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

VICTOR CHARLES FOURSTAR, JR.,
Petitioner,

v.

PAUL COPENHAVER,
Respondent.

Case No. 1:14-cv-01486 MJS (HC)

**ORDER GRANTING MOTION TO AMEND
PETITION; ORDER DISMISSING
AMENDED PETITION FOR WRIT OF
HABEAS CORPUS**

(Docs. 6-8)

Petitioner is a federal prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Both parties have consented to Magistrate Judge jurisdiction. (See ECF Nos. 3, 5.)

Petitioner filed the instant habeas petition in this Court on September 24, 2014 and an amended petition on October 28, 2014. (ECF No. 1, 6.) He is currently incarcerated at United States Prison Atwater. In October 2002, Petitioner was convicted in the District of Montana of aggravated sexual abuse in violation of 18 U.S.C. §§ 1153(a) and 2241(a). United States v. Fourstar, 87 Fed. Appx. 62, 63 (9th Cir. 2004). Petitioner argues that his incarceration was improper as it was based in part on a prior state crime conviction that was wrongfully obtained. (See generally Am. Pet.)

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1 **I. MOTION TO AMEND**

2 Petitioner filed the instant action on September 24, 2014. (Pet., ECF No. 1.) On
3 October 3, 2014, Petitioner filed a separate petition challenging the same conviction.
4 (ECF No. 6.) The petition was construed as a motion to amend the present petition in
5 this matter, and thereby transferred. (See E.D. Cal. Case No. 1:14-cv-01456-BAM, ECF
6 No. 12.) Petitioner also filed two motions to amend on November 17 and 20,
7 respectively. (ECF Nos. 7-8.) Rule 15(a) of the Federal Rules of Civil Procedure provides
8 that a party may amend its pleading once as a matter of course up to 21 days after
9 service of a responsive pleading is filed. Here Respondent has not been directed to, and
10 has not filed a response. Accordingly, Petitioner's motion to file an amended petition is
11 granted. Regardless, even if it was not Petitioner's intent to amend the petition, the
12 original petition would be dismissed for the reasons stated below.

13 **II. SCREENING THE PETITION**

14 Because the petition was filed after April 24, 1996, the effective date of the
15 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), AEDPA applies to the
16 petition. Lindh v. Murphy, 521 U.S. 320, 327 (1997); Jeffries v. Wood, 114 F.3d 1484,
17 1499 (9th Cir. 1997).

18 The Rules Governing Section 2254 Cases in the United States District Courts
19 (Habeas Rules) are appropriately applied to proceedings undertaken pursuant to 28
20 U.S.C. § 2241. Habeas Rule 1(b). Habeas Rule 4 requires the Court to make a
21 preliminary review of each petition for writ of habeas corpus. The Court must summarily
22 dismiss a petition "[i]f it plainly appears from the petition and any attached exhibits that
23 the petitioner is not entitled to relief in the district court...." Habeas Rule 4; O'Bremski v.
24 Maass, 915 F.2d 418, 420 (9th Cir. 1990); see also Hendricks v. Vasquez, 908 F.2d 490
25 (9th Cir. 1990). Habeas Rule 2(c) requires that a petition 1) specify all grounds of relief
26 available to the Petitioner; 2) state the facts supporting each ground; and 3) state the
27 relief requested. Notice pleading is not sufficient; rather, the petition must state facts that
28 point to a real possibility of constitutional error. Rule 4, Advisory Committee Notes, 1976

1 Adoption; O'Bremski v. Maass, 915 F.2d at 420 (quoting Blackledge v. Allison, 431 U.S.
2 63, 75 n.7 (1977)). Allegations in a petition that are vague, conclusory, or palpably
3 incredible are subject to summary dismissal. Hendricks v. Vasquez, 908 F.2d at 491.

4 Further, the Court may dismiss a petition for writ of habeas corpus either on its
5 own motion under Habeas Rule 4, pursuant to the respondent's motion to dismiss, or
6 after an answer to the petition has been filed. Advisory Committee Notes to Habeas Rule
7 8, 1976 Adoption; see Herbst v. Cook, 260 F.3d 1039, 1042-43 (9th Cir. 2001).

8 **III. JURISDICTION**

9 A federal prisoner who wishes to challenge the validity or constitutionality of his
10 conviction or sentence must do so by way of a motion to vacate, set aside, or correct the
11 sentence under 28 U.S.C. § 2255. Tripati v. Henman, 843 F.2d 1160, 1162 (9th Cir.
12 1988). In such cases, only the sentencing court has jurisdiction. Id. at 1163. A prisoner
13 may not collaterally attack a federal conviction or sentence by way of a petition for a writ
14 of habeas corpus pursuant to 28 U.S.C. § 2241. Hernandez v. Campbell, 204 F.3d 861,
15 865 (9th Cir. 2000) ("Generally, motions to contest the legality of a sentence must be
16 filed under § 2255 in the sentencing court, while petitions that challenge the manner,
17 location, or conditions of a sentence's execution must be brought pursuant to § 2241 in
18 the custodial court."); Tripati, 843 F.2d at 1162.

19 In contrast, a federal prisoner challenging the manner, location, or conditions of
20 that sentence's execution must bring a petition for writ of habeas corpus under 28 U.S.C.
21 § 2241. Hernandez, 204 F.3d at 865. Here, Petitioner is challenging the validity and
22 constitutionality of his conviction. Therefore, the appropriate procedure would be to file a
23 motion pursuant to § 2255 and not a habeas petition pursuant to § 2241.

24 The Ninth Circuit has recognized a narrow exception allowing a federal prisoner
25 authorized to seek relief under § 2255 to seek relief under § 2241 if the remedy by
26 motion under § 2255 is "inadequate or ineffective to test the validity of his detention."
27 Alaimalo v. United States, 636 F.3d 1092, 1096 (9th Cir. 2011), citing Harrison v. Ollison,
28 519 F.3d 952, 956 (9th Cir. 2008). "This is called the 'savings clause' or 'escape hatch' of

1 § 2255." Id. Furthermore, § 2255 petitions are rarely found to be inadequate or
2 ineffective. Aronson v. May, 85 S.Ct. 3, 5 (1964) (a court's denial of a prior § 2255
3 motion is insufficient to render § 2255 inadequate.); Tripati, 843 F.2d at 1162-63 (9th Cir.
4 1988) (a petitioner's fears of bias or unequal treatment do not render a § 2255 petition
5 inadequate). The burden is on the petitioner to show that the remedy is inadequate or
6 ineffective. Redfield v. United States, 315 F.2d 76, 83 (9th Cir. 1963).

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

11 Petitioner fails to meet either of these requirements. In this case, Petitioner is
12 challenging the validity and constitutionality of his federal sentence imposed by a federal
13 court, rather than an error in the administration of his sentence. Therefore, the
14 appropriate procedure would be to file a motion pursuant to § 2255 in the sentencing
15 court, not a habeas petition pursuant to § 2241 in this Court.

16 Petitioner did not lack an unobstructed opportunity to present his claims in his §
17 2255 motion. Here, Petitioner has sought review of his federal petition many times. After
18 his 2010 conviction, Petitioner appealed the decision to the Ninth Circuit, which denied
19 his claims on appeal on January 30, 2004. United States v. Fourstar, 87 Fed. Appx. 62
20 (9th Cir. 2004). Petitioner then sought relief in the district of conviction by way of motions
21 pursuant to 28 U.S.C. § 2255. For instance, on June 12, 2013, the District of Montana
22 denied a successive motion under § 2255, and noted that it was at least Fourstar's third
23 such motion. United States v. Fourstar, 2013 U.S. Dist. LEXIS 82874, 1-2 (D. Mont. June
24 12, 2013).

25 Petitioner has also filed several petitions for writ of habeas corpus under § 2241.
26 On November 25, 2013, the Northern District of Illinois dismissed a § 2241 petition and
27 noted that the United States District Court for the Northern District of Georgia had
28 previously rejected a similar petition from Petitioner. See Fourstar v. Walton, 2013 U.S.

1 Dist. LEXIS 166775 (S.D. Ill. Nov. 25, 2013).

2 The Ninth Circuit has "held that a § 2241 petition is available under the 'escape
3 hatch' of § 2255 when a petitioner (1) makes a claim of actual innocence, and (2) has
4 not had an 'unobstructed procedural shot' at presenting that claim. Stephens v. Herrera,
5 464 F.3d 895, 898 (9th Cir. 2006).

6 Petitioner argues, however, that § 2255 is inadequate and ineffective, because he
7 has already filed § 2255 motions and they have been denied. Under the AEDPA, a
8 prisoner may not bring a second or successive Section 2255 motion in district court
9 unless "a panel of the appropriate court of appeals" certifies that the motion contains: (1)
10 newly discovered evidence that, if proven and viewed in light of the evidence as a whole,
11 would be sufficient to establish by clear and convincing evidence that no reasonable
12 factfinder would have found the movant guilty of the offense; or (2) a new rule of
13 constitutional law, made retroactive to cases on collateral review by the Supreme Court,
14 that was previously unavailable. 28 U.S.C. § 2255; see Harrison v. Ollison, 519 F.3d
15 952, 955 (9th Cir. 2008). Petitioner fails to meet either of these requirements. Fourstar v.
16 United States, No. 11-72234, 2011 U.S. App. LEXIS 26583 (9th Cir. Sept. 14, 2011)
17 (denying application for authorization to file successive § 2255 motion).

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

1 2241 "is not available under the inadequate-or-ineffective-remedy escape hatch of
2 [Section] 2255 merely because the court of appeals refuses to certify a second or
3 successive motion under the gatekeeping provisions of [Section] 2255." Lorentsen v.
4 Hood, 223 F.3d 950, 953 (9th Cir. 2000). Further, as previously stated, the remedy under
5 Section 2255 usually will not be deemed inadequate or ineffective merely because a
6 previous Section 2255 motion was denied, or because a remedy under that section is
7 procedurally barred. Id. at 953 (stating that the general rule in the Ninth Circuit is that
8 "the ban on unauthorized second or successive petitions does not per se make § 2255
9 'inadequate or ineffective'"); see also United States v. Valdez-Pacheco, 237 F.3d 1077
10 (9th Cir. 2001) (procedural limits on filing second or successive Section 2255 motion
11 may not be circumvented by invoking the All Writs Act, 28 U.S.C. § 1651); Moore, 185
12 F.3d at 1055 (rejecting petitioner's argument that Section 2255 remedy was ineffective
13 because he was denied permission to file a successive Section 2255 motion, and stating
14 that dismissal of a subsequent Section 2255 motion does not render federal habeas
15 relief an ineffective or inadequate remedy); Tripati, 843 F.2d at 1162-63.

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

1 eyewitness accounts, or critical physical evidence — that was not presented at trial."
2 Schlup v. Delo, 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995).

3 In this case, Petitioner claims that he is innocent and that there us recent
4 Supreme Court authority in support of his claims, but does not provide information
5 regarding which Supreme Court decisions he is relying upon. (See Am. Pet.)
6 Accordingly, the Court concludes that Petitioner has not demonstrated that Section 2255
7 constitutes an "inadequate or ineffective" remedy for raising his claims. Accordingly,
8 Section 2241 is not the proper statute for raising Petitioner's claims, and the petition
9 should be dismissed for lack of jurisdiction.

10 **IV. CERTIFICATE OF APPEALABILITY**

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

16 (a) In a habeas corpus proceeding or a proceeding under section 2255 before a
17 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.

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

21 (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—

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

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

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

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

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If a court denies a 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-EI, 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-EI, 537 U.S. at 338.

In the present case, reasonable jurists would not find to be debatable or wrong the Court's determination that Petitioner is not entitled to federal habeas corpus relief nor would they find petitioner 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 certificate of appealability.

V. ORDER

Accordingly, IT IS HEREBY ORDERED:

- 1) Petitioner's Motions to Amend be GRANTED;
- 2) The petition for writ of habeas corpus be DISMISSED;
- 3) The Clerk of Court is DIRECTED to enter judgment and close the case; and
- 4) The Court DECLINES to issue a certificate of appealability.

IT IS SO ORDERED.

Dated: December 3, 2014

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE