

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

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

**OCTAVIO HERNANDEZ SUAREZ,**  
Petitioner,  
  
**v.**  
  
**MICHAEL L. BENOVA,**  
Respondent.

Case No. 1:14-cv-01189 AWI MJS (HC)  
**FINDINGS AND RECOMMENDATION  
REGARDING PETITION FOR WRIT OF  
HABEAS CORPUS**  
**(Doc. 1)**

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

Petitioner filed the instant habeas petition in this Court on July 30, 2014. He is currently incarcerated at Taft Correctional Institution. Petitioner claims arise from his February 24, 2004 conviction in the Eastern District of California. Petitioner was found guilty of conspiracy to distribute methamphetamine, in violation of 21 U.S.C. §§ 846(a)(1), 841(a)(1), and possession with intent to distribute methamphetamine, aiding and abetting, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. See United States v. Suarez, 185 Fed. Appx. 597, 598 (9th Cir. 2006). Petitioner was sentenced to imprisonment in the custody of the U.S. Bureau of Prisons for 240 months. Id. Presently, Petitioner argues that he actually innocent of the offense because he does not qualify as

1 a career offender under the Armed Career Criminal Act. (See generally Pet.)

2 **I. SCREENING THE PETITION**

3 Because the petition was filed after April 24, 1996, the effective date of the  
4 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), AEDPA applies to the  
5 petition. Lindh v. Murphy, 521 U.S. 320, 327 (1997); Jeffries v. Wood, 114 F.3d 1484,  
6 1499 (9th Cir. 1997).

7 The Rules Governing Section 2254 Cases in the United States District Courts  
8 (Habeas Rules) are appropriately applied to proceedings undertaken pursuant to 28  
9 U.S.C. § 2241. Habeas Rule 1(b). Habeas Rule 4 requires the Court to make a  
10 preliminary review of each petition for writ of habeas corpus. The Court must summarily  
11 dismiss a petition "[i]f it plainly appears from the petition and any attached exhibits that  
12 the petitioner is not entitled to relief in the district court...." Habeas Rule 4; O'Bremski v.  
13 Maass, 915 F.2d 418, 420 (9th Cir. 1990); see also Hendricks v. Vasquez, 908 F.2d 490  
14 (9th Cir. 1990). Habeas Rule 2(c) requires that a petition 1) specify all grounds of relief  
15 available to the Petitioner; 2) state the facts supporting each ground; and 3) state the  
16 relief requested. Notice pleading is not sufficient; rather, the petition must state facts that  
17 point to a real possibility of constitutional error. Rule 4, Advisory Committee Notes, 1976  
18 Adoption; O'Bremski v. Maass, 915 F.2d at 420 (quoting Blackledge v. Allison, 431 U.S.  
19 63, 75 n.7 (1977)). Allegations in a petition that are vague, conclusory, or palpably  
20 incredible are subject to summary dismissal. Hendricks v. Vasquez, 908 F.2d at 491.

21 Further, the Court may dismiss a petition for writ of habeas corpus either on its  
22 own motion under Habeas Rule 4, pursuant to the respondent's motion to dismiss, or  
23 after an answer to the petition has been filed. Advisory Committee Notes to Habeas Rule  
24 8, 1976 Adoption; see Herbst v. Cook, 260 F.3d 1039, 1042-43 (9th Cir. 2001).

25 **II. JURISDICTION**

26 A federal prisoner who wishes to challenge the validity or constitutionality of his  
27 conviction or sentence must do so by way of a motion to vacate, set aside, or correct the  
28 sentence under 28 U.S.C. § 2255. Tripati v. Henman, 843 F.2d 1160, 1162 (9th Cir.

1 1988). In such cases, only the sentencing court has jurisdiction. Id. at 1163. A prisoner  
2 may not collaterally attack a federal conviction or sentence by way of a petition for a writ  
3 of habeas corpus pursuant to 28 U.S.C. § 2241. Hernandez v. Campbell, 204 F.3d 861,  
4 865 (9th Cir. 2000) (“Generally, motions to contest the legality of a sentence must be  
5 filed under § 2255 in the sentencing court, while petitions that challenge the manner,  
6 location, or conditions of a sentence's execution must be brought pursuant to § 2241 in  
7 the custodial court.”); Tripati, 843 F.2d at 1162.

8 In contrast, a federal prisoner challenging the manner, location, or conditions of  
9 that sentence's execution must bring a petition for writ of habeas corpus under 28 U.S.C.  
10 § 2241. Hernandez, 204 F.3d at 865. Here, Petitioner is challenging the validity and  
11 constitutionality of his conviction. Therefore, the appropriate procedure would be to file a  
12 motion pursuant to § 2255 and not a habeas petition pursuant to § 2241.

13 The Ninth Circuit has recognized a narrow exception allowing a federal prisoner  
14 authorized to seek relief under § 2255 to seek relief under § 2241 if the remedy by  
15 motion under § 2255 is "inadequate or ineffective to test the validity of his detention."  
16 Alaimalo v. United States, 636 F.3d 1092, 1096 (9th Cir. 2011), citing Harrison v. Ollison,  
17 519 F.3d 952, 956 (9th Cir. 2008). "This is called the 'savings clause' or 'escape hatch' of  
18 § 2255." Id. Furthermore, § 2255 petitions are rarely found to be inadequate or  
19 ineffective. Aronson v. May, 85 S.Ct. 3, 5 (1964) (a court's denial of a prior § 2255  
20 motion is insufficient to render § 2255 inadequate.); Tripati, 843 F.2d at 1162-63 (9th Cir.  
21 1988) (a petitioner's fears of bias or unequal treatment do not render a § 2255 petition  
22 inadequate). The burden is on the petitioner to show that the remedy is inadequate or  
23 ineffective. Redfield v. United States, 315 F.2d 76, 83 (9th Cir. 1963).

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

28 Petitioner fails to meet either of these requirements. In this case, Petitioner is

1 challenging the validity and constitutionality of his federal sentence imposed by a federal  
2 court, rather than an error in the administration of his sentence. Therefore, the  
3 appropriate procedure would be to file a motion pursuant to § 2255 in the sentencing  
4 court, not a habeas petition pursuant to § 2241 in this Court.

5 Petitioner did not lack an unobstructed opportunity to present his claims in his §  
6 2255 motion. After his conviction, Petitioner sought direct appeal to the Ninth Circuit. The  
7 appeal was denied on June 16, 2006. United States v. Suarez, 185 Fed. Appx. 597, 598  
8 (9th Cir. 2006). Petitioner then moved to vacate, set aside, or correct his federal  
9 sentence pursuant to 28 U.S.C. § 2255 asserting that he received ineffective assistance  
10 of counsel. The Court denied the motion on March 21, 2008. See United States v.  
11 Suarez, 2008 U.S. Dist. LEXIS 119542 (E.D. Cal. Mar. 20, 2008). Petitioner then filed a  
12 motion to set aside the judgment on the § 2255 motion on June 9, 2010. The motion was  
13 denied on June 23, 2010. (See E.D. Cal. Case United States v. Suarez, No. 2:02-cr-  
14 00246-WBS-AC, ECF No. 200-01.) Petitioner then filed a motion for reconsideration on  
15 July 8, 2010. The motion was likewise denied. (See E.D. Cal. Case United States v.  
16 Suarez, No. 2:02-cr-00246-WBS-AC, ECF No. 202-03.)

17 Petitioner filed a second motion to set aside or vacate the judgment on the § 2255  
18 motion March 20, 2013. The motion was denied on April 30, 2013. (See E.D. Cal. Case  
19 United States v. Suarez, No. 2:02-cr-00246-WBS-AC, ECF No. 215, 218, 220.)  
20 Furthermore, Petitioner has previously sought relief by way with a petition for writ of  
21 habeas corpus pursuant to 28 U.S.C. § 2241. In the petition, filed on June 14, 2011,  
22 Petitioner contended that he was "actually innocent" of the 20 year mandatory minimum  
23 sentence under 21 U.S.C. § 841(b)(1)(A) based on the United States Supreme Court  
24 decision in Carachuri-Rosendo v. Holder, U.S. , 130 S.Ct. 2577, 177 L. Ed. 2d 68  
25 (2010). Hernandez v. Benov, 2011 U.S. Dist. LEXIS 123921 (E.D. Cal. Oct. 25, 2011).  
26 The Magistrate Judge, in recommending dismissal of the petition, stated:

27 Petitioner claims that he did not have an unobstructed opportunity  
28 to present his actual innocence claims in his § 2255 motion and he must  
now raise it by way of a § 2241 petition. In Carachuri-Rosendo, the

1 Supreme Court addressed the applicability of a state's recidivist law to the  
2 aggravated felony determination in an immigration context. Irrespective of  
3 whether the Supreme Court's decision in Carachuri-Rosendo applies to  
4 Petitioner's case, his arguments are not persuasive. It is possible that the  
5 Ninth Circuit Court of Appeals could grant an application to file a second  
6 or successive petition under § 2255 if he were to seek permission.  
7 Therefore, Petitioner fails to demonstrate that he has not had an  
8 unobstructed opportunity to present this claim for review. Moreover, even  
9 if Petitioner had sought authorization from the Ninth Circuit based on the  
10 holding in Carachuri-Rosendo and was unsuccessful, his inability to obtain  
11 such authorization, in and of itself, would not open the section 2255  
12 escape hatch. See Lorentsen v. Hood, 223 F.3d 950, 953 (9th Cir. 2000)  
13 (Section 2241 jurisdiction is not available merely because the courts of  
14 appeals refused to authorize a second or successive Section 2255  
15 motion). It appears that Petitioner's filing of the instant § 2241 petition is a  
16 transparent attempt to circumvent the requirements attached to filing a §  
17 2255 petition.

18 Furthermore, Petitioner has failed to demonstrate that his claims  
19 qualify under the savings clause of section 2255 because his claims are  
20 not proper claims of "actual innocence." In Bousley v. United States, 523  
21 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998), the Supreme Court  
22 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  
24 no reasonable juror would have convicted him." Id. at 623 (internal  
25 quotation marks omitted). Petitioner bears the burden of proof on this  
26 issue by a preponderance of the evidence, and he must show not just that  
27 the evidence against him was weak, but that it was so weak that "no  
28 reasonable juror" would have convicted him. Lorentsen, 223 F.3d at 954.

In this case, Petitioner does not assert that he is factually innocent  
of the crime for which he was convicted. Rather, he claims that, for  
sentencing purposes, he does not have the requisite qualifying prior  
conviction under California law which subjected him to mandatory  
enhancement. Under the savings clause, however, Petitioner must  
demonstrate that he is factually innocent of the crime for which he has  
been convicted, not the sentence imposed. See Ivy v. Pontesso, 328 F.3d  
1057 1060 (9th Cir. 2003); Lorentsen, 223 F.3d at 954 (to establish  
jurisdiction under Section 2241, petitioner must allege that he is "'actually  
innocent' of the crime of conviction.") Based on the foregoing, the Court  
finds that Petitioner has not demonstrated Section 2255 constitutes an  
"inadequate or ineffective" remedy for raising his claims. Accordingly,  
Section 2241 is not the proper avenue for raising Petitioner's claims, and  
the petition should be dismissed for lack of jurisdiction.

23 Hernandez v. Benov, 2011 U.S. Dist. LEXIS 123921, 4-7 (E.D. Cal. Oct. 25, 2011). The  
24 Court adopted the recommendation of the Magistrate Judge and dismissed the petition  
25 on November 7, 2012. Hernandez v. Benov, 2012 U.S. Dist. LEXIS 179819 (E.D. Cal.  
26 Dec. 18, 2012). Accordingly, Petitioner as had the opportunity to file multiple § 2255  
27 motions, and has presented no reason why he has not attempted to seek approval to file  
28 the instant motion as a second or successive § 2255 motion. Petitioner has not shown

1 that he lacked an unobstructed opportunity to present his claims in his § 2255 motion.

2 While Petitioner states that he is actually innocent of the offense, Petitioner has  
3 not presented a case of factual innocence. Instead Petitioner argues that his prior crimes  
4 that the district court found to be predicate offenses in the Armed Career Criminal Act no  
5 longer qualify and he should not have been considered a career offender. (See Pet.)  
6 Petitioner's argument that he should not be treated as a career offender is a purely legal  
7 claim that has nothing to do with factual innocence. Accordingly, it is not a cognizable  
8 claim of 'actual innocence' for the purposes of qualifying to bring a § 2241 petition under  
9 the escape hatch. Marrero v. Ives, 682 F.3d 1190, 1193-94 (9th Cir. 2012) (collecting  
10 similar holdings from other circuits).

11 Moreover, even if Petitioner had an unobstructed procedural shot to challenge the  
12 finding by the district judge that he was a career offender, his claim would fail. Petitioner  
13 argues that Descamps v. United States, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013),  
14 demonstrates that he is not a career offender because his prior offenses should not  
15 serve as predicate offenses. (See, Pet.) In Descamps, the Supreme Court held that  
16 "sentencing courts may not apply the modified categorical approach when the crime of  
17 which the defendant was convicted has a single, indivisible set of elements." Id. at 2282.  
18 Even assuming Descamps assists Petitioner, the Supreme Court has not made its  
19 holding retroactive. See Jones v. McGrew, 2014 WL 2002245 at \*5 (C.D. Cal. May 15,  
20 2014) ("Petitioner cannot maintain that Descamps effected a material change in the  
21 applicable law; the Descamps Court clearly communicated its believe that its ruling in the  
22 was "dictated" by existing precedent." (citation omitted); Wilson v. Holland, 2014 WL  
23 517531, \*3 (E.D. Ky. Feb. 10, 2014) ("there is no indication in . . . Descamps that the  
24 Supreme Court made those holdings retroactive to cases on collateral review"); Groves  
25 v. United States, 2014 WL 2766171, \*4 (7th Cir. June 19, 2014) ("To date, the Supreme  
26 Court has not made Descamps retroactive on collateral review."); Monroe v. U.S., 2013  
27 WL 6199955, \*2 (N.D. Texas Nov. 26, 2013) (the Court "did not declare that [Descamps]  
28 applied retroactively on collateral attack") (collecting cases). Indeed, it is improbable that

1 Descamps announced a new rule of law. According to Descamps, Supreme Court  
2 "caselaw explaining the categorical approach and its 'modified' counterpart all but  
3 resolves this case." 133 S. Ct. at 2283. "Under our prior decisions, the inquiry is over."  
4 Id. at 2286. Accordingly, Petitioner has not met either prong of the savings clause, and  
5 the Court recommends that the petition be dismissed.

### 6 **III. CERTIFICATE OF APPEALABILITY**

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

12 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a  
13 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.

14 (b) There shall be no right of appeal from a final order in a proceeding to test the  
15 validity of a warrant to remove to another district or place for commitment or trial a  
16 person charged with a criminal offense against the United States, or to test the  
validity of such person's detention pending removal proceedings.

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

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

20 (B) the final order in a proceeding under section 2255.

21 (2) A certificate of appealability may issue under paragraph (1) only if the  
22 applicant has made a substantial showing of the denial of a constitutional  
right.

23 (3) The certificate of appealability under paragraph (1) shall indicate which  
24 specific issue or issues satisfy the showing required by paragraph (2).

25 If a court denies a petition, the court may only issue a certificate of appealability "if  
26 jurists of reason could disagree with the district court's resolution of his constitutional  
27 claims or that jurists could conclude the issues presented are adequate to deserve  
28 encouragement to proceed further." Miller-El, 537 U.S. at 327; Slack v. McDaniel, 529

1 U.S. 473, 484 (2000). While the petitioner is not required to prove the merits of his case,  
2 he must demonstrate “something more than the absence of frivolity or the existence of  
3 mere good faith on his . . . part.” Miller-EI, 537 U.S. at 338.

4 In the present case, reasonable jurists would not find to be debatable or wrong  
5 the Court's determination that Petitioner is not entitled to federal habeas corpus relief nor  
6 would they find petitioner deserving of encouragement to proceed further. Petitioner has  
7 not made the required substantial showing of the denial of a constitutional right.  
8 Accordingly, the Court hereby declines to issue a certificate of appealability.

9 **IV. RECOMMENDATION**

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

12 These Findings and Recommendations are submitted to the assigned United  
13 States District Court Judge, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B)  
14 and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern  
15 District of California. Within thirty (30) days after being served with a copy, Petitioner  
16 may file written objections with the Court. Such a document should be captioned  
17 "Objections to Magistrate Judge's Findings and Recommendations. The Court will then  
18 review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). Petitioner is  
19 advised that failure to file objections within the specified time may waive the right to  
20 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

21 IT IS SO ORDERED.

22  
23 Dated: August 25, 2014

24 /s/ Michael J. Seng  
25 UNITED STATES MAGISTRATE JUDGE  
26  
27  
28