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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

WALTER R. BURNLEY,  
  
Petitioner,  
  
v.  
  
P. COPENHAVER, Warden,  
  
Respondent.

Case No. 1:14-cv-01784-LJO-BAM-HC  
  
FINDINGS AND RECOMMENDATIONS TO  
DISMISS THE PETITION FOR WRIT OF  
HABEAS CORPUS (DOC. 1)  
  
FINDINGS AND RECOMMENDATIONS TO  
DECLINE TO ISSUE A CERTIFICATE OF  
APPEALABILITY AND TO DIRECT THE  
CLERK TO CLOSE THE CASE  
  
**OBJECTIONS DEADLINE:**  
**THIRTY (30) DAYS**

Petitioner is a federal prisoner proceeding pro se and in forma pauperis with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1) and Local Rules 302 through 304. Pending before the Court is the petition, which was filed on November 14, 2014.

I. Screening the Petition

The Rules Governing Section 2254 Cases in the United States District Courts (Habeas Rules) are appropriately applied to proceedings undertaken pursuant to 28 U.S.C. § 2241. Habeas Rule 1(b). Habeas Rule 4 requires the Court to make a preliminary review

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

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

24 A petition for habeas corpus should not be dismissed without  
25 leave to amend unless it appears that no tenable claim for relief  
26 can be pleaded were such leave granted. Jarvis v. Nelson, 440 F.2d  
27 13, 14 (9th Cir. 1971).

28 Here, Petitioner challenges his sentence of 262 years that was

1 imposed in 2007 in the United States District Court for the Western  
2 District of Wisconsin. His sentence included time imposed for prior  
3 state convictions of crimes of violence. Petitioner argues that his  
4 prior state court convictions were not crimes of violence pursuant  
5 to 18 U.S.C. § 924(e), and thus he is actually innocent of the facts  
6 that warranted an enhanced sentence.

## 7 II. Background

8 Petitioner alleges that on November 21, 2006, in the United  
9 States District Court for the Western District of Wisconsin, he was  
10 convicted at a jury trial of four counts of bank robbery by  
11 intimidation in violation of 18 U.S.C. § 2113(a) for robbing  
12 multiple banks in April and May 2006. (Pet., doc. 1, 1-2.) On  
13 February 7, 2007, Petitioner was sentenced to 262 months in prison.  
14 In July 2008, the Court of Appeals for the Seventh Circuit affirmed  
15 his conviction in the course of a direct appeal in which Petitioner  
16 raised only the issue of the sufficiency of the evidence of  
17 intimidation. On December 2009, the sentencing court denied  
18 Petitioner's first motion pursuant to § 2255. On July 18, 2014, the  
19 Seventh Circuit denied Petitioner's motion to file a successive  
20 § 2255 motion, which Petitioner sought in order to raise a challenge  
21 to his 2007 sentence on the ground that pursuant to pursuant to  
22 Descamps v. United States, 133 S.Ct. 2276 (2013), his prior  
23 Wisconsin state convictions of battery and reckless injury should  
24 not have been considered crimes of violence under United States  
25 Sentencing Guidelines 4(B)1.1(B). (Id. at 2.)

## 26 III. Subject Matter Jurisdiction under 28 U.S.C. § 2241

27 A court will not infer allegations supporting federal  
28 jurisdiction; a federal court is presumed to lack jurisdiction in a

1 particular case unless the contrary affirmatively appears, and thus  
2 federal subject matter jurisdiction must always be affirmatively  
3 alleged. Fed. R. Civ. P. 8(a); Stock West, Inc. v. Confederated  
4 Tribes of the Colville Reservation, 873 F.2d 1221, 1225 (9th Cir.  
5 1989). When a federal court concludes that it lacks subject matter  
6 jurisdiction, the court must dismiss the action. Arbaugh v. Y&H  
7 Corp., 546 U.S. 500, 514 (2006); Moore v. Maricopa County Sheriff's  
8 Office, 657 F.3d 890, 894 (9th Cir. 2011).

9 A federal prisoner who wishes to challenge his conviction or  
10 sentence on the grounds it was imposed in violation of the  
11 Constitution or laws of the United States or was otherwise subject  
12 to collateral attack must do so by way of a motion to vacate, set  
13 aside, or correct the sentence under 28 U.S.C. § 2255. 28 U.S.C.  
14 § 2255; Stephens v. Herrera, 464 F.3d 895, 897 (9th Cir. 2006);  
15 Tripati v. Henman, 843 F.2d 1160, 1162 (9th Cir. 1988). In such  
16 cases, the motion must be filed in the district where the defendant  
17 was sentenced because only the sentencing court has jurisdiction.  
18 Hernandez v. Campbell, 204 F.3d at 864; Tripati, 843 F.2d at 1163.  
19 Generally, a prisoner may not collaterally attack a federal  
20 conviction or sentence by way of a petition for a writ of habeas  
21 corpus pursuant to 28 U.S.C. § 2241. Stephens v. Herrera, 464 F.3d  
22 at 897; Tripati, 843 F.2d at 1162.

23 In contrast, a federal prisoner challenging the manner,  
24 location, or conditions of that sentence's execution must bring a  
25 petition for writ of habeas corpus under 28 U.S.C. § 2241. Brown v.  
26 United States, 610 F.2d 672, 677 (9th Cir. 1990).

27 Here, Petitioner's claim is essentially a claim of an  
28 unauthorized or excessive sentence. Because Petitioner challenges

1 the underlying judgment and not errors in the administration of his  
2 sentence, the petition appears to come within the scope of 28 U.S.C.  
3 § 2255(a), which states that such challenges are to be brought in a  
4 motion pursuant to § 2255 to vacate, set aside, or correct the  
5 sentence.

6 A. Inadequate or Ineffective Remedy

7 Petitioner contends that he is entitled to proceed pursuant to  
8 28 U.S.C. § 2241 because § 2255 is inadequate and ineffective due to  
9 his actual innocence of the sentencing enhancement and his lack of  
10 an unobstructed procedural shot at presenting his claim.

11 Title 28 U.S.C. § 2255(e) provides as follows:

12 An application for a writ of habeas corpus in behalf  
13 of a prisoner who is authorized to apply for relief by  
14 motion pursuant to this section, shall not be entertained  
15 if it appears that the applicant has failed to apply  
16 for relief, by motion, to the court which sentenced him,  
or that such court has denied him relief, unless it  
also appears that the remedy by motion is inadequate or  
ineffective to test the legality of his detention.

17 28 U.S.C. § 2255(e).

18 A federal prisoner authorized to seek relief under § 2255 may  
19 seek relief under § 2241 only if he can show that the remedy  
20 available under § 2255 is "inadequate or ineffective to test the  
21 legality of his detention." United States v. Pirro, 104 F.3d 297,  
22 299 (9th Cir. 1997) (quoting § 2255). Although there is little  
23 guidance on when § 2255 is an inadequate or ineffective remedy, in  
24 the Ninth Circuit it is recognized that the exception is narrow.  
25 Id.; Moore v. Reno, 185 F.3d 1054, 1055 (9th Cir. 1999) (dismissal  
26 of a successive motion pursuant to § 2255 did not render such motion  
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1 procedure an ineffective or inadequate remedy so as to authorize a  
2 federal prisoner to seek habeas relief); Aronson v. May, 85 S.Ct. 3,  
3 5 (1964) (denial of a prior § 2255 motion is insufficient to render  
4 § 2255 inadequate); Tripati, 843 F.2d at 1162-63 (noting that a  
5 petitioner's fears of bias or unequal treatment do not render a  
6 § 2255 petition inadequate); see, United States v. Valdez-Pacheco,  
7 237 F.3d 1077 (9th Cir. 2001) (procedural requirements of § 2255 may  
8 not be circumvented by filing a petition for writ of audita querela  
9 pursuant to the All Writs Act, 28 U.S.C. § 1651). The burden is on  
10 the petitioner to show that the remedy is inadequate or ineffective.  
11 Redfield v. United States, 315 F.2d 76, 83 (9th Cir. 1963). If a  
12 petitioner proceeding pursuant to § 2241 fails to meet his burden to  
13 demonstrate that the § 2255 remedy is inadequate or ineffective,  
14 then the § 2241 petition will be dismissed for lack of jurisdiction.  
15 Ivy v. Pontesso, 328 F.3d 1057, 1061 (9th Cir. 2003).

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18 The AEDPA limits the circumstances under which a petitioner may  
19 file a second or successive motion pursuant to § 2255:  
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21 A second or successive motion must be certified as  
22 provided in section 2244 by a panel of the appropriate  
23 court of appeals to contain—

24 1) newly discovered evidence that, if proven  
25 and viewed in light of the evidence as a whole, would  
26 be sufficient to establish by clear and convincing  
27 evidence that no reasonable factfinder would have  
28 found the movant guilty of the offense; or

2) a new rule of constitutional law, made  
retroactive to cases on collateral review by the  
Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h).

1 The fact that Petitioner brought an earlier motion pursuant to  
2 § 2255, which was denied, is insufficient by itself to render the  
3 § 2255 remedy inadequate. Aronson v. May, 85 S.Ct. at 5. Likewise,  
4 the denial of Petitioner's motion for leave to file a successive  
5 § 2255 motion does not render the remedy under § 2255 inadequate or  
6 ineffective pursuant to 28 U.S.C. § 2255(e) and (h). See, Moore v.  
7 Reno, 185 F.3d at 1055. It is established that the authority of  
8 federal courts to grant habeas relief under § 2241 is limited by  
9 § 2255. Tripati v. Henman, 843 F.2d at 1162.

10 B. Actual Innocence

11 Petitioner argues that his remedy pursuant to § 2255 is  
12 inadequate because he is actually innocent of the sentencing  
13 enhancement.

14 Although authority in this circuit is limited, it is recognized  
15 that the § 2255 remedy is inadequate and ineffective, and thus a  
16 petition pursuant to § 2241 is available, when the petitioner  
17 1) claims to be factually innocent of the crime for which he has  
18 been convicted, and 2) has never an "unobstructed procedural shot"  
19 at presenting the claim. Stephens v. Herrera, 464 F.3d at 898.

20 1. Factual Innocence

21 A claim of actual innocence for purposes of the "escape hatch"  
22 of § 2255 is assessed by the test stated in Bousley v. United  
23 States, 523 U.S. 614, 623 (1998), which in turn requires that the  
24 petitioner demonstrate that in light of all the evidence, it is more  
25 likely than not that no reasonable juror would have convicted him.  
26 Stephens, 464 F.3d at 898.

27 Here, Petitioner does not allege facts that show his innocence  
28 of the underlying substantive offenses, but rather challenges an

1 element or elements of a sentencing enhancement. His claim fails to  
2 show that it would be more likely than not that he could have  
3 avoided a conviction altogether. See Marrero v. Ives, 682 F.3d  
4 1190, 1193-94 (9th Cir. 2012), cert. den. 133 S.Ct. 1264 (2013)  
5 (holding that a purely legal claim of having been wrongfully  
6 sentenced as a career offender under the Sentencing Guidelines does  
7 not constitute a cognizable assertion of actual innocence for  
8 purposes of invoking § 2255's savings clause). Petitioner's claim  
9 is foreclosed by Marrero v. Ives. See Green v. Thomas, no. 12-  
10 35013, 485 Fed.Appx. 888, \*1 (9th Cir. Oct. 16, 2012) (unpublished)  
11 (holding that a claim that one is actually innocent of being a  
12 career offender under U.S.S.G. § 4B1.1 and therefore should be  
13 allowed to proceed with his section 2241 petition under the "escape  
14 hatch" of 28 U.S.C. § 2255(e) is foreclosed by Marrero, and that  
15 dismissal of such a petition is appropriate).

16 In summary, Petitioner has failed to establish factual  
17 innocence. Therefore, Petitioner cannot proceed under the so-  
18 called escape hatch because he has not shown that the § 2255 remedy  
19 is inadequate or ineffective. Accordingly, it will be recommended  
20 that the petition for writ of habeas corpus be dismissed for lack of  
21 subject matter jurisdiction.

22 IV. Certificate of Appealability

23 Unless a circuit justice or judge issues a certificate of  
24 appealability, an appeal may not be taken to the Court of Appeals  
25 from the final order in a habeas proceeding in which the detention  
26 complained of arises out of process issued by a state court. 28  
27 U.S.C. § 2253(c)(1)(A); Miller-El v. Cockrell, 537 U.S. 322, 336  
28 (2003). A district court must issue or deny a certificate of



1 appealability when it enters a final order adverse to the applicant.  
2 Habeas Rule 11(a).

3 A certificate of appealability may issue only if the applicant  
4 makes a substantial showing of the denial of a constitutional right.  
5 § 2253(c)(2). Under this standard, a petitioner must show that  
6 reasonable jurists could debate whether the petition should have  
7 been resolved in a different manner or that the issues presented  
8 were adequate to deserve encouragement to proceed further. Miller-  
9 El v. Cockrell, 537 U.S. at 336 (quoting Slack v. McDaniel, 529 U.S.  
10 473, 484 (2000)). A certificate should issue if the Petitioner  
11 shows that jurists of reason would find it debatable whether: (1)  
12 the petition states a valid claim of the denial of a constitutional  
13 right, and (2) the district court was correct in any procedural  
14 ruling. Slack v. McDaniel, 529 U.S. 473, 483-84 (2000).

15 In determining this issue, a court conducts an overview of the  
16 claims in the habeas petition, generally assesses their merits, and  
17 determines whether the resolution was debatable among jurists of  
18 reason or wrong. Id. An applicant must show more than an absence  
19 of frivolity or the existence of mere good faith; however, the  
20 applicant need not show that the appeal will succeed. Miller-El v.  
21 Cockrell, 537 U.S. at 338.

22 Here, it does not appear that reasonable jurists could debate  
23 whether the petition should have been resolved in a different  
24 manner. Petitioner has not made a substantial showing of the denial  
25 of a constitutional right. Accordingly, it will be recommended that  
26 the Court decline to issue a certificate of appealability.

1 V. Recommendations

2 In accordance with the foregoing analysis, it is RECOMMENDED  
3 that:

4 1) The petition for writ of habeas corpus be DISMISSED for lack  
5 of subject matter jurisdiction; and

6 2) The Court DECLINE to issue a certificate of appealability;  
7 and 3) The Clerk be DIRECTED to close the case.

8 These findings and recommendations are submitted to the United  
9 States District Court Judge assigned to the case, pursuant to the  
10 provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 304 of the Local  
11 Rules of Practice for the United States District Court, Eastern  
12 District of California. Within thirty (30) days after being served  
13 with a copy, any party may file written objections with the Court  
14 and serve a copy on all parties. Such a document should be  
15 captioned "Objections to Magistrate Judge's Findings and  
16 Recommendations." Replies to the objections shall be served and  
17 filed within fourteen (14) days (plus three (3) days if served by  
18 mail) after service of the objections. The Court will then review  
19 the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b) (1) (C).  
20 The parties are advised that failure to file objections within the  
21 specified time may result in the waiver of rights on appeal.

22 Wilkerson v. Wheeler, - F.3d -, -, no. 11-17911, 2014 WL 6435497, \*3  
23 (9th Cir. Nov. 18, 2014) (citing Baxter v. Sullivan, 923 F.2d 1391,  
24 1394 (9th Cir. 1991)).

25 IT IS SO ORDERED.

26 Dated: December 10, 2014

27 /s/ Barbara A. McAuliffe  
28 UNITED STATES MAGISTRATE JUDGE