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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

WESLEY WILLIAM BOWMAN,)	1:11-cv-00440-SKO-HC
)	
Petitioner,)	ORDER DENYING PETITIONER'S MOTION
)	FOR RELIEF FROM THE JUDGMENT
)	(DOC. 9)
v.)	
)	ORDER DECLINING TO ISSUE A
H. A. RIOS, Warden,)	CERTIFICATE OF APPEALABILITY
)	
Respondent.)	
)	
)	

Petitioner is a federal prisoner who proceeded pro se in a habeas corpus action pursuant to 28 U.S.C. § 2241. Pursuant to 28 U.S.C. § 636(c)(1), Petitioner consented to the jurisdiction of the United States Magistrate Judge to conduct all further proceedings in the case, including the entry of final judgment, by manifesting consent in a signed writing filed by Petitioner on March 23, 2011 (doc. 5). On April 8, 2011, the Court dismissed the petition for lack of jurisdiction, declined to issue a certificate of appealability, and entered judgment pursuant to

1 the order of dismissal.

2 Pending before the Court is Petitioner's motion for relief
3 from the judgment pursuant to Fed. R. Civ. P. 60(b)(4), which was
4 filed on May 13, 2011. Petitioner contends that the judgment was
5 void due to plain error as he was actually or factually innocent
6 of the legal requirements for enhancement of his sentence because
7 one prior conviction of tampering with an automobile was not a
8 crime of violence as found by the sentencing court.

9 I. Motion for Relief from the Judgment of Dismissal

10 A. Legal Standards

11 Fed. R. Civ. P. 60 applies to habeas proceedings only to the
12 extent that application is not inconsistent with the applicable
13 federal statutes and rules. Gonzalez v. Crosby, 545 U.S. 524,
14 529 (2005) (challenge to dismissal of a § 2254 petition for
15 untimeliness).

16 Here, Petitioner challenges the Court's determination that
17 dismissal of the §2241 petition was required because Petitioner
18 had not shown that his remedy pursuant to 28 U.S.C. § 2255 was
19 inadequate or ineffective. The Court will assume that Rule 60(b)
20 is appropriately applied in Petitioner's case.

21 Federal Rule of Civil Procedure 60(b) governs the
22 reconsideration of final orders of the district court. The rule
23 permits a district court to relieve a party from a final order or
24 judgment on various grounds, including 1) mistake, inadvertence,
25 surprise, or excusable neglect; 2) newly discovered evidence;
26 3) fraud or misconduct by an opposing party; 4) a void judgment;
27 5) a satisfied judgment; or 6) any other reason that justifies
28 relief from the judgment. Fed. R. Civ. P. 60(b). The motion for

1 reconsideration must be made within a reasonable time, and with
2 respect to the first three grounds, no more than a year after the
3 entry of the judgment, order, or proceeding. Fed. R. Civ. P.
4 60(c). Motions to reconsider are committed to the discretion of
5 the trial court. Combs v. Nick Garin Trucking, 825 F.2d 437, 441
6 (D.C.Cir. 1987); Rodgers v. Watt, 722 F.2d 456, 460 (9th Cir.
7 1983) (en banc). To succeed, a party must set forth facts or law
8 of a strongly convincing nature to induce the Court to reverse
9 its prior decision. See, e.g., Kern-Tulare Water Dist. v. City
10 of Bakersfield, 634 F.Supp. 656, 665 (E.D.Cal. 1986), aff'd in
11 part and rev'd in part on other grounds, 828 F.2d 514 (9th Cir.
12 1987), cert. denied, 486 U.S. 1015 (1988). The Ninth Circuit has
13 stated that "[c]lause 60(b)(6) is residual and 'must be read as
14 being exclusive of the preceding clauses.'" LaFarge Conseils et
15 Etudes, S.A. v. Kaiser Cement, 791 F.2d 1334, 1338 (9th Cir.
16 1986) (quoting Corex Corp. v. United States, 638 F.2d 119 (9th
17 Cir. 1981)). Accordingly, "the clause is reserved for
18 'extraordinary circumstances.'" Id.

19 Further, when filing a motion for reconsideration, Local
20 Rule 230(j) requires a party to show the "what new or different
21 facts or circumstances are claimed to exist which did not exist
22 or were not shown upon such prior motion, or what other grounds
23 exist for the motion," as well as "why the facts or circumstances
24 were not shown at the time of the prior motion."

25 B. Facts

26 Here, Petitioner alleged that he was an inmate of the United
27 States Penitentiary at Atwater, California (USPA) who challenged
28 his sentence of one hundred (100) months imposed in case number

1 06-00037-01-CR-W-HFS on September 5, 2006, by the United States
2 District Court for the Western District of Missouri upon
3 Petitioner's conviction of being a felon in possession of a
4 firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924 (a)(2).
5 (Pet. 6-7.) Petitioner alleged that the sentencing court
6 enhanced his sentence for having two prior convictions for a
7 crime of violence or a controlled substance offense, when in fact
8 Petitioner had only one such predicate conviction. (Pet. 6.)
9 Petitioner alleged that he was "factually innocent" of the legal
10 requirements for the enhanced sentence because one prior
11 conviction of tampering with an automobile was not a crime of
12 violence as found by the sentencing court. Petitioner prayed
13 that his sentence be vacated and that his case be remanded for
14 resentencing based on only one prior conviction for a controlled
15 substance offense.

16 Petitioner admitted that prison officials could not grant
17 the relief he requested. (Pet. 3.) He further indicated that he
18 had not filed previous petitions under 28 U.S.C. §§ 2241 or 2255.
19 (Pet. 4.)

20 C. Analysis

21 A federal prisoner who wishes to challenge his conviction or
22 sentence on the ground it was imposed in violation of the
23 Constitution or laws of the United States or was otherwise
24 subject to collateral attack must do so by way of a motion to
25 vacate, set aside, or correct the sentence under 28 U.S.C.
26 § 2255. 28 U.S.C. § 2255; Stephens v. Herrera, 464 F.3d 895, 897
27 (9th Cir. 2006); Tripati v. Henman, 843 F.2d 1160, 1162 (9th Cir.
28 1988). In such cases, the motion must be filed in the district

1 where the defendant was sentenced because only the sentencing
2 court has jurisdiction. Hernandez v. Campbell, 204 F.3d 861, 864
3 (9th Cir. 2000); Tripati, 843 F.2d at 1163. Generally, a
4 prisoner may not collaterally attack a federal conviction or
5 sentence by way of a petition for a writ of habeas corpus
6 pursuant to 28 U.S.C. § 2241. Stephens v. Herrera, 464 F.3d 895,
7 897 (9th Cir. 2006); Tripati, 843 F.2d at 1162.

8 In contrast, a federal prisoner challenging the manner,
9 location, or conditions of that sentence's execution must bring a
10 petition for writ of habeas corpus under 28 U.S.C. § 2241. Brown
11 v. United States, 610 F.2d 672, 677 (9th Cir. 1990).

12 A federal prisoner authorized to seek relief under § 2255
13 may seek relief under § 2241 only if he can show that the remedy
14 available under § 2255 is "inadequate or ineffective to test the
15 legality of his detention." United States v. Pirro, 104 F.3d
16 297, 299 (9th Cir. 1997) (quoting § 2255). Although there is
17 little guidance on when § 2255 is an inadequate or ineffective
18 remedy, the Ninth Circuit has recognized that the exception is
19 narrow. Id; Moore v. Reno, 185 F.3d 1054, 1055 (9th Cir. 1999)
20 (dismissal of a successive motion pursuant to § 2255 did not
21 render such motion procedure an ineffective or inadequate remedy
22 so as to authorize a federal prisoner to seek habeas relief);
23 Aronson v. May, 85 S.Ct. 3, 5 (1964) (denial of a prior § 2255
24 motion is insufficient to render § 2255 inadequate); Tripati, 843
25 F.2d at 1162-63 (9th Cir. 1988) (a petitioner's fears of bias or
26 unequal treatment do not render a § 2255 petition inadequate);
27 see, United States v. Valdez-Pacheco, 237 F.3d 1077 (9th Cir.
28 2001) (procedural requirements of § 2255 may not be circumvented

1 by filing a petition for writ of audita querela pursuant to the
2 All Writs Act, 28 U.S.C. § 1651). The burden is on the
3 petitioner to show that the remedy is inadequate or ineffective.
4 Redfield v. United States, 315 F.2d 76, 83 (9th Cir. 1963). If a
5 petitioner proceeding pursuant to § 2241 fails to meet the burden
6 of demonstrating that the § 2255 remedy is inadequate or
7 ineffective, then the § 2241 petition will be dismissed for lack
8 of jurisdiction. Ivy v. Pontesso, 328 F.3d 1057, 1061 (9th Cir.
9 2003).

10 In this case, Petitioner challenged his underlying sentence
11 because of the sentencing court's use of prior convictions in
12 determining the length of the sentence. Because Petitioner was
13 alleging errors in his sentence, and not errors in the
14 administration of his sentence, the Court correctly concluded
15 that Petitioner was not entitled to relief under § 2241. In
16 addition, Petitioner made no express claim that § 2255 was
17 inadequate or ineffective. Therefore, it appeared that
18 § 2255 remained available to Petitioner.

19 Petitioner urges that he was factually innocent of the legal
20 requirements for the enhanced sentence because one prior
21 conviction of tampering with an automobile was not a crime of
22 violence as found by the sentencing court. He relies on out of
23 circuit cases which have granted relief based on a showing of
24 factual innocence of sentencing enhancements, as distinct from a
25 showing of factual innocence of the offense or offenses for which
26 the petitioner was sentenced. However, even assuming that
27 § 2255 was otherwise unavailable to Petitioner, he did not
28 establish actual innocence sufficient to permit him to proceed

1 pursuant to § 2241.

2 Although authority in this circuit is limited, it is
3 recognized that the § 2255 remedy is inadequate and ineffective.
4 Thus a petition pursuant to § 2241 is available, when the
5 petitioner 1) claims to be factually innocent of the crime for
6 which he has been convicted, and 2) has never had an
7 “unobstructed procedural shot” at presenting the claim. Stephens
8 v. Herrera, 464 F.3d 895, 898 (9th Cir. 2006). In this circuit,
9 a claim of actual innocence for purposes of the “escape hatch” of
10 § 2255 is assessed by the test stated in Bousley v. United
11 States, 523 U.S. 614, 623 (1998), which in turn requires that the
12 petitioner demonstrate that in light of all the evidence, it is
13 more likely than not that no reasonable juror would have
14 convicted him. Stephens, 464 F.3d 895, 898.

15 Here, Petitioner does not allege or demonstrate that in
16 light of all the evidence, it is more likely than not that no
17 reasonable juror would have convicted him. Instead, Petitioner
18 alleges only that he was factually innocent with respect to
19 findings concerning prior convictions considered for sentencing.
20 Thus, Petitioner has not established actual innocence as defined
21 by Bousley v. United States, and thus he has not met the standard
22 required in this circuit. Stephens v. Herrera, 464 F.3d at 898;
23 Lorentsen v. Hood, 223 F.3d at 954; see, Rith v. Rios, No. 1:10-
24 CV-01035 GSA HC, 2010 WL 2546052, *3-*4 (E.D.Cal. 2010).

25 The cases from outside this circuit on which Petitioner
26 relies are not determinative. All federal circuit courts are
27 courts of equal stature; one circuit’s decisions are not binding
28 on other circuits. However, circuit authority generally binds

1 all courts within a particular circuit, including the court of
2 appeals itself, until it is overruled by the court itself sitting
3 en banc, or by the Supreme Court. Hart v. Massanari, 266 F.3d
4 1155, 1171 (9th Cir. 2001).

5 Because the dismissal of the petition was effected in
6 accordance with the precedent of this circuit, the judgment of
7 dismissal was not void. Petitioner's motion for relief from the
8 judgment will be denied.

9 II. Certificate of Appealability

10 Unless a circuit justice or judge issues a certificate of
11 appealability, an appeal may not be taken to the Court of Appeals
12 from the final order in a proceeding under section 2255. 28
13 U.S.C. § 2253(c)(1)(B); Hohn v. United States, 524 U.S. 236, 239-
14 40 (1998). Appeal from a proceeding that is nominally undertaken
15 pursuant to 28 U.S.C. § 2241, but which is really a successive
16 application under § 2255, requires a certificate of
17 appealability. Porter v. Adams, 244 F.3d 1006, 1007 (9th Cir.
18 2001).

19 It appears from the face of Petitioner's § 2241 petition
20 that Petitioner is raising claims attacking only the legality of
21 his sentence, and not the execution of his sentence.

22 A certificate of appealability may issue only if the
23 applicant makes a substantial showing of the denial of a
24 constitutional right. § 2253(c)(2). Under this standard, a
25 petitioner must show that reasonable jurists could debate whether
26 the petition should have been resolved in a different manner or
27 that the issues presented were adequate to deserve encouragement
28 to proceed further. Miller-El v. Cockrell, 537 U.S. at 336

1 (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)). A
2 certificate should issue if the Petitioner shows that jurists of
3 reason would find it debatable whether the petition states a
4 valid claim of the denial of a constitutional right and that
5 jurists of reason would find it debatable whether the district
6 court was correct in any procedural ruling. Slack v. McDaniel,
7 529 U.S. 473, 483-84 (2000).

8 In determining this issue, a court conducts an overview of
9 the claims in the habeas petition, generally assesses their
10 merits, and determines whether the resolution was debatable among
11 jurists of reason or wrong. Id. It is necessary for an
12 applicant to show more than an absence of frivolity or the
13 existence of mere good faith; however, it is not necessary for an
14 applicant to show that the appeal will succeed. Miller-El v.
15 Cockrell, 537 U.S. at 338.

16 A district court must issue or deny a certificate of
17 appealability when it enters a final order adverse to the
18 applicant. Rule 11(a) of the Rules Governing Section 2254 Cases.

19 Here, it does not appear that reasonable jurists could
20 debate whether the motion should have been resolved in a
21 different manner. Petitioner has not made a substantial showing
22 of the denial of a constitutional right. Accordingly, the Court
23 will decline to issue a certificate of appealability.

24 III. Disposition

25 Accordingly, it is ORDERED that:

26 1) The motion for relief from the judgment of dismissal is
27 DENIED; and

28 2) The Court DECLINES to issue a certificate of

1 appealability.

2

3 IT IS SO ORDERED.

4 **Dated: July 29, 2011**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

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