

1
2
3
4
5
6
7
8
9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF CALIFORNIA

11 HECTOR ROGELIO CASAS-
12 MONTEJANO,
13 *also known as* HECTOR ROGER CASAS,

14 Petitioner,

15 v.

16 ALBERT NAJERA, U.S. MARSHAL,

17 Respondent.
18 _____/

1:11-CV-00524 GSA HC

ORDER DISMISSING PETITION FOR WRIT OF
HABEAS CORPUS

ORDER DIRECTING CLERK OF COURT TO
CLOSE CASE

ORDER DECLINING ISSUANCE OF
CERTIFICATE OF APPEALABILITY

19
20 Petitioner, a federal detainee proceeding pro se, filed the instant Petition for Writ of Habeas
21 Corpus on March 29, 2011. He is currently in the custody of the U.S. Marshal Service at the Fresno
22 County Jail. He has been indicted on charges of unlawful reentry into the United States in United
23 States of America v. Casas-Montejano, No. 1:10-cv-00134 OWW.

24 The instant petition does not pertain to the indictment under which he is currently being
25 detained. Rather, the petition challenges the plea agreement in United States of America v. Casas,
26 2:92-cv-00181-JGD-1. Petitioner claims he pleaded guilty to Counts 1, 3, and 6, "in exchange for
27 dismissal of 3 charges, reduction of the total sentence to less than 5 years, and permanent residency."
28 See Petition at 4. He states he entered into the plea agreement based on Assistant U.S. Attorney

1 Patrick McLaughlin's promise that Petitioner would not be deported. He claims he has fulfilled the
2 terms of the plea agreement by pleading guilty to the three counts and by cooperating with the
3 government as a confidential informant; however, the government has failed to fulfill the terms of
4 the plea agreement by virtue of Petitioner's removal from the United States. Petitioner asks for
5 specific performance of the plea agreement.

6 JURISDICTION

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

17 In contrast, a prisoner challenging the manner, location, or conditions of that sentence's
18 execution must bring a petition for writ of habeas corpus under 28 U.S.C. § 2241 in the district
19 where the petitioner is in custody. Stephens, 464 F.3d at 897; Hernandez v. Campbell, 204 F.3d 861,
20 864-65 (9th Cir.2000) (per curiam); Brown v. United States, 610 F.2d 672, 677 (9th Cir. 1990);
21 Capaldi v. Pontesso, 135 F.3d 1122, 1123 (6th Cir. 1998); United States v. Tubwell, 37 F.3d 175,
22 177 (5th Cir. 1994); Kingsley v. Bureau of Prisons, 937 F.2d 26, 30 n.5 (2nd Cir. 1991); United
23 States v. Jalili, 925 F.2d 889, 893-94 (6th Cir. 1991); Barden v. Keohane, 921 F.2d 476, 478-79 (3rd
24 Cir. 1991); United States v. Hutchings, 835 F.2d 185, 186-87 (8th Cir. 1987). "The general rule is
25 that a motion under 28 U.S.C. § 2255 is the exclusive means by which a federal prisoner may test the
26 legality of his detention, and that restrictions on the availability of a § 2255 motion cannot be
27 avoided through a petition under 28 U.S.C. § 2241." Stephens, 464 F.3d at 897 (citations omitted).

28 Notwithstanding, pursuant to the savings clause in § 2255, a federal prisoner may file a

1 petition pursuant to § 2241 to challenge the conviction and sentence *if* he can show that the remedy
2 available under § 2255 is "inadequate or ineffective to test the validity of his detention." United
3 States v. Pirro, 104 F.3d 297, 299 (9th Cir.1997) (quoting § 2255); see Hernandez, 204 F.3d at 864-
4 65. The Ninth Circuit has recognized that it is a very narrow exception. Ivy v. Pontesso, 328 F.3d
5 1057, 59 (9th Cir.) (as amended), cert. denied, 540 U.S. 1051 (2003). The remedy under § 2255
6 usually will not be deemed inadequate or ineffective merely because a prior § 2255 motion was
7 denied, or because a remedy under that section is procedurally barred. See Aronson v. May, 85 S.Ct.
8 3, 5 (1964) (a court's denial of a prior § 2255 motion is insufficient to render § 2255 inadequate.);
9 Tripathi, 843 F.2d at 1162-63 (a petitioner's fears of bias or unequal treatment do not render a § 2255
10 petition inadequate); Williams v. Heritage, 250 F.2d 390 (9th Cir.1957); Hildebrandt v. Swope, 229
11 F.2d 582 (9th Cir.1956).

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

20 In this case, Petitioner is challenging the validity of his federal conviction and sentence
21 imposed by the United States District Court for the Central District of California. Therefore, the
22 appropriate procedure would be to file a motion pursuant to § 2255 in the Central District, not a
23 habeas petition pursuant to § 2241 in this Court. This Court is without jurisdiction unless Petitioner
24 can demonstrate that he qualifies under the savings clause. He has failed to do so. He does not
25 claim actual innocence and he does not claim that he has been denied an opportunity to present his
26 claims to the Central District. Therefore, the Court lacks jurisdiction to proceed in this matter. The
27 petition must be dismissed. Petitioner is advised that he should seek relief by filing a motion
28 pursuant to 28 U.S.C. § 2255 in the Central District of California.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF APPEALABILITY

A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition, and an appeal is only allowed in certain circumstances. Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003). The controlling statute in determining whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a 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.

(b) There shall be no right of appeal from a final order in a proceeding to test the 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 validity of such person's detention pending removal proceedings.

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

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

(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, 537 U.S. at 327; 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, 537 U.S. at 338.

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

1 certificate of appealability.

2 **ORDER**

3 Accordingly, IT IS HEREBY ORDERED:

- 4 1) The petition for writ of habeas corpus is DISMISSED;
5 2) The Clerk of Court is DIRECTED to enter judgment and close the case; and
6 3) The Court DECLINES to issue a certificate of appealability.

7
8 IT IS SO ORDERED.

9 **Dated: May 10, 2011**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE