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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DONALD E. WISHART,)	1:09-CV-01118 LJO SMS HC
)	
Petitioner,)	ORDER DISMISSING PETITION FOR WRIT
)	OF HABEAS CORPUS
v.)	
)	ORDER DIRECTING CLERK OF COURT
)	TO ENTER JUDGMENT AND CLOSE CASE
NEIL H. ADLER,)	
)	ORDER DECLINING ISSUANCE OF
Respondent.)	CERTIFICATE OF APPEALABILITY

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

Petitioner is challenging 2002 federal convictions of failing to file tax returns and violations of 18 U.S.C. § 287, 18 U.S.C. § 1341, and 26 U.S.C. § 7212. (Pet. at 36.) At the time of filing, Petitioner was in the custody of the Bureau of Prisons at the Taft Correctional Institution, but he has since been released from prison.

On June 25, 2009, Petitioner filed the instant petition for writ of habeas corpus.

DISCUSSION

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

1 F.2d 840, 842 (5th Cir.1980).

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

9 In this case, despite his protestations to the contrary, Petitioner is attacking the conviction and
10 sentence, not the manner, location, or conditions of the sentence's execution. He argues he is actually
11 innocent of several counts. He complains of errors in the indictment, trial and sentencing. He
12 requests that certain counts be vacated. He also complains of ineffective assistance of counsel, a
13 conflict of interest by the trial court, and abuse of discretion by the trial court. Because Petitioner is
14 challenging his conviction and sentence, he must pursue his claims in the sentencing court via a
15 motion to vacate, set aside, or correct the sentence pursuant to 28 U.S.C. § 2255.

16 In rare situations, a federal prisoner authorized to seek relief under § 2255 may seek relief
17 under § 2241 *if* he can show “the remedy by motion [under § 2255] is inadequate or ineffective to
18 test the validity of his detention.” Ivy v. Pontesso, 328 F.3d 1057, 1059 (9th Cir.2003) (quoting
19 § 2255); United States v. Pirro, 104 F.3d 297, 299 (9th Cir.1997). Although there is little guidance
20 from any court on when § 2255 is an inadequate or ineffective remedy, the Ninth Circuit has
21 recognized that it is a very narrow exception. Ivy, 328 F.3d at 1059; Pirro, 104 F.3d at 299; Aronson
22 v. May, 85 S.Ct. 3, 5 (1964) (a court’s denial of a prior § 2255 motion is insufficient to render §
23 2255 inadequate.); Tripati, 843 F.2d at 1162-63 (9th Cir.1988) (a petitioner's fears of bias or
24 unequal treatment do not render a § 2255 petition inadequate); Williams v. Heritage, 250 F.2d 390
25 (9th Cir.1957); Hildebrandt v. Swope, 229 F.2d 582 (9th Cir.1956). The burden is on the petitioner
26 to show that the remedy is inadequate or ineffective. Redfield v. United States, 315 F.2d 76, 83 (9th
27 Cir. 1963).

28 In this case, Petitioner claims § 2255 is inadequate and ineffective. The Ninth Circuit has

1 provided little guidance on what constitutes “inadequate and ineffective” in relation to the savings
2 clause but has acknowledged that “[o]ur sister circuits, however, have held that § 2255 provides an
3 “inadequate or ineffective” remedy (and thus that the petitioner may proceed under § 2241) when the
4 petitioner claims to be: (1) legally innocent of the crime for which he has been convicted; and, (2)
5 has never had an “unobstructed procedural shot” at presenting this claim.” Ivy, 328 F.3d at 1059-60,
6 *citing Lorentsen v. Hood*, 223 F.3d 950, 954 (9th Cir.2000) (internal citations omitted). “In other
7 words, it is not enough that the petitioner is presently barred from raising his claim of innocence by
8 motion under § 2255. He must never have had the opportunity to raise it by motion.” Id. In this case,
9 Petitioner states he has not sought relief in the sentencing court with a motion pursuant to § 2255. He
10 claims doing so would be impractical because he believes the sentencing court will refuse to hold a
11 hearing with Petitioner present. (Pet. at 51-52.) This argument is meritless. First, his belief that the
12 court will not hold a hearing is completely speculative. Second, whether or not the Court will hold a
13 hearing on the § 2255 motion has no bearing on the inadequacy or ineffectiveness of the remedy. The
14 bottom line is that Petitioner has a remedy available to him by way of a motion under § 2255.

15 Therefore, the petition will be dismissed.

16 Certificate of Appealability

17 A petitioner seeking a writ of habeas corpus has no absolute entitlement to appeal a district
18 court’s denial of his petition, and an appeal is only allowed in certain circumstances. Miller-El v.
19 Cockrell, 123 S.Ct. 1029, 1039 (2003). The controlling statute in determining whether to issue a
20 certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

21 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a
22 district judge, the final order shall be subject to review, on appeal, by the court
of appeals for the circuit in which the proceeding is held.

23 (b) There shall be no right of appeal from a final order in a proceeding to test the
24 validity of a warrant to remove to another district or place for commitment or trial
a person charged with a criminal offense against the United States, or to test the
25 validity of such person’s detention pending removal proceedings.

26 (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an
appeal may not be taken to the court of appeals from—

27 (A) the final order in a habeas corpus proceeding in which the
28 detention complained of arises out of process issued by a State
court; or

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(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

If a court denies a petitioner’s petition, the court may only issue a certificate of appealability “if jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” Miller-El, 123 S.Ct. at 1034; Slack v. McDaniel, 529 U.S. 473, 484 (2000). While the petitioner is not required to prove the merits of his case, he must demonstrate “something more than the absence of frivolity or the existence of mere good faith on his . . . part.” Miller-El, 123 S.Ct. at 1040.

In the present case, the Court finds that reasonable jurists would not find the Court’s determination that Petitioner is not entitled to federal habeas corpus relief debatable, wrong, or deserving of encouragement to proceed further. Petitioner has not made the required substantial showing of the denial of a constitutional right. Accordingly, the Court hereby DECLINES to issue a certificate of appealability.

ORDER

Accordingly, IT IS HEREBY ORDERED:

- 1) The petition for writ of habeas corpus is DISMISSED for failure to allege grounds that would entitle Petitioner to relief under 28 U.S.C. § 2241;
- 2) The Clerk of Court is DIRECTED to enter judgment and close the case;
- 3) The Court DECLINES to issue a certificate of appealability.

IT IS SO ORDERED.

Dated: April 16, 2010

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE