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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MESA RITH,

1:10-CV-01035 GSA HC

Petitioner,

FINDINGS AND RECOMMENDATION
REGARDING PETITION FOR WRIT OF
HABEAS CORPUS

v.

HECTOR A. RIOS, JR., Warden,

Respondent.

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

BACKGROUND¹

Petitioner is currently incarcerated at the United States Penitentiary in Atwater, California. He challenges his guilty plea and sentence in the United States District Court for the District of Utah for assault on a federal officer. He was sentenced under the Armed Career Criminal Act (“ACCA”) to 96 months imprisonment.

Following his conviction, on August 26, 2004, Petitioner filed a motion to vacate, set aside or correct the sentence pursuant to 28 U.S.C. § 2255 in the sentencing court, which was

¹This information was derived from the petition for writ of habeas corpus.

1 denied on May 19, 2005.² Petitioner appealed to the Tenth Circuit Court of Appeals, and the
2 appeal was denied.

3 Petitioner filed the instant petition for writ of habeas corpus on June 9, 2010. Petitioner
4 argues that his prior conviction for possession of an unregistered sawed-off shotgun was not a
5 “violent felony” under the ACCA. He contends that he is actually innocent of the ACCA
6 sentencing designation because he has not suffered two prior violent felony or serious drug
7 offenses.

8 DISCUSSION

9 A federal prisoner who wishes to challenge the validity or constitutionality of his federal
10 conviction or sentence must do so by way of a motion to vacate, set aside, or correct the sentence
11 under 28 U.S.C. § 2255. Tripati v. Henman, 843 F.2d 1160, 1162 (9th Cir.1988); see also
12 Stephens v. Herrera, 464 F.3d 895, 897 (9th Cir.2006), cert. denied, 549 U.S. 1313 (2007);
13 Thompson v. Smith, 719 F.2d 938, 940 (8th Cir.1983); In re Dorsainvil, 119 F.3d 245, 249 (3rd
14 1997); Broussard v. Lippman, 643 F.2d 1131, 1134 (5th Cir.1981). In such cases, *only the*
15 *sentencing court has jurisdiction*. Tripati, 843 F.2d at 1163. A prisoner may not collaterally
16 attack a federal conviction or sentence by way of a petition for a writ of habeas corpus pursuant
17 to 28 U.S.C. § 2241. Grady v. United States, 929 F.2d 468, 470 (9th Cir.1991); Tripati, 843 F.2d
18 at 1162; see also United States v. Flores, 616 F.2d 840, 842 (5th Cir.1980).

19 In contrast, a prisoner challenging the manner, location, or conditions of that sentence's
20 execution must bring a petition for writ of habeas corpus under 28 U.S.C. § 2241 in the district
21 where the petitioner is in custody. Stephens, 464 F.3d at 897; Hernandez v. Campbell, 204 F.3d
22 861, 864-65 (9th Cir.2000) (per curiam); Brown v. United States, 610 F.2d 672, 677 (9th Cir.
23 1990); Capaldi v. Pontesso, 135 F.3d 1122, 1123 (6th Cir. 1998); United States v. Tubwell, 37
24 F.3d 175, 177 (5th Cir. 1994); Kingsley v. Bureau of Prisons, 937 F.2d 26, 30 n.5 (2nd Cir.

25
26 ²The Court takes judicial notice of Mesa Rith v. United States, Case No. 2:04-cv-00787-TC (D. Utah 2004).
27 This Court “may take notice of proceedings in other courts, both within and without the federal judicial system, if
28 those proceedings have a direct relation to matters at issue.” U.S. ex rel. Robinson Rancheria Citizens Council v.
Borneo, Inc., 971 F.2d 244 (9th Cir.1992); see also MGIC Indem. Co. v. Weisman, 803 F.2d 500, 505 (9th Cir. 1986);
United States v. Wilson, 631 F.2d 118, 119 (9th cir. 1980).

1 1991); United States v. Jalili, 925 F.2d 889, 893-94 (6th Cir. 1991); Barden v. Keohane, 921 F.2d
2 476, 478-79 (3rd Cir. 1991); United States v. Hutchings, 835 F.2d 185, 186-87 (8th Cir. 1987).
3 “The general rule is that a motion under 28 U.S.C. § 2255 is the exclusive means by which a
4 federal prisoner may test the legality of his detention, and that restrictions on the availability of a
5 § 2255 motion cannot be avoided through a petition under 28 U.S.C. § 2241.” Stephens, 464
6 F.3d at 897 (citations omitted).

7 As Petitioner acknowledges, an exception exists by which a federal prisoner may seek
8 relief under § 2241 *if* he can demonstrate the remedy available under § 2255 to be "inadequate or
9 ineffective to test the validity of his detention." United States v. Pirro, 104 F.3d 297, 299 (9th
10 Cir.1997) (quoting § 2255); see Hernandez, 204 F.3d at 864-65. The Ninth Circuit has
11 recognized that it is a very narrow exception. Ivy v. Pontesso, 328 F.3d 1057, 59 (9th Cir.) (as
12 amended), cert. denied, 540 U.S. 1051 (2003). The remedy under § 2255 usually will not be
13 deemed inadequate or ineffective merely because a prior § 2255 motion was denied, or because a
14 remedy under that section is procedurally barred. See Aronson v. May, 85 S.Ct. 3, 5 (1964) (a
15 court’s denial of a prior § 2255 motion is insufficient to render § 2255 inadequate.); Tripati, 843
16 F.2d at 1162-63 (a petitioner's fears of bias or unequal treatment do not render a § 2255 petition
17 inadequate); Williams v. Heritage, 250 F.2d 390 (9th Cir.1957); Hildebrandt v. Swope, 229 F.2d
18 582 (9th Cir.1956).

19 The Ninth Circuit has provided little guidance on what constitutes “inadequate and
20 ineffective” in relation to the savings clause. It has acknowledged that “[other] circuits, however,
21 have held that Section 2255 provides an ‘inadequate and ineffective’ remedy (and thus that the
22 petitioner may proceed under Section 2241) when the petitioner claims to be: (1) factually
23 innocent of the crime for which he has been convicted; and, (2) has never had an ‘unobstructed
24 procedural shot’ at presenting this claim .” Ivy, 328 F.3d at 1059-60, citing Lorentsen v. Hood,
25 223 F.3d 950, 954 (9th Cir.2000)); see also Stephens, 464 F.3d at 898. The burden is on the
26 petitioner to show that the remedy is inadequate or ineffective. Redfield v. United States, 315
27 F.2d 76, 83 (9th Cir.1963).

28 In this case, Petitioner is challenging the validity and constitutionality of his federal

1 sentence imposed by the United States District Court for the District of Utah, rather than an error
2 in the administration of his sentence. Therefore, the appropriate procedure would be to file a
3 motion pursuant to § 2255 in the District of Utah, not a habeas petition pursuant to § 2241 in this
4 Court.

5 Petitioner argues, however, that § 2255 is inadequate and ineffective, because he had
6 already filed a § 2255 motion by the time the Supreme Court decided Haste v. United States, 553
7 U.S. 1001 (2008), Chambers v. United States, ___ U.S. ___, 129 S.Ct. 687 (2009), and Begay v.
8 United States, 553 U.S. 137 (2008). Therefore, he argues, he could not have filed a § 2255
9 challenge to the ACCA sentencing enhancement because those cases had not yet been decided.
10 However, this does not render the remedy of § 2255 inadequate or ineffective.

11 Under the AEDPA, a prisoner may not bring a second or successive Section 2255 motion
12 in district court unless “a panel of the appropriate court of appeals” certifies that the motion
13 contains: (1) newly discovered evidence that, if proven and viewed in light of the evidence as a
14 whole, would be sufficient to establish by clear and convincing evidence that no reasonable
15 factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional
16 law, made retroactive to cases on collateral review by the Supreme Court, that was previously
17 unavailable. 28 U.S.C. § 2255; see Harrison v. Ollison, 519 F.3d 952, 955 (9th Cir.2008).

18 Petitioner fails to meet either of these requirements. First, newly discovered evidence is not at
19 issue in this case. Second, Petitioner does not cite to any cases, and the Court has found none,
20 finding that the United States Supreme Court decisions upon which Petitioner's claims are based,
21 are “new rules” of constitutional law that are retroactively applicable. Accordingly, it appears
22 that Petitioner does not qualify to file a successive Section 2255 motion.

23 Nevertheless, Petitioner's inability to meet the statutory requirements for filing a
24 successive Section 2255 motion does not automatically render the remedy under Section 2255
25 inadequate or ineffective. See Moore v. Reno, 185 F.3d 1054, 1055 (9th Cir.1999) (concluding
26 that a Section 2255 movant may not avoid the limitations imposed on successive petitions by
27 styling his petition as one pursuant to Section 2241 rather than Section 2255, and that the
28 AEDPA required dismissal of petitioner's successive Section 2255 motion because his claim was

1 based neither on a new rule of constitutional law made retroactive by the Supreme Court nor on
2 new evidence). To the extent Petitioner argues that his only remedy is to pursue his claims via a
3 habeas petition pursuant to Section 2241 because a panel of the Tenth Circuit would refuse to
4 certify a second or successive motion under Section 2255, Petitioner's argument fails. Section
5 2241 “is not available under the inadequate-or-ineffective-remedy escape hatch of [Section] 2255
6 merely because the court of appeals refuses to certify a second or successive motion under the
7 gatekeeping provisions of [Section] 2255.” Lorentsen, 223 F.3d at 953. Further, as previously
8 stated, the remedy under Section 2255 usually will not be deemed inadequate or ineffective
9 merely because a previous Section 2255 motion was denied, or because a remedy under that
10 section is procedurally barred. Id. at 953 (stating that the general rule in the Ninth Circuit is that
11 “the ban on unauthorized second or successive petitions does not per se make § 2255 ‘inadequate
12 or ineffective’ ”); see also United States v. Valdez-Pacheco, 237 F.3d 1077 (9th Cir.2001)
13 (procedural limits on filing second or successive Section 2255 motion may not be circumvented
14 by invoking the All Writs Act, 28 U.S.C. § 1651); Moore, 185 F.3d at 1055 (rejecting petitioner's
15 argument that Section 2255 remedy was ineffective because he was denied permission to file a
16 successive Section 2255 motion, and stating that dismissal of a subsequent Section 2255 motion
17 does not render federal habeas relief an ineffective or inadequate remedy); Tripati, 843 F.2d at
18 1162-63.

19 Moreover, Petitioner has failed to demonstrate that his claims qualify under the savings
20 clause of Section 2255 because Petitioner's claims are not proper claims of “actual innocence.” In
21 the Ninth Circuit, a claim of actual innocence for purposes of the Section 2255 savings clause is
22 tested by the standard articulated by the United States Supreme Court in Bousley v. United
23 States, 523 U.S. 614 (1998). Stephens, 464 U.S. at 898. In Bousley, the Supreme Court explained
24 that, “[t]o establish actual innocence, petitioner must demonstrate that, in light of all the
25 evidence, it is more likely than not that no reasonable juror would have convicted him.” Bousley,
26 523 U.S. at 623 (internal quotation marks omitted). Petitioner bears the burden of proof on this
27 issue by a preponderance of the evidence, and he must show not just that the evidence against
28 him was weak, but that it was so weak that “no reasonable juror” would have convicted him.

1 Lorensen, 223 F.3d at 954.

2 In this case, Petitioner does not assert that he is factually innocent of the crime for which
3 he was convicted. Rather, he claims that, for sentencing purposes, he does not have the requisite
4 qualifying prior “violent felony” convictions and, thus, he is actually innocent of being
5 designated a “Career Offender” based on his prior conviction for ‘unlawful possession of an
6 unregistered sawed-off shotgun.’ Pet. at 14 (citation omitted). Under the savings clause,
7 however, Petitioner must demonstrate that he is factually innocent of the crime for which he has
8 been convicted, not the sentence imposed. See Ivy, 328 F.3d at 1060; Lorensen, 223 F.3d at 954
9 (to establish jurisdiction under Section 2241, petitioner must allege that he is “‘actually innocent’
10 of the crime of conviction”); Edwards v. Daniels, 2006 U.S. Dist. LEXIS 94750, at *7, 2006 WL
11 3877525 (D.Or.2006) (“Petitioner's assertion that he is actually innocent of a portion of his
12 sentence does not qualify him for the ‘escape hatch’ of § 2255 because he must allege that he is
13 ‘legally innocent of the crime for which he has been convicted,’ not the sentence imposed.”),
14 adopted by Edwards v. Daniels, 2007 U.S. Dist. LEXIS 12356, 2007 WL 608115 (D.Or.2007).
15 Therefore, the instant § 2241 petition does not fit within the exception to the general bar against
16 using Section 2241 to collaterally attack a conviction or sentence imposed by a federal court. See
17 Lorensen, 223 F.3d at 954 (declining to decide whether federal prisoners who are actually
18 innocent may resort to Section 2241 when relief is not available under Section 2255 because the
19 petitioner had not shown actual innocence); see also Stephens, 464 F.3d at 898-99 (concluding
20 that, although petitioner satisfied the requirement of not having had an “unobstructed procedural
21 shot” at presenting his instructional error claim under Richardson v. United States, 526 U.S. 813,
22 119 (1999) because the claim did not become available until Richardson was decided eight years
23 after his first Section 2255 motion had been denied and the claim did not satisfy the requirements
24 for a second or successive Section 2255 motion, petitioner could not satisfy the actual innocence
25 requirement as articulated in Bousley and, thus, failed to properly invoke the escape hatch
26 exception of Section 2255); Harrison, 519 F.3d at 959 (“[A] motion meets the escape hatch
27 criteria of § 2255 ‘when a petitioner (1) makes a claim of actual innocence, and (2) has not had
28 an unobstructed procedural shot at presenting that claim.’”).

