



1 are United States v. Briggs, 623 F.3d 724 (9<sup>th</sup> Cir. 2010), and United States v. Castro, 2012 WL  
2 1552617 (E.D. Cal. May 1, 2012)(unpublished), both of which deal with the quantum of evidence  
3 required to support an enhanced sentence based upon gun possession. For the reasons discussed below,  
4 the Court has no alternative but to dismiss the petition.

## 5 DISCUSSION

### 6 A. General Principles of Habeas Corpus Jurisdiction.

7 A federal court may not entertain an action over which it has no jurisdiction. Hernandez v.  
8 Campbell, 204 F.3d 861, 865 (9<sup>th</sup> Cir. 2000). A federal prisoner who wishes to challenge the validity  
9 or constitutionality of his conviction or sentence must do so by way of a motion to vacate, set aside, or  
10 correct the sentence under 28 U.S.C. § 2255. Tripati v. Henman, 843 F.2d 1160, 1162 (9<sup>th</sup> Cir.1988);  
11 Thompson v. Smith, 719 F.2d 938, 940 (8<sup>th</sup> Cir.1983); In re Dorsainvil, 119 F.3d 245, 249 (3<sup>rd</sup> 1997);  
12 Broussard v. Lippman, 643 F.2d 1131, 1134 (5<sup>th</sup> Cir.1981). In such cases, only the sentencing court  
13 has jurisdiction. Tripati, 843 F.2d at 1163. A prisoner may not collaterally attack a federal conviction  
14 or 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 (9<sup>th</sup> Cir.1991); Tripati, 843 F.2d at 1162; see also United States v.  
16 Flores, 616 F.2d 840, 842 (5<sup>th</sup> Cir.1980).

17 In contrast, a federal 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. Capaldi v. Pontesso,  
19 135 F.3d 1122, 1123 (6<sup>th</sup> Cir. 1998); United States v. Tubwell, 37 F.3d 175, 177 (5<sup>th</sup> Cir. 1994);  
20 Kingsley v. Bureau of Prisons, 937 F.2d 26, 30 n.5 (2<sup>nd</sup> Cir. 1991); United States v. Jalili, 925 F.2d 889,  
21 893-94 (6<sup>th</sup> Cir. 1991); Barden v. Keohane, 921 F.2d 476, 478-79 (3<sup>rd</sup> Cir. 1991); United States v.  
22 Hutchings, 835 F.2d 185, 186-87 (8<sup>th</sup> Cir. 1987); Brown v. United States, 610 F.2d 672, 677 (9<sup>th</sup> Cir.  
23 1990).

### 24 B. Petitioner's Claims Are Not Cognizable As Habeas Claims.

25 As discussed above, when a federal inmate is challenging a conviction or sentence, the proper  
26 vehicle for challenging the same is by a motion to vacate, set aside, or correct the sentence pursuant to  
27 28 U.S.C. § 2255 in the sentencing court, not a habeas corpus petition in the custodial court.  
28 Nevertheless, a federal prisoner authorized to seek relief under § 2255 may seek relief under § 2241 *if*

1 he can show that the remedy available under § 2255 is "inadequate or ineffective to test the validity of  
2 his detention." Hernandez v. Campbell, 204 F.3d 861, 864-5 (9<sup>th</sup> Cir.2000); United States v. Pirro, 104  
3 F.3d 297, 299 (9<sup>th</sup> Cir.1997) (*quoting* § 2255). The Ninth Circuit has recognized that this is a very  
4 narrow exception. Id.; Ivy v. Pontesso, 328 F.3d 1057 (9<sup>th</sup> Cir. 2003) (a petitioner must show actual  
5 innocence *and* that he never had the opportunity to raise it by motion to demonstrate that § 2255 is  
6 inadequate or ineffective); Holland v. Pontesso, 234 F.3d 1277 (9<sup>th</sup> Cir. 2000) (§ 2255 not inadequate or  
7 ineffective because Petitioner misses statute of limitations); Aronson v. May, 85 S.Ct. 3, 5 (1964) (a  
8 court's denial of a prior § 2255 motion is insufficient to render § 2255 inadequate.); Lorensen v. Hood,  
9 223 F.3d 950, 953 (9<sup>th</sup> Cir. 2000) (same); Tripati, 843 F.2d at 1162-63 (9<sup>th</sup> Cir.1988) (a petitioner's  
10 fears of bias or unequal treatment do not render a § 2255 petition inadequate); Williams v. Heritage,  
11 250 F.2d 390 (9<sup>th</sup> Cir.1957); Hildebrandt v. Swope, 229 F.2d 582 (9<sup>th</sup> Cir.1956); see United States v.  
12 Valdez-Pacheco, 237 F.3d 1077 (9<sup>th</sup> Cir. 2001) (procedural requirements of § 2255 may not be  
13 circumvented by invoking the All Writs Act, 28 U.S.C. § 1651). The burden is on the petitioner to  
14 show the remedy is inadequate or ineffective. Redfield v. United States, 315 F.2d 76, 83 (9<sup>th</sup> Cir. 1963).

15 In Ivy v. Pontesso, 328 F.3d 1057 (9<sup>th</sup> Cir. 2003), the Ninth Circuit held that the remedy under  
16 a § 2255 motion would be "inadequate or ineffective" if a petitioner is actually innocent, but  
17 procedurally barred from filing a second or successive motion under § 2255. Ivy, 328 F.3d at 1060-  
18 1061. That is, relief pursuant to § 2241 is available when the petitioner's claim satisfies the following  
19 two-pronged test: "(1) [the petitioner is] factually innocent of the crime for which he has been  
20 convicted and, (2) [the petitioner] has never had an 'unobstructed procedural shot' at presenting this  
21 claim." Id. at 1060.

22 "In determining whether a petitioner had an unobstructed procedural shot to pursue his claim,  
23 we ask whether petitioner's claim 'did not become available' until after a federal court decision."  
24 Harrison v. Ollison, 519 F.3d 952, 960 (9<sup>th</sup> Cir. 2008), cert. denied \_\_ U.S. \_\_, 129 S.Ct. 254 (2008).  
25 "In other words, we consider: (1) whether the legal basis for petitioner's claim 'did not arise until after  
26 he had exhausted his direct appeal and first § 2255 motion;' and (2) whether the law changed 'in any  
27 way relevant' to petitioner's claim after that first § 2255 motion." Id., citing Ivy, 328 F.3d at 1060-61.  
28 In explaining this two-part standard, the Ninth Circuit in Ivy stated:

1 In other words, it is not enough that the petitioner is presently barred from raising his  
2 claim of innocence by motion under 2255. He *must never have had* the opportunity to  
raise it by motion.

3 Ivy, 328 F.3d at 1060 (emphasis supplied).

4 Here, the Court need not address whether § 2255 is inadequate or ineffective because Petitioner  
5 has failed to show he is actually innocent of the charges against him. “To establish actual innocence,  
6 petitioner must demonstrate that, in light of all the evidence, it is more likely than not that no  
7 reasonable juror would have convicted him.” Bousley v. United States, 523 U.S. 614, 623, 118 S.Ct.  
8 1604 (1998)(*quoting* Schlup v. Delo, 513 U.S. 298, 327-328, 115 S.Ct. 851 (1995)); Stephens v.  
9 Herrera, 464 F.3d 895, 898 (9<sup>th</sup> cir. 2008). “[A]ctual innocence means factual innocence, not mere  
10 legal insufficiency,” and “in cases where the Government has forgone more serious charges in the  
11 course of plea bargaining, petitioner’s showing of actual innocence must also extend to those charges.”  
12 Bousley, 523 U.S. at 623-624. However, a petitioner’s obligation to demonstrate actual innocence is  
13 limited to crimes actually charged or consciously forgone by the Government in the course of plea  
14 bargaining. *See, e.g., id.* at 624 (rejecting government’s argument that defendant had to demonstrate  
15 actual innocence of both “using” and “carrying” a firearm where the indictment only charged using a  
16 firearm).

17 Although the United States Supreme Court has not provided much guidance regarding the  
18 nature of an “actual innocence” claim, the standards announced by the various circuit courts contain  
19 two basic features: actual innocence and retroactivity. *E.g.,* Reyes-Requena v. United States, 243 F.3d  
20 893, 903 (5<sup>th</sup> Cir. 2001); In re Jones, 226 F.3d 328 (4<sup>th</sup> Cir. 2000); In re Davenport, 147 F.3d 605 (7<sup>th</sup>  
21 Cir. 1998); Triestman v. United States, 124 F.3d 361 (2<sup>nd</sup> Cir. 1997); In re Hanserd, 123 F.3d 922 (6<sup>th</sup>  
22 Cir. 1997); In re Dorsainvil, 119 F.3d 245 (3d Cir. 1997).

23 Based upon a review of the petition, the Court concludes that Petitioner does not assert his  
24 “actual innocence” of the crime for which he was convicted; rather, he impliedly asserts a lack of  
25 evidence to connect him to the seized weapons upon which the sentence enhancement was based.  
26 However, the Ninth Circuit, along with various other circuits, have repeatedly held that a habeas  
27 petitioner cannot assert a claim of actual innocence based on a non-capital sentencing enhancement.  
28 Marrero v. Ives, 682 F.3d 1190, 1193-1194 (9<sup>th</sup> Cir. 2012). In Marrero, the Ninth Circuit rejected a

1 claim of “actual innocence” as to a sentence enhancement for purposes of bringing the habeas petition  
2 under the escape hatch, concluding that the claim was not factual but a “purely legal claim”:

3 Our sister circuits are in accord that a petitioner generally cannot assert a cognizable claim of  
4 actual innocence of a noncapital sentencing enhancement. See Bradford v. Tamez (In re  
5 Bradford), 660 F.3d 226, 230 (5th Cir.2011) (per curiam) (“[A] claim of actual innocence of a  
6 career offender enhancement is not a claim of actual innocence of the crime of conviction and,  
7 thus, not the type of claim that warrants review under § 2241.”); Gilbert v. United States, 640  
8 F.3d 1293, 1323 (11th Cir.2011) (en banc) (“[T]he savings clause does not authorize a federal  
9 prisoner to bring in a § 2241 petition a claim, which would otherwise be barred by § 2255(h),  
10 that the sentencing guidelines were misapplied in a way that resulted in a longer sentence not  
11 exceeding the statutory maximum.”), cert. denied, — U.S. —, 132 S.Ct. 1001, 181 L.Ed.2d  
12 743 (2012); Unthank v. Jett, 549 F.3d 534, 536 (7th Cir.2008) (holding that actual innocence,  
13 under the escape hatch, is factual innocence of the crime of conviction); Trenkler v. United  
14 States, 536 F.3d 85, 99 (1st Cir.2008) (noting that “[m]ost courts have required a credible  
15 allegation of actual innocence to access the savings clause” and holding that the petitioner  
16 failed to make such a showing where he did not claim actual innocence of the crime of  
17 conviction or allege that he was sentenced to a greater term of imprisonment than authorized  
18 by statute); Poindexter v. Nash, 333 F.3d 372, 382 (2d Cir.2003) (“[W]hatever the merit of the  
19 contention that the Guidelines were misapplied in the treatment of [the petitioner’s] three  
20 undisputed prior convictions, his claim that the three crimes should have been treated as one  
21 crime is not cognizable as a claim of actual innocence.”); Okereke v. United States, 307 F.3d  
22 117, 120–21 (3d Cir.2002) (holding that the petitioner could not qualify for the escape hatch  
23 where he merely challenged his sentence and did not claim factual innocence of the crime of  
24 conviction); United States v. Peterman, 249 F.3d 458, 462 (6th Cir.2001) (holding that  
25 petitioners cannot qualify for the escape hatch when they “do not argue innocence but instead  
26 challenge their sentences”).

16 Marrero, 682 F.3d at 1193-1194.

17 Here, Petitioner is challenging a sentence enhancement based upon possession of weapons.  
18 Accordingly, even if his habeas claim could be construed as incorporating an argument of actual  
19 innocence, it fails because this Circuit does not recognize “actual innocence” as applicable to claims  
20 regarding *noncapital sentence enhancements* for purposes of qualifying for the escape hatch. See  
21 Marrero, 682 F.3d at 1192–95; see also Phillips v. Copenhaver, 2013 WL 1284234, \*4 (E.D. Cal.  
22 March 28, 2013); Gaytan-Gonzalez v. Benov, 2013 WL 1190016, \*1 (E.D.Cal. March 21, 2013);  
23 Velasquez v. Ellis, 2012 WL 4468699, \*2-3 (E.D. Cal. September 27, 2012); Hodge v. Copenhaver,  
24 2012 WL 4829317, \*2 (E.D. Cal. Oct. 10, 2012). Hence, construed as a claim for habeas corpus, the  
25 petition must be dismissed.<sup>1</sup>

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28 <sup>1</sup> Indeed, Petitioner concedes that Morrero bars presenting his contention as a habeas claim. (Doc. 1, p. 5).

1           C. If Viewed As A § 2255 Motion, The Action Is Barred

2           In the Court’s view, the best interpretation of this action is as a § 2255 motion. However,  
3 construed as such, it is barred in two principal ways. First, it is presented in the wrong court. Motions  
4 under § 2255 must be brought in the sentencing court. 28 U.S.C. § 2255(a); Hernandez, 204 F.3d at  
5 864-865. Because this Court is only the custodial court, to the extent that the instant petition could be  
6 construed as a § 2255 motion, this Court lacks jurisdiction. Hernandez, 204 F.3d at 864-865.

7           Second, it is time barred because it was filed well beyond one year after Petitioner's conviction  
8 became final. Although § 2255 permits later motions based on decisions announcing newly-  
9 recognized rights, such decisions must (1) be from the United States Supreme Court, and (2) be made  
10 retroactively applicable to cases on collateral review. The cases relied upon by Petitioner, Briggs and  
11 Castro, do not satisfy either criterion. Accordingly, even if the Court construed the instant petition as  
12 a motion pursuant to § 2255, it would be barred.

13           D. Petitioner’s Claims Are Not Cognizable As An Audita Querela Petition

14           If the Court takes Petitioner at his word in wishing to petition for a writ of audita querela, then  
15 the action is not cognizable under this legal basis either. A writ of “audita querela,” literally “the  
16 complaint having been heard,” is a common law writ used to attack a judgment that was correct when  
17 rendered, but which later became incorrect because of circumstances arising after the entry of  
18 judgment. Carrington v. United States, 503 F.3d 888, 890 n. 2 (9th Cir.2007) (citing Doe v. INS, 120  
19 F.3d 200, 203 n. 4 (9th Cir.1997)). The writ of audita querela has been abolished in civil actions (see  
20 Fed.R.Civ.P. 60(e)), but “potentially survives in the federal criminal context [ ] under the Supreme  
21 Court's decision in United States v. Morgan, 346 U.S. 502 (1954) and the All Writs Act [28 U.S.C. §  
22 1651(a)].” United States v. Valdez–Pacheco, 237 F.3d 1077, 1079 (9th Cir.2001) (citing Doe, 120  
23 F.3d at 203).

24           The Ninth Circuit has held:

25           ... Morgan stands for the proposition that the common law writs, such as coram nobis and  
26 audita querela, are available to “fill the interstices of the federal postconviction remedial  
27 framework.” In other words, the common law writs survive only to the extent that they fill  
“gaps” in the current systems of postconviction relief.

28 Valdez–Pacheco, 237 F.3d at 1079 (citations and internal quotation marks omitted). “A writ of audita

1 querela is not an available remedy where the claims raised would be cognizable in a § 2255 habeas  
2 petition.” Carrington, 503 F.3d at 890 (citing Valdez–Pacheco, 237 F.3d at 1080). Moreover, a “gap”  
3 in the current system of post-conviction relief does not exist simply because a particular prisoner's §  
4 2255 motion is procedurally barred by the ban on second or successive petitions pursuant to 28 U.S.C.  
5 § 2244(b)(1)-(2). See United States v. Gamboa, 608 F.3d 492, 495 (9th Cir.2010); Moore v. Reno, 185  
6 F.3d 1054, 1055 (9th Cir.1999) (holding that the dismissal of a subsequent § 2255 motion due to  
7 statutory limitations on successive petitions does not render federal habeas relief an ineffective or  
8 inadequate remedy).

9 As noted above, in 1995 Petitioner was tried and convicted of conspiracy to distribute and  
10 possess for sale methamphetamine. Petitioner’s sentence was enhanced under the Federal Sentencing  
11 Guidelines because his co-conspirator possessed weapons. Petitioner bases his instant claim for post-  
12 conviction relief on a purported post-judgment change in the law. In this regard, he asserts that Briggs  
13 and Castro now require that a defendant must have actual possession of the weapon in order for the  
14 enhancement to apply, thus, Petitioner contends, precluding its applicability to him under the facts  
15 elicited at trial. Petitioner contends that this claim is properly presented by way of petition for writ of  
16 audita querela because his direct appeal is closed and the claim would not be cognizable if now  
17 presented in a federal habeas corpus proceeding. Therefore, he reasons, a gap in post-conviction relief  
18 exists here that is available to him. Although Petitioner does not expressly state it, his argument  
19 implies that he filed an earlier § 2255 motion that apparently was denied before Briggs and Castro  
20 were decided, thus foreclosing him from pursuing a second § 2255 motion.

21 However, as mentioned, the fact that Petitioner may be procedurally barred from presenting the  
22 instant claim in a second or successive § 2255 motion does not mean that a “gap” exists in available  
23 post-conviction remedies. Gamboa, 608 F.3d 492, 495; Moore, 185 F.3d at 1055. As the Ninth Circuit  
24 explained in Valdez–Pacheco:

25 A prisoner may not circumvent valid congressional limitations on collateral attacks by  
26 asserting that those very limitations create a gap in the postconviction remedies that must be  
27 filled by the common law writs. See Kimberlin, 675 F.2d at 869; see also In re Davenport, 147  
28 F.3d 605, 608 (7th Cir.1998) (concluding that, even if the limitations of AEDPA foreclosed the  
use of 28 U.S.C. §§ 2241 and 2255 by federal prisoners, “it would be senseless to suppose that  
Congress permitted them to pass through the closed door [by way of the All Writs Act] simply  
by changing the number 2241 to 1651 on their motions”); cf. Moore v. Reno, 185 F.3d 1054,

1 1055 (9th Cir.1999) (per curiam) (concluding that § 2255 is not inadequate or ineffective  
2 merely because a particular prisoner's § 2255 motion is procedurally barred).

3 Valdez–Pacheco, 237 F.3d at 1080.

4 As discussed above, Petitioner’s claim challenging his sentence would normally fall within the  
5 purview of § 2255, regardless of whether he is procedurally barred from presenting that claim in a  
6 second or successive motion. See Ivy v. Pontesso, 328 F.3d 1057, 1059 (9th Cir.2003) (“In general, §  
7 2255 provides the exclusive procedural mechanism by which a federal prisoner may test the legality of  
8 detention.”); see also Cradle v. United States ex rel. Miner, 290 F.3d 536, 538 (3rd Cir.2002) (“It is  
9 the inefficacy of the remedy, not the personal inability to use it, that is determinative.”). Accordingly,  
10 a writ of audita querela is not available to Petitioner under these circumstances.

11 **ORDER**

12 For the foregoing reasons, the Court HEREBY DIRECTS the Clerk of the Court to assign a  
13 United States District Judge to this case.

14 **RECOMMENDATION**

15 Accordingly, the Court RECOMMENDS that the Petition for Writ of Habeas Corpus, or,  
16 alternatively, a motion for writ of audita querela, be DISMISSED.

17 This Findings and Recommendation is submitted to the United States District Court Judge  
18 assigned to the case pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local  
19 Rules of Practice for the United States District Court, Eastern District of California. Within twenty-one  
20 (21) days after being served with a copy of this Findings and Recommendation, any party may file  
21 written objections with the Court and serve a copy on all parties. Such a document should be captioned  
22 “Objections to Magistrate Judge’s Findings and Recommendation.” Replies to the Objections shall be  
23 served and filed within ten (10) court days (plus three days if served by mail) after service of the  
24 Objections. The Court will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636  
25 (b)(1)(C).

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