

1 The Rules Governing Section 2254 Cases in the United States District Courts (Habeas
2 Rules) are appropriately applied to proceedings undertaken pursuant to 28 U.S.C. § 2241.
3 Habeas Rule 1(b). Habeas Rule 4 requires the Court to make a preliminary review of each
4 petition for writ of habeas corpus. The Court must summarily dismiss a petition "[i]f it plainly
5 appears from the petition and any attached exhibits that the petitioner is not entitled to relief
6 in the district court...." Habeas Rule 4; O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990);
7 see also Hendricks v. Vasquez, 908 F.2d 490 (9th Cir. 1990). Habeas Rule 2(c) requires that
8 a petition 1) specify all grounds of relief available to the Petitioner; 2) state the facts supporting
9 each ground; and 3) state the relief requested. Notice pleading is not sufficient; rather, the
10 petition must state facts that point to a real possibility of constitutional error. Rule 4, Advisory
11 Committee Notes, 1976 Adoption; O'Bremski v. Maass, 915 F.2d at 420 (quoting Blackledge
12 v. Allison, 431 U.S. 63, 75 n. 7, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977)). Allegations in a
13 petition that are vague, conclusory, or palpably incredible are subject to summary dismissal.
14 Hendricks v. Vasquez, 908 F.2d at 491.

15 Further, the Court may dismiss a petition for writ of habeas corpus either on its own
16 motion under Habeas Rule 4, pursuant to the respondent's motion to dismiss, or after an
17 answer to the petition has been filed. Advisory Committee Notes to Habeas Rule 8, 1976
18 Adoption; see, Herbst v. Cook, 260 F.3d 1039, 1042-43 (9th Cir. 2001).

19 **II. JURISDICTION**

20 A federal prisoner who wishes to challenge the validity or constitutionality of his
21 conviction or sentence must do so by way of a motion to vacate, set aside, or correct the
22 sentence under 28 U.S.C. § 2255. Tripati v. Henman, 843 F.2d 1160, 1162 (9th Cir.1988). In
23 such cases, only the sentencing court has jurisdiction. Id. at 1163. A prisoner may not
24 collaterally attack a federal conviction or sentence by way of a petition for a writ of habeas
25 corpus pursuant to 28 U.S.C. § 2241. Hernandez v. Campbell, 204 F.3d 861, 865 (9th Cir.
26 2000) ("Generally, motions to contest the legality of a sentence must be filed under § 2255 in
27 the sentencing court, while petitions that challenge the manner, location, or conditions of a
28 sentence's execution must be brought pursuant to § 2241 in the custodial court."); Tripati, 843

1 F.2d at 1162.

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 Hernandez, 204 F.3d at 865. Here, Petitioner is challenging the validity and constitutionality
5 of his conviction. Therefore, the appropriate procedure would be to file a motion pursuant to
6 § 2255 and not a habeas petition pursuant to § 2241.

7 The Ninth Circuit has recognized a narrow exception allowing a federal prisoner
8 authorized to seek relief under § 2255 to seek relief under § 2241 if the remedy by motion
9 under § 2255 is "inadequate or ineffective to test the validity of his detention." Alaimalo v.
10 United States, 636 F.3d 1092, 1096 (9th Cir. 2011), citing Harrison v. Ollison, 519 F.3d 952,
11 956 (9th Cir. 2008). "This is called the 'savings clause' or 'escape hatch' of § 2255." Id.
12 Furthermore, § 2255 petitions are rarely found to be inadequate or ineffective. Aronson v. May,
13 85 S.Ct. 3, 5, 13 L. Ed. 2d 6 (1964) (a court's denial of a prior § 2255 motion is insufficient to
14 render § 2255 inadequate.); Tripathi, 843 F.2d at 1162-63 (9th Cir.1988) (a petitioner's fears
15 of bias or unequal treatment do not render a § 2255 petition inadequate); Williams v. Heritage,
16 250 F.2d 390 (9th Cir.1957); Hildebrandt v. Swope, 229 F.2d 582 (9th Cir.1956). The burden
17 is on the petitioner to show that the remedy is inadequate or ineffective. Redfield v. United
18 States, 315 F.2d 76, 83 (9th Cir. 1963).

19 The Ninth Circuit has also "held that a § 2241 petition is available under the 'escape
20 hatch' of § 2255 when a petitioner (1) makes a claim of actual innocence, and (2) has not had
21 an 'unobstructed procedural shot' at presenting that claim." Stephens v. Herrera, 464 F.3d
22 895, 898 (9th Cir. 2006).

23 In this case, Petitioner is challenging the validity and constitutionality of his federal
24 sentence imposed by a federal court, rather than an error in the administration of his sentence.
25 Therefore, the appropriate procedure would be to file a motion pursuant to § 2255 in the
26 sentencing court, not a habeas petition pursuant to § 2241 in this Court.

27 **III. PETITIONER IS NOT ENTITLED TO FILE A SECOND § 2255 MOTION**

28 Petitioner argues that § 2255 is inadequate and ineffective because he has already filed

1 a § 2255 motion, and that motion has been denied. Under the AEDPA, a prisoner may not
2 bring a second or successive § 2255 motion in district court unless "a panel of the appropriate
3 court of appeals" certifies that the motion contains: (1) newly discovered evidence that, if
4 proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear
5 and convincing evidence that no reasonable factfinder would have found the movant guilty of
6 the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral
7 review by the Supreme Court, that was previously unavailable. 28 U.S.C. § 2255; see
8 Harrison v. Ollison, 519 F.3d 952, 955 (9th Cir. 2008). Petitioner fails to meet either of these
9 requirements. First, newly discovered evidence is not at issue in this case. Second, Petitioner
10 does not cite to any cases, and the Court has found none, finding that the United States
11 Supreme Court decision in Carachuri-Rosendo v. Holder is a "new rule" of constitutional law
12 that is retroactively applicable. Other district courts have found likewise. See Thomas v.
13 Holland, 2011 U.S. Dist. LEXIS 63423 (E.D. Ky. June 15, 2011) (After describing how the
14 Western District of North Carolina declined to apply Carachuri-Rosendo retroactively, the court
15 held that it "is also unwilling to apply it retroactively to a case on collateral review without
16 further guidance from the Supreme Court or any Courts of Appeal."). Accordingly, it appears
17 that Petitioner does not qualify to file a successive § 2255 motion.

18 Nevertheless, Petitioner's inability to meet the statutory requirements for filing a
19 successive § 2255 motion does not automatically render the remedy under § 2255 inadequate
20 or ineffective. See Moore v. Reno, 185 F.3d 1054, 1055 (9th Cir. 1999) (concluding that a §
21 2255 movant may not avoid the limitations imposed on successive petitions by styling his
22 petition as one pursuant to § 2241 rather than § 2255, and that the AEDPA required dismissal
23 of petitioner's successive § 2255 motion because his claim was based neither on a new rule
24 of constitutional law made retroactive by the Supreme Court nor on new evidence). To the
25 extent Petitioner may argue that his only remedy is to pursue his claim via a habeas petition
26 pursuant to § 2241 because a panel of the court of appeals would refuse to certify a second
27 or successive motion under § 2255, Petitioner's argument fails. § 2241 "is not available under
28 the inadequate-or-ineffective-remedy escape hatch of § 2255 merely because the court of

1 appeals refuses to certify a second or successive motion under the gatekeeping provisions of
2 § 2255." Loretsen v. Hood, 223 F.3d 950, 953 (9th Cir. 2000). Further, as previously stated,
3 the remedy under § 2255 usually will not be deemed inadequate or ineffective merely because
4 a previous § 2255 motion was denied, or because a remedy under that section is procedurally
5 barred. Id. at 953 (stating that the general rule in the Ninth Circuit is that "the ban on
6 unauthorized second or successive petitions does not per se make § 2255 'inadequate or
7 ineffective"); see also United States v. Valdez-Pacheco, 237 F.3d 1077 (9th Cir. 2001)
8 (procedural limits on filing second or successive Section 2255 motion may not be
9 circumvented by invoking the All Writs Act, 28 U.S.C. § 1651); Moore, 185 F.3d at 1055
10 (rejecting petitioner's argument that § 2255 remedy was ineffective because he was denied
11 permission to file a successive § 2255 motion, and stating that dismissal of a subsequent §
12 2255 motion does not render federal habeas relief an ineffective or inadequate remedy);
13 Tripati, 843 F.2d at 1162-63.

14 **IV. PETITIONER IS NOT ENTITLED TO FILE A § 2241 PETITION**

15 The Ninth Circuit has "held that a § 2241 petition is available under the 'escape hatch'
16 of § 2255 when a petitioner makes a claim of actual innocence." Stephens, 464 F.3d at 898.

17 Here, Petitioner has failed to demonstrate that his claims qualify under the savings
18 clause of Section 2255 because Petitioner's claims are not proper claims of "actual
19 innocence." In the Ninth Circuit, a claim of actual innocence for purposes of the § 2255
20 savings clause is tested by the standard articulated by the United States Supreme Court in
21 Bousley v. United States, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998). In
22 Bousley, the Supreme Court explained that, "[t]o establish actual innocence, petitioner must
23 demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror
24 would have convicted him." Bousley, 523 U.S. at 623. Petitioner bears the burden of proof on
25 this issue by a preponderance of the evidence, and he must show not just that the evidence
26 against him was weak, but that it was so weak that "no reasonable juror" would have convicted
27 him. Loretsen, 223 F.3d at 954.

28 In this case, Petitioner does not assert that he is factually innocent of the crime for

1 which he was convicted. Rather, he claims that, for sentencing purposes, he does not have
2 the requisite qualifying prior conviction and, thus, he has been wrongfully sentenced with a
3 ten-year enhancement. Under the savings clause, however, Petitioner must demonstrate that
4 he is factually innocent of the crime for which he has been convicted, not the sentence
5 imposed. See Ivy, 328 F.3d at 1060; Lorentsen, 223 F.3d at 954 (to establish jurisdiction under
6 § 2241, petitioner must allege that he is "'actually innocent' of the crime of conviction");
7 Therefore, the instant § 2241 petition does not fit within the exception to the general bar
8 against using § 2241 to collaterally attack a conviction or sentence imposed by a federal court.
9 See Lorentsen, 223 F.3d at 954 (declining to decide whether federal prisoners who are
10 actually innocent may resort to § 2241 when relief is not available under § 2255 because the
11 petitioner had not shown actual innocence); see also Stephens, 464 F.3d at 898-99
12 (concluding that, although petitioner satisfied the requirement of not having had an
13 "unobstructed procedural shot" at presenting his claim, petitioner could not satisfy the actual
14 innocence requirement as articulated in Bousley and, thus, failed to properly invoke the
15 escape hatch exception of § 2255).

16 Based on the foregoing, the Court finds that Petitioner has not demonstrated § 2255
17 constitutes an "inadequate or ineffective" remedy for raising his claims. Accordingly, § 2241
18 is not the proper avenue for raising Petitioner's claims, and the petition should be dismissed
19 for lack of jurisdiction.

20 **III. RECOMMENDATION**

21 Based on the foregoing, it is HEREBY RECOMMENDED that the petition for writ of
22 habeas corpus be DISMISSED.

23 These Findings and Recommendations are submitted to the assigned United States
24 District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule
25 304 of the Local Rules of Practice for the United States District Court, Eastern District of
26 California. Within thirty (30) days after being served with a copy, Petitioner may file written
27 objections with the Court. Such a document should be captioned "Objections to Magistrate
28 Judge's Findings and Recommendations. The Court will then review the Magistrate Judge's

1 ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). Petitioner is advised that failure to file objections
2 within the specified time may waive the right to appeal the District Court's order. Martinez v.
3 Ylst, 951 F.2d 1153 (9th Cir. 1991).

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IT IS SO ORDERED.

Dated: January 4, 2012

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE