-00143-AWI-DLB (HC)  
10 Petitioner, ORDER ADOPTING FINDINGS AND  
11 v. RECOMMENDATION, DISMISSING  
12 H.A. RIOS, JR., PETITION FOR WRIT OF HABEAS CORPUS,  
13 Respondent. [Doc. 5] AND DIRECTING CLERK OF COURT TO  
TERMINATE ACTION  
14 \_\_\_\_\_ /15 Petitioner is a federal prisoner proceeding pro se with a petition for writ of habeas corpus  
16 pursuant to 28 U.S.C. § 2241.17 On February 4, 2009, the Magistrate Judge issued [Findings and Recommendation](#) that the  
18 Petition for Writ of Habeas Corpus be DISMISSED. This Findings and Recommendation was  
19 served on all parties and contained notice that any objections were to be filed within thirty (30)  
20 days of the date of service of the order.21 On March 2, 2009, Petitioner filed timely [objections](#), along with a [supplement](#), to the  
22 Findings and Recommendation. (Court Docs. 7-8.)23 In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(C), this Court has conducted  
24 a *de novo* review of the case. Having carefully reviewed the entire file, including Petitioner's  
25 objections, the Court concludes that the Magistrate Judge's Findings and Recommendation is  
26 supported by the record and proper analysis. Petitioner's objections present no grounds for  
27 questioning the Magistrate Judge's analysis. As explained by the Magistrate Judge, 28 U.S.C. §  
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1 2255 provides that a federal prisoner attacking his sentence “may move the court which imposed  
2 the sentence to vacate, set aside or correct the sentence.” 28 U.S.C. § 2255(a). In general,  
3 Section 2255 “provides the exclusive procedural mechanism by which a federal prisoner may test  
4 the legality of detention.” Harrison v. Ollison, 519 F.3d 952, 955 (9<sup>th</sup> Cir. 2008); Lorentsen v.  
5 Hood, 223 F.3d 950, 953 (9<sup>th</sup> Cir. 2000). A federal court cannot consider a petition for habeas  
6 relief pursuant to Section 2241 unless it appears that the petitioner's remedy under Section 2255  
7 is “inadequate or ineffective to test the legality of his detention.” 28 U.S.C. § 2255(e); Stephens  
8 v. Herrera, 464 F.3d 895, 897 (9<sup>th</sup> Cir. 2006), *cert. denied*, --- U.S. ----, 127 S.Ct. 1896 (2007). A  
9 federal prisoner cannot avoid restrictions on the availability of a Section 2255 motion through a  
10 petition under Section 2241. Stephens, 464 F.3d at 897; Moore v. Reno, 185 F.3d 1054, 1055 (9<sup>th</sup>  
11 Cir. 1999) (per curiam). A federal prisoner may avail himself of Section 2255's escape hatch only  
12 when he “(1) makes a claim of actual innocence, and (2) has not had an unobstructed procedural  
13 shot at presenting that claim.” Stephens, 464 F.3d at 898; Ivy v. Pontesso, 328 F.3d 1057, 1060  
14 (9<sup>th</sup> Cir. 2003).

15 Here, Petitioner has failed to demonstrate that his remedy under Section 2255 is  
16 “inadequate or ineffective.” Petitioner refers to himself as being innocent of the exact sentence  
17 he received because his sentence was not lowered when the restitution amount was corrected.  
18 However, Petitioner does not claim that he did not engage in the conduct upon which his  
19 conviction rests; Nor does he make any showing whatsoever of factual innocence. See Nousley v.  
20 United States, 523 U.S. 614, 623 (1998) (actual innocence refers to factual innocence and not  
21 mere legal insufficiency). Thus, the court finds Section 2255's escape hatch is not available.<sup>1</sup>

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23 <sup>1</sup> The court notes that the Middle District of Pennsylvania has already denied Petitioner's request for relief  
24 pursuant to Section 2241 on this same issue. The court found as follows:  
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26 In this case, Knight has failed to present any allegations suggesting that he was not involved in the  
27 alleged underlying criminal activity. Knight's sentencing related claim, namely, that the amount of  
28 restitution was improperly calculated, has nothing to do with the actual question of Petitioner's  
guilt. Finally, because his present claim was previously asserted in an application for leave to file a  
second or successive § 2255 petition, does not warrant a determination that Knight's § 2255  
remedy is inadequate or unavailable.

27 Knight v. U.S., 2005 WL 2216830, \*3, No. 3:CV-05-1803 (M.D.Pa. 2005). In addition, The Third Circuit has  
28 denied Petitioner relief through mandamus, finding that there is no indication from the corrected judgment that the  
District Court intended to reduce the amount of loss for sentencing purposes. In re Knight, 278 Fed.Appx. 169, 171,  
2008 WL 2175304, \*1, No. 08-1821 (3<sup>rd</sup> Cir. 2008).

1 Accordingly, IT IS HEREBY ORDERED that:

2 1. The Findings and Recommendation issued February 4, 2009, is ADOPTED IN  
3 FULL;

4 2. The Petition for Writ of Habeas Corpus is DISMISSED;

5 3. The Clerk of the Court is DIRECTED to close this action. This terminates this  
6 action in its entirety; and,

7 4. All pending motions are DENIED as moot.

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9 IT IS SO ORDERED.

10 Dated: April 16, 2009

11 /s/ Anthony W. Ishii  
12 CHIEF UNITED STATES DISTRICT JUDGE